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LABOR LAW - THE APEX DECISION AND ITS EFFECT ON THE APPLICATION OF THE SHERMAN ACT TO ACTIVITIES OF LABOR UNIONS

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LABOR LAW — THE APEX DECISION AND ITS EFFECT ON THE APPLICATION OF THE SHERMAN ACT TO ACTIVITIES OF LABOR UNIONS —Labor made a bold attempt in the case of *Apex Hosiery Company v. Leader*[1] to procure a determination by the Supreme Court that labor organizations and their activities are exempt from the Sherman Act.[2] The act, having survived this attack, presumably remains a potential weapon against labor unions.[3] However, the Court by its decision has rejected a theory that the Sherman Act should be expanded on the principles of the Wagner Act decisions,[4] has imposed a new restriction upon its application, and has opened the way for developments which will have substantially the effect of excluding labor unions from its application.

[1] 310 U. S. 469, 60 S. Ct. 982 (1940), noted 54 HARV. L. REV. 146 (1940). The respondent labor union had engaged in a sit-down strike in petitioner's plant to enforce its demands for a closed shop agreement. Petitioner, which produced $5,000,000 worth of hosiery annually, about 3% of the total output of the industry, shipped interstate 80% of its product. As a result of the occupation of the plant and destruction of machinery by the strikers, petitioner's operations were completely halted for more than three months. In the trial court petitioner recovered a judgment for triple damages of $700,000.

[2] 26 Stat. L. 209 (1890), 15 U. S. C. (1934), § 1 et seq.

[3] To have excluded labor unions from the operation of the Sherman Act, on the theory that Congress had not intended the statute to apply to such combinations, would have meant overruling decisions which went back thirty-two years. This the Court was unwilling to do in view of the failure of repeated attempts to accomplish that result through Congressional action. Apex case, 310 U. S. 469 at 488. The case for labor is set out in Boudin, "The Sherman Act and Labor Disputes," 39 COL. L. REV. 1283 (1939) and 40 COL. L. REV. 14 (1940).

[4] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1,

I.

Whether activities of a labor union constitute a violation of the Sherman Act has in part depended upon the stage of interstate commerce at which the restraint is imposed.[5] Cases of union interference with the movement of interstate commerce can be classified as follows: (1) preventing production of goods at their source, (2) preventing movement of goods between source and market, (3) preventing purchase or use of goods at the market end. The *Coronado* cases[6] established the doctrine that activities in the first category, as contrasted with those in the third, do not constitute a violation of the Sherman Act without evidence of a union purpose having interstate ramifications from which an intent to restrain commerce could be inferred.

While there was proof in the *Apex* case that production of goods to be shipped to markets in other states had been prevented by flagrantly unlawful methods, there was no evidence that the union had any purpose except to increase its strength within the city of Philadelphia. Thus, on authority of the *Coronado* decisions, the Sherman Act was not applicable.[7] This impasse for the petitioners was met by the ingenious argument that the Wagner Act decisions were authority for applying the Sherman Act to interferences with production of goods to be sold in interstate markets, since those decisions determined that stoppage of manufacturing directly burdens and restrains commerce.[8] The Court conceded that the activities of the respondent union were within the scope of federal power, but denied that the operation of the Sherman Act extended to all unlawful labor activities which obstruct

57 S. Ct. 615 (1936); National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U. S. 58, 57 S. Ct. 615, 630, 645 (1936).

[5] Cases in which the Sherman Act has been applied to labor activities have been traditionally classified as cases where the interference with commerce was direct so that intent to restrain commerce could be inferred and cases where the interference was indirect but accompanied by an express intent to restrain commerce. 49 YALE L. J. 518 at 519 (1940). Whether an interference is "direct" or "indirect," however, has depended upon the stage of commerce at which the interference is imposed.

[6] United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570 (1922); Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551 (1925).

[7] Gregory, "Labor's Coercive Activities under the Sherman Act—The Apex Case," 7 UNIV. CHI. L. REV. 347 at 353 (1940).

