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cusable.³⁸ And the question of excusability is one of law and therefore reviewable in every case.³⁹ The leading case for this principle is *Norton v. McLaurin*⁴⁰ wherein the court outlined the rules governing application of the statute. Upon entry of the motion to set aside, the judge finds the facts on which it is based, and these findings are conclusive on appeal when supported by the evidence. From such findings, he determines whether excusable negligence has been shown. And from this determination, either party may appeal. If he correctly determines the negligence is not excusable, that puts an end to the motion. If he correctly determines the negligence is excusable, then he may in the exercise of his discretion grant or deny relief, and it is his ruling in this particular that is reviewable only on a showing of abuse of discretion. Hence, as might be expected, most of the cases in the reports have turned on whether the legal ruling below was correct⁴¹ rather than whether the court had abused its discretion.⁴² The question of an abuse of discretion thus becomes pertinent only⁴³ where, as in the instant case, the supreme court decides that the trial court in vacating the judgment correctly held the negligence to be excusable.

DAVID M. McLELLAND.

Labor—Collective Bargaining Agreements—Union Liability for Damages Under the Taft-Hartley Act

On June 23, 1947, the Taft-Hartley Act¹ made labor unions liable in damages for the breach of collective bargaining agreements² and for injuries resulting from certain "unlawful" strikes and boycotts.³ In both types of cases the injured party is provided with unobstructed

³⁸ *Manning v. Roanoke & T. R. R.*, 122 N. C. 824, 28 S. E. 963 (1898); *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022 (1896); *State Bank, Ltd. v. Post Falls Land & Water Co.*, 29 Idaho 587, 161 Pac. 242 (1916). Movant must also show that he has a meritorious defense. *Craver v. Spaugh*, 226 N. C. 450, 38 S. E. 2d 525 (1946).

³⁹ *Marsh v. Griffin*, 123 N. C. 660, 31 S. E. 840 (1898); *Griel v. Vernon*, 65 N. C. 76 (1871); FREEMAN, *op. cit. supra*, note 31, §290 ("This discretion relates only to the question whether under the particular facts and circumstances disclosed the case is one which merits relief. . . . It has no relation to questions of law which may arise upon the facts, but such questions must, of course, be determined and be subject to review the same as any other matter of law.").

⁴⁰ 125 N. C. 185, 34 S. E. 269 (1899).

⁴¹ *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. 2d 266 (1946); *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. 2d 67 (1945); *Wachovia Bank & Trust Co. v. Turner*, 202 N. C. 162, 162 S. E. 221 (1931); *Sutherland v. McLean*, 199 N. C. 345, 154 S. E. 662 (1930); *Warren v. Harvey*, 92 N. C. 137 (1885).

⁴² *Brown v. Hale*, 93 N. C. 188 (1885); *Kerchner v. Baker*, 82 N. C. 169 (1880); *Bank of Statesville v. Foote et al.*, 77 N. C. 131 (1877).

⁴³ No case has been found wherein the trial judge denied the motion to set aside notwithstanding a legally correct ruling that movant's negligence was excusable.

¹ "Labor Management Act, 1947," 61 STAT. —, 29 U. S. C. A. §141 (Supp. 1947).

² *Id.* §185.

³ *Id.* §187.

access to the federal courts to enforce his rights, and the union treasury is subject to execution on the judgment. The person who has been injured by an "unlawful" strike or boycott has the additional privilege of seeking his remedy in any other court with jurisdiction over the parties.

The amenability of unions in state courts has been chaotic. About one third of the states have statutes making unincorporated associations suable in their common names, but some of these statutes have been judicially restricted to include only "business" associations. In states without statutes on the subject the case law is even more confused. Some accord unions the common law immunity⁴ of unincorporated associations, others utilize the devices of class suits or "waivable defect" or estoppel, while a few allow unions to be sued on grounds of policy and necessity.⁵

Whether a collective bargaining agreement be considered a treaty, or a mutually acceptable list of shop rules, or a common law contract has also been in a state of confusion.⁶ Congress considered the divergence among the states as to the status of collective bargaining agreements and as to the suability of unions to be an interference with collective bargaining and thereby a burden on interstate commerce. Therefore, Congress took the next logical step in encouraging collective bargaining by recognizing such agreements as binding contracts and opening the federal courts to insure a remedy.

