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Labor Law - Business Hours Not Proper Subject for Collective Bargaining - Jewel Tea Co. v. Amalgamated Meat Cutters, No. 12653 (C.A. 7th, 1960), cert. denied No. 732 (1960)

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the denial of bail pending appeal in the *Campbell* case was a proper exercise of the court's discretion. However, a court in exercising its discretion under Rule 46 (a)(2) in narcotic cases should carefully consider the factual situation in each case. Perhaps more leniency should be exercised in the case of first offenders than in the case of second offenders. Moreover, bail should never be denied for the purpose of punishment, since the judgment of conviction cannot be executed while the matter is stayed pending appeal.[19]

[19] Cf. Reynolds v. United States, 80 S.Ct. 30 (1959).

LABOR LAW–BUSINESS HOURS NOT PROPER SUBJECT FOR COLLECTIVE BARGAINING

Jewel Tea Co. filed suit against Locals 189, 262, 320, 546, 547, 571 and 638 of the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO, and several officials of the union, alleging a violation of Sections 1 and 2 of the Sherman Antitrust Act.[1] The complaint alleged that the defendants had engaged in an unlawful combination and conspiracy to suppress competition among retail meat markets in the Chicago area and to prevent all sale of meats and meat products before 9 a.m. or after 6 p.m. It was pleaded that under compulsion of the alleged conspiracy and the threat of strike by the unions, the plaintiff was forced to sign contracts with the defendant unions containing, among other things, a restriction that market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer coming into the market before or after said hours would be served. The operation of the agreements has enabled Associated Food Retailers of Greater Chicago, Inc., a major competitor, to remain closed after 6 p.m. without fear of losing trade to plaintiff, because of evening sales, and also to avoid the added expense of remaining open during the evening. *Jewel Tea Co. v. Amalgamated Meat Cutters,* No. 12653 (C.A.7th, 1960).

The defendants appealed from orders by the United States District Court denying their motion to dismiss the complaint; the court of appeals affirmed the district court's orders and remanded the suit to the district court for determination of the amount of damages. Certiorari was denied by the Supreme Court of the United States. Docket No. 732 (March 28, 1960). 28 Law Week 3283.

While Sections 1 and 2 of the Sherman Act prohibit any contract or conspiracy in restraint of trade, such anti-trust legislation is not applicable

[1] Also named as defendants, but not parties to the appeal, are Associated Food Retailers of Greater Chicago, Inc., a not-for-profit trade association representing several thousand individual or independent food stores engaged in the retail sale of meat in the Greater Chicago area, and the secretary-treasurer of said association.

to labor organizations while they are carrying out their legitimate objectives.[2] Since a labor union may be exempt from the antitrust laws while a non-labor group such as Associated Food Retailers of Greater Chicago, a defendant herein, is not shielded therefrom, "what is the result if the two conspire?" In *Allen Bradley Co. v. Local Union No. 3, I.B.E.W.*,[3] the Court said: "Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."[4] In the same opinion the court also stated: "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."[5] The application of the *Bradley* case to *Jewel* obviously brands the defendant unions' agreement with the defendant trade association (a non-labor organization) as a violation of the anti-trust laws.

Another question to be considered is whether the agreement regulating market operating hours, entered into between the defendant unions and the plaintiff, Jewel Tea Co., constitutes carrying out the legitimate objectives of a labor union, and is, therefore, an activity shielded from the anti-trust laws. In other words: "does a labor representative have *any* right to a voice in the determination of market operating hours?" The court of appeals in the *Jewel* case decided this determination was solely a function of the employer. The court stated:

> An employer has the right and it is his duty, if he is to survive commercially, first to determine the needs of the public, second to provide a time, a place and facilities for meeting those needs, and third to provide, under the terms of the National Labor Relations Act, the services of the employees to accomplish the foregoing objectives. The right of labor attaches only to the third, and if any effort is made by labor to infringe rights of the employer in the first or second field, it is not shielded from the sword of the antitrust laws. Determining the needs of the public and meeting those needs are inherent proprietary rights and obligations of the employer and must be clearly distinguished from his rights and duties as master in the master servant relationship. *Setting marketing hours is one such proprietary function which an employer has the exclusive right to determine as dictated by economic factors present within his trading area.*[6]

As the foregoing statement by the court of appeals illustrates, an employer need not discuss every facet of the company's business with its em-

[2] 15 U.S.C.A. §§ 1, 2, 17 (Supp., 1959); United States v. Chattanooga Chapter National Elec. Contractors Ass'n., 116 F. Supp. 509 (E.D. Tenn., 1953).

