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Jurisdictional Disputes

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COMMENT

JURISDICTIONAL DISPUTES

When conspicuous and startling headlines in the daily press tell of yet another bitter struggle between two great unions for the right to claim as theirs employees in a certain industry, it is not uncommon for the reader to remark that here is evidence of the outgrowth of the modern labor organizations. But those who so conclude err, for disputes between rival unions are so steeped in antiquity, so embellished in the pages of industrial history as to have become traditional. In fact, as long ago as 1395 a fierce dispute between two rival crafts threatened the interests of the English people to such an extent that the king had to intervene and establish the jurisdictional line of demarcation. This was a controversy between the London cordwainers and foreign cobblers and it was decided that their relative positions should remain in *status quo*.[1] But still there was no peace between the warring elements and a more detailed order apportioning the work among the claimants was made in 1409.[2] That the other trades also indulged in such costly and, it is suggested, unproductive, rivalry is illustrated by the following excerpt from a leading treatise on industrial history:

> In earlier ages, when the right to a continuance of the accustomed livelihood was recognized by law and public opinion, disputes arising from the encroachment of one craft on the work of another were habitually settled by what was, in effect, a judicial decree, exactly as if the point at issue had been the boundary between two landed estates. Thus the apportionment of work between the carpenters and joiners was a fruitful cause of dispute. A committee of the Common Council of the City of London made an elaborate award in 1632, defining in detail the particular kinds of work to be done by the Companies of Carpenters and Joiners respectively, "deal coffins being assigned as a knotty question to both in common . . ." And to turn to quite another dispute we find the tanners and whittawyers disputing as to the limits of their crafts . . .[3]

This fact that the vexatious problem has long been with us, however, is no reason for lightly dismissing it as unworthy of attention. For one thing, the amazing growth of labor organizations during the past decade has intensified its importance,[4] as has, also, the major and perhaps catastrophic schism in the American labor movement resulting in the birth of the C.I.O. in 1935 and the consequent struggle between it and the entrenched A.F.L.[5] For another, it is no longer possible arbitrarily to settle them by judicial edict. It is, in fact, exceedingly questionable if there is presently any machinery available; judicial, quasi-judicial, or

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[1] H. T. RILEY, MEMORIALS OF LONDON AND LONDON LIFE (1868) pp. 539-541.

[2] Riley, *op. cit. supra*, n. 1, pp. 571-574.

[3] WEBB, INDUSTRIAL DEMOCRACY (1920) p. 510, n. 1.

[4] In 1944 the total membership of all unions was 14,300,000, of which 7,500,000 were members of the AFL, and 6,000,000 belonged to CIO affiliates, the remaining 800,000 being claimed by organizations independent of either.

[5] Herzog v. Cline, 131 Misc. Rep. 816, 227 N. Y. S. 462 (1927).

administrative, for the satisfactory and final disposition of the multifarious wrangles between hostile labor factions. An objective discussion of this subject is not untimely; for, unquestionably the cessation of the war will activate many labor conflicts now apparently dormant.

To understand better the tremendous scope of this labyrinthical situation, the following hypothetical, but not usual case is posed: The employees of *A* are members of *B* union. They are satisfied with their hours, working conditions, and wages and there is no allegation of any unfair labor practices upon the part of *A*. *C*, a rival union, enters the field, contending that the employees should affiliate with it, and, in order to prosecute its point, either pickets *A* or instigates a boycott. If *A's* employees were to accede to *C's* demands, it is highly probable that *B* would take resort to the same tactics previously employed by *C*. Thus *A* is caught in a vicious vise, from the jaws of which he must extricate himself if his business is to survive on a profitable basis. Likewise, his employees are genuinely interested in an amicable agreement, for otherwise their means of livelihood is in jeopardy. The public, too, is injured, as indeed it is whenever industrial strife ensues, and hence must demand a discontinuance of the destructive quarrel. But in most instances there appears no available relief and in all cases it is exceedingly difficult and slow of attainment.

Within this significant problem there are two general and distinct divisions which, in turn, may fall naturally into one of several groupings, depending upon the interrelation between *A*, *B*, and *C*. It is with respect to those variations that this discussion of inter-union disputes will deal, and for this purpose they may best be classified as follows: (a) Jurisdictional Disputes, *i.e.*, where the two rival unions are members of the *same* parent organization, *e.g.*, the A.F.L. or the C.I.O.; and (b) Dual Disputes, *i.e.*, where the two rival unions are affiliates of rival parent organizations, or are not associated with any national union. Under each of these two categories will be considered the following situations: (a) where the employer has neither contracted with any union for a closed or union shop nor recognized any union as the exclusive bargaining agent of his employees; (b) where the employer has a closed or union shop agreement with one union and another attempts to gain recognition; and (c) where one union has been certified by the National Labor Relations Board as the exclusive bargaining agent of his employees. It is, of course, to be expected that in many instances there is a penumbral area, and a given case might be placed in one of several divisions, for the differentiation is not always clear. The classification has, therefore, of necessity, been somewhat arbitrary, and it is best to bear that unavoidable factor in mind in considering the ensuing discussion, which will be devoted to jurisdictional disputes, leaving the consideration of dual disputes to a subsequent date.

1.