The minority report of the Senate Committee⁷ attacked the constitutionality of the provision conferring upon the federal courts jurisdiction over suits for breach of contract "without regard to the citizenship of the parties."⁸ Such a suit would have to come within one of two possible grounds of judicial power as defined and required by the Constitution.⁹ There must be either diversity of citizenship, or the suit must be one "arising under [the] Constitution, [or] the laws of the United States," that is, it must involve a federal question. Since diversity of citizenship is not a prerequisite under the Taft-Hartley Act, the sole remaining source of judicial power is that of suits involving a federal question. The minority contended that suits on collective bargain-

⁴ *Hallman v. The Wood, Wire and Metal Lather's International Union*, 219 N. C. 798, 15 S. E. 2d 361 (1941); Note, *Suability of Unincorporated Associations in North Carolina*, 25 N. C. L. Rev. 319 (1947).

⁵ *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922); *Busby v. Electric Utilities Employees Union*, 147 F. 2d 865 (App. D. C. 1945); see generally: Witmer, *Trade Union Liability*, 51 YALE L. J. 40 (1941); Note, 33 CAL. L. REV. 444 (1945).

⁶ 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 492 (1940); GREGORY, LABOR AND THE LAW 378 (1946); HARRIS AND WILLIAMSON, TRENDS IN COLLECTIVE BARGAINING 58 (1945).

⁷ SEN. REP. No. 105, pt. 2, 80th Cong., 1st Sess. 14 (1947).

⁸ 61 STAT. —, 29 U. S. C. A. §185(a) (Supp. 1947).

⁹ U. S. CONST. Art. III §2.

ing agreements would not meet the requirements of the federal question type of judicial power in that such suits would involve primarily questions of state law and questions of fact.

The issue will arise when a suit in which the judgment is enforceable against the union treasury and not against the individual members is brought by or against a labor union in its common name for damages on a collective bargaining agreement that Congress has declared binding. Under such a state of facts, will the suit qualify as one "arising under [the] Constitution, [or] the laws of the United States" and thereby invoke the judicial power of the federal courts?

An affirmative answer to the proposition is called for by *Osborne v. The United States Bank* in which Chief Justice Marshall said:

"We think, then, that when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

"When a bank sues, the first question which presents itself, and which lies at the foundation of the cause is, has this entity a right to sue? . . . This depends on a law of the United States. . . . (This is an important question, and it exists in every possible case.)"¹⁰

The Act appears to give extraordinary privileges to a party bringing an action. The suit may be brought without regard to either diver-

¹⁰ 9 Wheat. 738, 823 (U. S. 1824). *Accord*, *Davis v. Slocumb*, 263 U. S. 158 (1923); *Tex. & Pac. R. R. v. Kirk*, 115 U. S. 1 (1885); *Lucking v. First National Bank—Detroit*, 142 F. 2d 528 (C. C. A. 6th 1944) (distinguished the *Gully* case); *Independence Shares Corp. v. Deckart*, 108 F. 2d 51 (C. C. A. 3d 1939) (suit under the Securities Act which specifically gives district courts "jurisdiction to enforce liability created by this title"); *Fishman v. Marcourse*, 32 F. Supp. 460 (E. D. Pa. 1940) (action under the Fair Labor Standards Act in which the court disposed of the jurisdictional question by tersely stating that district courts have jurisdiction of cases under laws regulating commerce); *McGoon v. Northern Pac. R. R.*, 204 Fed. 998 (E. D. N. D. 1913). *But cf.*, *Gully v. First National Bank*, 299 U. S. 109 (1936); *Puerto Rico v. Russell & Co.*, 288 U. S. 476 (1933); *Gold Washing & Water Co. v. Keyes*, 96 U. S. 199 (1877); *Costanzo Coal Mining Co. v. Weirton Steel Co.*, 150 F. 2d 929 (C. C. A. 4th 1945); *Burke v. Union Pacific R. R.*, 129 F. 2d 844 (C. C. A. 10th 1942) (The last two cases followed the *Gully* case literally.).

