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procedural arbitrability, there is language within those decisions to the effect that the question of procedural arbitration should not be handled any differently from questions of substantive arbitrability. A party may not only wish to preclude arbitration of certain matters, but also to preclude it when certain procedures for presenting it are not followed. The test is the same. The court should determine whether the party seeking to bar arbitration because of procedural non-compliance has succeeded in drafting a procedural provision which satisfies the explicitness test.

PHILIP H. GRANDCHAMP

Labor Law—Public Utility Anti-Strike Act—Invalid Under NLRA.— ***Street Elec. Ry. and Motor Coach Employees v. Missouri.***[1]—On November 15, 1961, the State of Missouri brought suit to enjoin a threatened strike by employees of the Kansas City Transit Co. which had resulted from an impasse in collective bargaining negotiations. Pursuant to the provisions of the King-Thompson Act,[2] the Governor of Missouri had seized the transit company on November 13,[3] the day on which the strike had been called. In so doing, the Governor proclaimed that all rules and regulations governing the internal management and organization of the company and its duties and responsibilities were to remain in force and effect throughout the term of operation by the state.[4] Upon seizure of the transit company by the state, the strike became enjoinable under a provision of the act making it unlawful to use the strike weapon as a means of enforcing demands against a utility after possession has been taken by the state.[5] From an adverse decision of the Missouri Supreme Court upholding an injunction, the union appealed. In a unanimous decision, the Supreme Court of the United States HELD: that the Missouri statute authorizing seizure and providing for the issuance of injunctions against strikes after seizure is in direct conflict with federal legislation guaranteeing the right to strike against a public utility engaged in interstate commerce and thus invalid under the supremacy clause of the Constitution.[6]

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[1] 374 U.S. 74 (1963).

[2] Mo. Rev. Stat. § 295.10-.210 (1959).

[3] Mo. Rev. Stat. § 295.180(1) (1959) sets forth the power of the Governor when a utility strike threatens. The Governor is empowered where a strike "threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare . . . to take immediate possession of the plant, equipment or facility for use and operation by the state of Missouri in the public interest."

[4] Mo. Rev. Stat. § 295.190 (1959) provides that "the governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter."

[5] Mo. Rev. Stat. 295.200(1) (1959) provides that:

> It shall be unlawful for any person, employee or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state.

Mo. Rev. Stat. 295.200(6) (1959) provides that "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

[6] U.S. Const. art. VI, cl. 2 provides that "This Constitution, and the Laws of the

The federal legislation determined to have preempted the field was the National Labor Relations Act, sections 7 and 13 in particular. Section 7 provides that "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. . . ."[7] Section 13 of the NLRA recites that except as otherwise provided in the act, nothing "shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."[8] Section 13 demonstrates a recognition on the part of the framers of the NLRA that conferring the right to bargain collectively would produce little increase in bargaining strength without the existence of the correlative right to strike as a means of inducing the employer to negotiate in reasonable and responsible terms.

Prior to the principal case, a number of Supreme Court decisions prompted the reasonable conclusion that the National Labor Relations Act reserved little power in the states to infringe or abridge the employee's guaranteed right to strike for legitimate labor objectives. The Supreme Court in *Auto Workers Union v. O'Brien*[9] citing several earlier cases,[10] declared that "None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."[11] Despite these decisions and this seemingly clear declaration, the limits of the field occupied by the federal act were still in doubt. All of the cases decided had involved the right of employees of *manufacturing* companies to strike. Still untested was the validity of *public-utility* anti-strike laws which made strikes against public utilities unlawful.[12] Such state measures were grounded upon the premise that the public health, safety and welfare required the continued operation of the public utilities.

In the initial challenge to such a measure, the Supreme Court struck down as conflicting with the federal law the Wisconsin Public Utility Anti-Strike Law,[13] which by its terms, made it a misdemeanor for any group of public utility employees to engage in a strike which would cause an interruption of an essential public utility service.[14] The Court in the *Wisconsin Board*

United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[7] 61 Stat. 140, 29 U.S.C. § 157 (1958).