[8] Apex case, 310 U. S. 469 at 474 ff. Petitioner reasoned as follows: the Sherman Act applies to restraints which directly burden interstate commerce; the Supreme Court in order to sustain the constitutionality of the Wagner Act necessarily had to determine that restraints on production, which that statute was attempting to eliminate, directly burdened interstate commerce so as to be within the scope of the commerce power; ergo, restraints on production were within the Sherman Act. The argument is discussed in 49 YALE L. J. 518 at 524 ff. (1940).

the flow of commerce.[9] Yet the impression to be gained from previous decisions is that the Court has been applying the act, except where restrained by notions of the breadth of the commerce power, to any interference with interstate sales of goods. Limitations in applying the act to labor activities, instead of coming from a studied interpretation of statutory language and purpose, were the product of inhibitions derived from a restricted conception of federal power.[10]

The first instance of restricting the scope of the statute where labor union activities were involved was the *First Coronado* case.[11] Respecting the power of Congress over matters which, though not strictly interstate commerce, burden such commerce, the Court there said:

> "it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate commerce. But in the latter case, the intent to injure, obstruct or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances."[12]

Distinguishing *Loewe v. Lawlor* (*Danbury Hatters* case),[13] the first Supreme Court case holding labor activities within the Sherman Act, the Court said: "The direct object of attack was interstate commerce."[14] Then at the close of the decision the Court significantly stated: "The circumstances are such as to awaken regret that, in our view of the federal jurisdiction, we can not affirm the judgment. But

[9] Apex case, 310 U. S. 469 at 484 ff.

[10] The Sherman Act decisions do not accurately measure the scope of the commerce power. See 35 COL. L. REV. 1072 (1935). Still the Court in instances where it has restricted the application of the Sherman Act in labor cases was motivated by a reluctance to extend the arm of the federal government too far. Any other view hardly explains the absence of correlation between what constitutes a violation of the act and how commerce and competition are affected. In a note, 39 COL. L. REV. 1247 (1939), criticizing the holding of the district court in the Apex case, issue is taken with the view that the requirement of an intentional restraint was derived not from the statute but from interpretation of constitutional power. Yet the reasons why intent is readily inferred in one case and not in another are unexplained. The writer of the comment in 49 YALE L. J. 518 (1940) suggests that the varying results in labor cases under the Sherman Act reflect the Court's attitude toward the merits of the different union activities. But the analysis does not satisfactorily explain the consistent distinction between strike cases and boycott cases despite the lack of difference in the union objectives or in the illegality of the union methods.

[11] United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570 (1922).

[12] Id., 259 U. S. 344 at 408.

[13] 208 U. S. 274, 28 S. Ct. 301 (1908).

[14] United Mine Workers v. Coronado Coal Co., 259 U. S. 344 at 409, 42 S. Ct. 570 (1922).

it is of far higher importance that we should preserve inviolate the *fundamental limitations* in respect to the federal jurisdiction."[15]

In the next case[16] involving union interference with production of goods to be shipped interstate, the Court said:

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said *directly to burden interstate commerce*."[17]

The language sounds distinctly as though the Court were thinking in terms of federal power with no regard to the purposes of the statute.[18] The same approach appears in *Levering & Garrigues Co. v. Morrin*[19] where the bases of the decision were the absence of an intent to affect "the sale or transit of materials in interstate commerce" in view of the local purposes of the union, and the fact that curtailment of the shipment of goods in interstate commerce was a result "incidental, indirect, and remote."

Despite these indications that the previous decisions were worked out in terms of constitutional power, the Court in the *Apex* case read into them a construction of the statute limiting its application to restraints upon commerce which were intended to have, or in fact did have, the effect of suppressing competition in the interstate market.[20] Even the decisions in which labor activities were held to be within the statute do not support such a construction, for they likewise indicate

[15] Id., 259 U. S. 344 at 413 (italics supplied).

[16] United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924).

