Duquesne Law Review

Volume 21
Number 2 *Symposium: The Application of Antitrust Laws to Labor-Related Activities*

Article 11

1983

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Recommended Citation
Harold J. Datz, *The Relationship Between Section 8(e) Cases and Antitrust Cases*, 21 Duq. L. Rev. 419 (1983).
Available at: https://dsc.duq.edu/dlr/vol21/iss2/11

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The Relationship Between Section 8(e) Cases and Antitrust Cases

*Harold J. Datz**

I. Introduction

It is a truism to say that the field of labor law does not stand unto itself. A given controversy between labor and management may involve fields of law beyond the narrow parameters of labor law. When this occurs, there is a problem concerning which tribunal is to decide the issues of law. Thus, for example, where the controversy involves issues under the National Labor Relations Act (NLRA),[1] issues under the Sherman Act,[2] and issues of contract law, who is to decide the disputes: the NLRB, federal agencies and courts charged with responsibility for anti-trust enforcement, or arbitrators and courts charged with contract enforcement?

I would like to focus on one aspect of this problem that touches my agency, the National Labor Relations Board (NLRB). Where the controversy involves NLRA issues and other issues, to what extent do tribunals with jurisdiction over the controversy have jurisdiction over the NLRA issues, i.e. to what extent does the NLRB lose its exclusive jurisdiction over NLRA issues?

II. Power of a Court to Resolve NLRA Issues Arising in Antitrust Cases or in Section 301 Cases

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*,[3] decided in 1975, the Supreme Court dealt with a case presenting issues under section 8(e) of the NLRA and sections 1 and 2 of the Sherman Act. The contractual clause under attack required the signatory employer to restrict its subcontracting to

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1. 29 U.S.C. §§ 151-69 (1976 & Supp. IV 1980).
2. 15 U.S.C. §§ 1-7 (1976).
3. 421 U.S. 616 (1975).

firms who had contracts with the signatory union. Under union pressure, Connell signed the clause. It thereafter attacked the clause as being violative of the Sherman Act. The union defended on the ground that the clause was protected by the construction industry proviso to section 8(e).

At the outset, the Court was faced with the issue of whether the section 8(e) question was within the exclusive province of the NLRB. The Court held that it was not. In rather sweeping terms, the Court stated that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws."[4]

Parenthetically, it should be noted that, according to the Court, the NLRB had never passed on the section 8(e) proviso issue presented in that case. Thus, the Court did not have to decide the issue of what deference, if any, it would pay to Board resolution of the issue.

Thus, as noted, the Court held that it had the power to resolve the 8(e) issue. It resolved that issue by holding that the clause was not protected by the 8(e) proviso. On a related question, the union argued that even if the clause was unlawful under section 8(e), the exclusive remedy therefore was under the NLRA and not under antitrust law. The Court rejected this argument. "There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA."[5]

The same issue was presented to the Court in the recent case *Kaiser Steel Corp. v. Mullins*.[6] In that case, Kaiser had a contract with the UMW under which it was obligated to make contributions to certain health and retirement funds. The contributions would be measured by the amount of coal produced by the unit employees and the number of hours they worked. In addition, the signer had to make an additional payment for each ton of purchased coal for which a contribution had not been made. Thus, if the signatory bought coal from a non-UMW producer, it had to make an additional payment.

Kaiser produced only high-volatile coal, and it therefore had to

4. *Id.* at 626.
5. *Id.* at 634.
6. 102 S. Ct. 851 (1982).

purchase mid-volatile coal. It purchased such coal from Mid-Continent. That employer's employees were represented by another union, but they enjoyed benefits equal to or better than the UMW contract. However, since Mid-Continent was not a UMW signatory, and did not pay into UMW funds, Kaiser was required to make the additional contributions for this purchased coal. Kaiser paid the contributions based on the coal that it produced and on the hours worked by its employees. But it declined to make contributions based on the coal produced by Mid-Continent. After expiration of the contract, the trustees sued Kaiser under section 301. Kaiser defended on the ground that the "purchased coal" clause violated the Sherman Act and violated section 8(e) of the NLRA. With particular respect to the latter contention, Kaiser argued that the clause penalized Kaiser for doing business with a non-UMW firm, and that the purpose of the clause was to acquire representative status for the UMW regarding Mid-Continent's employees. Accordingly, Kaiser was enmeshed in the UMW's dispute with Mid-Continent.