[3] 325 U.S. 797 (1945).

[4] Ibid., at 808.

[5] Ibid., at 810.

[6] Jewel Tea Co. v. Amalgamated Meat Cutters, No. 12653 (C.A.7th, 1960) at 4, 5.

ployees or their representatives.[7] However, there is no general rule as to where the line is to be drawn. This is illustrated by *Cross & Co. v. N.L.R.B.*[8] where the court said it was impossible "to enunciate a generalizing principle for the decision of future cases, [because] *generalization must await the accumulation of a body of decided cases pricking out the line between subject matters within the Act* [*N.L.R.A.*] *and subject matters outside its scope. . . .*"[9]

In the *Jewel* case, the decision of the court of appeals seems to be a short sighted view of what constitutes subject matter required to be submitted to collective bargaining within the scope of the N.L.R.A.[10] The cases are in accord that, "rates of pay, wages, hours of employment, or other conditions of employment,"[11] is the language in the statute which defines the matters which the employer is required to submit to collective bargaining.[12] The query is: "What does the statutory language embrace?"

Disputes which were the traditional subject matter of collective bargaining such as the settlement of wages,[13] shorter hours,[14] and vacation periods,[15] are unquestionably included within the statute. However, the scope of the statute has not been limited merely to traditional subjects of collective bargaining. Matters which are now held to be within the scope of the N.L.R.A., requiring collective bargaining, were felt, at one time, to be absolute proprietary rights subject solely to the discretion of the employer. Some of these matters are: Retirement and pension plans,[16]

[7] A refusal to bargain about legislative policies and other generalities is not to be forbidden within the provisions of the N.L.R.A. Globe Cotton Mills v. N.L.R.B., 103 F.2d 91 (C.C.A.5th, 1939).

[8] 174 F.2d 875 (C.A.1st, 1949).

[9] Ibid., at 878 (emphasis supplied).

[10] It is lawful to insist matters within the scope of the N.L.R.A. be submitted to collective bargaining and unlawful to insist upon submission of matters outside the scope thereof. N.L.R.B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

[11] N.L.R.A. §§ 8(a)(5), 9(a); 29 U.S.C.A. §§ 158(a)(5), 159(a) (Supp., 1959).

[12] Cross & Co. v. N.L.R.B., 174 F.2d 875 (C.A.1st, 1949); Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (C.A.7th, 1948), cert. den. 336 U.S. 960 (1949); N.L.R.B. v. Barrett Co., 135 F.2d 959 (C.C.A.7th, 1943); N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676 (C.C.A.9th, 1943); Wilson & Co. v. N.L.R.B., 115 F.2d 759 (C.C.A.8th, 1940).

[13] Singer Mfg. Co. v. N.L.R.B., 119 F.2d 131 (C.C.A.7th, 1941), cert. den. 313 U.S. 595 (1941).

[14] N.L.R.B. v. Pilling & Son, 119 F.2d 32 (C.C.A.3d, 1941).

[15] United States v. United Mine Workers, 330 U.S. 258 (1947).

[16] Inland Steel Co. v. N.L.R.B., 170 F.2d 247 (C.A.7th, 1948), cert. den. 336 U.S. 960 (1949).

provisions for in-plant feeding,[17] group insurance,[18] medical and hospital fund,[19] bonuses,[20] and the subcontracting of work.[21] The contention that the scope encompassed only those matters which were the subject of collective bargaining as of the date of the adoption of the Act has been rejected.[22]

What has caused this flexible translation of the scope of the Act? Having fulfilled the bare objectives of reasonable hours and adequate wage, plus healthy working conditions, unions have, in recent years, been directing their efforts to matters which are not within the confined *literal* translation of "rates of pay, wages, hours of employment, or other conditions of employment." Naturally, such efforts are being met with the contention that these areas represent matters of management prerogative and are not within the scope of the National Labor Relations Act.