The author is not unaware of the force and implications of Mr. Justice Cardozo's opinion in the *Gully* case. It is submitted that the *Gully* case is distinguishable from the *Osborne* case and inapplicable to suits under the Taft-Hartley Act. The *Gully* case interpreted the amount of jurisdiction conferred on the federal courts by the Act of 1875, 18 STAT. 470 (1875), 28 U. S. C. §41(1) (1927), but a suit under the Taft-Hartley Act will not rely on the Act of 1875, because jurisdiction of such suits is expressly conferred upon the federal courts by the Taft-Hartley Act itself: "Suits for violation of contracts . . . may be brought in any district court . . .", 29 U. S. C. A. §185(a) (Supp. 1947).

For a complete discussion of "federal question" jurisdiction, see: Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943); Chadbourne and Levin, *Original Jurisdiction of Federal Questions*, 90 U. OF PA. L. REV. 639 (1942); Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362 (1942).

sity of citizenship or amount in controversy in any United States district court having jurisdiction of the parties. A district court is deemed to have jurisdiction of a union either in the district where the union maintains its principal office or in any district in which the authorized agents of the union are acting for employee members. Service of any legal process upon an authorized agent is deemed to constitute service on the labor organization. A money judgment is enforceable against the union treasury but not the members.

Actually the foregoing are not drastic changes from the prior procedure. Previously federal courts entertained class suits by and against unions where the requisite diversity of citizenship was present. Theoretically complete diversity of citizenship of all the members had to exist.¹¹ However, in practice the requisite diversity might readily be obtained by proper selection of representatives, for only the citizenship of the representatives need appear.¹² Furthermore, since suits under the Act will involve a federal question, it was superfluous to waive the necessity of diversity of citizenship. As to not requiring any specified jurisdictional amount, it should suffice to point out that Congress has not established a jurisdictional amount for many types of suits.¹³

Since the *Coronado* case¹⁴ and later by virtue of Federal Rule 17(b), suits to enforce a federal right have been brought in the common name of the unincorporated association. In passing, it is interesting to notice that Mr. Padway, the late general counsel of A. F. of L., testified at a hearing of the Judiciary Committee¹⁵ which adopted the above Federal Rule, to the effect that unions no longer feared being sued in their common name, "because we, too, have to sue . . . to obtain our rights." When a judgment is recovered in a suit against an unincorporated association in its common name, the common property is subject to execution.¹⁶ The Taft-Hartley Act insures against a recurrence similar to the *Danbury Hatters Case*,¹⁷ where individual members of the union had their houses sold at execution to pay the judgment, by exempting the property of the individual members from the judgment. Such a limited liability of union members is similar to that enjoyed by stockholders of a corporation—a natural corollary of allowing the unions to be sued as an entity.

Service of process under the Act seems slightly more liberal than

¹¹ 2 MOORE'S FEDERAL PRACTICE 2100 (1938).

¹² *International Allied Printing Trades Ass'n. v. Master Printers Union of N. J.*, 34 F. Supp. 178 (D. N. J. 1940).

¹³ 25 STAT. 433 (1911), 28 U. S. C. §41 (1927).

¹⁴ *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344 (1922).

¹⁵ *Hearings before the Judiciary Committee on H. R. 8892*, serial 17, 75th Cong., 3d Sess. (1938).

¹⁶ 1 MOORE'S FEDERAL PRACTICE 314 (1938).

