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LABOR LAW-BREACH OF NO-STRIKE COVENANT-DAMAGE SUITS AGAINST UNIONS

Bernard L. Goodman S. Ed.
University of Michigan Law School

LABOR LAW—BREACH OF NO-STRIKE COVENANT—DAMAGE SUITS AGAINST UNIONS—Plaintiff corporation and defendant union entered into a collective bargaining agreement which provided that there should be no strikes by members of the union until the grievance procedure prescribed therein was exhausted. A walkout in violation of this agreement occurred and the plaintiff sought damages for the consequent loss of profits. A statute provided that "Whenever any unincorporated . . . association . . . shall be formed in this state . . . actions . . . may be brought by or against such associations. . . ."[1] On de novo hearing, *held*, the defendant was amenable to suit by virtue of the statute. But in view of the uncertain profit record of the plaintiff, recovery was allowed only for the amount of the fixed expenses of the corporation during the time that its operations were hampered by the strike. *General Magnetic Company v. United Electrical Radio & Machine Workers of America, Local 937, CIO*, 328 Mich. 542, 44 N.W. (2d) 140 (1950).

In the absence of statute, it has generally been held that a labor organization has no legal personality and therefore cannot sue or be sued as such.[2] This situation has been altered in most states by explicit legislation.[3] Other jurisdictions have adopted statutes of the type involved in the principal case, dealing with "associations" and while some courts have refused to construe these as covering unions,[4] the practical effects of such holdings have been minimized in some instances by legislation specifically allowing suits by and against labor organizations.[5] In the remaining jurisdictions,[6] legal responsibility may still be imposed upon a union by virtue of the theory of estoppel[7] or the employment of a representative

[1] Mich. Comp. Laws (1948) §612.12.

[2] 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 1362 (1940). But see Busby v. Electric Utilities Employees Union, (D.C. Cir. 1945) 147 F. (2d) 865.

[3] U.S. DEPT. OF LABOR, LABOR INFORMATION BULLETIN 16 (March, 1947).

[4] St. Paul Typothetae v. St. Paul Bookbinders' Union, 94 Minn. 351, 102 N.W. 725 (1905); Johnston v. Albritton, 101 Fla. 1285, 134 S. 563 (1931). *Contra*: Armstrong v. Superior Ct., 173 Cal. 341, 159 P. 1176 (1916).

[5] Fla. Laws (1943) c. 21968, §11; Minn. Laws (1947) c. 527.

[6] These states are Ark., Ga., Ill., Ky., Me., Mass., Mo., Miss., N.H., Ore., R.I., Tenn., and W.Va. [see supra note 3]. To this list must be added Louisiana which has repealed its "Union Control Act" [La. Acts (1946) Act No. 180] by La. Acts (1948) Act No. 130.

[7] If a union conducts itself as if it were a legal entity it may be estopped from denying that status when held accountable with respect to such conduct. Forest City Mfg. Co. v. I.L.G.W.U., 233 Mo. App. 935, 111 S.W. (2d) 934 (1938).

suit.[8] Furthermore, under the Taft-Hartley Act[9] if a union's activities have even a slight effect upon interstate commerce, it is amenable to suit in the federal courts for breach of a collective bargaining agreement.[10] Nevertheless, violation of a no-strike covenant[11] seldom moves an employer to resort to a damage suit.[12] Perhaps one of the reasons for this is the frequent inability to recover for the loss of profits[13] and the consequent probability that the employer will be limited in his recovery to a substitute, and often relatively unsatisfactory measure of damages.[14] Moreover, a strike constituting a breach of contract generally relieves the employer of his obligations thereunder[15] and imposes upon him a duty to mitigate his damages. Under some circumstances this might require the employer to hire new employees in defiance of union standards,[16] a course ill-suited to a long-range industrial relations policy.[17] A weightier reason for the dearth of damage suits against unions for breach of a no-strike covenant is the availability of more effective courses of action, such as disciplinary layoffs[18] and resort to arbitration.[19] But no doubt the primary reason why damage suits

[8] Smith v. Arkansas Motor Freight Lines, 214 Ark. 553, 217 S.W. (2d) 249 (1949); Mursener v. Forte, 186 Ore. 253, 205 P. (2d) 568 (1949).