In *Herzog v. Cline,* several grocers, conducting small stores situated in the borough of the Bronx, New York, retained their employees who had shifted their membership from one union to another. Both organizations were sub-affiliates of the A.F.L., the latter having been disenfranchised because of a squabble arising out of accusations that a portion of the membership was communist controlled. Prior to the altercation, the grocers had executed a contract with the disposed union, but that

had apparently expired at the time of the difficulties in question. Upon being rebuffed in the demand that the grocers discharge the employees because of their changed union membership, the recalcitrant union "declared a strike" and the stores were picketed for several months. It was in order to stop this interference with their business that the grocers brought an action in the New York court, asking that such activities be enjoined. The court, in granting the relief prayed for, said:

> Where there are several unions in a trade and an employer exercises his right to hire members of one of them rather than of the other, he should not be subject to strikes solely because of his choice. If he were subject thereto for such reason alone, there might be continuous strikes against him, with no object other than to determine the survival of the strongest union. The employer himself might not survive. Such strikes, in my opinion, would be deemed in law to be based on malice, and malicious strikes are unlawful.[6]

The *Herzog* case is interesting because of the willingness of a court to in effect settle an inter-organizational argument in spite of the general reluctance of the judiciary to intervene. Of course, once jurisdiction was assumed by the court, it was in no manner departing from the norm by declaring unlawful a strike which, upon its view of the evidence, it regarded as malicious.[7] That generally the court will refuse to entertain jurisdiction when the ultimate issue to be decided is predicated upon a grievance occasioned by the ruling of a non-profit association of which both parties are members has been well settled since the now historic case of *Dawkins v. Antrobus*.[8] This certainly is not meant by the way of criticism of the *Herzog* approach, for there would modernly seem to be a very real need for distinguishing between clubs, churches, charities, and run-of-mine eleemosynary institutions, and the trade unions which have now assumed the proportions of a Gargantua and affect the lives of the entire populace. But such is not the orthodox view, for the majority of courts are still disposed to follow the concept established by the *Dawkins* case. Indicative of that attitude is the case of *California State Brewers' Institute et al v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, et al.*[9] There the court was confronted with a request by the Brewers to determine whether it

[6] Herzog v. Cline, *supra*, n. 5, 227 N. Y. S. at pp. 465-466. The court indicated that had the purpose of the strike been to improve the economic position of the employees it would have been lawful. But, is this not merely presenting a skirt of respectability behind which a union may hide, ostensibly professing to be seeking the betterment of workers, while in reality it is actuated by a desire to become dominant in the field and perpetuate itself.

[7] This should not be understood to mean that the motive of the union will render a strike for an otherwise lawful purpose illegal. See Jenkins v. Fowler, 24 Pa. 308 (1855). Rather, the court reasoned that because there was no showing that the purpose was a lawful one (see *supra*, n. 6) the picketing must be enjoined. This is in line with the generally accepted rule that *the burden of proving the lawfulness of the alleged purpose is upon the strikers.* See Maesel v. Sigman, 123 Misc. Rep. 714, 205 N. Y. S. 807 (1924).

[8] 17 Ch. D. 615 (1881). For an excellent discussion of this leading case and its ramifications, see Chafee, *Internal Affairs of Associations Not for Profit* (1930) 43 HARV. L. REV. 993. Chief concern of this litigation was the attempt by Colonel Dawkins to hold the trustees of his club liable for his expulsion.

[9] 19 F. Supp. 824 (N. D. Calif., 1937).

should bargain collectively with the Teamsters Union or the Brewery Workers' Union, both long affiliated with the A.F.L. As late as 1933 the A.F.L. had, by an executive resolution, given the Teamsters jurisdiction over the drivers of conveyances hauling brewery products, but the Brewery Workers had refused to yield, whereupon the Teamsters threatened arbitrarily to assume control over the entire industry. The employers thus found themselves in a maze of another's making, and it would have seemed to one uninitiated in the artifices of labor law that the judiciary would be the proper body to which to appeal for aid. The court, however, denied any relief, basing its position upon the following language:

> Such freedom of association and self-organization includes self-management and self-discipline. . . . Decisions reached by labor unions according to their own constitution and by-laws of procedure are not to be invalidated by a court of law, provided that all parties have had an opportunity to be heard, that the decision has not been arbitrary, and that the fundamental law of the association has not been violated. A court of law will, therefore, not interfere with the decision of the American Federation of Labor, with its internal organization, or with the method of its making or enforcing its awards. The court recognizes the right of the American Federation of Labor to adjust jurisdictional disputes. The settlement of such controversies and the enforcement of such decisions is clearly the function of the Federation. That higher body to which these two labor organizations belong, and of which they are members, must determine this matter and render and enforce a binding decision between them . . .[10]

Idealistic though such reasoning may sound, it is in reality but sophisticated jargon predicated upon a misconceived and inapplicable principle of law which has long outlived its usefulness in the field of labor law and in particular where inter-union disputes are concerned. No example can be found where the futility of the court's position is more evident than in the controversy between the Teamsters and Brewery Workers' unions for at the time of the last mentioned case the conflagration had been raging for nearly half a century, with but a brief respite as both contestants paused to bow while Mr. Volstead led prohibition across the stage. To dismiss the problem with a casual wave of the judicial hand by holding that the matter must be settled and the settlement enforced by the A.F.L., apparently assumed to be omnipotent, is to jest where the seriousness of the issues calls for solemn and studied decision. The utter futility of the situation has been fully recognized by at least one court[11] which expressed its disgust that the A.F.L. had not yet, after the elapse of so long a period, contrived to enforce its decree with regard to the discord between the Teamsters and Brewery Workers' unions. It suggested, in a purely gratuitous statement, that one solution might be for the A.F.L. to suspend the Brewery Workers' Union's charter until such time as it complied with the parent organization's ruling. And then, in the next breath, the

[10] 19 F. Supp. 824 (N. D. Calif, 1937), cited *supra*, n. 9, at pp. 824-25.

