Journal of Air Law and Commerce

Volume 39 | Issue 2 Article 7

1973

Case Notes

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LABOR LAW—HOT CARGO CONTRACTS—Hot Cargo Contracts Executed Between RLA "Carriers by Air" and Labor Organizations Violate the Unfair Labor Practice Sections of the LMRA. *International Association of Machinists and Aerospace Workers, AFL-CIO and Lufthansa German Airlines and Marriott In-Flite Services, Division of Marriott Corporation*, Case No. 31-CE-28, May 31, 1972, 197 N.L.R.B. no. 18; 80 L.R.R.M. 1305.

Lufthansa airlines entered into a labor agreement with the International Association of Machinists (IAM). The agreement provided that Lufthansa would cease doing business with nonunion caterers and would hire only from union approved lists. Lufthansa then notified Marriott, a nonunion caterer, of the termination of their contracts at both the Chicago and Los Angeles airports.[1] Marriott claimed that the agreement was an illegal hot cargo contract proscribed by the Labor Management Relations Act (LMRA)[2] and was granted a temporary injunction preventing the cancellation of the contracts. *Held, Cease and Desist*: Hot cargo contracts executed between Railway Labor Act (RLA)[3] "carriers by air" and labor organizations violate the unfair labor practice sections of the LMRA. The term "employer" used in the hot cargo prohibition includes "carriers by air" even though the LMRA definition of "employer"[4] excludes any person subject to the RLA. *International Association of Machinists and Aerospace Workers, AFL-CIO and Lufthansa German Airlines and Marriott In-Flite Services, Division of Marriott Corporation*, Case No. 31-CE-28, May 31, 1972, 197 N.L.R.B. no. 18; 80 L.R.R.M. 1305.

The LMRA contains a carefully drafted set of definitions applicable to Subchapter II of the National Labor Relations Act. This sub-

[1] An insignificant contract between Lufthansa and Marriott concerning minimal catering operations at the Boston Airport was not affected by the new agreement.

[2] Labor Management Relations Act, 29 U.S.C. §§ 1-651 (1970).

[3] Railway Labor Act, 45 U.S.C. §§ 1-661 (1970).

[4] Labor Management Relations Act § 2(1), 29 U.S.C. § 152(1) (1970). *See* NLRB v. American Federation of Television and Radio Artists, 291 F. Supp. 409 (D. Md. 1968).

chapter contains the unfair labor practice provisions invoked by Marriott to prevent the cancellation of its catering contracts. A preliminary examination of the statutory definition of "employer"[5] and its relation to both the hot cargo and secondary boycott provisions of the LMRA will facilitate an understanding of the Board's opinion. The term "employer" is negatively defined by a listing of certain classes of employers excluded from coverage under Subchapter II of the Act. According to the definition, any person subject to the RLA is excluded. Lufthansa airlines is covered by the RLA because common carriers by air engaged in interstate and foreign commerce are accorded labor treatment under section 181 of the RLA.[6] Previous judicial interpretations of the term "employer" have not included carriers such as Lufthansa that are within the RLA jurisdiction.[7]

Marriott charged Lufthansa with violating fair labor practices by entering into a hot cargo contract proscribed by section 8(e) of the LMRA.[8] This section bans any express or implied agreement between "*any labor organization and any employer*" in which the employer agrees to cease doing business or refrain from handling the products of any other person.[9] The secondary boycott provi-

[5] "The term 'employer' includes any person acting as agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any corporation or association operating a hospital . . . or *any person subject to the Railway Labor Act. . . .*" Labor Management Relations Act § 2(2), 29 U.S.C. § 152(2) (1970) (emphasis added). *See* Teamsters Local 25 v. New York, N.H. & H. R. Co., 350 U.S. 155 (1956); Bruno v. Northeast Airlines, Inc., 229 F. Supp. 716 (D. Mass. 1964).

[6] "All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service." Railway Labor Act § 181, 29 U.S.C. § 181 (1970). *See* Bullock v. Capital Airways, Inc., 176 F. Supp. 449 (E.D.N.Y. 1959).

