Louisiana Law Review

Volume 22 | Number 2
The Work of the Louisiana Supreme Court for the 1960-1961 Term
February 1962

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The National Labor Relations Board had a bad year at the bar of the Supreme Court. Of the seven major decisions in which it was involved, all the Board could manage was one win, one tie, and a mandate to play the game over. The other cases resulted in resounding defeats.

In four landmark cases the Court rejected the *Mountain Pacific* doctrine[1] and sharply curtailed the Board's power to prescribe the *Brown-Olds* disgorgement remedy.[2]

The Court held that agreements are not illegal *per se* solely because they give the union control over the hiring process. A hiring hall arrangement is valid on its face, even though it is not written in accordance with the verbal formulae prescribed by the Board, where it provides for selection on a seniority basis "irrespective of whether such employee is or is not a member of the Union."[3]

The same result obtains as to a contract provision which vests the power to hire in a union foreman, even though the contract incorporates general union laws by reference, where (a) his status as hiring agent is controlled by the employer, (b) he is free from union discipline if he discharges his hiring functions pursuant to employer direction, and (c) the general union laws are expressly made inoperative if they conflict either with the contract or state or federal law.[4]

However, although a "foreman hiring" clause is legal, the Court did give the Board a shaky affirmance, by a four-to-four

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1. Mountain Pacific Chapter of Assoc. General Contractors, 119 N.L.R.B. 883 (1957).

2. Brown-Olds Plumbing & Heating Corp., 115 N.L.R.B. 594 (1956).

3. Local 357, Int'l Bro. of Teamsters v. NLRB, 81 Sup. Ct. 835 (1961).

4. NLRB v. News Syndicate Co., 81 Sup. Ct. 849 (1961); International Typographical Union v. NLRB, 81 Sup. Ct. 855 (1961).

vote without opinion, of its position that a strike to force the inclusion of such a clause in a contract violates Section 8(b)(1)(B) because it restrains and coerces the employer in the selection of his representatives for the adjustment of grievances.[5]

As to the Board's power to order, as a remedy for Section 8(a)(3) and 8(b)(2) violations, the offending parties to reimburse *all* employees for dues and assessments paid to the union during the period beginning six months prior to the filing of the charge, the Court held that such power lies in two situations only: (1) Where the union gained status as the bargaining representative by reason of unfair labor practices impairing employee freedom of choice, in which case the order may require that dues and assessments be remitted to the employees who paid them;[6] (2) Where particular employees were unlawfully coerced into acquiring or retaining union membership, in which case the order may require the return of dues and assessments, but only to the employees so coerced.[7] In other situations, the remedy is punitive, not remedial, and therefore beyond the Board's authority.

In *NLRB v. Radio & Television Broadcast Engineers Union*,[8] the Court unanimously ended the Board's stubborn insistence, in the teeth of adverse decisions from three of the four circuit courts that had passed on the question,[9] that it is not required in a Section 10(k) proceeding to determine which of the disputing unions is entitled to jurisdiction over the work at issue. The Board must, said the Court, "hear and determine the dispute" on the merits, as the statute expressly requires, using such criteria as practice and custom. If the Board does not make such a determination, its order under Section 8(b)(4)(D) against the striking union is unenforceable.

The Board did somewhat better in *Local 761, International Union of Electrical Workers v. NLRB*,[10] a case in which it had

5. International Typographical Union v. NLRB, 81 Sup. Ct. 855 (1961). Mr. Justice Frankfurter did not participate.

6. Virginia Electric Co. v. NLRB, 319 U.S. 533 (1953).

7. Local 60, United Brotherhood of Carpenters v. NLRB, 81 Sup. Ct. 875 (1961); Local 357, Int'l Brotherhood of Teamsters v. NLRB, 81 Sup. Ct. 835 (1961); NLRB v. News Syndicate Co., 81 Sup. Ct. 849 (1961).

8. 81 Sup. Ct. 330 (1961).

9. NLRB v. Radio & Television Broadcast Engineers Union, 272 F.2d 713 (2d Cir. 1959); NLRB v. Union Association of Journeymen, 242 F.2d 722 (3d Cir. 1957); NLRB v. United Brotherhood of Carpenters, 261 F.2d 166 (7th Cir. 1958). *Contra*, NLRB v. Local 450, Int'l Union of Operating Engineers, 275 F.2d 413 (5th Cir. 1960).