¹⁷ *Loewe v. Lawlor*, 235 U. S. 522 (1914).

under the Federal Rules. The latter apparently requires valid service to be on a "process agent" by appointment or by law,¹⁸ whereas under the Act any agent is sufficient. The provision with regard to the districts in which suits may be brought is fortunately unequivocal,¹⁹ for, in the absence of a special venue statute, 28 U. S. C. A. §112 requires suits involving a federal question to be brought in the district where the defendant is an "inhabitant." The confusion which has resulted as to where a defending unincorporated association is an "inhabitant"²⁰ is avoided by the Act's explicit provisions concerning venue.

In 1902, Mr. Justice Brandeis, considered a friend of labor, declared: "The unions should squarely take the position that they are amenable to the law."²¹ Mr. Padway testified in 1938 that labor no longer feared being sued as an entity.²² In 1947, why do unions object to being sued for breach of contract when only the contracting employers or other unions may sue and only the common property of the union is subject to execution?

A partial reason may be that unions still have an inherent fear of lawyers and courts. This fear is not unfounded. In courts, the rights of unions may be determined on technicalities and not on the merits of the labor dispute. This is especially likely because presiding judges are fully equipped to be judges in courts of law but not necessarily statesmen in the field of labor relations.

Liability for damages resulting from wildcat strikes in breach of "no-strike" clauses has been attacked by the unions on the grounds that it imposes liability for acts beyond union control. It is a well known fact that unions have not always been successful in controlling the rank and file of their members. Moreover, it may be more difficult to obtain discipline in light of the provisions in the Taft-Hartley Act insuring the rights of individual employees²³ and discouraging union security agreements.²⁴ Although the Act expressly states that a union is "bound by the acts of its agent"²⁵ and that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling,"²⁶ the Act does not transform unions into insurers.

¹⁸ FED. R. CIV. P., 4(d)(3).

¹⁹ 61 STAT. —, 29 U. S. C. A. §185(c) (Supp. 1947) (Suits may be brought in any district court having jurisdiction of the parties. Courts shall be deemed to have jurisdiction of unions either in the district in which it maintains its principal office or in any district where its agents are engaged in representing employee members.)

²⁰ United States v. Sutherland, 74 F. 2d 89 (C. C. A. 8th 1934).

²¹ Address before the Economics Club of Boston, December 4, 1902.

²² See note 16, *supra*.

²³ 61 STAT. —, 29 U. S. C. A. §§141(b), 157, 158(a)(1), 158(a)(3), 158(b)(1), 158(b)(2), 158(b)(5), 159(a), 159(c)(1)(A).

²⁴ *Id.* §§158(a)(3), 158(b)(2), 158(b)(5), 159(e through h), 186(c)(4).

²⁵ *Id.* §185(b).

²⁶ *Id.* §§152(13), 185(e). These sections render inapplicable the test of union

Instead, unions, like employers, are subject to the common law rules of agency—"scope of employment, etc." A union member is not an "agent" solely by virtue of his membership.²⁷

In former agreements the "no-strike" provisions have been so loosely drafted, *e.g.*, "The Union . . . agrees . . . there shall be no strikes, walk-outs, slow-downs or other interference with normal operation . . .," that unions have apparently assumed the role of insurers. In the future such a consequence may be avoided by precisely defining in just which cases the union assumes responsibility.

Some unions have advocated refusing "no-strike" clauses, but others, like the Boilermakers—A. F. of L., say the presence or absence of no-strike clauses is immaterial, for arbitration machinery implies an obligation not to strike. On the question of the legality of refusing to insert a "no-strike" clause, the Senate Committee reported such a clause was a point to be bargained for.²⁸

Unions are currently attempting to obtain a waiver of damage liability for breach of contract from employers. The availability of such waivers as valid defenses to damage suits is open to question. In other fields of litigation, although some courts have upheld waivers not to sue,²⁹ federal courts have held such waivers to be contrary to public policy and void.³⁰

The clauses for waiver of damage liability which unions are currently attempting to secure may possibly be distinguished from the usual exculpation clause which confronts courts. In the first place, these waivers by employers are of unions' contractual liability, in contrast with the usual exculpation clauses which waive liability for negligence. The greatest distinction is that the parties are roughly equal in bargaining power.³¹ According to press reports, in the Murray, the Ford and the International Harvester agreements with the UAW—CIO, the employers agreed to a partial waiver of damage liability in consideration of prompt specified action by the union to get wildcat strikers back on the job plus the right to fire the strikers through an impartial umpire. Thus the employer has traded his action for damages for uninterrupted production.

