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counseled indigent include only a trial record and *pro se* submissions. Conspicuously absent are the prior assistance of counsel in examination of the trial record and preparation of arguments to the appellate court, and an intermediate appellate court once passing on those claims.⁸⁹ The inference is compelling that this treatment falls below the line of adequacy drawn in *Ross*, thus giving rise to a constitutional right to counsel.

CONCLUSION

Over a decade ago the Supreme Court, examining the rights of indigent persons, stated that "[t]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."⁹⁰ More recently, in finding a sixth amendment guarantee of counsel at trial whenever there exists a possibility of a prison sentence, the Court felt that "the adversary system functions best and most fairly only when all parties are represented by competent counsel."⁹¹ *Ross v. Moffitt*, in disposing of a constitutional claim of right to counsel on discretionary appeals in all but atypical situations, contrasts strikingly with these principles. A state's highest court, as final arbiter of interpretation of state common law, might provide the most meaningful review of a criminal conviction.⁹² This fact is unaffected by whether access to that court is by right or discretion. *Ross* describes certiorari practice as a "somewhat arcane art."⁹³ If this be true, lawyers, not *pro se* indigent appellants, should unravel its mysteries.

STANLEY D. DAVIS

Labor Law—Preemption of State Damage Remedies for Discharge

Since the Taft-Hartley amendments to the National Labor Rela-

89. See text accompanying note 32 *supra*.

90. *Coppedge v. United States*, 369 U.S. 438, 449 (1962).

91. *Argersinger v. Hamlin*, 407 U.S. 25, 65 (1972) (Powell, J., concurring).

92. See, e.g., *State v. Dix*, 282 N.C. 490, 193 S.E.2d 897 (1973), *rev'g* *State v. Dix*, 14 N.C. App. 328, 188 S.E.2d 737 (1972) (modifying elements of common law kidnapping relied on by lower court).

93. 417 U.S. at 616.

tions Act¹ excluded supervisors² from the protection of the Act,³ the question of whether supervisors could be protected by state law has gone unanswered. In *Beasley v. Food Fair, Inc.*⁴ the United States Supreme Court faced this question squarely⁵ and held that the remedy, granted by North Carolina's Right-to-Work Law,⁶ for discharge because of union membership was preempted by section 14(a)⁷ of the National Labor Relations Act.⁸ In reaching this conclusion, the Court appears to have relied on the policy rather than the language of section 14(a). As a result, the impact of section 14(a) on state laws regulating the conduct of supervisors will be much more devastating than was intended by Congress.⁹

The petitioners, managers of meat departments in respondent Food Fair's stores, were discharged because of their union membership. Their union filed charges with the National Labor Relations

1. Labor-Management Relations Act, 29 U.S.C. §§ 151-64 (1970).

2. *Id.* § 152(11) provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

3. *Id.* § 152(3) provides in the relevant portion as follows: "The term employee . . . shall not include . . . any individual employed as a supervisor . . ."

4. 416 U.S. 653 (1974).

5. *Id.* at 657.

6. N.C. GEN. STAT. §§ 95-78 to -84 (1965). The relevant sections provide as follows:

§ 95-81. . . . No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

§ 95-83. . . . Any person who may be denied employment or be deprived of continuation of his employment in violation of . . . § 95-81 . . . shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

7. 29 U.S.C. § 164(a) (1970). This section provides as follows: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

8. 416 U.S. at 658.

9. Congressional intent is evidenced by the Senate Committee on Labor and Public Welfare Report on the Labor-Management Relations Act. S. REP. No. 105, 80th Cong., 1st Sess. (1947). The relevant language is: "This is a new section which makes it clear . . . that it is contrary to national policy for other Federal or state agencies to compel employers . . . to treat supervisors as employees for the purpose of collective bargaining or organizational activity." *Id.* at 28.