10. 81 Sup. Ct. 1285 (1961).

decided that a union, by picketing a gate at a struck employer's premises reserved for use by the employees of independent contractors performing work there, induced or encouraged work stoppages intended to cause the contractors to cease doing business with the struck employer, thereby violating Section 8(b)(4). The Court gave a tentative nod of approval to the Board's decision, but rejected its mechanistic approach to the problem. The Court pointed out that, while picketing is not necessarily *exempt* from the statutory interdiction simply because it occurs at premises owned by the struck employer, it is not necessarily *within* the statutory interdiction simply because it occurs at a reserved gate. The controlling question is the nature of the work performed by the employees who use the gate.

If their work aids the everyday operations of the struck employer, as for example, where they are delivering supplies for regular use, or if it is related to the normal operations of the struck employer, as for example, where the employees are performing conventional maintenance work, picketing which appeals for their support is permissible. The Court remanded the case for findings as to the extent to which employees doing normal maintenance work also used the gate, with a direction that the legality of the picketing depends upon whether such use was substantial or *de minimis*.

The Board's only clear-cut success occurred in the case of *International Ladies' Garment Workers Union v. NLRB*,[11] in which the Court agreed that it is unlawful for an employer and a union to enter into a strike settlement agreement recognizing, as the exclusive bargaining representative of a unit of employees, a union which does not in fact have the support of a majority of those employees at the time of recognition, even though both parties relied in good faith on the accuracy of authorization cards as manifesting the wishes of the majority of eligible workers in the unit. The Court agreed with the Board that such action, regardless of the bonafides of the parties, impressed an agent selected by the minority upon the nonconsenting majority, thereby violating Sections 8(a)(1), 8(a)(2), and 8(b)(1)(A). And the Court sustained the Board's sweeping remedy, which set aside the contract which the parties subsequently executed, and prohibited the company from recognizing the Union, even on a members-only basis, unless and until it was certified after an election.

11. 81 Sup. Ct. 1603 (1961).

The foregoing cases are important, not only because of what they teach about the law but also because they demonstrate the diminished force of the once-powerful presumption that the NLRB has an expertise commanding the respect and deference of the courts.

However, I want to focus attention on a decision that did not involve the Board at all. There are three reasons for this choice: (1) the case was the last labor decision handed down during the term; (2) it raises questions that transcend the field of labor relations; and (3) it is pregnant with mischief.

In *International Association of Machinists v. Street*,[12] six employees of the Southern Railway System brought an action in a Georgia court seeking a declaration of invalidity and an injunction, on behalf of themselves and all others similarly situated, prohibiting enforcement of a union shop agreement executed pursuant to Section 2, Eleventh of the Railway Labor Act, and requiring them to belong to the union and to pay dues, initiation fees, and assessments as a condition of employment. The plaintiffs alleged that some of the money they were required to pay to the union had been used, and would continue to be used, to finance the campaigns of candidates for state and federal offices and to promote political and economic doctrines and programs to which they were opposed; and they claimed that to force them to give financial support to such activities against their wishes violated constitutional guarantees, notably freedom of association and freedom of speech.

The trial court, finding the allegations fully proved, sustained the claim of the plaintiffs, held Section 2, Eleventh of the Railway Labor Act, unconstitutional, permanently enjoined enforcement of the agreement against the plaintiffs or anyone similarly situated, so long as the union continued to use monies collected thereunder to finance political doctrines, programs, and candidates to which they were opposed, and ordered repayment of the dues, fees, and assessments previously paid by three of the plaintiffs. The Georgia Supreme Court affirmed.

On appeal, six members of the Supreme Court of the United States reaffirmed the holding in the *Hanson* case[13] five years ago that Section 2, Eleventh, is not unconstitutional on its face

12. 81 Sup. Ct. 1784 (1961).
13. Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956).

insofar as it permits the execution and enforcement of union shop agreements to collect dues, fees, and assessments. However, they found that while the statute gives an employee no cause for complaint when his money is used to defray the costs of negotiating and administering collective bargaining agreements, including the adjustment and settlement of disputes, it does not permit the use of an unwilling employee's money to finance political activities.