[11] International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America et al. v. California State Brewers' Instititute et al., 25 F. Supp. 870 (1938). Noted in (1938) 6 DUKE BAR ASSN. J. 37.

judge stated that he was powerless to settle the dispute, since the court could not enter any order binding the inter-affairs of the A.F.L.[12]

There has been some indication that the Washington Supreme Court is inclined to follow the more enlightened and correct view, taking jurisdiction over such controversies when it appears that the parent union has been unable to cope adequately with the insurgence. Thus in *Blanchard v. The Golden Age Brewing Co.*,[13] while the court did not directly consider the question here involved, the decision of it was implicit in the result at which it arrived. The controversy was once again between the Teamsters' Union and the Brewery Workers' Union, this time the action being at the instance of the latter and the allegation being that, because of threats and coercion by the Teamsters, the Brewers were discharging members of the complainant union. For the court to have exercised its jurisdiction it must have conceded that it could examine into affairs normally believed to be the sole concern of the A.F.L. This it did, premising its conclusion upon the proposition that the right to earn a livelihood and to continue in employment unmolested by the unwarranted activities of third persons is the subject of equitable protection. It further stated that the employer has a correlative right to employ whomever he wishes, free from the intimidation of others, and his business should not be subjected to irreparable damage because he exercises that right. This principle was stated to be appropriate whether or not there was a contract of employment between the employer and his employees.[14] Such cases as the *Blanchard* case and the *Herzog* case must, however, be viewed with extreme caution, for they are definitely in the minority, as will appear from a discussion of another aspect of this same problem in a subsequent portion of this article.

The hope had been expressed by many that the National Labor Relations Board, acting pursuant to the authority conferred upon it by Section 9 (a) of the Act,[15] would enter these troublesome conflicts and replace chaos with some semblance of order. Such hope, however, appeared to have died an abortive death in 1936 when the board refused to take jurisdiction over a dispute between two rival A.F.L. unions, each claiming the right to represent the employees of the Aluminum Company of America. The board, while recognizing that under the terms of the Act it had jurisdiction, refused to assume or exercise it, stating as its reason:

> It is preferable that the Board should not interfere with the internal affairs of labor organizations. Self-organization of employees implies a policy of self-management. The role that organizations of employees eventually must play in the structure established by Congress through that Act is a large and vital one. They will best be able to perform that role if they are

[12] The general applicability of the doctrine by the courts is emphasized in the case of Carey v. International Brotherhood of Paper Makers et al, 123 Misc. Rep. 680, 206 N. Y. Supp 73 (1924), where, although no inter-union dispute was involved, the same court that decided the *Herzog* case refused to scrutinize the inter-affairs of an union.

[13] 188 Wash. 396, 63 P. (2d) 397 (1936), where officers of the Teamsters Union were found in contempt because persisting in their war with the Brewery Workers.

[14] Blanchard v. The Golden Age Brewing Co., 188 Wash. 396, 63 P.(2d) 397 (1936), cited *supra*, n. 13, at pp. 421-422.

[15] National Labor Relations Act (July 5, 1935), c. 372, 49 Stat. 449, 29 U. S. C. O. § 151 *et seq.*

> permitted freely to work out the solutions to their own internal problems. In its permanent operation the act envisages cohesive organizations, well-constructed and intelligently guided. Such organizations will not develop if they are led to look elsewhere for the solutions to such problems. In fine, the policy of the National Labor Relations Act is to encourage the procedure of collective bargaining and to protect employees in the exercise of the rights guaranteed to them from the denial and interference of employers. That policy can best be advanced by the Board's devoting its attention to controversies that concern such fundamental matters.[16]

That the board had definitely committed itself to this rule and was not moved merely by the exigency of a certain case was made evident by two matters decided but two weeks subsequent to the *Aluminum Co. of America* opinion. In both the *Axton-Fisher Tobacco Co.*[17] and the *Standard Oil Co.*[18] decisions, jurisdiction was denied, reliance being placed upon the previous holding.[19] In the *Axton-Fisher* case the board recognized that there were then many other internal disputes raging within the A.F.L., some of which were difficult of solution and of basic importance to the labor movement, but, nevertheless, felt justified in completely ignoring them because:

> . . : the Board should leave organizations of labor free to work out their own solutions through the procedure they themselves have established for that purpose.[20]

This in spite of the fact that the notorious history of such disagreements has been marked by an almost complete failure on the part of the hierarchy of labor to enforce its decree when eventually promulgated. The board's position is the more difficult to comprehend in view of the unequivocal language of the Policy Section of the Act which gives as the motivating purpose the elimination of substantial obstructions to the free flow of commerce by *encouraging and protecting* the rights of workers to designate representatives of their own choosing. Certainly the settlement of these unwanted jurisdictional disputes within the ranks of a great federation of labor is within the purview of such a statement of policy. The inherent soundness of this contention has been conceded by the board in a recent decision on a complaint filed at the request of the *Arkell Safety Bag Co.*[21] The dispute was between the Teamsters Unions and the Brotherhood of Paper, Sulphite and Paper Mill Workers, both affiliated with the A.F.L. Each organization claimed the right to represent the employees. How long the conflict had endured we are not told, except that six months after the filing of the complaint, neither of the opposing parties had made any attempt to refer the jurisdictional issue to the parent body. Without any explanation or reference to its previous position, the board assumed jurisdiction and ordered an election. It would be presumptuous to attempt any prognostication as to

[16] *In re* Aluminum Company of America 1 N.L.R.B. 530, 537-8 (1936).

[17] *In re* Axton-Fisher Tobacco Co. et al., 1 N.L.R.B. 604 (1936).

