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Labor Law--Concurrent Jurisdiction of NLRB and Arbitrator When Unfair Labor Practice Breaches Collective Bargaining Agreement (Carey v. Westinghouse Elec. Corp., 15 App. Div. 2d 7 (1st Dep't 1961))

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Although the act did not make the employer an insurer, it was "designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed. . . ." [34] The conclusion reached in the principal case effectuates that purpose. It is evident that Congress did not intend to include troublesome problems of causation that could bring about harsh results in the application of the act.[35] The Court's decision will tend to bring future litigation closer in line with the original objectives of the Federal Employers' Liability Act.

LABOR LAW — CONCURRENT JURISDICTION OF NLRB AND ARBITRATOR WHEN UNFAIR LABOR PRACTICE BREACHES COLLECTIVE BARGAINING AGREEMENT. — Petitioner, a labor union, sought to compel Westinghouse Electric Corporation to arbitrate a representation dispute which included a grievance constituting an unfair labor practice under the Taft-Hartley Act.[1] The collective bargaining agreement required Westinghouse to recognize the union as the representative of "production and maintenance" employees. The grievance stated that certain workers supposedly doing "experimental" work were actually doing "production" work and hence, that the union should be recognized as the bargaining agent for these workers. The refusal of Westinghouse to do so constituted both a breach of contract and an unfair labor practice since petitioner union had been certified by the National Labor Relations Board as the representative of "production and maintenance" workers. Since the grievance involved an unfair labor practice, a matter exclusively within the jurisdiction of the NLRB, the question arose whether the controversy could be sent to arbitration, pursuant to an arbitration clause in the agreement, by a state court. The Appellate Division *held* that the dispute should be heard by the NLRB because of its expertise in the field of union representation, but emphasized that "a breach of contract does not become *ipso facto* incapable of arbitration because it also

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[34] Wilkerson v. McCarthy, 336 U.S. 53, 68, *rehearing denied,* 336 U.S. 940 (1949).

[35] See Pound, *Foreword* to Elkind, *Which Court?*, 17 OHIO ST. L.J. 356, 358-60 (1956).

[1] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(5) (1958). "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a). . . ." *Ibid.*

happens to be an unfair labor practice." [2] *Carey v. Westinghouse Elec. Corp.*, 15 App. Div. 2d 7, 221 N.Y.S.2d 303 (1st Dep't 1961).

The question of pre-emption by the NLRB has plagued our courts since Congress passed the Labor Management Relations Act [3] [hereinafter referred to as the Act]. The purpose of this legislation was the promotion of a national policy in furtherance of peaceful labor relations.[4] Under the Act, the NLRB is empowered to prevent persons from engaging in unfair labor practices.[5] The question whether the NLRB has *exclusive* jurisdiction of unfair labor practices which are not in violation of bargaining contracts has been settled by the United States Supreme Court.[6] The unequivocal pronouncement by that Court affirming the exclusive jurisdiction of the NLRB in such cases has been accordingly followed by the courts in New York.[7]

No such uniformity of opinion can be found in either the New York courts or the federal courts regarding the instant question, *i. e.*, who has jurisdiction if the unfair labor practice is also a breach of contract? The majority of New York courts have held that such an unfair labor practice could not be arbitrable because the NLRB has exclusive jurisdiction. The majority of these decisions have been promulgated by the New York Supreme

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[2] Carey v. Westinghouse Elec. Corp., 15 App. Div. 2d 7, 12, 221 N.Y.S.2d 303, 308 (1st Dep't 1961).

[3] 61 Stat. 136 (1947), 29 U.S.C. §§ 151-68 (1958), as amended, 73 Stat. 525, 541, 542, 544, 29 U.S.C. §§ 153, 159-60, 164 (Supp. 1, 1959).

[4] 61 Stat. 137 (1947), 29 U.S.C. § 151 (1958).

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Ibid.*

[5] 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958). "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." *Ibid.*

[6] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245.

In Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), the Court held that even when the NLRB declines to assume jurisdiction of an unfair labor practice, it may not proceed to a state court.

[7] *E. g.*, Spartan Coat, Apron, Towel & Linen Supply Co. v. Simon, 6 N.Y.2d 829, 159 N.E.2d 700, 188 N.Y.S.2d 216 (1959) (memorandum decision).