[7] *See* note 5 *supra.*

[8] Labor Management Relations Act § 8(e), 29 U.S.C. § 158(e) (1970).

[9] "It shall be an unfair labor practice for any labor organization and any *employer* to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcable and void. . . ." Labor Management Relations

sion, section 8(b)(4)(B),[10] is closely related to the hot cargo prohibition. It prohibits the encouragement or inducement of strikes or refusals to work when the object of the secondary activity is to require "any person" to cease doing business with any other "person."[11] Secondary boycotts can be effective tools in enforcing hot cargo contracts by exerting pressure on neutral employers to boycott or strike against an employer who is not complying with a hot cargo contract.[12] When section 8(b)(4)(B) was amended, however, it was carefully worded to avoid using the term "employer;" instead, it applies to "any individual employed by any person engaged in commerce" or in any industry affecting commerce.[13] In deciding whether to enjoin permanently the cancellation of the Marriott catering contracts, the Board was forced to decide the jurisdictional scope of the hot cargo prohibition: Should the word "employer" used in section 8(e) be construed in terms of the statutory definition that excludes carriers covered by the RLA or should it be given the extended jurisdictional scope of a related provision, section 8(b)(4)(B)?

The National Labor Relations Board relied almost exclusively on legislative history in deciding that Lufthansa should be considered an "employer" within the scope of the section 8(e). Section 8(e) was added to the LMRA as part of the Labor-Manage-

Act § 8(e), 29 U.S.C. § 158(e) (1970) (emphasis added). *See* United Bhd. of Carpenters and Joiners of America, AFL-CIO v. NLRB, 332 F.2d 636 (3d Cir. 1964).

[10] Labor Management Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970).

[11] "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage *any individual employed by any person engaged in commerce* . . . to engage in a strike or a refusal . . . to use, manufacture, process, transport or otherwise handle any . . . commodities . . . where . . . an object thereof is forcing or requiring any person to cease using, selling, handling . . . the products of any other producer . . . or manufacturer, or to cease doing business with any other person. . . ." Labor Management Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1970) (emphasis added). *See* NLRB v. Servette, Inc., 377 U.S. 46 (1964); Riverside Coal Co. v. United Mine Workers of America, 410 F.2d 267 (6th Cir. 1969), *cert. denied*, 396 U.S. 846 (1969); Honolulu Typographical Union No. 37 v. NLRB, 401 F.2d 952 (1968); Big Apple Supermarkets, Inc. v. Dutto, 237 F. Supp. 774 (E.D.N.Y. 1965).

[12] Section 8(b)(4)(B) was intended to protect the neutral employers against secondary pressures. The purpose of the statute was to prevent a union engaged in a primary strike against employer A from putting pressure on A by inducing the employees of employer B to stop work with the object of compelling B to cease doing business with A.

[13] *See* note 10 *supra.*

ment Reporting and Disclosure Act of 1959.[14] The inclusion of the hot cargo proscription was the congressional response to a Supreme Court decision stating that under existing labor statutes hot cargo contracts were not illegal per se.[15] Originally, Senator Albert Gore introduced a bill before the Senate banning all hot cargo contracts executed between "*any labor organization and any employer who is a common carrier subject to Part II of the Interstate Commerce Act.*"[16] Senator Gore's proposal had a limited scope since Part II of the Interstate Commerce Act covers only certain classes of "motor carriers" and would not have included any person subject to the RLA.[17] House Representatives Landrum and Griffin recognized the limited scope of Senator Gore's proposal.[18] Representative Landrum served as spokesman for the House stating: "[I]f such contracts are bad in one segment of our economy they are undesirable in all segments."[19] As a result, the house omitted the Part II Interstate Commerce restriction of Senator Gore's proposal and adopted section 8(e) in its present form. In the numerous pages of legislative history accompanying the House activity, no discussion expanding the statutory definition of "employer" can be found.[20] Nevertheless, the Board in *Lufthansa* was persuaded that the strong intent to enlarge the narrow scope of Senator Gore's proposal was a sufficient basis on which to determine that use of the term "employer" in section 8(e) was in a generic rather than statutory sense.