[18] *In re* Standard Oil Co. of California et al. 1 N.L.R.B. 614 (1936).

[19] The board is not, however, committed to the doctrine of *stare decisis* as are the courts. Hence it was admittedly possible that at some future date the attitude represented by these cases might change.

[20] *In re* Axton-Fisher Tobacco Co. et al., 1 N.L.R.B. 604 (1936), cited *supra*, n. 17, at p. 613.

[21] *In re* Arkell Safety Bag Co. et al., 15 L. ed. 37, 57 N.L.R.B. 222 (1944).

the import of this apparent reversal of form, but it is to be hoped that it indicates a disposition, at least on the part of the present board, to depart from its former arbitrary refusal to involve itself in any affair that might even conceivably be adjusted by a parent labor federation.

2.

Another common and equally provocative circumstance in which the jurisdictional dispute may arise is where the employer has already recognized the status of one of the unions as sole bargaining agent for its employees, generally either by an union or closed shop agreement.[22] While there appear frequent assertions that the same rule applies here[23] as in those cases just considered, it is submitted that the cases do not suggest this intention and the existence of a contractual agreement between one of the unions and the employer should have a very real effect upon the court's attitude. This erroneous conclusion has probably resulted from a failure to distinguish distinctly between the factual situation where no agreement exists and that where the employer has contracted with one of the unions. The cases cited in support of the assumed principle are generally not in point, for they either involve the former problem or concern such non-profit associations as clubs, churches, fraternal insurance associations, *et cetera.* In fact, an exhaustive research has produced but one case which can fairly be said to hold that the court will adhere to the rule of nonintervention, even though a contract is then in force. The court so holding is, paradoxically, the same that assumed just the contrary position in the *Herzog* case,[24] and the occasion was *Hendren v. Curtis.*[25]

Briefly stated, the facts were as follows: Two local unions, both members of the International Hod Carriers, Building and Common Laborers' Union of America, had executed contracts with contractors building a New York subway. By the terms of the contract the work was allocated in a specified manner. Subsequently a supplemental memorandum agreement was entered into, giving the contractors the right to apportion the work in any manner they saw fit in the event a jurisdictional dispute arose. That event occurred and the contractors exercised their right of election, but the plan was no longer satisfactory to the less successful of the two unions and it sought an injunction giving it exclusive right to employment as rock drillers, blasters and laborers in shaft and tunnel work. The New York court dismissed the complaint, stating that the matter was one which should be disposed of by the parent union. But it will be noted that, even here, the union seeking the relief was attempting to breach a contract, rather than have others enjoined from attempting to induce a breach. With this in mind it can scarcely be said that even this opinion is authority for the aforementioned broad statements.

[22] As used here an *union shop* is one in which non-union members may be hired, but in order to retain their employment they must join the union within a certain period, designated in the agreement, while in a *closed shop,* none but union members can be hired and membership must be continued as a condition of continued employment. *See* HANDLER, CASES AND MATERIALS ON LABOR LAW (1944) 67.

[23] *See* (1939) 28 GEO. L. J. 132, where the author says, "Courts have consistently adopted a hands off policy in the administration of the internal affairs of labor organizations." Also comparable statements in (1939) 49 YALE L. J. 329.

[24] Herzog v. Cline, 131 Misc. Rep. 816, 227 N. Y. S. 452 (1927), cited *supra,* n. 5.

[25] 297 N. Y. Supp. 364 (1937).

There is, however, one group of cases in which the courts have concluded they were without jurisdiction to consider such cases, not because of the jurisdictional aspect of the problem, but rather by virtue of the Norris-LaGuardia Act[26] or its various state counterparts.[27] Since those cases refrain from any discussion of the inter-union aspect of the matter with respect to the court's authority to assume jurisdiction, it might reasonably be inferred that were it not for the statutes restricting their equitable jurisdiction they would arrive at a contrary result. An illustrative case is *Blankenship et al. v. Kurfam et al.*[28] There the plaintiffs were employees of *A*, all members of the Industrial Brotherhood of Electrical Workers with which *A* had contracted, the agreement probably calling for a closed shop, although that is not made clear by the opinion. *A* rejected the demands of the defendant, the International Hod Carriers, Building and Common Laborers' Union, that he negotiate with it with regard to certain of the plaintiff employees, his refusal being predicated upon the existing contract with the brotherhood. Both unions were affiliated with the A.F.L. The defendant then surrounded *A's* business with pickets, threatening violence if the plaintiff did not cease working for *A*. The Seventh Circuit Court of Appeals denied the plaintiff's suit for an injunction, grounding its decision upon the Norris-LaGuardia Act as construed by the *Senn* case[29] and the *New Negro Alliance* case.[30] The correctness of such a holding is without the province of this discussion, but the case is important, for it exemplifies the courts' approach to the particular type of a jurisdictional dispute now under consideration. Nowhere in the opinion is there any mention of the supposed rule that even where a contract is involved the court will not intervene in the inter-union affairs of a labor organization. It is, of course, arguable that had the court been unable to rely upon the Norris-LaGuardia Act it would have so held, but there is no authority for such a conjecture, either in the case itself or in the others examined.

The Washington Supreme Court, faced with a similar problem, the contestants being those veteran antagonists, the Teamsters and the Brewery Workers, held in *United Union Brewing Co. v. Beck*[31] that there was no "labor dispute" within the purview of the state anti-injunction act[32] and enjoined the Teamsters from continuing their unlawful activities. That the court's attention was adequately directed toward the inter-union aspect of the case is certain, for Chief Justice Blake predicated his lone dissent solely upon the alleged proposition that, since the quarrel was between two unions each owing allegiance to the A. F. L.:

> It is universally held that the courts will not take jurisdiction of the controversy.[33]

But in support of this dogmatic assertion he was unable to cite one

[26] Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U. S. C. § 101 *et seq.*

[27] REV. STAT. § 7612-1 *et seq.* For the Washington Anti-Injunction Act *see* Laws 1933, Ex. Sess., p. 10 § 1 *et seq.*

[28] 96 F.(2d) 450 (1938).