[17] Id., 265 U. S. 457 at 471 (italics supplied).

[18] See cases where the Court has tested the validity of legislation under the commerce power by the directness of the relation between the regulated activities and the movement of interstate commerce, for example: Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397 (1922); Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 42 S. Ct. 470 (1923); Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837 (1935); Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855 (1936). In the Schechter case, 295 U. S. 495 at 547, the Court found in the labor cases under the Sherman Act support for its approach in passing upon the validity of the National Recovery Act, saying, "The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act."

[19] 289 U. S. 103, 53 S. Ct. 549 (1933).

[20] Apex case, 310 U. S. 469 at 509 ff.

that the Court has been thinking in terms of effect on the movement of interstate commerce and not in terms of effect on competition. The language of the statute was construed in the *Danbury Hatters* case as prohibiting "any combination whatever to secure action which essentially *obstructs the free flow of commerce* between the states, or restricts, *in that regard*, the liberty of a trader to engage in business."[21] In *Duplex Printing Press Co. v. Deering*, the sole emphasis was upon the loss of the plaintiff's interstate trade; the majority of the Court did not even mention that defendants undertook to unionize the plaintiff at the instance of the latter's competitors.[22] The *Second Coronado* decision seems to treat the union purpose of preventing competition with union-mined coal in other states merely as evidence necessary to relate the union activities more closely to the movement of goods in interstate commerce.[23]

The effect of these decisions has been that under the Sherman Act restraints imposed at one stage of commerce were treated differently than restraints imposed at another stage.[24] Whereas the showing of a purpose to curtail the quantity of commerce in interstate markets was essential to bring within the act a conspiracy to stop production, no such showing was required in the case of a conspiracy to conduct a boycott. Apparent approval then by the Court in the *Apex* case of the decisions giving rise to this distinction confuses the meaning of its theory that the Sherman Act, on the basis of its language and purpose, has a restricted application.[25] If the act is aimed at the evils of suppressing competition, it is difficult to see why preventing production of

[21] Loewe v. Lawlor, 208 U. S. 274 at 293, 28 S. Ct. 301 (1908) (italics supplied).

[22] 254 U. S. 443, 41 S. Ct. 172 (1921). These facts are brought out in the dissenting opinion, 254 U. S. 443 at 479 ff. A later case, following the authority of the Duplex case, is Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U. S. 37, 47 S. Ct. 522 (1927).

[23] Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 at 305, 310, 45 S. Ct. 551 (1925).

[24] Compare the boycott cases, Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301 (1908), and Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172 (1921), with the strike cases, United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 42 S. Ct. 570 (1922), and United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457, 44 S. Ct. 623 (1924).

[25] "Labor under the Apex Decision," 8 INT. JUR. ASSN. BULL. 125 at 136 (1940): "Obviously, in terms of the Court's own primary ground for decision, the central point is—what usable tests are provided to determine whether in a particular case labor's influence upon the market amounts to a suppression or curtailment of commercial competition? In all candor, the majority's assertion that the *Duplex*, *Bedford* and *Second Coronado Coal* cases satisfied the need to show such suppression or curtailment of commercial competition may conceivably emasculate this whole aspect of the *Apex* decision."

goods at their source is not just as much a violation as preventing purchase or use at the market end.[26]

2.

Not only was interference with production involved in the *Apex* case but there was also an interference of the intermediate type, namely, preventing shipment of completed goods to fill orders of dealers in other states.[27] The majority opinion held that even the latter activity was no violation of the Sherman Act, stated that the statute was not aimed at policing interstate transportation, and distinguished other decisions.[28] Overlooked was the very wording of the injunction in the *Duplex* case, which enjoined "interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce" of the plaintiff's products.[29] Moreover, three justices in an opinion written by Chief Justice Hughes dissented from the conclusion that a conspiracy to prevent transportation in interstate commerce was outside the act, relying upon lower court decisions and expressions in the Supreme Court opinions.[30]

Though the dissent may be fully justified on the basis of authority, the holding is at least consistent with the theory of the majority that the statute is to have a restricted interpretation. Obstructions imposed at any of the three stages of interstate commerce curtail the quantity of goods moving in commerce and so reduce competition in those goods; and an obstruction at one stage can curtail the quantity of commerce as effectively as one at another stage. Therefore, since the Court in the

[26] Competition in interstate markets between members of an industry is reduced whenever the business of one is subjected to a burden not imposed on the business of the others. Restriction on the manufacture of its products is certainly as fatal to the competitive powers of a business as resistance to the sale of its products.