In reaching its decision, the Board also relied on the legislative history of the amendments to the secondary boycott provisions made in 1959. The wording of the original secondary boycott section allowed the creation of several loopholes in the application of the prohibition; *i.e.* it only proscribed secondary activity when

[14] Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, Pub. L. No. 86-257 (Sept. 14, 1959).

[15] United Bhd. of Carpenters and Joiners of America, AFL v. NLRB, 375 U.S. 93 (1958).

[16] S. REP. No. 187, 86th Cong., 1st Sess. (1959) (emphasis added).

[17] Part II of the Interstate Commerce Act is applicable to "motor carriers." *See* 49 U.S.C. § 302 (1970). *See* United States v. Aides, 211 F. Supp. 122 (E.D. Pa. 1962); Gerut v. Poe, 11 F.R.D. 281 (1951); Gibson v. Glasgow, 178 Tenn. 273, 157 S.W.2d 814 (1942).

[18] 105 CONG. REC. 15532 (1959) (remarks of Representative Griffin).

[19] 105 CONG. REC. 14343 (1959) (remarks of Representative Landrum).

[20] H.R. REP. No. 741, 86th Cong., 1st Sess. 80 (1959).

conducted by "employees of any employer."[21] In 1959 this wording was amended to include secondary activity conducted by "any individual employed by any person."[22] In adopting this amendment Congress indicated that the term "employer" was removed to permit the application of the secondary boycott proscription to all employers. In its decision, the Board applied the legislative history of section 8(b)(4)(B) to section 8(e) reasoning that both sections were part of the 1959 congressional response intended to close loopholes in the application of the unfair labor practice sections.[23] To give the hot cargo proscription a narrower jurisdictional scope than the secondary boycott prohibition would, in the Board's opinion, create another loophole requiring further amendments to the complex sections.

In placing extensive reliance on legislative history, the Board refused to examine objectively the chain of events preceding the enactment of section 8(e) and the amendments to section 8(b)(4). The Supreme Court gave full effect to the exclusions contained in the statutory definition of "employer" and ruled that section 8(b)(4) does not include any individual employed by any person subject to the RLA.[24] Congress considered this ruling as the creation of a loophole that permitted the secondary boycott activity by all employers excluded from the statutory definition. Thus, in 1959, the 86th Congress removed the word "employer" from section

[21] As enacted in 1947, section 8(b)(4)(A) of the LMRA made it an unfair labor practice for a labor organization to induce or encourage the "employees of any employer" to engage in a strike or other "concerted activity" where an object of such activity was to force or require any employer or person to cease doing business with any other person. The wording of the original section allowed several loopholes in the application of the prohibition since its jurisdictional reach was restricted to statutory employers. In 1959, the 86th Congress changed the wording of section 8(b)(4) by substituting the word "individual" for "employees" and by substituting "person" for the word "employer." By removing the controversial words "employers" and "employees" it would appear that Congress intended to make the new section applicable to all employers, no longer excluding those covered by the Railway Labor Act. *See* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1112-21 (1960).

[22] *Id.*

[23] United Bhd. of Carpenters and Joiners of America, AFL v. NLRB, 375 U.S. 93 (1958); *see* note 24 *infra*.

[24] The Supreme Court affirmed a previous NLRB decision stating that section 8(b)(4)(A) did not include any individual employed by any person subject to the Railway Labor Act. The Court's decision upheld the separation for Railway Labor Act employers and thus reinforced the statutory definition of "employer." International Rice Milling Co. v. NLRB, 341 U.S. 665 (1951).

8(b)(4) and substituted the word "person." A few days later, motivated by another Supreme Court decision that declared that hot cargo contracts were not illegal per se under existing labor statutes,[25] Congress enacted section 8(e). There can be no denial that the close relationship between hot cargo contracts and secondary boycotts was recognized by these legislators, but there also can be no denial that the drafters were aware of the interpretation given to the statutory definition of "employer" by the Supreme Court. Therefore, in light of this reasoning and in the absence of any clear expression to the contrary, the word "employer" in section 8(e) should be enforced according to the statutory definition of "employer" as interpreted by the Supreme Court.