[29] Senn v. Tilelayers Protective Union, 301 U. S. 468, 57 Sup. Ct. 857, 81 L. ed. 1229 (1937).

[30] New Negro Alliance v Sanitary Grocery, 303 U. S. 552, 304 U. S. 542, 58 Sup Ct. 703, 82 L. ed. 1012 (1938).

[31] 200 Wash. 474, 93 P.(2d) 772 (1939); Noted in (1939) 88 U. OF PA. L. REV. 363.

[32] Laws 1933, Ex. Sess., p. 10 § 1 *et seq.*, cited *supra*, n. 27.

[33] 200 Wash. 474, at p. 494, *supra*, n. 31.

case in point, depending solely upon the statement in American Jurisprudence, relating to non-profit associations other than labor organizations, and two prior Washington decisions,[35] one involving a mutual benefit insurance order and the other a disagreement of a member of the Typographical Union with a decision of the union's appeal council. The majority, of course, was in accord with the same court's attitude when confronted with an inter-union dispute involving no contractual problem.[36] We may, therefore, with some degree of assurance, assume that the Washington court has, at least tacitly, rejected the doctrine that inter-union jurisdictional disputes are to be ignored by all but the parent federation.

At least one court has taken a novel approach in determining an inter-union squabble of this nature by finding a contract between the parent organization with one of the two rivals giving to it the sole right to jurisdiction. This interesting case, a landmark in the field of labor law, is *Obergfell v. Green.*[37] Once again the disputants were the Teamsters and the Brewery Workers, the latter bringing the action to enjoin its arch rival from enforcing the A.F.L. resolution of 1933 giving the Teamsters jurisdiction over the brewery drivers. In order to sustain its position, the Brewery Workers set up its charter of 1887, granted by the A.F.L., which provided that it should have exclusive jurisdiction over all workers employed in breweries, including the drivers engaged in delivering the products and, further, that it could in no manner be deprived of this authority without its consent. The court held that the A.F.L. resolution of 1933 to which the Brewery Workers had vigorously objected, and from which they had thrice appealed, was an attempt to abrogate the contract represented by the 1887 charter, and that since valuable property rights were involved, the Teamsters would be enjoined from enforcing or attempting to enforce the tortuous resolution.[38] The property rights to which the reference was made were: (a) seniority rights, (b) strike and sick benefits, and (c) the right to be represented in collective bargaining. The court also place a great deal of emphasis upon the fact that the Teamsters were attempting to coerce employers to break their existing collective bargaining agreements with the Brewery Workers. The reasoning and consequent result were severely criticized by at least one law review writer, the nub of the objection being that the A.F.L. alone should be entrusted with the arbitration of such controversies and that it was unpropitious for a court to intervene for such unwonted action might "provoke resentment and invite failure."[39] But it never has been the law that an obligor should be allowed to breach his contract merely because to require him to adhere to its terms might injure his feelings or pique his pride. Likewise, the enforcement of the order is no more onerous than in many other matters where equity exerts its influence.

It was to be expected that this significant case would be carried to a higher court and it was as a result that the United States Circuit

[34] 4 AM. JUR. 466.

[35] Kelley v. Grand Circle etc. Woodcraft, 40 Wash. 691, 82 Pac. 1007 (1905); Stiners v. Blethen, 124 Wash. 473, 215 Pac. 7 (1923).

[36] *See* the *Blanchard* case, *supra*, n. 13.

[37] Memo Sp. (D.D.C.) 67 Wash. L. Rep. 941, 29 F. Supp. 589 (1939); noted in (1939) 28 GEO. L. J. 132; *also* in (1939) 49 YALE L. J. 329.

[38] For an excellent discussion on the test of ending a breach of contract, *see* Green, *Relational Interests* (1935) 29 ILL. L. REV. 1041.

[39] (1939) 49 YALE L. J. 329, 332.

Court of Appeals for the District of Columbia reversed the decision.[40] The basis of the decision is that the case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, but the court devoted much space to a reiteration, by way of *obiter dictum,* to the contractual basis upon which the lower court predicated its result. The Brewery Workers' charter was, said the court, subject to the conditions contained in the A.F.L. constitution which gave it the right to take such action as its councils deemed most expeditious in the interest of the general welfare of labor. In other words, the promise in the charter was illusory, the contract only unilaterally enforceable. Respect was also paid to the principle that the judiciary should not interfere with the internal affairs of non-profit associations, except in rare instances. It is urged that the approach of the lower court was sound in law, and certainly it promised a practicable, albeit novel, solution to an irksome question. But in view of its repudiation by the court of appeals, tacitly joined in by the United States Supreme Court, there is presently little hope that it will be accepted by the federal bench.