Court.[8] The Appellate Division had not directly concerned itself with the question of pre-emption until the present case although there have been some recent dicta to the effect that the filing of an unfair labor practice would not preclude the enforcement of a collective bargaining contract in a New York state court.[9]

This same lack of uniformity is evident in the federal courts although there appears to be a modern trend which does not recognize the doctrine of pre-emption. The federal courts had recognized the NLRB as having exclusive jurisdiction regardless of the contract breach[10] until the significant decision of *Lodge No. 12 v. Cameron Iron Works, Inc.* in 1958.[11] This opinion held that, though the same act be both an unfair labor practice and an arbitrable contract violation, "the parties should not be forced to abandon their contract right. . . ."[12] The court stressed that contract provisions are obviously different from other matters committed exclusively to the board,[13] *viz.*, unfair labor practices which do not violate contract provisions. The former embody strictly private rights enforceable by the courts; while the latter, though they also are private rights, are in fact quasi-public in that they are used to effectuate the declared public policy of the Act.[14] The court declared that the unfair labor practices should come under the jurisdiction of the NLRB since such con-

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[8] *E. g.*, In the Matter of New York Mailers' Union Number Six, 222 N.Y.S.2d 1000, 1002 (Sup. Ct. 1961); Bloomer Bros. Co. v. Smith, 20 Misc. 2d 345, 347, 189 N.Y.S.2d 433, 435 (Sup. Ct. 1959); General Warehousemen's Union v. Glidden Co., 10 Misc. 2d 700, 706, 172 N.Y.S.2d 678, 683 (Sup. Ct. 1958); A. E. Nettleton Co. v. United Shoeworkers Union, 138 N.Y.S.2d 256, 257 (Sup. Ct. 1955). *Contra,* District 65, Distributive, Processing & Office Workers Union v. Gerda Footwear Co., 133 N.Y.S.2d 339, 341 (Sup. Ct. 1954).

[9] Carey v. Westinghouse Elec. Corp., 6 App. Div. 2d 582, 584, 180 N.Y.S.2d 203, 205 (1st Dep't 1958) (per curiam), *aff'd on other grounds,* 6 N.Y.2d 934, 161 N.E.2d 216, 190 N.Y.S.2d 1003 (1959); Klein v. Styl-Rite Optics, Inc., 8 App. Div. 2d 811, 812, 188 N.Y.S.2d 421, 425 (1st Dep't 1959) (memorandum decision) (3-2 decision).

[10] United Elec. Workers v. General Elec. Co., 231 F.2d 259, 261 (D.C. Cir.), *cert. denied,* 352 U.S. 872 (1956); NLRB v. International Union, UAW, 194 F.2d 698, 702 (7th Cir. 1952).

[11] 257 F.2d 467, 471-74 (5th Cir.), *cert. denied,* 358 U.S. 880 (1958).

[12] *Id.* at 474.

[13] *Id.* at 472.

[14] "However, in this case, we must go one step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a 'breach of contract *is not* an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decision, the latter leaves decision discretionary." *Id.* at 473.

duct is contrary to the avowed national policy of the Act. But the court also argued that since the same act was a contract violation, and it was the manifest intent of the parties that such conduct should be subject to arbitration, the arbitrator also would have jurisdiction. Such reasoning has led to a federal trend of concurrent jurisdiction over such acts.[15]

The obvious problem attached to this doctrine is the possibility of diverse results, *e. g.,* it is conceivable that an arbitrator may uphold the discharge of an employee when upon the same facts the NLRB would conclude that the discharge is an unfair labor practice.[16] The *Cameron* case offers no solution to this difficulty but suggests that "even though the Board is not bound by an arbitration award, it may find that compliance with the award is not violative of the Act . . ." [17] or it may even decline jurisdiction because the arbitrable solution was adequate.[18]

In the principal case, the majority expressly declared that a breach of contract does not become *ipso facto* incapable of arbitration because it also happens to be an unfair labor practice. It indicated, however, that if a particular dispute involved a substantial question in an area in which the expertise of the NLRB has found expression, that factor would be determinative of the appropriate forum. The majority determined that this dispute involved an element of representation and that was unquestionably a field in which the NLRB has particular skill.[19]

The dissenting opinion, after echoing the majority's rejection of pre-emption, objected to its use of the expertise criterion on the ground that such a standard would lead to a facts-of-each-case approach to the problem. It declared that the issue of union

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[15] United Steelworkers Union v. New Park Mining Co., 273 F.2d 352, 358 (10th Cir. 1959); International Union of Operating Engineers v. Gulf Oil Corp., 262 F.2d 80 (5th Cir. 1958) (per curiam) (case reversed and remanded on strength of *Cameron* jurisdictional holding). *Contra,* International Chem. Workers v. Olin Mathieson Chem. Corp., 4 CCH LAB. L. REP. (LAB. REL.) (CCH Lab. Cas.) ¶ 17432 (S.D. Ill. Feb. 7, 1962); Local 1357, Retail Clerks Ass'n v. Food Fair Stores, Inc., 42 CCH Lab. Cas. ¶ 16945 (E.D. Pa. 1961).

[16] 107 U. PA. L. REV. 876, 880 (1959).

[17] Lodge No. 12 v. Cameron Iron Works, Inc., 257 F.2d 467, 473 (5th Cir.), *cert. denied,* 358 U.S. 880 (1958).

[18] McDonnell Aircraft Corp., 109 N.L.R.B. 930, 935 (1954); Crown Zellerbach Corp., 95 N.L.R.B. 753 (1951).