The Board's extensive reliance on legislative history is questionable without other corroborating evidence. The length of the Labor-Management Reporting and Disclosure Act of 1959[26] and the voluminous legislative history make it possible to edit congressional remarks to support diverse positions; *i.e.* although there are congressional remarks supporting the Board's conclusion to read sections 8(e) and 8(b)(4)(B) conjunctively, other legislative history can be interpreted to show that no conjunctive reading was intended. Senator Barry Goldwater, the author of section 8(b)(4)(B) remarked:

> [T]he word 'person' is used in the proposed amendments to the secondary boycott provision rather than 'employer' . . . to extend the provisions . . . to public employers, railroads or agricultural enterprises *without subjecting them to other provisions of the Act.*[27]

The Board's decision was based on a conjunctive reading of sections 8(b)(4)(B) and 8(e). The original version of section 8(b)(4)(B) contained a hot cargo clause that was later deleted by the Conference Committee.[28] The Board interpreted this deletion as conclusive proof that a conjunctive reading was intended; the omission of the phrase, according to the Board's analysis, served as an avoidance of the duplication between the two sections. The possibility does exist, however, that the hot cargo clause was deleted from section 8(b)(4)(B) because it was not intended to

[25] *See* note 15 *supra.*

[26] *See* note 14 *supra.*

[27] 105 CONG. REC. 6428 (1959) (remarks of Senator Goldwater).

[28] Conf. Rep. No. 1147, 86th Cong., 1st Sess., § 704 A-Boycotts (1959).

have the broad jurisdictional reach given to the secondary boycott prohibition. The retention of the ban in section 8(b) would have been sufficient to make the hot cargo contracts illegal per se in the same broad language used to make the secondary boycotts an unfair labor practice. Separating the hot cargo and secondary boycott proscriptions into two distinct provisions would only have been necessary if secondary boycotts and hot cargo contracts were to have a different jurisdictional application.

Finally, the Board in *Lufthansa* reinforced its decision to expand the statutory definition of "employer" and consequently the scope of the hot cargo section by relying on a statement found in *Ohio Valley Carpenters District Council.*[29] The Board reasoned, in accordance with *Ohio Valley*, that it made little sense to uphold a hot cargo contract as valid under the terms of section 8(e) if the enforcement of the contract was forbidden under the secondary boycott provisions. This reasoning however, contradicts the very terms of section 8(e) because Congress explicitly recognized that in certain situations, *i.e.* the construction and clothing manufacturing industries,[30] hot cargo contracts should be permitted even though the tools traditionally used for enforcing the contracts had been completely removed. Therefore, a resolution of the issue presented in *Lufthansa* more reconcileable with the terms of section 8(e) would have been to consider the use of "employer" in section 8(e) as providing an implicit exception for all those employers excluded from the statutory definition.

In discussing the merits of this decision, the effects of the Board's action should be as carefully considered as the methods employed in reaching it. *Lufthansa* represents a significant encroachment on the jurisdiction of the Railway Labor Act through agency law making conducted by the NLRB. This decision modified the

[29] Ohio Valley Carpenters District Council, 136 N.L.R.B. 977, 49 L.R.R.M. 1908 (1961).

[30] " . . . *Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure or other work: *Provided further*, that for the purposes of this subsection . . . 'any employer' . . . shall not include persons in the relation of jobber, manufacturer, contractor, or subcontractor working on the goods or the premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry. . . ." Labor Management Relations Act § 8(e), 29 U.S.C. § 158(e) (1970) (emphasis added).

LMRA definition of "employer" to permit the application of the hot cargo contract to a previously exempt employer.[31] Although such agreements are in derogation of the free enterprise system and are obstructions to the movement of commerce, policy decisions determining the jurisdictional reach of labor statutes are reserved to Congress, not the NLRB.