The Court of Appeals for the District of Columbia Circuit ruled that Kaiser could not defend against the section 301 suit by claiming that the clause violated antitrust laws or violated section 8(e). Regarding the section 8(e) defense, the court ruled that section 8(e) was under the exclusive jurisdiction of the NLRB. The Supreme Court disagreed. Regarding the 8(e) issue, the Court declined to leave this matter to the exclusive jurisdiction of the NLRB.

In deciding *Kaiser* as it did, the Court effectively extended *Connell.* It will be recalled that, in *Connell,* the defendant-union argued that the clause was *privileged* under the NLRA and, therefore, an antitrust violation could not be established. In the *Kaiser* case, the defendant-employer argued that the contract was *unlawful* under the NLRA and, therefore, contractual liability should not attach. However, this distinction was rejected. In both cases, the section 8(e) issue had to be resolved to adjudicate the plaintiff's claim, whether that claim be under the Sherman Act or under section 301.

The Court also went beyond *Connell* in the sense that the *Kaiser* case was a contract enforcement action. Where one party has performed under a contract, and the other party has not, it is arguably a forfeiture to sanction non-performance by the other party. Thus, in the *Kaiser* case, the employees had performed services for their employer, and the employer was withholding a por-

tion of the compensation. It was argued that to permit Kaiser to escape payment was to give it a windfall and to work a forfeiture. Notwithstanding these considerations, the Court declined to enforce the contract. The Court said that "our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law." The Court also said:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[7]

The Court also noted that section 8(e) provides that hot cargo clauses are an unfair labor practice and are "unenforceable and void." Thus, in that one sentence, Congress declared that the NLRB could find and remedy an unfair labor practice, and a section 301 court could refrain from enforcing a contract. The Court concluded as follows:

> [W]here a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense. While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.[8]

I would note parenthetically that one can legitimately quarrel with the notion that Kaiser is a party which Section 8(e) is designed to protect. In the first place, Kaiser was a signatory to the 8(e) clause and was, in law, *in pari delicto* with the union signatory. However, it is clear that section 8(e) is designed to protect public rights, and not private ones. Thus, there is a public interest in the nonenforcement of the contract, even though this works to the private benefit of a wrong-doer. Secondly, Kaiser was a neutral in a section 8(e)-8(b)(4)(B) sense. Section 8(b)(4)(B) would prohibit a union from pressuring Kaiser to cause it to cease doing business with the union's primary disputant, the non-UMW coal company. Section 8(e) is aimed at preventing the union from accomplishing the same end by agreement. Thus, section 8(e)

7. *Id.* at 859 (quoting Hurd v. Hodge, 334 U.S. 24, 34-35 (1948)).
8. 102 S. Ct. at 860.

would prohibit the union from agreeing with Kaiser to cease doing business with the union's primary disputant, the non-UMW coal company. In both situations, the non-UMW company is the primary and Kaiser is the neutral, and (8)(b)(4)(B) and 8(e) are designed to protect neutrals.

Perhaps though, this is where 8(b)(4)(B) and 8(e) part company. That is, section 8(b)(4)(B) is designed to protect Kaiser from pressure. Further, under section 8(b)(4)(A), Kaiser can stop pressure to force it to sign a section 8(e) clause. But once it signs the clause, section 8(e) may be used to prohibit enforcement and thereby protect the boycotted employer, the non-UMW producer. Thus, it may be that section 8(e) is designed to protect the victim of the enforcement of a section 8(e) clause. Notwithstanding this, the Court said that Kaiser was a party which section 8(e) was designed to protect.