Yet another approach had long been urged by Thurman Arnold, one time assistant United States Attorney General, as a part of his five-point program of action under the Sherman Anti-Trust Act.[41] This would naturally be limited to those disputes which interfered with interstate commerce and Mr. Arnold took the position that where such was the case the offending union should be subject to prosecution for violation of the Act.[42] The test of this hitherto untried technique was provided by a dispute between the United Brotherhood of Carpenters and Joiners and the International Association of Machinists, each union being an affiliate of the A.F.L. For many years there had raged a controversy as to which should have jurisdiction over the erection and dismantling of machinery and the efforts of the parent federation to arrive at an amicable settlement had been of no avail. In 1932 the two unions mutually agreed that Machinists should be entitled to work on metal machinery and disputes should be resolved by arbitration. Anheuser-Busch, Inc., employed seventy-eight members of the Carpenters Brotherhood and eighty members of the Machinsts Union, having contracted with both of them separately, the terms of the aforementioned agreement being incorporated into each of the respective contracts. The corporation, in order to expand its plant, procured the services of an independent contractor, who in turn would utilize the services of the two rival unions in accordance with their contractual undertakings. The Carpenters, however, rebelled, repudiating their agreements with both the Machinists and the corporation, ordered a strike, attempted to prevent that other union employees of the corporation and the independent contractor from carrying on their accustomed work and encouraged all union members and their friends to refrain from purchasing the corporation's product.[43] As the beer which the corporation manufactured and the raw materials from which it was made were both shipped throughout the several United States, the United States Attorney General obtained an indictment of the Carpenter's Brotherhood and its

[40] Green v. Obergfell, 121 F.(2d) 46, 138 A. L. R. 258 (1941); *certiorari denied,* 314 U. S. 637, 62 Sup. Ct. 72, 86 L. ed. 511 (1941).

[41] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A. § 1 *et seq.*

[42] *See* Report of Assistant Attorney General Thurman Arnold (1941), Annual Report of the Attorney General of the United States, pp. 61-62.

[43] For a more detailed statement of the facts see U. S. Supreme Court Briefs, Term of Oct. 1940, Brief No. 43.

executive officers for violation of the Anti-Trust laws.

In *United States v. Hutcheson*,[44] the question of whether the labor union was within the purview of the criminal provisions of the Act was adjudicated by the United States Supreme Court. Mr. Justice Frankfurter, startling the legal profession by his method and rationale, answered for a majority of the Court in the negative. It is not with the devious and circuitous route by which the Court attained its goal that we are here concerned,[45] but rather with the fact that another potential weapon against the jurisdictional dispute has been barred. Although the union's counsel at some length argued the question,[46] there is no discussion in the opinion of whether the inter-union aspect of the case, taken alone, would be sufficient to tie the judicial hands. It seems obvious that it would not, for if a crime be committed against the sovereign, the culprit would hardly be allowed to raise the cry of "Sanctuary" merely because his actions were primarily directed against a member of his private society.

At first, as pointed out elsewhere herein,[47] the National Labor Relations Board categorically refused to take cognizance of the strife between two rival but brother unions. But, however, where one of the parties has a contract with the employer, the board just recently has shown a disposition to consider such matters as properly within its supervision. Thus the board held in the *South-Western Public Service Co.* matter[48] the point that the proceedings should be dismissed on the ground that the dispute involved a jurisdictional dispute between two unions affiliated with the same parent was not well taken because:

> . . . the conflict between them was of long standing, universal in scope and apparently insoluble without resort to administrative processes of NLRA.[49]

The board further stated that the fact one union had an automatic renewal contract did not bar the board's intervention. Insofar as the contract aspect of the problem is concerned, this appears to be a negative approach, for the board is intimating that it can, in effect, set aside the contract, but the opinion is not definitive as to that question. In arriving at this result, the board had as precedent two opinions, the *Kistler* case[50] and the *Mountain States* case.[51] In arriving at its conclusion in the first case the board said:

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[44] 312 U. S. 219, 61 Sup. Ct. 463, 85 L. ed. 788 (1941).

[45] For a consideration of that aspect of the case *see* Steffin, *Labor Activities in Restraint of Trade: The Hutcheson Case* (1941) 36 ILL. L. REV. 1; M. R. Kamin, *The Hutcheson Case, Another View* (1941) 36 ILL. L. REV. 41. The various anti-trust aspects of the case are also discussed by Purdue, *Labor Activities an Anti-Monopoly Legislation* (1942) 17 WASH. L. REV. 206. In brief the majority decided that the public policy statement in the Norris-LaGuardia Act neutralized the Clayton Act and that by this interlacing those ten statutes with the Sherman Act, labor unions were immunized.

[46] *Supra* n. 43, appellees' brief.

[47] *Supra* pp. 223 and 224.

[48] *In re* South-Western Public Service Co., 15 L. Rel. Rep. 209, 58 N.L.R.B. 926 (1944).

[49] *In re* South-Western Public Service Co., 15 L. Rel. Rep. 209, cited *supra* n. 48 at p. 209.

[50] *In re* W. H. Kistler Stationery Co. et al., 51 N.L.R.B. 978 (1943), where the board decided an election should be held to determine whether the Lithographers or the Printing Pressmen, both AFL unions, should represent the employees.

[51] *In re* Mountain States Power Co., 15 L. Rel. Rep. 72, 58 N.L.R.B. 20 (1944), including river claims by the Hydro-Electric Operators and the International Brotherhood of Electric Workers, both AFL affiliates.

> In the past the board has, as a matter of policy, refused to permit rival unions affiliated with the same parent organization to resort to the administrative processes of the National Labor Relations Act for settlement of their representation disputes where adequate and appropriate machinery was available to them under the procedure of the parent organization. It is apparent here, however, that effective resolution of the existing conflict cannot be had without resort to the administrative processes of the Act.[52]

The board presently appears inclined to take jurisdiction only if the following conditions are present: (a) the conflict is universal in scope, (b) the discord has continued over a long period of years, and (c) the sole solution apparently effective is resort to the Act.[53] That this is quite a sharp reversal of its original position must be conceded when it is recalled that previously in conflicts of such long standing and utter hopelessness as those between the Teamsters and Brewery Workers, the board had denied the propriety of its intervention. The future alone can tell us whether the board will exercise its power in all matters where the afore-mentioned three conditions are present or will blandly close its eyes whenever the potato has become too hot for comfortable handling.