[27] Apex case, 310 U. S. 469 at 483.

[28] Id., 310 U. S. 469 at 490, 512.

[29] Duplex Printing Press Co. v. Deering, 254 U. S. 443 at 478, 41 S. Ct. 172 (1921).

[30] Apex case, 310 U. S. 469 at 514-515: "Whatever vistas of new uncertainties in the application of the Sherman Act the present decision may open, it seems to be definitely determined that a conspiracy of workers, or for that matter of others, to obstruct or prevent the shipment or delivery of goods in interstate commerce to fill orders of the customers of a manufacturer or dealer is not a violation of the Sherman Act. With that conclusion I cannot agree." The dissent confines itself to union activities of the second category, nowhere advocating that a conspiracy to prevent the manufacture of goods comes within the act. However, as revealed by the record in the case, only a small percentage of the damages proved by petitioners could possibly have been attributable to the interference with the shipment of finished products. Undoubtedly recovery can be had only for damages proximately resulting from a violation of the act, and so, even had the contention of the dissent prevailed, the benefit to petitioner would have been slight.

Apex case decided that interference of the first category lies outside the scope of the statute, it could not rationally decide that the second device, other factors being the same, is within its scope. Even the dissenting judges did not argue that interference with production of goods, as in the *Apex* case, should be within the scope of the act; hence they retained an arbitrary distinction between interference with commerce at different stages. This distinction, which had grown into the law when the Court apparently felt restrained in its application of the statute to labor cases by the limits of federal power, is explainable as marking a line which fits the statute into those limits.[31] Now that the limits exist no longer, the rationale is knocked out from under the distinction. Consequently the Court faced the alternative of extending the act to coincide with the widened interpretation of the commerce clause, or of reconsidering the act with a view to restricting its application along new lines. The dissent did neither; the majority, by refusing to hold interference with transportation within the statute, went in the direction of the latter alternative. The quesion now remaining is how far in that direction the Court will go.

3.

It has been seen how the Court in the *Apex* case developed a restrictive interpretation of the Sherman Act to exclude from its application labor conspiracies to stop production and to stop transportation, at least where an ultimate object is not the suppression of competition. This development, though accomplished without disapproval of any of the earlier cases, makes their authority precarious. The groundwork has been laid for overruling the *Danbury Hatters* case,[32] the *Duplex* case,[33] the *Bedford Stone* case,[34] and even the *Second Coronado* case.[35] The boycott cases, which include the first three, involved situations little different from that of the *Apex* case[36] except that union interference occurred at the market stage of interstate commerce. If the Sherman Act is now to be applied only to labor conspiracies in restraint of *competition*, there can be no distinction, on the basis of effect upon competition, between obstructions of commerce at different stages. If

[31] See supra, at note 10.

[32] Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301 (1908).

[33] Duplex Printing Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172 (1921).

[34] Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U. S. 37, 47 S. Ct. 522 (1927).

[35] Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 45 S. Ct. 551 (1925).

