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Labor Union Disaffiliation - Problem of Contract Bar and Contract Assumption

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the duties of his office throughout the state, while he resides in the same county in which he was appointed.[49]

The fact that a notary, in his own county, does not authenticate the jurat with his official seal in an affidavit will not invalidate the instrument because the court will take judicial notice of the notaries public in the county in which the court entertains jurisdiction.[50]

No Illinois cases could be found in which an attempt was made to hold a notary liable to one injured by his negligence or fraud. It is manifest, however, that grave consequences can result from an improper performance of the notary's functions, especially in regard to deeds. A notary might be held liable for a false certification in the same way as a certified public accountant.[51] In addition, it might be possible to satisfy a judgment against him out of the bond[52] which every notary must obtain.

The notary and his role in society seem to have been neglected for too long. A serious study of the situation by legislators and lawyers is in order.

LABOR UNION DISAFFILIATION–PROBLEM OF CONTRACT BAR AND CONTRACT ASSUMPTION

In the comparatively unexplored field of labor relations no more trackless area can be found than that reached when a union local votes to disaffiliate in toto from the parent organization or from the international during the term of a valid, binding collective bargaining agreement. The effect of such disaffiliation might be felt on future certification proceedings, or on the rights to the benefits and burdens of the existing contract between the employer and the local. Will the existing contract act as a bar to certification proceedings for a new representative? If a new local should be certified, will that local be forced to assume the existing contract, or may it bargain on its own behalf?

Answers to these questions[1] serve as a most fertile ground for labor litigation today.

Basically, the problems of contract bar and of contract assumption are closely allied to the relationship of union to employee. That relationship may be described either as agent-principal or as third party beneficiary. The National Labor Relations Board, in attempting to decide the contract

[49] Ill. Rev. Stat. (1951) c. 99, § 10.

[50] Hertig v. People, 159 Ill. 237, 42 N.E. 879 (1896); Schaefer v. Kienzel, 123 Ill. 430, 15 N.E. 164 (1888); Dyer v. Flint, 21 Ill. 80 (1859).

[51] Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

[52] Ill. Rev. Stat. (1951) c. 99 § 4.

[1] Limited to those situations where the local disaffiliates in toto. Also limited to the problem of contract acting as a bar to certification proceedings, and the necessity of contract assumption by successor union. For a discussion of property rights upon disaffiliation see 131 ALR 902 (1941).

bar or contract assumption issues, is guided by this and other fundamental considerations.

Among these considerations is the Board's desire to safeguard the rights of employees to act collectively, and at the same time, to maintain the stability of existing contracts.[2] To attain these ends the Board strives to effectuate the intentions of the Labor Management Relations Act.[3] Where, therefore, inconsistencies appear in the cases, recourse to this general intention may provide a clue as to rationale.

It has been pointed out that the rights of employees to choose representatives is nowhere made subject to the existence of a contract.[4] In framing the Labor Management Relations Act of 1947, Congressional draftsmen sought to preclude such implication.[5] While it may generally be said that a valid[6] contract will bar a certification proceeding if it is not contrary to the provisions of the act, and is with a certified, competent union,[7] this simple rule has been expanded by the current of decisions into a generalization admitting of great variety and exception.[8] These exceptions may possibly be rationalized on the ground of effectuating the intentions of the Act.

Although one author has said that "evaluating the Board's development of the contract-bar rule against its own criterion of steering a course between stability and flexibility is impossible on an empirical basis . . . ,"[9] yet it may be possible to develop a norm by which the result of future litigation can be forecast.

A more precise solution to the certification question, and ultimately to

[2] New England Transportation Co., 1 N.L.R.B. 97 (1936); Container Corp. of America, 61 N.L.R.B. 823 (1945); Trailer Co. of America, 51 N.L.R.B. 1106 (1943).

[3] Conrad, The Contract-Bar-Rule-and Disaffiliation Cases, N.Y.U. 4th Annual Conference on Labor 412 (1951).

[4] Rosenfarb, National Labor Policy 273 (1940).

[5] In disposing of a proposal to condition certification on contract assumption, a House committee stated: "Since the inclusion of such a provision might give rise to an inference that the practice of the Board, with respect to conducting representation elections while collective bargaining contracts are in effect, should not be continued, it is omitted from the conference agreement." U.S. Code Congressional Service 1156 (1947).

[6] Washington-Eljir Co., 48 N.L.R.B. 1165 (1943).

[7] Cramp Shipbuilding Co., 52 N.L.R.B. 309 (1943).