[8] 61 Stat. 151, 29 U.S.C. § 163 (1958).

[9] 339 U.S. 454 (1950).

[10] Plankton Packing Co. v. Wisconsin Bd., 338 U.S. 953 (1950); LaCrosse Tel. Corp. v. Wisconsin Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York Labor Bd., 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945).

[11] Supra note 9, at 457.

[12] At the time of the O'Brien decision some 12 states had enacted Public Utility Peace Acts in various forms including: Florida, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Texas, Virginia, and Wisconsin.

[13] Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951).

[14] Wis. Stat. §§ 111.50 et seq. (1949).

case found that in making it unlawful for employees to strike against public utilities, the state had sought to deny entirely a federally guaranteed right.[15] The Court stated that "It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of the rights protected by § 7 of the Federal Act."[16]

In so holding the Wisconsin act invalid, the Court dismissed the contention that in construing the federal act a distinction should be drawn between public utilities and national manufacturing organizations. The Court pointed out that when the NLRA was before Congress for enactment, a proposal for separate treatment for public utilities was suggested and emphatically rejected.[17] This led Mr. Justice Vinson, speaking for the majority to state that "Creation of a special classification for public utilities is for Congress, not for this Court."[18]

With the aforementioned cases as precedent, the Supreme Court was asked to rule upon the validity of the King-Thompson Act, Missouri's Public Utility Anti-Strike Law. There were many distinguishing features between the Missouri statute in question and the Wisconsin law which had been declared invalid. While the statute in the *Wisconsin Board* case was a comprehensive code for settling labor disputes between public utilities and their employees, the King-Thompson Act was much more limited in application. The provisions of the Missouri statute were only to be invoked when a *local emergency* was deemed to exist.[19] However, the Supreme Court foreshadowed its decision in the principal case when, in the *Wisconsin Board* case, it indicated that even if the Wisconsin statute had been limited to situations involving only a local emergency, the measure would still conflict with the federal law.[20] The Court concluded that "Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce."[21]

A second distinguishing aspect of the principal case was the seizure of the utility by the Governor of Missouri. The federal act specifically excludes from application of its provisions "any state or political subdivision thereof."[22] The question arose in the principal case as to whether by virtue of the Governor's seizure of the transit company, the utility had been converted from a privately owned company into a state enterprise. If the utility were determined to have been transformed into a state institution as a result of the seizure, the exclusionary provision of the NLRA would permit infringement of the employee's right to strike by the Missouri Public Utility Anti-Strike Law. Mr. Justice Stewart, in speaking for the majority, dismissed the form of the transformation for substance. He explained that:

Whatever the status of the title to the property of Kansas City

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15 Supra note 13, at 394.

16 Id. at 398.

17 Id. at 391-92.

18 Id. at 392-93.

19 Mo. Rev. Stat. 295.180 (1959) confers upon the Governor the authority to determine when an emergency exists.

20 Supra note 13, at 394.

21 Ibid.

22 61 Stat. 137, 29 U.S.C. § 152(2) & (3) (1958).

> Transit, Inc., acquired by the State as a result of the Governor's executive order, the record shows that the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business.[23]

This was not the first time that seizure had been used to avoid a strike. In *Youngstown Sheet & Tube Co. v. Sawyer*,[24] Mr. Justice Black firmly rejected seizure as a substitute for collective bargaining when he explained that Congress, in enacting the Taft-Hartley Act, specifically refused to add a provision authorizing government seizure in cases of emergency. He reasoned that Congress had viewed seizure in the same light as compulsory arbitration: an interference with the normal process of collective bargaining which is so essential to our economic system.[25] Traditionally, the framers of our federal statutes dealing with labor relations have been guided by the principle that the solution of labor-management problems must rest upon a free economy and upon free collective bargaining. Seizure was especially incompatible with the federal act in the principal case since it was wholly token in character, involving merely a paper transfer of possession of the utility and having as its sole consequence the prohibition of the strike.