[36] The union in each case was seeking to unionize the petitioner's plant, and the only effect on interstate commerce which was shown was a reduction in the petitioner's business.

a boycott case comes before the Court, and the only union object is similar to that in the *Apex* case, there is every reason to expect a holding like that in the *Apex* case.[37]

The *Second Coronado* case did involve an element relied upon to find a violation of the Sherman Act which was not present in the *Apex* case, namely a purpose on the part of the union to prevent competition with union-produced goods in the interstate market.[38] The Court in the latter case asserted it was not ready to discard its holding in the former, and yet the following language appears in its opinion:

> "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. But under the doctrine applied to non-labor cases, the mere fact of such restrictions on competition does not itself bring the parties to the agreement within the condemnation of the Sherman Act. . . . Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." [39]

Because this language was so unnecessary to the decision rendered,[40] being even inconsistent with express reservations imposed upon the scope of the decision,[41] and because of the effort made to cite authority, how-

[37] The holding may be made in United States v. Hutcheson, (D. C. Mo. 1940) 32 F. Supp. 600, which is before the Supreme Court this term. 8 U. S. LAW WEEK 726, 730 (1940). In that case a union involved in a jurisdictional dispute sent out circulars through the country requesting union sympathizers to refrain from drinking the products of a St. Louis brewery. The district court, while treating the activity as one within the Sherman Act, proceeded upon the doubtful ground that the Norris-LaGuardia Act had made it legal.

[38] Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 at 310, 45 S. Ct. 551 (1925).

[39] Apex case, 310 U. S. 469 at 503-504.

[40] The irrelevancy of the statements is conceded by the Court in the sentence immediately following them: "And in any case, the restraint here is, as we have seen, of a different kind and has not been shown to have any actual or intended effect on price or price competition."

[41] Apex case, 310 U. S. 469 at 512: "We only hold now, as we have previously

ever weak,[42] for the statements, one is tempted to regard this dictum as highly significant. At least, it suggests the way the Court may go, when a situation like that of the *Second Coronado* case again comes before it.

On the basis of all the implications in the *Apex* decision developed by the present analysis, labor unions should be practically exempt from the act. Curtailment of the quantity of goods moving in interstate commerce through restraints imposed by a labor union either at the production end, at the transportation stage, or at the market end will not of itself constitute a violation of the Sherman Act, if the Court adheres to a restrictive interpretation of the Sherman Act. Neither will a union purpose to eliminate price competition between union and non-union made goods bring its activities within the act, if the Court follows its dictum in the *Apex* case. With all these exemptions hardly a situation can be conceived where labor unions would run afoul of the Sherman Act, unless the unions are used by combinations of those engaged in an industry as the means for suppressing competition or fixing prices.[43]

Philip W. Buchen

held both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the Second Coronado case." It is possible to reconcile this statement with the dictum earlier in the opinion approving a union purpose to eliminate price competition based upon differences in labor standards. The purpose of the union in the Second Coronado case apparently went to the lengths of wanting by destruction of the plaintiff's mines to eliminate coal entirely from competition in lieu of eliminating price competition by maintenance of its wage scale. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295 at 308, 45 S. Ct. 551 (1925). However, the distinction between a labor combination to restrain commerce for the purpose of obtaining wage demands and one to restrain commerce because the wage demands are not met is such that the slightest care by a union in formulating its objectives would take it out of the doctrine of the Second Coronado case as limited by the Court's present dictum.

[42] Appalachian Coals v. United States, 288 U. S. 344, 53 S. Ct. 471 (1933), held that producers of bituminous coal did not violate the Sherman Act by creating an exclusive selling agency to alleviate distress caused by over-production and injurious marketing practices. American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 S. Ct. 72 (1921), raised no question under the Sherman Act but merely involved a suit in general equity jurisdiction to enjoin picketing by an outside union, the Court approving the right of a union to extend its organization but disapproving of the methods used. In Levering & Garrigues v. Morrin, 289 U. S. 103, 53 S. Ct. 549 (1933), and National Association of Window Glass Mfrs. v. United States, 263 U. S. 403, 44 S. Ct. 148 (1923), elimination of price competition in interstate commerce is dealt with nowhere in the opinions.

[43] Situations represented by United States v. Brims, 272 U. S. 549, 47 S. Ct. 169 (1926), and Local 167, International Brotherhood of Teamsters v. United States, 291 U. S. 293, 54 S. Ct. 396 (1934).