Finally, the Court permitted Kaiser to raise the defense, even though the union's suit was based on a claim for contributions to a health and retirement fund, and Congress had amended the Employee Retirement Income Security Act of 1974 (ERISA)[9] to remove road blocks from the perfecting of such claims. The Court concluded that the relevant section of ERISA, section 306(a), did not operate to preclude Kaiser's defense. That section provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, *to the extent not inconsistent with law,* make such contributions in accordance with the terms and conditions of such plan or agreement.[10]

The Court reasoned that if the clause is violative of section 8(e), it is "inconsistent with law" and therefore section 8(e) could be raised as a defense to the contract action. Section 306(a) precludes only unrelated or extraneous defenses.

Thus, a court with section 301 or antitrust jurisdiction can hear and decide whether an agreement violates 8(e). A different issue is whether such a court can hear and decide the issue of whether a given clause is a mandatory or non-mandatory subject of bargaining. It is clear that a clause can be non-mandatory without being unlawful. It is also clear that the issue of whether a clause is mandatory is relevant to the issue of antitrust liability. That is, whether a clause is mandatory is a factor that may operate to

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9. 29 U.S.C. §§ 1001a-1453 (1976 & Supp. IV 1980).
10. *Id.* at § 1145 (Supp. IV 1980) (emphasis added).

render it immune from antitrust attack. The question is if a court that has an antitrust case before it would decide the issue of whether the clause is mandatory, just as it decides 8(e) issues. The Court's language in *Connell* is broad enough to permit a court to do so. Thus, the Court said that "federal courts may decide *labor law questions* that emerge as collateral issues in suits brought under independent federal remedies . . . ."[11] On the other hand, the issue of whether a clause is mandatory may be better addressed by the Board. It involves the scope of section 8(d) of the NLRA in light of changing industrial realities, rather than a construction of a specific legislative prohibition. Thus, there is an argument for leaving this issue to the Board. (The issue could be raised in either a Section 8(b)(3) or 8(a)(5) case.) However, I suspect that a court would decide the issue. The Court's language in *Connell* is broad enough to support this result. Further, *United Mine Workers v. Pennington*[12] involved a non-mandatory clause. That is, the clause was related to the wages paid by other employers in other units. The Court held that the agreement was not immune from antitrust attack.

Still another issue is whether a court with jurisdiction to hear and decide an antitrust case would stay its hand because the case involved section 8(a)(3) issues. The problem may be presented in the *California State Council of Carpenters v. Associated General Contractors of California*[13] case. In essence, that case involves an alleged agreement among employers to do business with non-union subcontractors and to refrain from doing business with union subcontractors. It should be noted at the outset that, unlike *Connell,* it would appear that an antitrust violation in this case is not dependent upon a showing of a violation of the NLRA. Secondly, the issue of whether the NLRA offers exclusive remedies may turn on the facts of a particular case. Under one set of facts, the NLRA may offer no remedy, and a fortiori, the NLRA would not offer an exclusive remedy. Thus, if a subcontractor remains unionized and loses business as a consequence of the agreement, there may be no violation of the NLRA. The NLRB has held that the NLRA does not forbid one employer from refraining to do business with another, even if this action is prompted by the fact that the second employer is a unionized firm.[14] Thus, even if employees, the union,

11. 421 U.S. 616, 626 (1975) (emphasis added).
12. 381 U.S. 657 (1965).
13. 648 F.2d 527 (9th Cir. 1980), *cert. granted,* 102 S. Ct. 998 (1982).
14. *See* National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127 (2d Cir.

and the subcontractor can show an injury, it may nonetheless be the case that the NLRA offers no relief.

On the other hand, if the subcontractors, in order to be eligible bidders, withdrew recognition from the union and/or discharged their union adherent employees, this conduct would constitute a violation of the NLRA by the subcontractors. Further, it may be that the firms who caused this may be liable along with the subcontractor. However, under *Connell,* it would appear that the mere fact that these NLRA remedies would be available for the union and the employees would not, by itself, operate to defeat an antitrust claim by the union and/or the employees.