In declaring the King-Thompson Act in conflict with federal law, the Supreme Court has strongly demonstrated that "collective bargaining, with the right to strike at its core, is the essence of the federal scheme."[26] With its decision in the Missouri case, the Court has apparently closed the door on state legislation curtailing the right of peaceful strikes for legitimate labor objectives in the field of privately owned public utilities.

The Court, in preserving the right to strike, has thus preserved the "voluntariness" in collective bargaining. The threat of strike, with its harmful consequences to both sides, gives efficacy to collective bargaining negotiations. The threat of harm makes bargaining meaningful since it motivates the parties to think in terms of a reasonable and responsible settlement. Remove the right to strike and the consequent threat of harm and the motivation to bargain responsibly no longer exists. An employer who knows that failure to bargain reasonably will not produce a strike, but, instead thereof, seizure and prohibition of the strike, has no incentive to contract on any terms but his own. In short, nullification of the right to strike not only destroys the strike but undermines the entire collective bargaining process which is dependent upon the strike weapon for its effectiveness. The Court by its decision has demonstrated that it will go to great lengths to protect the right

[23] Supra note 1, at 81.
[24] 343 U.S. 579 (1952).
[25] Id. at 586.
[26] Supra note 1, at 82.

of employees of privately owned companies to strike for legitimate labor objectives, even where the consequences may be an interruption of a vital utility service necessary to the public's health and welfare. However, this does not preclude the state from limiting the right to strike of employees of *truly* state-owned instrumentalities. NELSON G. ROSS

Labor Law—Secondary Boycotts—Picketing Railroad Right-of-way.—*Carrier Corp. v. NLRB.*[1]—A complaint was filed by the National Labor Relations Board against Local 5895, United Steel Workers Union, whose members went on strike against Carrier Corporation on March 2, 1960. Picket lines had been established and maintained at numerous entrances to the plant, including an entrance to a railroad spur line on a right-of-way owned by the New York Central Railroad adjacent to Carrier's property. The spur line was used to provide rail service to Carrier and other companies. The railroad tracks were enclosed by a fence, part of which was a railroad gate through which the trains entered and left the spur. The Railroad's operations were not disturbed until March 11 when, pursuant to arrangements made by Carrier, the Railroad attempted to "spot" empty box cars at Carrier's siding and to pick up loaded box cars. This operation required several passages through the railroad gate. During this time union pickets at the railroad gate forcibly sought to prevent the Railroad from servicing Carrier Corporation. The Trial Examiner found the Union's actions to be in violation of Sections 8(b)(4)(i) and 8(b)(4)(ii)(B) of the National Labor Relations Act,[2] but the Board reversed this finding.[3] The Court of Appeals for the Second Circuit HELD: picketing of the Railroad's right-of-way where the manifest objective was to prevent employees of the Railroad from handling goods of the struck employer in the course of regular delivery and removal operations was a violation of the NLRA. The Union was not furthering its legitimate objective of publicizing its dispute in picketing the Railroad, nor were the actions of the Union incidental to legitimate objectives of the dispute.

A review of the history of the interpretation of section 8(b)(4) shows that the cases can be grouped into those involving disputes at the premises of the primary employer and those taking place at the premises of a neutral employer. In the situation of picketing the primary employer's premises many activities coming within the literal terms of the statute have been found to be

[1] 311 F.2d 135 (2d Cir. 1962), cert. granted, 83 S. Ct. 1298 (1963).

[2] 49 Stat. 449 (1935), as amended by 73 Stat. 519 (1959), 29 U.S.C. § 158(b)(4) (1958), as amended by Pub. L. 86-257, § 704(b). Section 8(b)(4) provides that it is an unfair labor practice for a union:

> (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is
> . . .
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in products of any other person. . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .

[3] 132 N.L.R.B. 127, 48 L.R.R.M. 1319 (1961).