Board alleging violation of section 8(a)(1)¹⁰ of the National Labor Relations Act. The Regional Director refused to issue a complaint, and the General Counsel denied the appeal that followed on the ground that petitioners were supervisors¹¹ and therefore not entitled to the protections of the Act.¹²

Following the refusal to issue a complaint, the petitioners sued in North Carolina Superior Court alleging that their discharge violated sections 95-81 and 95-83¹³ of North Carolina's Right-to-Work Law. The trial court granted summary judgment to the respondents on the ground that the second clause of section 14(a)¹⁴ of the National Labor Relations Act prohibited enforcement of the State law in favor of supervisors.¹⁵ The North Carolina Court of Appeals reversed, holding that the State law was not preempted.¹⁶ The court reasoned that since supervisors are excluded from the protections of the National Labor Relations Act¹⁷ their activities could not fall within the "arguably prohibited or arguably protected" test for preemption.¹⁸ The North Carolina Supreme Court reversed and reinstated the trial court decision.¹⁹

The United States Supreme Court granted certiorari²⁰ and affirmed the decision of the North Carolina Supreme Court. It reasoned as follows:

the second clause of §14(a) relieving the employer of obligations under "any law, either National or local, relating to collective bargaining" applies to any law that requires an employer "to accord to

10. 29 U.S.C. § 158(a)(1) (1970). This section makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the right to form, join, or assist labor organizations." The theory of the union was that the discharge of supervisors would interfere with the organizational activities of the employees; if supervisors are discharged because of union membership, other employees might think they also could be discharged. Such subtle coercion by employers violates section 8(a)(1) and will be remedied by an order for reinstatement with back pay of the discharged supervisors. *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836 (5th Cir.) (per curiam), *cert. denied*, 355 U.S. 864 (1957); *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954).

11. The union had asked for and been granted a representation election by the Board prior to the discharge. In considering the election petition, the Board had determined the petitioners were supervisors and had excluded them from the bargaining unit. This finding was a clear and binding determination of the petitioners' supervisory status.

12. See text accompanying note 28 *infra*.

13. See note 6 *supra*.

14. See note 7 *supra*.

15. 416 U.S. at 656.

16. 15 N.C. App. 323, 329-30, 190 S.E.2d 333, 337 (1972).

17. See note 28 and accompanying text *infra*.

18. See text accompanying note 33 *infra*.

19. 282 N.C. 530, 193 S.E.2d 911 (1973).

20. 414 U.S. 907 (1973).

the front line of management the anomalous status of employees." Enforcement against respondent in this case of §§ 95-81 and 95-83 would plainly put pressure on respondent "to accord to the front line of management the anomalous status of employees" and would therefore flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees.²¹

To appreciate the complex nature of the policies underlying the *Beasley* decision, it will be helpful to review the treatment of supervisors under both the National Labor Relations Act and state law.

Prior to the 1947 Taft-Hartley amendments, the status of supervisors under the National Labor Relations Act was unclear. Congress had not elected to exclude them from the definition of employee.²² Yet, when supervisors organized a union, the National Labor Relations Board's policy was that such an organization of supervisors could not be an appropriate bargaining unit.²³ This discrepancy between the language of the statute and the Board's interpretation of that language was resolved in *Packard Motor Co. v. NLRB*,²⁴ in which the United States Supreme Court said, "we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests."²⁵ Congress reacted to this decision by including sections 2(3), 2(11), and 14(a) in the 1947 Taft-Hartley amendments.²⁶ Its purpose was to remove supervisors from the protections of the Act and to relieve employers "from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees."²⁷ Since the passage of those sections, the National Labor Relations Act has afforded no protection to supervisors who have been discharged for union activity.²⁸

21. 416 U.S. at 662.

22. Ch. 372, § 2, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(3) (1970) read as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse

23. *Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

24. 330 U.S. 485 (1947).

25. *Id.* at 490.