Five of these six — Justices Brennan, who wrote the opinion, Clark, Douglas, Stewart, and the Chief Justice, held that, since it was the use of the money, not its collection, that was unlawful, and since this was not a proper class action, the Georgia injunction prohibiting enforcement of the agreement against the plaintiffs and others similarly situated was inappropriate. Moreover, they agreed that it would be improper blanketly to enjoin *all* expenditures of funds for political purposes. "[M]any of the expenditures involved . . . are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the use of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other."[14]

The appropriate remedy, they said, must be narrowly drawn so as to protect only the rights of the individual dissenters who have made their objections known to union officials and may take two forms: (1) prohibiting the union from expending that proportion of the money collected from the dissenters which is equal to the proportion of the union's total expenditures made for political activities; (2) restoring to each dissenter that portion of his money which is equal to the proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

The sixth man, Mr. Justice Whittaker, while agreeing with

14. 81 Sup. Ct. 1784, 1802 (1961).

the interpretation of the Railway Labor Act, would have permitted the remedy formulated by the Georgia court to stand.

The three dissenting judges held that Section 2, Eleventh, properly interpreted, permits monies collected under a union shop agreement from unwilling employees to be spent for political purposes. Thus, they came squarely to grips with the constitutional question raised by the state court decision.

Justices Frankfurter and Harlan found no constitutional objection to the statute as thus construed. Justice Black took a contrary view and held that the Court should have required the union to refund all dues, fees, and assessments paid by the plaintiffs under protest and should have exempted them from such future payments so long as the funds were used to promote causes they opposed.

The statutory basis for the decision in the *Street* case seems to be as applicable to the National Labor Relations Act as it is to the Railway Labor Act.

The Court majority relied heavily on the legislative history of Section 2, Eleventh, showing that the railway brotherhoods sought the 1951 amendment permitting union shop agreements in large measure to prevent "dead heads" from enjoying the benefits of grievance processing before the Railway Adjustment Board without contributing to the support of that complex and costly statutory agency.

While the NLRA creates nothing comparable to the Railway Adjustment Board, the legislative history underlying the Taft-Hartley amendments manifests an equal concern over "free loaders," and no one will argue that grievance processing in the forum of private arbitration is without substantial cost.

The argument may be developed as follows. A union's right to collect dues from unwilling employees carries with it an implied duty to spend the money thus collected only for purposes which implement the policy of the statute — the NLRA — granting that right, that is, for organizational and bargaining purposes. Or, to put it another way, the monies thus collected are impressed with a trust that they will be used exclusively for such purposes. This federal duty is fixed upon unions as a concomitant of their federal right to exact dues from unwilling employees.[15]

15. Compare Steele v. L. & N. R.R., 323 U.S. 192 (1944).

The decision in the *Street* case has disquieting aspects, the most important of which is the strong suggestion that a number of the Justices, perhaps a majority, hold the view that the result was compelled by constitutional considerations.

Only Justice Black squarely says so. However, there is little, if any, doubt that Justice Douglas shares his view as to the use of an unwilling member's dues and fees for political purposes. While content to stand with the majority on the meaning of Section 2, Eleventh, thereby avoiding the constitutional question, Justice Douglas states in his separate concurrence that "if an association is compelled, the individual should . . . not be required to finance the promotion of causes with which he disagrees."[16] And in the companion case of *Lathrop v. Donohue*,[17] involving the question of whether a state may compel a lawyer to belong to a bar association and pay dues thereto as a condition of practicing law, he says in dissent: "[F]reedom of association is not an absolute . . . [but] if the individual is to be compelled to associate with others in a common cause, . . . exceptional circumstances should be shown [and they must be] 'narrowly drawn' so as to be confined to the precise evil." There is no special circumstance or justifying evil which warrants forcing an attorney to associate "with a group that demands his money for the promotion of causes with which he disagrees, from which he obtains no gain, and which is not a part and parcel of service owing litigants or courts. . . . Once we approve this measure we sanction a device, where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose . . . we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades."[18]

Furthermore, the narrow construction given to Section 2, Eleventh, by the majority of the Court, since it seems to be palpably incorrect, raises serious question about their position on the issue of constitutional law. Surely Justice Frankfurter is right when he states: "[P]reoccupation with legislative measures that touch the vitals of labor's interests and with the men and parties who effectuate them . . . is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread-and-butter concerns. . . . To suggest that [the

16. International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1804 (1961).
17. 81 Sup. Ct. 1826 (1961).
18. *Id.* at 1858, 1859.