[8] As evidence of the elasticity of the rule see National Lead Co., 45 N.L.R.B. 182 (1942), where the employees voted unanimously to change national affiliation, with entire membership wishing to switch, the Board allowing an election, and Yellow Transit Co., 73 N.L.R.B. 424 (1947), where no grievances were processed for four months, and no meetings for eight months by the contracting union and the Board held the contract to act as a bar.

[9] Conrad, The Contract-Bar-Rule-and Disaffiliation Cases, N.Y.U. 4th Annual Conference on Labor 453 (1951).

the contract assumption problem, would seem to be presented by an analysis of the relationship of union to employee in this function.

Broadly speaking, the relationship of bargaining agent to the employee is that of agent to principal. In *Graham v. Southern Ry. Co.*[10] the court pointed out that a bargaining agent under the N.L.R.A. "is but an agent for a principal, and not an independent contractor.... The important word in this connection is the word 'representatives.' The bargaining agent is a representative, not an independent contractor."[11]

The Board has ostensibly refrained from committing itself to either the agency or the third party beneficiary rule, although it once stated that "labor organizations are merely the agent of the employees in an appropriate unit."[12] Recently it has been silent on the question, but an implication can be drawn that such is still the opinion of the Board from the fact that it allows, in some cases, the contract to operate as a bar where only the parent of the local was changed.[13]

Ramifications flowing from the theory are readily apparent. If the true relationship is that of agency, then the contract between the employer and employee is the property of the employees collectively, with the benefits and duties therefrom descending upon the membership regardless of the affiliation of the group. The principal would remain liable on the contract although a new agent were substituted by a subsequent election and designation of bargaining representative.

A cursory glance at the third party beneficiary theory will demonstrate the implications incident thereto. If the true party to the contract is the union, and in a subsequent proceeding the union, the bargaining agent, were changed, one of the parties would no longer be in existence, and a new contract would seem to be necessary.

This theory might have even more startling results. If the employees are but third party beneficiaries, and are unable to discharge the union as bargaining representative, one of the intentions of the act, the right to guarantee collective action, might well be destroyed. The possibility of domination by unscrupulous leaders is possible, since the employees would be deprived of the right of discharge. With the advent of the requirements of non-Communist affidavits by union leaders, the employees, for

[10] 74 F. Supp. 663 (D.C., 1947).

[11] Referring to Sec. 7, N.L.R.A. which provided: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing...." 49 Stat. 452 (1935), 29 U.S.C.A. § 157 (1947). Pertinent provisions of the Labor Management Relations Act are identical. 61 Stat. 140 (1947), 29 U.S.C.A. § 157 (1947).

[12] Mill B., Inc., 40 N.L.R.B. 346 (1942).

[13] Chesapeake and Potomac Telephone Co., 89 N.L.R.B. No. 25, 25 L.R.R.M. 1538 (1950).

example, might find themselves shackled to those who refuse to file such affidavits, and thus be deprived of the right to the facilities of the Board. The adherence to this theory would be a drastic curtailment of the flexibility sought to be protected by the act and the Board.

The agency doctrine,[14] however, has the flexibility desired because when the employees become dissatisfied with their representatives, they may, under this doctrine, by appropriate vote disaffiliate themselves and choose another body to represent them. Since frequently the contract is redenred unenforceable by such disaffiliation, an essential requirement would be that the dissatisfaction of the employees be bona fide, and not merely for the purpose of escaping from liability on the contract.[15]

If the agency theory is thus tested against the facts of total disaffiliation with which we are concerned, the application of the rule would follow in proper order. In looking at the disaffiliation, the Board would first decide if the dispute of the employees and the resulting disaffiliation was bona fide. If such was found to be the fact, the next query would be as to the exact change effected. If the only change were in the name of the local, with the officers remaining the same, there can be little doubt that the contract should act as a bar.[16] This holding should likewise extend to those cases where the officers and name might be changed, the membership remaining the same. Thus the flexibility of union choice is guaranteed as well as the stability of contract. Where, however, upon total disaffiliation of the local, the subsequent certification petition is submitted by substantially the same employees *but in a different bargaining unit*, then the doctrine of the Board that confusion as to the agent[17] should operate to allow future certification would seem to be consonant with logic and the safeguard of rights desired by both management and labor. It must be remem-

[14] It must be noted that the theory of agency relationship is limited to the negotiation of the contract. The theory must break down when applied to the status after the execution of the contract, and also in the problem of enforcement of the contract by the members. The fault lies not with the bargaining machinery, but with the attempt to utilize common law principles which conflict with the situation of a statutorily created conflict.