26. See notes 2, 3, and 7 *supra*.

27. S. REP. No. 105, *supra* note 9, at 5.

28. *NLRB v. Big Three Welding Equip. Co.*, 359 F.2d 77 (5th Cir. 1966); *NLRB*

Subsequent to the amendments the United States Supreme Court first faced the issue of state regulation of supervisor activity in *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Association*.²⁹ In that case plaintiffs brought suit under Wisconsin's anti-picketing statute to enjoin the union from picketing plaintiffs' vessels. The Supreme Court of Wisconsin affirmed³⁰ the trial court's dismissal for lack of jurisdiction over the subject matter because the picketing was arguably prohibited by the National Labor Relations Act and, thus, state regulation of the activity was preempted. The Supreme Court reversed, holding that the Act did not preempt the state regulation under the circumstances of the case.³¹ The Court first summarized the ground rules for preemption in labor law:³² "[I]n general, a State may not regulate conduct arguably 'protected by § 7, or prohibited by § 8' of the National Labor Relations Act, . . . and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulations. . . ."³³ Because of an earlier Board decision that Hanna's engineers were supervisors,³⁴ the Court said their activities could not be arguably protected by section 7 or prohibited by section 8, thus removing this ground for preemption.³⁵ The Court then considered whether "legislative purpose" required preemption. The union argued that the first clause of section 14(a) of the Act—"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"—signified a policy of *laissez faire* toward supervisors that ousted both federal and state authority over supervisors' conduct.³⁶ In response, the Court stated: "This broad argument fails utterly in light of the legislative history, for the Committee reports re-

v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir. 1960); *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951), *cert. denied*, 342 U.S. 908 (1952); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949). *But see* cases cited note 10 *supra*.

29. 382 U.S. 181 (1965).

30. 23 Wis. 2d 433, 127 N.W.2d 393 (1964), *rev'd*, 382 U.S. 181 (1965).

31. 382 U.S. at 194.

32. The development of federal preemption in labor law has been thoroughly analyzed in Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

33. 382 U.S. at 187. In essence, section 7 protects the rights of employees to self organization and collective bargaining. Section 8 lists a number of activities prohibited as unfair labor practices.

34. In *Hanna*, as in *Beasley*, the Board had made an earlier determination that the employees involved were supervisors and thus, were not subject to the protections of the National Labor Relations Act. *See* note 11 *supra*.

35. 382 U.S. at 188.

36. *Id.* at 189.

veal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees."³⁷ However, since the state law involved in *Hanna* protected the employer by allowing him to petition the state courts for an injunction against picketing, the Court concluded that this legislative purpose would not be violated by allowing the state injunction.³⁸ The question remaining after *Hanna* was whether "legislative" purpose would require the preclusion of a state law protecting the supervisor, rather than the employer.

In *Beasley* the United States Supreme Court began its inquiry by stating that *Hanna* had construed only the first clause of section 14(a) and in doing so had allowed state regulations only when such regulation furthered, not hindered, the "legislative purpose" of the Act.³⁹ *Hanna* did not, in the Court's view, foreclose preemption in cases like *Beasley* in which state regulations violated the command of the second clause of section 14(a).⁴⁰

At this point the Court turned to the petitioners' contention that state damage remedies for discharge because of union membership do not come within the ambit of the second clause of section 14(a)—"no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"—because they do not relate to *collective bargaining*. Examination of the Court's attempt to dispose of this contention discloses a weak link in the Court's chain of logic.

The petitioners argued that because of the phrase "relating to collective bargaining," the second clause of section 14(a) was a "limited prohibition against state regulations that compel an employer to bargain collectively with unions that include supervisors as members,"⁴¹ and that state damage remedies for discharge because of union membership would not violate such a prohibition. The Court rejected this construction as too narrow. It stated that Congress' intention in passing sections 2(3), 2(11), and 14(a) was to "redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed inter-

37. *Id.*

38. *Id.* at 190.

39. 416 U.S. at 657.