Congressional reports stating the aim of the 1951 legislation] covertly meant to encompass any less than maintenance of those activities normally engaged in by unions is to withdraw life from law and to say that Congress dealt with artificialities and not with railway unions as they were and as they functioned."[19]

Why, then, did Justice Brennan and his confreres exert such Herculean efforts to avoid facing the constitutional question? The most likely answer is that their statutory interpretation rests on "the crutch of . . . fear of unconstitutionality"[20] and that at least some of them hold the view that neither workers nor anyone else can constitutionally be required by private agreement to pay their money to support causes they oppose.

The fact that Justices Brennan, Clark, Stewart, and the Chief Justice concurred in dismissing the Wisconsin lawyer's action in the integrated bar case adds force to this conclusion. Despite the fact that the pleadings showed that the plaintiff had paid his dues under protest on the ground that the bar association used members' dues to engage in political and propaganda activities of which he did not approve and that he set forth those activities and his objections thereto with almost as much particularity as the plaintiffs in the *Street* case, these four Justices again finessed the constitutional question, this time by holding that the issue of impingement of the plaintiff's constitutional right of free speech was not presented with sufficient concreteness to permit its adjudication.

If, as seems likely, "fear of unconstitutionality" impelled the majority to take the position they took in the *Street* case, the decision may portend a constitutional development of the first magnitude.

Clearly a government cannot *require,* under penalty or sanction, affirmation, by words or conduct, of a belief or program.[21] But it does not follow from the fact that a government may not constitutionally *command* something that it may not *permit* it to exist. Both federal and state governments are prohibited by the first and fourteenth amendments, respectively, from *requiring* a public officer, as a test for office, to swear belief in God.[22]

19. International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1815, 1816 (1961).
20. *Id.* at 1808 (dissenting opinion of Mr. Justice Black).
21. West Virginia State Board v. Barnette, 319 U.S. 624 (1943).
22. See Torcaso v. Watkins, 81 Sup. Ct. 1680 (1961).

But, since both amendments require governmental *action*, neither is under a constitutional mandate to prevent a private organization from requiring its employees, as a condition of employment, to take such an oath. To give another example, a government may not constitutionally direct the proprietor of a lunch counter to operate it on a racially segregated basis.[23] But it offends no constitutional injunction if it *permits* lunch counters to be operated on that basis.

In his eloquent dissent Mr. Justice Black argues that a government cannot "in furtherance of some public interest . . . actual or imaginary . . . *compel* membership in Rotary Clubs, fraternal organizations, religious groups, chambers of commerce, bar associations, labor unions, or any other private organizations . . . or to pay their money to support causes they detest."[24] (Emphasis added.)

But, reverting to the facts of the *Street* case, it is the union shop agreement, not the government, that *compels* employees, as a condition of employment, to join a union and pay dues and fees, a part of which are used for political purposes. The government *permits* the activity, but it does not *require* it.

In both the *Hanson* and *Street* cases the union shop agreement permitted by the Railway Labor Act was operating in states with right-to-work laws. Since Section 2, Eleventh, unlike the corresponding provisions of the Taft-Hartley Act, expressly supersedes contrary state law, there is some basis for the Court's acceptance of the proposition that such governmental authorization is the constitutional equivalent of governmental compulsion. Section 2, Eleventh, does more than merely tolerate union shop agreements executed in right-to-work states. It affirmatively overcomes a local law which, but for the federal statute, would prevent such agreements. In this sense, the federal statute is the source of the power and the authority by which the rights of workers under state law are lost or sacrificed and, arguably, therefore, constitutes sufficient governmental action to bring the first amendment into play.

But stated broadly, as if a statute which *permits* union shop agreements involves the same kind of governmental action as one which *requires* them, the proposition is patently unsound.

