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Labor Law—Federal Pre-emption—Constitutionality of State "Premium: Moratorium" Statute.—John Hancock Mut. Life Ins. Co. v. Commissioner of Ins

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CASE NOTES

Labor Law—Federal Pre-emption—Constitutionality of State "Premium Moratorium" Statute.—*John Hancock Mut. Life Ins. Co. v. Commissioner of Ins.*[1]—The Massachusetts Legislature enacted a premium moratorium statute providing (1) that no life, disability, or medical insurance policy would lapse because of non-payment of premiums during a strike by the insurer's collection agents if the premiums were "normally collected by insurance agents employed by the insurer," and (2) that the policyholders would be entitled to a premium grace period of thirty-one days after the termination of the strike.[2] Under an enabling statute,[3] Hancock, an insurance company dealing in these types of policies, sought direct review of the statute by the Massachusetts Supreme Judicial Court. HELD: The statute is invalid since it conflicts with the National Labor Relations Act.[4] The statute gives a potential economic weapon to the insurer's employees which would restrict the bilateral freedom of collective bargaining intended by Congress. Also, the statute directly interferes with a right specifically protected under the NLRA, namely, the right of non-striking employees to continue to work during the strike.

The McCarran-Ferguson Act[5] gave to the states wide power over the business of insurance despite its interstate character. The same act, however, specifically retained federal power over labor relations in the business through application of the NLRA.[6]

In the insurance field, as in others, the police power of the states and the concurrent federal power under the NLRA have created a "penumbral area [which] can be rendered progressively clear only by the course of litigation."[7] In the landmark case of *San Diego Bldg. Trades Council v. Garmon*,[8] the Supreme Court discussed the broad field of labor relations and the extent to which the NLRA had pre-empted the field, stating concisely that state power must yield when an activity is arguably subject to section 7[9] or prohibited by section 8[10] of the act. However, those areas of "merely peripheral concern"

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[1] 1965 Mass. Adv. Sh. 1007, 208 N.E.2d 516.

[2] Mass. Acts 1963, ch. 796.

[3] Mass. Ann. Laws ch. 175, §§ 22A, 108(2)(a), 132 (1959).

[4] 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1964), amending 49 Stat. 449 (1935).

[5] 59 Stat. 33 (1945), 15 U.S.C. §§ 1011-15 (1964).

[6] 59 Stat. 33 (1945), 15 U.S.C. § 1014 (1964).

[7] Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955).

[8] 359 U.S. 236 (1959).

[9] National Labor Relations Act § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), amending 49 Stat. 452 (1935), reads in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

[10] National Labor Relations Act § 8, 61 Stat. 140 (1947), as amended, 15 U.S.C. § 158 (1964), amending 49 Stat. 452 (1935), defines unfair labor practices on the part of an employer and on the part of a labor organization.

to the NLRA or those activities "deeply rooted in local feeling and responsibility" were still the proper subject of state power.

Although the *Hancock* court did not mention *Garmon*, consideration of NLRA pre-emption is necessarily guided by the *Garmon* rule. The pivotal issue in applying the *Garmon* standard to the facts in *Hancock* is whether the operational effect of the premium moratorium statute is "arguably subject" to the NLRA or of "merely peripheral concern." By deciding that the statute regulated an area pre-empted by the NLRA, the *Hancock* court followed the trend toward severe limitation of state power where "free collective bargaining"[11] is in issue.

The area of "merely peripheral concern" with regard to free collective bargaining has been eroded steadily during the past six years. In *Local 24, Int'l Bhd. of Teamsters v. Oliver*,[12] the Supreme Court denied the application of an Ohio antitrust statute in a labor dispute. The statute prescribed the terms and conditions which governed the minimal rental charge and other leasing terms when a truck was leased to a carrier by an owner who drove his own vehicle while in the service of the carrier. The Court found that the statute regulated a substantive term of a labor-management agreement and therefore conflicted with the federally created freedom of collective bargaining.

In *General Elec. Co. v. Callahan*,[13] a federal court of appeals held that a Massachusetts statute[14] was contrary to the national policy of "free collective bargaining." The statute in question required a state board to determine which party to a labor dispute was "blameworthy" and to publish a report assigning the blame. Though the statute affected collective bargaining only indirectly, the *Callahan* court held the statute invalid because the resulting public opinion would exert excessive pressure upon the parties to the dispute .

The objection to the antitrust statute in *Oliver* was the attempted state regulation of collective bargaining by injecting state power directly into the substantive terms of a collective bargaining agreement. The objectionable feature of the statute in *Callahan* was the indirect pressure on the process of collective bargaining. Although this pressure was "indirect," it was not characterized as being of "merely peripheral concern" to the NLRA. The holding in *Hancock* goes beyond the *Oliver* and *Callahan* decisions. Unlike the antitrust statute in *Oliver*, the premium moratorium statute does not directly inject state power into free collective bargaining. Unlike the "blame-fixing" report in *Callahan*, the premium moratorium statute does not have an unavoidable and immediate effect. The moratorium statute might affect free collective bargaining, but such effect would be not only indirect but also

[11] The term "free collective bargaining" does not appear in the NLRA. It is found in the legislative history of the act. 93 Cong. Rec. 3835 (1947) (remarks of Senator Taft). The term as used in this note refers to the entire process of collective bargaining rather than to the more narrow definition of collective bargaining found in 61 Stat. 140, 29 U.S.C. § 158(d) (1964).

[12] 358 U.S. 283 (1959).

[13] 294 F.2d 60 (5th Cir. 1961), cert. denied, 369 U.S. 832 (1962).

