SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 6 | Issue 1

1954

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failed to obtain by compelling the defendants either to file suit on the alleged mechanics' lien or, after the sixty days' notice had passed, be barred from ever asserting the same.[11]

It is unfortunate that the two dissenting judges in the *Gustafson* case did not feel inclined to express their views in a written opinion. It would have been interesting to see on what grounds they differed with the logical opinion expressed by the majority.

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LABOR LAW — SECTION 301(a) LMRA NOT APPLICABLE TO CONTRACTS BETWEEN EMPLOYER AND INDIVIDUAL EMPLOYEE

The plaintiff labor organization sought a declaratory judgment as to the rights of the parties under a collective bargaining agreement, together with an accounting to determine the amounts of employees' salaries wrongfully withheld and a judgment in favor of the individual employees found to be entitled thereto. The complaint was dismissed by the trial court on the ground that it failed to state a cause of action. On appeal, the United States Court of Appeals, Third Circuit,[1] held that the subject matter of plaintiff's complaint was not within the grant of federal-question jurisdiction found in Section 301(a) of the Labor Management Relations Act[2] and dismissed the complaint on the ground of lack of diversity of citizenship.[3]

Section 301(a) applies only where the contract violated was between an employer and a labor organization.[4] The issue presented is whether the right asserted in the instant case arises from a violation of the collective bargaining contract between the union and the employer or from separate contracts between the employer and the individual employees. If the latter is true there is no diversity jurisdiction in the case at bar, and no jurisdiction to entertain this suit. Plaintiff admits that the rights in dispute are the claims of individual employees for their salaries, but contends that these individual employees whom it represents are third party beneficiaries of the collective bargaining contract. Therefore, plaintiff argues, the individual employees' rights arise out of that agreement, and the present claims would be based upon a violation of a contract between an employer and a labor organization. Plaintiff cites *J. I. Case Co. v. NLRB*[5] among others[6] in support of the third party beneficiary theory.

The court refused to accept the third party beneficiary theory because there are some provisions of the collective bargaining contract which run only to the benefit of the union and could not run to the benefit of the individual employee.[7] Also, the consideration for the employer's promise to pay

[11] OHIO REV. CODE § 1311.11.

wages is given by the beneficiary, rather than by the union. Furthermore, that theory leaves the employer without recourse against the employee, since the latter, the beneficiary, had made no promises. The court in the instant case interprets the *J. I. Case* case as meaning

> That the individual employee is a third party beneficiary of the collective bargaining contract only in the sense that the collective force of all employees in the unit has been brought to bear upon the employer to hammer out a bargain with him, the terms of which, by virtue of the statutory mandate, must be included in the employee's contract of hire, but that the provision of the collective contract specifying rates of pay ripens into a legal right only under the individual contract of hire and only because of the individual employee's labor.[8]

After discussing other conflicting theories found in cases explaining the tripartite relations raised by a collective bargaining contract,[9] the court formulates its own eclectic theory.

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[1] Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 107 F. Supp. 692 (W.D. Pa. 1952). The defendant presented three grounds for its motion to dismiss: lack of jurisdiction over the subject matter; wrong party plantiff; and failure of complaint to state a cause of action. The court ruled against the first two contentions and in favor of the last.

[2] 61 Stat. 156 (1947), 29 U.S.C. § 185(a). "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[3] Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 210 F.2d 623 (3rd Cir. 1954).

[4] Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806 (2nd Cir. 1950); 3 MOORE, FEDERAL PRACTICE § 17.25 (2nd ed. 1948).

[5] 321 U.S. 332, 64 Sup. Ct. 576 (1944).

[6] Mercury Oil Refining Co. v. Oil Workers International Union, 187 F.2d 980 (10th Cir. 1951); American Federation of Labor v. Western Union Telegraph Co., 179 F.2d 535 (6th Cir. 1950); Bakery & Confectionery Workers' International Union v. National Biscuit Co., 177 F.2d 684 (3rd Cir. 1949).

[7] Check-off provisions are an outstanding example.

[8] 210 F.2d 623, 627 (1954).

[9] a) The view that a collective bargaining contract was binding only in morals was once accepted. Its underlying philosophy was that the law should not meddle with such agreements. Teller, LABOR DISPUTES AND COLLECTIVE BARGAINING § 157 (1940).

b) A second theory is that the collective agreement establishes a usage in the plant or industry and that the individual contracts of hire are made with that usage in mind. This theory gives little legal significance to the collective bargaining agreement. The rights and duties arise from the individual hiring contract. *Ibid* § 159.

c) The third theory is that, in contracting with the employer, the union acts as agent for those it represents. This theory encounters the difficulty of explaining how an employee may become a party to the agreement, where he joins the union subsequent to the negotiations thereof. *Ibid* § 167.

d) Another theory finds that the union in contracting with the employer does so

The court reasons that the collective contract between the union and the employer is not a contract of hire. No employee gets a job by reason of the collective agreement and no obligation to any individual arises from it.[10] The collective agreement between the union and the employer establishes the wages, hours, and conditions which the employer includes in the contract of hire with the individual employees of the bargaining unit because of the National Labor Relations Act. An analogy is drawn to tariffs established by a carrier or a utility rate schedule. The rights and duties involved do not arise of themselves from the tariffs or schedules, but arise only when contracts are entered into between carrier and shipper and utility and customer. While the employer's general duty to pay a certain rate arises out of the collective bargaining contract plus the mandates of the National Labor Relations Act, the special duty to pay a particular employee wages arises out of the contract of hire. Since the duty to pay wages to a particular employee is the one alleged in the instant case and since this duty is not a violation of a contract between a labor union and an employer, Section 301(a)[11] cannot be used as a basis for federal jurisdiction.

After formulating this theory the court presents the problems which would result should the plaintiff's contentions be accepted. The court points out that the rights asserted in the case at bar are the individual rights of about four thousand employees, none of whom is joined or named. Under such circumstances the doctrine of res judicata would be an obstacle.[12] Another problem is presented by the numerous cases which hold that the union is the only proper party to any suit under Section 301(a).[13] Under that doctrine the union would be the exclusive agent to negotiate rights of all those whom it represents under the National Labor Relations Act, whether members of the union or not. This, together with a holding by the Supreme Court of New York[14] that Congress intended that the federal courts should be the exclusive fora to determine cases involving collective bargaining contracts under Section 301(a), would put the individual employee out of court. Therefore, the individual employee would have a right to his salary but no remedy to enforce it.

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for the benefit of those whom it represents. The employees are third party beneficiaries to the collective agreement. *Ibid* § 168.

[10] J.I. Case Co. v. N.L.R.B., 321 U.S. 332, 335, 64 Sup. Ct. 576, 579 (1944).

[11] 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

[12] "If plaintiff should prevail on the merits what of an employee in the unit who may have been inadvertently omitted from the reckoning? Is he barred? Is the defendant safe in paying the judgment in favor of plaintiff? If plaintiff should lose on the merits, as it did in the district court, are all employees in the unit barred?" 210 F.2d 623, 629.

[13] United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952); Ketcher v. Sheet Metal Workers' International Ass'n, 115 F. Supp. 802 (E.D. Ark. 1953); Schatte v. International Alliance, 84 F. Supp. 669 (S.D. Cal. 1949).

[14] Fitzgerald v. Kictograph Products, Inc., 28 L.R.R.M. 2611 (1951).