40. *Id.*

41. *Id.* at 658.

ests."⁴² Thus, the Court concluded that state damage remedies like sections 95-81 and 95-83 of the North Carolina General Statutes would, if applied, contradict this policy.

Unquestionably, Congress was concerned that, when supervisors join unions, conflicts might result because of the supervisors' divided loyalties between the employer and the rank and file workers.⁴³ It is equally clear that a law that might force an employer to retain a supervisor who belongs to a union would be within that concern.⁴⁴ It does not, however, follow that such a law necessarily is one "relating to collective bargaining" as required by the second clause of section 14(a).⁴⁵ The fact that an employer may be forced to retain a supervisor does not mean that he will also be forced to bargain with the supervisor either collectively or individually. The employer cannot be compelled to bargain with or about supervisors under federal law,⁴⁶ and the second clause of section 14(a) seemingly would prevent a similar compulsion under state law.⁴⁷ The legislative history as discerned in *Hanna* supports this conclusion.⁴⁸

Beasley's failure to follow the specific language of the second clause of section 14(a) may have unforeseen consequences. First, the Court's disregard of the "relating to collective bargaining" language extends the prohibition of 14(a) to any law that requires an employer to deem a supervisor an employee for *any purpose*. Since any state

42. *Id.* at 661-62.

43. The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

H.R. REP. No. 245, 80th Cong., 1st Sess. 14 (1947); S. REP. No. 105, *supra* note 9.

44. The North Carolina remedy for discharge arguably could have this effect since the employer would either have to retain the supervisor or be liable in money damages for his discharge.

45. The North Carolina law does not compel an employer in any way. It merely subjects him to liability for discrimination in employment on the basis of union membership or non-membership. N.C. GEN. STAT. § 95-83 (1965).

46. *NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169 (2d Cir. 1968); *West Pa. Power Co. v. NLRB*, 337 F.2d 993 (3d Cir. 1964); *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697 (5th Cir. 1964); *NLRB v. Retail Clerks Int'l Ass'n*, 203 F.2d 165 (9th Cir. 1953).

47. *See* note 7 *supra*.

48. *See* text accompanying note 37 *supra*.

law that offers protection to supervisors would require an employer to so deem a supervisor,⁴⁹ all such laws will be preempted. This result seems to go beyond the specific intent of Congress in passing section 14(a).⁵⁰

Secondly, in view of the Court's disregard of the language of section 14(a), it could be argued that the Court, in reaching its decision to preempt, relied primarily on the general policy supporting the exclusion of supervisors from the *federal* act.⁵¹ This argument could easily be extended to preempt state laws that offer protection to other classes of persons excluded from the National Labor Relations Act. If successful, this would leave agricultural and domestic workers⁵² in the same situation that *Beasley* has left supervisors—without any protections under either federal or state laws. Again, it is questionable whether Congress intended such a result.⁵³

Because of the questions raised by *Beasley* about the continued effectiveness of state laws that protect those excluded from the National Labor Relations Act, congressional action is imperative. Congress should amend the National Labor Relations Act to allow supervisors to organize and bargain with their employers under the protection of the Act so long as they do not join unions composed of rank and file employees. This action would solve the problem of conflicting loyalties owed to the employer and the rank and file. At the same time, such amendments would place supervisors on a more equal footing with the employer in bargaining about working conditions, wages, and tenure.

THOMAS WARREN ROSS

49. Any law that affords supervisors any rights and protections similar to those granted to employees under the National Labor Relations Act would seem to be a law "which compels an employer to deem a supervisor as an employee."

50. See note 9 *supra*.

51. See text accompanying note 21 *supra*. The language quoted by the Court is the same as that used by Congress when it considered the exclusion of supervisors from the federal Act. See text accompanying note 27 *supra*.

52. 29 U.S.C. § 152(3) (1970) excludes both agricultural and domestic workers from the definition of "employee" and thus denies them the protections of the Act.

53. Had Congress intended to preclude state as well as federal protection of these persons it could easily have so provided.