III. Choice of Remedies

We have seen that a court with jurisdiction to hear and decide a section 301 case or an antitrust case can hear and decide section 8(e) issues. Thus, as a practical matter, an employer-signatory to a section 8(e) clause has a number of options available to it. For example, it can decline to enforce the clause, and file a section 8(e) charge with the Board. If merit is found to the charge, a complaint would issue and 10(1) relief would be sought to restrain enforcement of the clause. In the alternative, it can decline to honor the clause and raise a section 8(e) defense to a section 301 suit.

It should be noted in passing that, in a sense, the route of filing a charge offers certain advantages. The enforcement of the clause can be immediately enjoined *pendente lite* upon a showing of "reasonable cause to believe" that section 8(e) has been violated. By contrast, the defense of a section 301 case involves the process of establishing the 8(e) violation. Of course, proceeding before the Board is not without its risks. The Board may decline to find the 8(e) violation. If it so finds, the charging party-signatory may be estopped from raising the matter in a section 301 case. At the very least, the section 301 court would probably give some deference to the Board's opinion.

Assuming that the signatory employer carries out the 8(e) clause, the boycotted employer has a choice of remedies. For example, in the case of an unlawful subcontracting clause, the signatory employer stops doing business with a non-union subcontractor. In that event, the subcontractor can file a section 8(e) charge and the Board could seek a 10(1) order restraining compliance with the clause. In addition, the subcontractor could file an antitrust claim

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1972); Local 447 and Malbaff Landscape Const. 172 NLRB Dec. (CCH) 128 (1968).

seeking the same relief, plus damages.

The choice of filing a charge offers the opportunity for an injunction based on a showing of "reasonable cause to believe" that section 8(e) has been violated. However, as discussed *supra,* the charging party runs the risk of a loss before the NLRB and collateral estoppel in the antitrust case. Further, under current Board law, the section 8(e) case will not result in the award of money damages to the charging party.

IV. Deference to NLRB Determinations

Assuming that a charge is filed, what deference, if any, will the court give to the NLRB disposition?

The disposition can be at various stages. The General Counsel can administratively dismiss the charges. In *Connell,* the Court dealt with a General Counsel dismissal, but said that it was distinguishable. In *Kaiser* the General Counsel had dismissed a charge filed by another party attacking the same clause. However, the Court was not called upon to resolve the section 301 case on the merits, and thus did not have to deal with the deference issue. In my view, the Court would give some deference to a well reasoned General Counsel dismissal, but not as much to a full Board decision.

In cases where the General Counsel proceeds, there will be multiple proceedings involving some of the same issues. In *National Maritime Union v. Commerce Tankers Corporation,*[15] a district court judge, acting under section 301, had granted injunctive relief to enforce a contract clause. Subsequently, the NLRB Regional Director sought to enjoin enforcement of the clause in a 10(1)-8(e) proceeding. A different judge in the same district court denied the relief. On a consolidated appeal, the Court of Appeals for the Second Circuit granted the 10(1) relief and reversed the section 301 injunction. The case illustrates that the route of consolidated appeal can avoid inconsistent results at this stage. The case also shows that, because of the relatively insubstantial burden in 10(1) cases, the 8(e) contention is likely to prevail at this stage.

After this stage, the Board would ultimately rule on the merits. It would appear that its ruling would be reviewed by a court of appeals under normal standards. If the court found a section 8(e) violation, it would not enforce the contract, and it may find an antitrust violation. If the court found the contrary, it would enforce

15. 457 F.2d 1127 (2d Cir. 1972).

the contract, and probably not find an antitrust violation.

V. Conclusion

As the result of recent decisions, it is clear that courts with jurisdiction over antitrust and section 301 claims have the power to resolve NLRA issues. The result is that parties pursue remedies and claims, based on NLRA principles, in non-Board forums. The choice of forum becomes a part of a litigant's strategy, and it can be anticipated that different parties will pursue different avenues in future cases. In these circumstances, it is essential that each tribunal give due regard to the aims of all federal policies — the NLRA, antitrust legislation, and section 301 contract principles.