Although no cases have been found so holding, it would seem that on principle the courts should take jurisdiction in these cases where the employer has contracted with one of the two brother unions. If the contract is otherwise valid and not repugnant to any existing public policy of the state or nation, it is well settled that the employer can be compelled to adhere to its terms. If the employer refuses or fails to abide by his contractual obligations, the obligor-union can picket his premises and such picketing will not be enjoined.[54] The reasoning would seem to be that there the employer has not satisfied the age-old equitable maxim, "He who seeks equity must come into court with clean hands." It has also been held that the union can obtain affirmative relief in equity, obtaining a decree enjoining the employer from violating the terms of the agreement by hiring others than the members of the union.[55] One court in so holding made the following significant statement by way of judicial dictum:

> Clearly, we think, what the contractors were bargaining for

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[52] *In re* W. H. Kistler Stationery Co. et al., 51 N.L.R.B. 978 (1943) cited *supra* n. 50 at p. 980.

[53] *In re* Mountain States Power Co., 15 L. Rel. Rep. 72, cited *supra* n. 51.

[54] Spivak v. Wankofsky, 155 Misc. Rep. 550, 278 N. Y. Supp. 552 (1935); Smith v. Bowen, 232 Mass. 100, 121 N. E. 814 (1919). But the picketing is unlawful, if, after the expiration of a contract which had been breached in part by the employer, the purpose is to punish the employer for such breach. *See* Farinli et al. v. Auto Mechanics Union, 200 Wash. 283, 93 P. (2d) 422. (1939)

[55] Ribner v. Rasco Butter and Egg Co., Inc., 135 Misc. Rep. 616, 238 N. Y. Supp. 132 (1929), where, at p. 638, the court said: "It is proper and praiseworthy that a union as in the instant case, having entered into a contract with the employer and feeling aggrieved because of an alleged breach thereof by the employer, should come into a court of equity and there seek the protection of its rights rather than to resort to picketing and strikes to redress its wrongs, with the resultant effect upon the orderly conduct of business and inconvenience to the public. Under the terms of the contract here presented there is mutuality of obligation. There should be mutuality of remedy. The contract is valid. The power of the court of equity to issue an injunction to prevent such alleged violation is well established."

> and what they obtained under the agreement *was freedom from industrial dispute, strike or collective adverse action* on the part of the union, its officers and its members during the term covered by the agreement. As we have already pointed out, this right, if infringed, could be enforced by injunction at the instance of the contractor.[56] (italics supplied.)

This forcefully brings into focus the plight of an employer who has a valid and enforceable agreement with one union and is then faced with considerable loss because of the antagonistic tactics of its rival which persists in boycotting, picketing and encouraging strikes. Is he to be told by the courts that they will afford him no relief or redress solely because the two contestants are of the same parent federation—a parent unable to enforce its decisions upon the recalcitrant ward? Clearly if the employer were to accede to the demands of the one, he will have the other with whom he has contracted to fence with next; and we have seen that equity has the jurisdiction and the inclination to enjoin the employer from breaching his contract. Thus he is caught in a vast and awesome pit from which there is no apparent escape. Even a caustic critic of the *Obergfell* case[57] admitted that the employer so trapped should be able to seek judicial relief from such coercive invasion.[58] It is earnestly submitted that one sound and practicable approach is for the courts to view the rival union's attempt to induce a breach of the contract as a tortuous act over which the court will assume and exercise jurisdiction, disregarding, and, if need be, repudiating the stupid shibboleth that the jurisdictional affairs are subject solely to the disciplinary powers of an impotent parent. In order to anticipate those situations where the courts may deem the anti-injunction statutes applicable, they must be amended so as to exclude from their purview these inter-union controversies.

3.

The third and last situation to be considered under the heading of jurisdictional disputes is where a labor board, either state or national, has certified one of the two unions as the exclusive bargaining agent for the employees and the other persists in forcing its demands upon the employer by picketing, strikes or boycotts. Thus far there have been found no cases involving this precise problem, but it is one which, in the future promises to be the source of much grief. The courts have shown a disposition to uphold the validity and effectiveness of the contract entered into pursuant to the certification, at least for the designated period,[59] and if none be specified, for a reasonable time.[60] The mere fact that there has been a sizable decrease in the membership of the union subsequent to certification is of itself insufficient to nullify the certification

[56] Hager et al. v. International Brotherhood of Electrical Workers, Tex. Civ. App. 48 S. W.(2d) 1033, 1040-41 (1932).

[57] Obergfell v. Green, Memo Sp. (D.D.C.) 67 Wash. L. Rep. 941, 29 F. Supp. 589 (1939), cited *supra* n. 37.

[58] (1939) 49 YALE L. J. 329, cited *supra* n. 39.

[59] Triboro Wash. Corp. v. State Labor Relations Board, 286 N. Y. 314, 36 N. E.(2d) 315, 144 A. L. R. 410 (1941), discussed at considerable length by B. M. Wilcox, *The Triboro Case, Mountain or Molehill?* (1943) 56 HARV. L. REV. 576. This case is in reality concerned with a dual rather than jurisdictional dispute. It will be considered at appropriate length in that aspect.