Faced with this management resistance, the unions have emphasized the effect that the matter in dispute would have upon the general welfare of all the employees as a class, rather than attempting to categorically assert: "this is a matter affecting wages," or "this is included within hours of employment." In *Wilson & Co. v. N.L.R.B.*,[23] the court said:

> It [N.L.R.A.] obligates the employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees *with respect to all matters which affect his employees as a class, including* wages, hours of employment, and working conditions.[24]

In *Carlisle v. Jacquelin*,[25] after specifying a list of proper subjects which were subject to collective bargaining, it was added:

> [A]nd all other matters of employee welfare which are, or normally would be, the fruit of the Company's general personnel policy, applicable to all its employees as such, and all of which are fairly comprehended within the term "conditions of employment," within the meaning of the Act.[26]

[17] Ibid.

[18] Cross & Co. v. N.L.R.B., 174 F.2d 875 (C.A.1st, 1949).

[19] United States v. United Mine Workers, 330 U.S. 258 (1947).

[20] Singer Mfg. Co. v. N.L.R.B., 313 U.S. 595 (1941).

[21] Timken Roller Bearing Co., 70 N.L.R.B. 500 (1946). The Board's order was denied enforcement on other grounds, Timken Roller Bearing Co. v. N.L.R.B., 161 F.2d 949 (C.C.A.6th, 1947).

[22] Cross & Co. v. N.L.R.B., 174 F.2d 875 (C.A.1st, 1949).

[23] 115 F.2d 759 (C.C.A.8th, 1940).

[24] Ibid., at 763 (emphasis supplied). Accord: N.L.R.B. v. Barrett Co., 135 F.2d 959 (C.C.A.7th, 1943); N.L.R.B. v. Montgomery Ward & Co., 133 F.2d 676 (C.C.A.9th, 1943).

[25] 55 N.L.R.B. 678 (1944).

[26] Ibid., at 682.

As can readily be seen, the wording of the statute in question has at least in some instances been given a flexible translation. In the present case the court of appeals gave it a limited interpretation by holding that market operating hours is solely a proprietary right which may only "incidentally affect" a firm's employees.

Although in denying certiorari, the Supreme Court did not pass on the question, an inference arises that the Supreme Court did not strongly disapprove of the decision of the court of appeals.

TORTS–FRAUD ACTION NOT ASSIGNABLE TO TRUSTEE IN BANKRUPTCY

In October 1956, a creditor obtained judgment against one LaVoy and a writ of execution was placed in the hands of deputy sheriff Hicks of Ingham County, Michigan. Execution was levied on LaVoy's Ford pickup truck, which was duly advertised for sale. At the time of the execution sale, the truck was worth approximately $1,100.00, but was actually sold for only $375.00. The sale was made by an agent, acting for an undisclosed principal who was, in fact, deputy sheriff Hicks. Shortly thereafter LaVoy filed in bankruptcy and the trustee in bankruptcy brought an action for fraud against deputy sheriff Hicks, joining Hicks' statutory surety as a co-defendant to the action. In his declaration, plaintiff-trustee formally elected to affirm the voidable contract resulting from the fraudulent execution sale, and seek the quintuple damages provided for in such cases by Michigan statute.[1] Defendant's motion to dismiss was granted on the grounds that the trustee could bring only the bankrupt's action of fraud as assignee and that such an action was non-assignable. The Supreme Court of Michigan affirmed the lower court, holding that an action of fraud is not assignable in spite of the fact that it arises out of a tangible property right. *Jones v. Hicks*, 100 N.W. 2d 243 (Mich., 1960).

Section 70 of the Federal Bankruptcy Act makes the following provision for devolution of title to a bankrupt's property:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property wherever located . . . (5) property, *including rights of action*, which

[1] Mich. C.L. 1948, § 623.148 provides: "The officer who shall make any sale on execution, shall, in his return on the execution, specify the articles sold, and the sum for which each article or parcel was sold; and if he shall be guilty of any fraud in the sale, or in the return, or shall unreasonably neglect to pay any money collected by him on such execution, when demanded by the creditor therein, he shall be liable to an action on the case, at the suit of the party injured, for five (5) times the amount of the actual damages sustained by reason of such fraud or neglect."