[15] Trailer Co. of America, 51 N.L.R.B. 1106 (1943).

[16] See Michigan Bell Telephone Co., 85 N.L.R.B. 303 (1949); Chesapeake and Potomac Telephone Co., 89 N.L.R.B. No. 25, 25 L.R.R.M. 1538 (1950) for cases in which the existing contract acted as a bar where the parent of the petitioning union changed affiliations. The Board pointed out that the structure, functions and membership of the local was unchanged, and thus there was no need for certification proceedings.

[17] "It is apparent that the normal bargaining relationship between the employer and the heretofore exclusive bargaining representative of its employees has become a matter of such confusion . . . that the relationship between them no longer can be said to promote stability in industrial relations." Boston Machine Works, 89 N.L.R.B. No. 17, 25 L.R.R.M. 1508 (1950).

bered, however, that the total disaffiliation must be the result of formalized action, or this schism[18] rule will not apply.[19]

By adopting such a simple solution, the Board would be solving the contract bar problem, and simultaneously providing the groundwork on the issue of assumption of the contract in the case of a new certification.

In the field of contract assumption, the few cases immediately concerned with the problem give little aid in its solution. The attitude of the Board in these few cases has been that it will not decide the question of successor assumption in a representation proceeding.[20] In two cases[21] the Board stated that where, under special circumstances, the two contending unions had agreed between themselves that the winner of the certification proceedings would assume the existing contract, that such election would be solely for the purpose of deciding who should assume the contract. Insofar as these cases tended to solve the problem of contract assumption, the Board expressly overruled them in the *Boston Machine Works* case.[22] A hint of Board policy in this respect may, however, be derived from the Board's decisions that if enough remains of the bargaining unit to effectually execute the contract, an election should be barred.[23]

Applying with equal force to this problem of contract assumption is the agency doctrine as discussed in relation to the contract bar rule.

Where the bargaining agent is the same except for minor changes in name or officers, the union designated as successor should be required to assume the existing contract on the theory that the principal remains the same while only the agent has changed. If, however, the bargaining unit itself has changed in regard to the types of employees to be covered by the bargaining unit, then the original parties to the contract are no longer in existence, and the successor union should be free to bargain for its own contract.

Militating against the theory that there should be a bargaining for a new contract is the idea that once employees are bound to a valid bargaining agreement, they should be forced to adhere to this contract and not be allowed to evade its duties under the guise of changing affiliation. Answers to such arguments are the basic reasons behind labor legislation: to guar-

[18] In J. J. Tourek Mfg. Co., 90 N.L.R.B. No. 4, 26 L.R.R.M. 1168 (1950) schism was defined as "formalized collective action at a union meeting."

[19] Morrison Telex Inc., 90 N.L.R.B. No. 43, 26 L.R.R.M. 198 (1950); Columbia River Salmon and Tuna Packers Assn., 91 N.L.R.B. No. 222, 27 L.R.R.M. 1025 (1950).

[20] Boston Machine Works, 89 N.L.R.B. No. 17, 25 L.R.R.M. 1508 (1950).

[21] Register and Tribune Co., 60 N.L.R.B. 360 (1945); Harbison-Walker Refactories Co., 43 N.L.R.B. 1349 (1942).

[22] 89 N.L.R.B. No. 17, 25 L.R.R.M. 1508 (1950).

[23] Great Lakes Carbon Corp., 44 N.L.R.B. 70 (1942).

antee to workers the right to freely choose their representatives.[24] If this right is to be guaranteed and a new unit as well as bargaining agent is certified, then practical sense would require a new bargaining contract since the impractical situation of attempting to fulfill present contract duties with an inadaptable unit would seem to cry for relief.

If the Board were to adopt this approach to the question, the difficulty of cases and possible friction between the contending parties could often be resolved at a tremendous saving in days lost due to strikes, much money wasted in contending for these theories, and of great expenses used for the maintenance of the facilities of the N.L.R.B. The Board would be in a position to summarily dismiss many petitions on grounds such that the applicant would be almost certain in 90 cases out of 100 to know the result of the petition before it was even filed.

[24] "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions . . . by encouraging the practice and procedure of collective bargaining, and by protecting the exercise by workers of full freedom of association, self organization. . . ." 61 Stat. 136 (1947), 29 U.S.C.A. § 151 (1947).