[60] N.L.R.B. v. Remington Rand, Inc. 94 F.(2d) 862 (1938), Certiorari denied in 304 U. S. 576, 585, 58 Sup. Ct. 1046, 1061, 82 L. ed. 1540, 1546 (1938).

or avoid the agreement.[61] This seems reasonable, for the maintenance of the membership of the union is not a necessary concomitance of its continued existence as a collective bargaining agent, since by hypothesis it represents all the employees without regard to their union affiliation. In order to preclude a vociferous minority from harassing the majority, as well as the employer, there is a presumption that the certified bargaining agent's authority is continuous, at least for a reasonable time, and this presumption is regarded by the board as being conclusive until the employees have taken action in accordance with the provisions of the Act to make a new selection.[62]

One writer in this field has suggested that the problem now under consideration may be dealt with in one of three ways:

> First, the existence of a valid contract negotiated by the majority representative might be held to eliminate all questions as to representation during its term. On the other hand the contract might be set aside completely on certification of a new bargaining representative. Finally, the conflict could be compromised by recognizing the change in employee allegiance but maintaining the contract binding on employer and employees, either automatically or at the option of the employer.[63]

While a detailed discussion of the cases is more properly reserved for a subsequent time, since thus far those decided have involved dual as opposed to jurisdictional disputes, it is appropriate briefly to summarize the position taken by the courts and the board. The former have adopted the view that the contract should prevail, providing, of course, that it is a *bona fide* and enforceable agreement.[64] The board, however, has in a few instances favored modification of the contract and ordered an election, even though the employer was then under a court injunction requiring him to hire only members of the contracting union,[65] but the usual approach has been to maintain the contract impact, merely substituting the one union for the other.[66] Neither have decreed abrogation of the contract.

CONCLUSION

That a consistent and coordinate approach by both courts and the board is not only desirable but imperative in all phases of jurisdictional conflicts is unarguable. It is by now obvious to any but the most bigoted that the situation either cannot or will not be solved by the unions themselves. In light of the past it is but sheer stupidity to ignore the problem by relying upon the supposed doctrine that the internal affairs of these allegedly non-profit associations cannot be interfered with. The public, the employers and the workers all have too much at stake to be satisfied by an opiate composed of that brand of unadulterated sophis-

[61] Wisconsin Employment Relations Board v. International Association of B.S.O.I.W. et al., 241 Wis. 286, 6 N. W.(2d) 339, 144 A. L. R. 430 (1942), where the paid-up membership of the union had dropped from 130 to 5 or 6.

[62] Oughten v. N.L.R.B., 118 F. (2d) 486 (1940); certiorari denied, 315 U. S. 797, 62 Sup. Ct. 485, 86 L ed. 1198 (1942).

[63] *Change of Bargaining Representative During the Life of a Collective Bargaining Agreement Under the Wagner Act* (1942) 51 YALE L. J. 465, 466.

[64] *Supra*, n. 59; *also see* 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING, § 167, 168.

[65] *In re* National Battery Co., 28 N.L.R.B. 28 (1940).

[66] 1 N.L.R.B. *Ann. Rep.* 108 (1936).

try. Merely by way of suggestion, the following are offered as possible, and it is believed, practical solutions: (1) An absolute repudiation by the courts and the National Labor Relations Board of the misconceived and inapplicable position that jurisdiction will not be assumed over inter-union disputes because the rivals are affiliated with the same parent; (2) utilization of the ordinary contract and tort approach in all cases where the employer has a valid and binding agreement with one of the rival unions; (3) legislation prohibiting picketing, boycotting and comparable activities in purely jurisdictional disputes;[67] and (4) a modification of the anti-injunction statutes, both state and federal, restoring the right of the courts to exercise their equitable jurisdiction where the dispute is between two unions and no question of wages, working conditions or hours is involved. If these propositions appear too radical, it can only be said in reply that unless some corrective is soon applied there will be no end to the needless loss and suffering engendered by these unprofitable jurisdictional conflicts. DONALD R. COLVIN

[67] Similar legislation has been enacted in Oregon (Ore. Laws 1939, c. 2) and Minnesota (Minn. Laws 1939, c. 440). At this writing their constitutionality has not been passed upon by the United States Supreme Court but it would appear that the reasonable exercise of the state police power would save them from condemnation and place them outside the authority of Thornhill v. Alabama, 310 U. S. 88, Sup. Ct. 730, 84 L. ed. 1093 (1940).

RECENT CASES

FAMILY ALLOWANCES—SURVIVAL OF ACTION TO WIDOW'S ESTATE—DISCRETION OF TRIAL COURT IN GRANTING. *W*, a widow of *H*, with no surviving minor children, petitioned the trial court for a family allowance which was granted in the sum of $575 and paid. Thereafter *W* petitioned *R*, executrix of *H's* estate for an additional allowance which *R* denied. *W* then brought action against *R*. Prior to trial of the case *W* died and *E*, executrix of *W's* estate was substituted as plaintiff to the action. *R* applied for a writ of prohibition to restrain further proceedings. The writ was issued by the Supreme Court which *held:* that "the right to the family allowance in this case is personal to the widow, and that the action does not survive to the executrix to her estate." There was a dissent by Justice Millard on the grounds of the impropriety of the writ of prohibition, a question not within the scope of this note, and a dissent by Justice Simpson taking issue with the court's interpretation of the statute involved, REM. REV. STAT. § 1476. *State ex rel. Cook v. Superior Court for Grant County*, 123 Wash. Dec. 231, 160 P. (2d) 606 (1945).

> REM. REV. STAT. § 1476 provides: "In addition to the awards herein provided for, the court may make such further reasonable allowance of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate, and any such allowance shall be paid by the executor or administrator in preference to all other charges, except funeral charges, expenses of last sickness and expenses of administration."