[19] See Matter of American Buslines, Inc., 151 F. Supp. 877, 884-87 (D. Neb. 1957).

Labor Management Relations Act § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . ."

representation is arbitrable and concurrent with the full functioning of the NLRB. The problem of divergent results is "solved" by invoking the *Cameron* hope that the NLRB will either accept the arbitrator's decision or decline jurisdiction because of the availability of arbitration.

Since the doctrine of pre-emption has been expressly rejected by the Appellate Division, the conflict-of-remedies possibility is the major obstacle to the workability of concurrent jurisdiction.[20] The attitude of the NLRB has been encouraging. It has expressed a desire to recognize the arbitrator's award [21] as well as expressing its approval of settlement by arbitration in general.[22] There have been cases where the NLRB has refused to assume jurisdiction because arbitration was available.[23] The apparent reason for such cooperation from the NLRB is the fact that the Board is presently overburdened with charges dealing with unfair labor practices affecting interstate commerce.[24] In one case, the NLRB accepted an arbitrator's award in an unfair labor practice case because three minimal requirements were met: 1) the arbitration proceedings were "fair and regular," 2) all parties had agreed to be bound and 3) the arbitration decision was not "clearly repugnant to the purposes and policies of the Act." [25] The attitude of the NLRB clearly indicates that if the arbitrator's award is reasonable, the Board will most likely accept the award or even decline to assume jurisdiction over the controversy. In effect, such procedure allays the fears of those who foresee conflicting remedies. If there is a conflict, it seems clear that the jurisdiction of the NLRB would then be pre-emptive, for the purposes of the Act could only be effectuated if the NLRB prevented a contrary remedy from being effective.

The instant decision indicates that New York has adopted the emerging federal viewpoint of concurrent jurisdiction over unfair labor practices which also breach contracts.[26] The potential

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[20] 107 U. PA. L. REV. 876, 880 (1959).

[21] Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). "[W]e believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrators' award." *Id.* at 1082.

[22] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems,* 57 COLUM. L. REV. 52, 63-65 (1957); Beatty, *Arbitration of Unfair Labor Practice Disputes,* 14 ARB. J. 180, 188 (1959).

[23] Cases cited note 18 *supra.*

[24] Note, 69 HARV. L. REV. 725, 729 (1956). "Moreover, the courts' refusal to exercise jurisdiction adds to the work load of the NLRB which is already unable effectively to exercise jurisdiction over all unfair labor practices that affect interstate commerce."

[25] Spielberg Mfg. Co., *supra* note 21, at 1082.

[26] At the time the principal decision was rendered, it was unclear whether a state court was compelled to follow federal labor law. Subsequently,

danger of conflicting remedies seems greatly diminished by the present attitude of the NLRB. Perhaps the only disturbing element in this opinion is the Court's attempt to establish a standard to determine when a case will be directed to the NLRB. The court's criterion demands that a dispute be channeled to the NLRB if it involves a substantial question in an area in which the NLRB has expressed its peculiar expertise. Such an *ad hoc* standard may give rise to two difficulties. Firstly, determining whether the NLRB has displayed its expertise in a given area may result in close questions for which the courts have no rigid guide. Secondly, since the NLRB has demonstrated its expertise in those areas in which it would have exclusive jurisdiction were it not for a contract breach, it may be that such a criterion will create a kind of pre-emption by judicial fiat. If the latter be true, the doctrine of concurrent jurisdiction propounded by the court may be more academic than real.

LABOR LAW — CONTRACT-BAR RULE — AMBIGUOUS UNION-SECURITY CLAUSE A BAR TO REPRESENTATION ELECTION. — Petitioner, United Mine Workers of America, brought a representation proceeding before the National Labor Relations Board during the insulated period of a current collective bargaining agreement between the intervenor, International Brotherhood of Electrical Workers, and the employer. The petitioning union alleged that the contract was not a bar to an election by the employees who were seeking another representative because the union-security provision did not on its face conform to the requirements of Section 8(a)(3) of the National Labor Relations Act. The Board, overruling major portions of its previously devised *Keystone* rule, *held* that since the union-security clause was not clearly unlawful it would constitute a bar to a representation election. *Paragon Prods. Corp.*, 4 CCH LAB. L. REP. (LAB. REL.) (CCH N.L.R.B.) ¶ 10657 (Nov. 28, 1961).

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however, on March 3, 1962, the United States Supreme Court, in Local 174, Teamsters Union v. Lucas Flour Co., 82 Sup. Ct. 571, 576-77 (1962), unequivocally declared that federal labor law must be applied in labor cases litigated in state courts. Since the federal viewpoint on concurrent jurisdiction is still unsettled (see text accompanying note 15 *supra*), this ruling on the supremacy of federal labor law does not necessarily mean that the outcome of the principal decision would have been changed.