"agents" set forth in Section 6 of the Norris-LaGuardia Act. See Mr. Justice Frankfurter's dissent in *United Brotherhood of Carpenters and Joiners of America v. United States*, 67 Sup. Ct. 775 (March 10, 1947).

²⁷ 93 CONG. REC. 4561 (May 2, 1947).

²⁸ SEN. REP. NO. 105, 80th Cong., 1st Sess. 18 (1947).

²⁹ *Smith v. MacDonald*, 37 Cal. App. 503, 174 Pac. 80 (1918); *Kennon v. Shepard*, 236 Mass. 57, 127 N. E. 426 (1926).

³⁰ *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (C. C. A. 6th 1944); *American Sugar Refining Co. v. Anaconda*, 138 F. 2d 765 (C. C. A. 5th 1943). See *Tobin Quarries v. Central Neb. Public Power and Irrigation Dist.*, 64 F. Supp. 200, 208 (D. C. Neb. 1946).

³¹ Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 COL. L. REV. 249 (1937).

Furthermore, the Conference Committee deleted a provision which made the breach of collective bargaining agreements an unfair labor practice.³² From this action it might be inferred that Congress intended redress for breach of contract to be a personal privilege rather than an unwaivable enforcement device. Contrast the silence of the Taft-Hartley Act on this point with the Federal Employers' Liability Act wherein Congress expressly declared "any contract . . . to exempt [an employer] from any liability created by this chapter . . . shall be void."³³

Limitation of the amount of damages may be another mode by which labor may protect itself against the ravages of damage liability. Nothing in the Act seems to prohibit bargaining for such a clause.

In contrast with contractual liability which may be minimized or totally avoided through bargaining, damage liability for "unlawful" strikes and boycotts (also unfair labor practices)³⁴ may be an unwaivable enforcement device. "Whoever shall be injured in his business or property" by an "unlawful" strike or boycott may sue the union in either the federal courts or the state courts. The language is comparable with the Sherman Act's provision for actions for treble damages. Although the actual damages are not augmented in the Taft-Hartley Act, damage liability, along with administrative cease and desist orders and court injunctions, will provide an important sanction for policing those outlawed labor practices.

This liability may prove detrimental to labor-management relations, if time and experience prove Congress went too far in outlawing all secondary strikes and boycotts without attempting to distinguish those which are unjustified from those justified by the union's "interest in a reasonable area of economic conflict."³⁵

Like so many features of the Taft-Hartley Act, liability for "unlawful" strikes and boycotts is open to abuse. It may lead to a plethora of suits against unions. An ever present and potential culprit is the anti-union employer. He will hesitate before bringing a breach of contract suit against the union with which he bargains,³⁶ but he may have no qualms about bringing vexatious suits against a union with which he has no collective bargaining relations.

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³² H. R. REP. No. 510, 80th Cong., 1st Sess. 41 (1947).

³³ 35 STAT. 66 (1908), 45 U. S. C. §55 (1943).

³⁴ 61 STAT. —, 29 U. S. C. A. §158(b)(4) (Supp. 1947).

³⁵ It is submitted that the following cases involve boycotts of the latter type: *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th 1908); *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177 (1904).

³⁶ The fact that no suits have been prosecuted under N. C. GEN. STAT. (1943) §1-97(6), which apparently authorizes suits against unions, during the four years since its enactment is indicative that employers do not lust to sue unions.