23. *Cf.* Buchanan v. Warley, 245 U.S. 60 (1917).
24. International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1809 (1961).

It means that the *Street* doctrine — and its predictable extension to the NLRA — is fully operative in states without right-to-work legislation, even though the federal statute, since it merely fails to prevent what the state has also failed to prevent, has no affirmative force at all. It seems almost fanciful to suppose that this is the kind of governmental action contemplated by the first amendment.

Furthermore, the proposition mutilates the state action requirement of the fourteenth amendment. It means that a non-right-to-work state cannot permit a union, over the objection of a member, to use dues collected under a union security agreement for political purposes. Beyond that, to draw examples from other areas, its logic compels the conclusion that a state may not constitutionally permit an accredited private school, a licensed private hospital, or an incorporated private tennis club to pursue admission, service, or personnel policies that the state itself could not pursue.

Such a philosophy of constitutional law would virtually revolutionize the first and fourteenth amendments, converting them from restrainers *of* governmental action into mandates *for* governmental action — the programs to be carried out in conformance with the legislative judgments of the courts.

Such mischievous consequences might be avoided by restricting the operation of the doctrine of the *Street* case to union shop agreements executed under the Railway Labor Act in right-to-work states. However, it would seem anomalous, to say the least, if the pre-emptive feature of Section 2, Eleventh of the Railway Labor Act, led to as great a lack of uniformity among the states as the non-pre-emptive feature of Section 14(b) of Taft-Hartley.

The answer to all this is, of course, that Justices Frankfurter and Harlan are right and the Court majority is wrong. Section 2, Eleventh, could have been, and should have been, interpreted as permitting the unions to do what they were doing in the *Street* case.

This is not to say that the policy the decision reflects is not salutary.

The problem was thoroughly explored by Professor Kahn-Freund of London last year. He pointed out that "to deprive

trade unions in Britain of the right to use union funds for political purposes would [be] incompatible with a democratic constitution." But, he asked: "What . . . about workers who, whilst disagreeing with the political aims pursued by the union, are nevertheless its members, by force of circumstance, rather than by choice?" The compromise that Britain has struck "between the need for democratic participation of the unions in national affairs and the need for a measure of democracy in their internal affairs" is to prohibit unions from spending "money for political purposes out of their general funds . . . They must create a separate political fund, and to do that they have to have a secret ballot and special rules for the administration of the political fund. . . . [Those rules] must contain stringent provisions for the protection of dissenters. Dissenters can . . . 'contract out,' which means that by signing an appropriate form, they can effectively declare their unwillingness to contribute to the political fund. Those who have done this must not . . . suffer discrimination regarding benefits or rights to participate in elections or in the administration of the union. [Furthermore,] willingness to contribute to the political fund must not be made a condition of admission."[25]

The fashioning of such a policy, with all of its implications and ramifications, is not a job well adapted to the piecemeal process of adjudication. It is more properly legislative business.

The validity of this assertion finds support in the difficulty the Court had in the *Street* case in trying to tailor a remedy which would "attain the appropriate reconciliation between majority and dissenting interests in the area of political expression." The result was a formula for relief which, in the words of Mr. Justice Black, may well "prove very lucrative to special masters, accountants and lawyers" but will offer "little hope for financial recompense to the individual workers whose . . . freedoms have been flagrantly violated."[26]

Moreover, while the court was clear that "political" activity is proscribed and that the "negotiation and administration" of agreements is permissible, it left open, because the matter was not before it, the question of the propriety of conduct which is neither politics nor bargaining. What, for example, of contribu-

25. Kahn-Freund, *Trade Union Democracy and the Law*, 1960 PROCEEDINGS, A.B.A. SECTION OF LABOR RELATIONS LAW 24, 32, 33.

26. International Ass'n of Machinists v. Street, 81 Sup. Ct. 1784, 1813 (1961).

tions to the Congress on Racial Equality to finance the enterprises of the "Freedom Riders"? These are matters that cry for the guidance of legislative standards.

As Mr. Justice Frankfurter put it in an earlier opinion: "At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck. . . . When that point has been reached — where the intersection should fall — is plainly a question within the special province of the legislation."[27]

27. AFL v. American Sash & Door Co., 335 U.S. 538, 546, 553 (1949).