[9] Labor-Management Relations Act, 1947, 61 Stat. L. 136, §301 (a), (b) (1947), 29 U.S.C. (1950 Supp.) §185 (a), (b).

[10] Shirley-Herman Co. v. International Hod Carriers, Bldg. & Common Laborers Union of America, Local No. 210, (2d Cir. 1950) 182 F. (2d) 806. See also International Brotherhood of Electrical Workers, Local 501 v. NLRB, (2d Cir. 1950) 181 F. (2d) 34.

[11] A no-strike covenant must be specifically set out in the collective bargaining agreement and will not be implied, merely, from provisions therein establishing grievance machinery. Dorsey Trailers, Inc., 80 N.L.R.B. Rep. 489 (1948).

[12] Report of the Joint Committee on Labor-Management Relations, 80th Cong., 2d sess., Rep. 986, Part 3, pp. 30-32 (1948). See also BUREAU OF NATIONAL AFFAIRS, THE TAFT-HARTLEY ACT AFTER ONE YEAR 185-186 (1948).

[13] Unless a business enterprise is well established and has evidenced a consistent profit record, recovery for loss of profits is too remote and speculative to be allowed. See, in addition to the principal case, Baker v. Lloyd, 198 Okla. 512, 179 P. (2d) 913 (1947). But see Schumann v. Karrer, 184 Cal. 50, 192 P. 849 (1920).

[14] WILLISTON, CONTRACTS §1345 (1937). But the substitute measure is generally the interest on the value of the property, or the rental value of the property, kept idle by the breach. 1 CONTRACTS RESTATEMENT §331 (1932). The principal case is unique in that it adopts the fixed costs of the strike-impeded business as a substitute measure of damages.

[15] NLRB v. Sands Mfg. Co., 306 U.S. 332, 59 S.Ct. 508 (1939); The Timken Roller Bearing Co. v. NLRB, (6th Cir. 1947) 161 F. (2d) 949.

[16] In the case of breach of an ordinary employment contract by employees, it is generally assumed that the employer is in a position to mitigate his damages by hiring new personnel. See WILLISTON, CONTRACTS §1362 (1937).

[17] The writer was unable to find any cases bearing directly on the question of whether the courts will apply the ordinary rules of contract law to a collective bargaining agreement so far as requiring an employer to engage in "strike-breaking" in order to mitigate damages. Apparently union attorneys are reluctant to raise this issue, though they may be expected to do so where the damages claimed are very large. However one eminent authority has observed that "judges . . . have often been unable to split their judicial personality sufficiently to deal with the turbulent clash of values found in labor matters." TELLER, A LABOR POLICY FOR AMERICA 25 (1945). But see Boeing Airplane Co. v. Aeronautical Industrial Dist. Lodge No. 751, of IAM, (D.C. Wash. 1950) 91 F. Supp. 596 at 606-607.

[18] BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING CONTRACTS 236 and 526 (1941). But see note, 49 MICH. L. REV. 142 (1950).

[19] UNITED STATES DEPT. OF LABOR, 68 MONTHLY LAB. REV. 145 (1949). See also GREGORY, LABOR AND THE LAW 409 (1946).

are infrequently pressed is that the court "victory" of today may well mean the labor relations debacle of tomorrow; parties who must continue to live together can assure little but mutual hostility if they must litigate their differences. Nevertheless, the trend towards increasing the legal responsibility of labor organizations has affected industrial relations by affording a bargaining point for employers[20] by which they have been able to win concessions from unions not otherwise likely to have been obtained.[21]

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[20] The legislative history of the Taft-Hartley Act (supra note 9) indicates that Congress expected the abrogation of union liability under §301 to be a bargaining point. S. Rep. No. 105, 80th Cong., 1st sess., p. 18 (1947). It now appears as though this expectation has been realized. See U.S. DEPT. OF LABOR, 68 MONTHLY LAB. REV. 145 (1949).

[21] Zorn, "New Union Responsibility," NEW YORK UNIVERSITY, FIRST ANNUAL CONFERENCE ON LABOR 318 (1948).