[14] Mass. Ann. Laws ch. 150, § 3 (1965).

speculative and potential. The effect of the *Hancock* statute would be speculative because it assumed that the insurants, motivated by a thorough knowledge of the moratorium, would not pay premiums during a strike and would decide after the strike whether to make up the back payments or to allow their policies to lapse. The effect would be potential because it required a strike of some duration to build up the anticipated pressure.

One recent Supreme Court decision would not seem to require the present decision.[15] In *DeVeau v. Braisted*,[16] the constitutionality of the New York Waterfront Act was in issue. The act prohibited the collection of dues from waterfront employees by a union if any officer of the union had been convicted of a felony. DeVeau challenged the act on the grounds that such prohibition forced the union to select officers and bargaining representatives under conditions which are not imposed by section 7 of the NLRA and that section 7 creates a federally protected freedom of collective bargaining. The Supreme Court upheld the act, stating that the NLRA does not exclude every state policy that may restrict complete freedom in collective bargaining.

> Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?[17]

This question posed in *DeVeau* seems particularly applicable to the *Hancock* decision. The speculative and potential effect upon which the court based its finding that the premium moratorium statute gave the union a "potent weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining" is a dialectically plausible frustration of the NLRA. But is it also sufficient to support a finding of "true, real frustration . . . of that policy?"

To reinforce the pre-emption finding, the court considered the operational effect of the moratorium statute upon other non-striking employees of the insurer. By suspending the contractual right to insist upon prepayment of premiums, the statute "curtailed or eliminated the premium collection work available" for non-strikers. Since there would be little or no collection work for non-striking agents, their right under the NLRA not to strike—and therefore to continue to work—would be impaired. Yet the cases cited by the court to illustrate similar instances where this right to "keep working" has been impaired deal with much more flagrant abuses of the right than the curtailing of premium collection work foreseen under the moratorium statute. The cases cited concern denial of access to the employer's plant[18] and reprisals levied by

[15] The strict rule followed in John Hancock Mut. Life Ins. Co. v. Commissioner of Ins., supra note 1, has not been followed by some lower courts; state power has been asserted in libel cases arising out of a labor dispute. Brantley v. Devereaux, 237 F. Supp. 156 (E.D.S.C. 1965); Meyer v. Local 107, Int'l Bhd. of Teamsters, 416 Pa. 401, 206 A.2d 382 (1965). Contra, Linn v. Local 114, United Plant Guard Workers, 337 F.2d 68 (6th Cir. 1964), cert. granted, 381 U.S. 923 (1965); Blum v. International Ass'n of Machinists, 42 N.J. 389, 201 A.2d 46 (1964). For a discussion of these four cases, see Comment, 6 B.C. Ind. & Com. L. Rev. 815, 816-20 (1965).

[16] 363 U.S. 144 (1960).

[17] Id. at 153.

[18] UAW-CIO v. Russell, 356 U.S. 634 (1958).

the union against non-strikers.[19] The moratorium statute established no similar direct prohibition on the right of the non-striking collection agents.

The *Hancock* decision must rest upon the operational effect of the moratorium statute on "free collective bargaining." The anticipated effect is a "dialectically plausible" frustration of the national labor policy. However, in finding a repugnance to that policy based on a speculative and potential effect on free collective bargaining, the *Hancock* court extends the reach of federal pre-emption under the NLRA. The thrust of the decision is to eliminate any area of "peripheral concern" from state regulation where free collective bargaining may be affected.

PAUL F. BEATTY

Labor Law—Municipal Pensions—Vesting of Rights.—*Yeazell v. Copins.*[1]—Appellant Kenneth Yeazell became a member of the police department of the city of Tucson, Arizona, in 1941. At that time, the Police Pension Act of 1937[2] was in effect, which provided, *inter alia*, that a pension amounting to fifty per cent of the average monthly earning for the single year immediately preceding retirement be paid to any policeman who had been in the service of the city for twenty years or more.[3] The act included a compulsory pensioner contribution of two per cent of each paycheck to the pension fund, out of which payments were to be made.[4] In 1952 the act was amended,[5] increasing the employees' compulsory contribution to five per cent and providing that the pension payment would be calculated on the average month's pay for the *five* years immediately preceding retirement.[6]

Upon Yeazell's retirement and application for pension in 1962, the appellee Police Pension Board fixed his monthly cash benefit payment in accordance with the provisions of the 1952 amended act. His awarded benefits were $7.21 per month less than they would have been if computed by the terms of the original act of 1937.[7]

Yeazell then brought a class action for a declaratory judgment that the amendment was unconstitutional and void as applied to himself and others

[19] Allen-Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961); NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953).

[1] 402 P.2d 541 (Ariz. 1965).

[2] Ariz. Code Ann. §§ 16-1801 to -1822 (1939).

[3] Ariz. Code Ann. § 16-1808(b) (1939) provides:

> Any member of the police department who has served such department twenty (20) years in the aggregate may, upon application, be retired, and shall be paid, during his lifetime, a monthly pension equal to one-half of the compensation received by him for a period of not less than one (1) year prior to the date of application for retirement. . . .

[4] Ariz. Code Ann. § 16-1807 (1939). That section further provided that if a contributor terminated his employment before the twenty years elapsed, he would be entitled to a refund of his contributions with 3½% interest.

[5] Ariz. Rev. Stat. Ann. §§ 9-911 to -934 (1952).

[6] Ariz. Rev. Stat. Ann. §§ 9-923, -925(A) (1952).

[7] Supra note 1, at 542.