The potential use of *Lufthansa* as a basis for further agency erosion of the term "employer" is substantial. Both the RLA and the LMRA have separate sets of carefully drawn definitions that insure certainty in the application of labor statutes. A coherent national labor policy cannot be achieved when different meanings are placed on the same word in different sections of the same act. There are sections in which "employer" can have only one meaningful definition.[32] Also, there is no rational basis for conscientiously applying certain definitions while disregarding others. For example, section 8(e) requires that a hot cargo contract be executed between an "employer" and a "labor organization." In *Lufthansa* the NLRB disregarded the statutory definition of "employer," but admitted that it would apply the strict statutory definition of "labor organization."[33] If the International Association of Machinists was an organization composed entirely of railroad employees, the controversy presented in this case would have been a "railroad dispute pure and simple" over which the NLRB would have had no jurisdiction.[34] The Board's decision results in giving the term "labor organization" its statutory definition while refusing to apply the equally important definition of "employer." Additional complications can be foreseen in interpreting other key words as the term "carrier," which, under the RLA, is given a liberal construction and therefore will inevitably

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[31] The use of "previously exempt employers" refers to those excluded from the LMRA's definition of "employer": the United States, any wholly owned government corporation, any Federal Reserve Bank, any corporation or association operating a hospital, *any person subject to the Railway Labor Act.*

[32] *See* Fanning's dissent in the *Lufthansa* decision for a discussion of the necessity of maintaining the statutory definitions in key phrases.

[33] "The term 'labor organization' means any organization of any kind, or any agency or employee representating a committee or plan, in which employees participate and which exists for the purpose, in whole or in part of dealing with *employers*. . . ." Labor Management Relations Act § 2(5), 29 U.S.C. § 152(5) (1970) (emphasis added). *See* Railroad Trainmen v. Terminal Co., 394 U.S. 369 (1969) for a discussion of traditional railway labor organizations exemption from this definition.

[34] Railroad Trainmen v. Terminal Co., 394 U.S. 369, 377 (1969).

conflict with the liberalization of the term "employer."[35]

The decision in *Lufthansa* also violates the established employer-union scheme of regulation. In 1958 the Supreme Court declared that hot cargo contracts were not illegal per se. Congress reacted in 1959 with the adoption of section 8(e) that banned the hot cargo contracts. Since 1959, "employers" and "labor organizations" have formulated their contracts assuming that the LMRA definition of "employer" excluded any person covered by the RLA. As a result of *Lufthansa*, all of these hot cargo contracts executed between carriers and labor organizations in reliance on the statutory definition are now declared unlawful.

The National Labor Relations Board has reached a decision that modifies a carefully structured statutory definition. Had the Board enforced the definition of "employer," Congress would have the opportunity to amend section 8(e) as it did section 8(b)(4)(B). This would remove the agency lawmaking concept and place the burden on Congress to decide whether a loophole had been created in the hot cargo prohibition. The necessity for a coherent national labor policy is best served when statutory definitions are conscientiously enforced. There may be no justification for allowing the rephehensible hot cargo contracts to thrive in any industry, but the decision to proscribe them must be made by Congress and not the NLRB.[36]

Douglas A. Harrison

CLASS ACTIONS—FEDERAL JURISDICTION—Each Party to a Class Action, Named and Unnamed, Must Independently Meet the Jurisdictional Amount Requirement to Establish Federal Jurisdiction Over His Claim Within the Class. *Zahn v. International Paper Co., Inc.*, 469 F.2d 1033 (2d Cir. 1972).

Approximately 200 landowners situated on Lake Champlain

[35] Jackson v. Northwest Airlines, 70 F. Supp. 501 (D. Minn. 1947), *aff'd*, 185 F.2d 74 (8th Cir. 1950), *cert. denied*, 342 U.S. 812 (1951).

[36] National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 644 (1967); NLRB v. Insurance Agents' International Union, 361 U.S. 477, 500 (1960).

brought a class action under Rule 23(b) (3)[1] to recover damages allegedly caused by discharge from defendant paper company's plant. Diversity of citizenship was the jurisdictional basis.[2] The district court found that each of the named plaintiffs had a good faith claim for $10,000,[3] thereby satisfying the jurisdictional amount for individual diversity suits. The court refused, however, to permit the suit to be maintained as a class action. The trial court found, to a legal certainty, that not all of the unnamed class members had a good faith claim for $10,000 against the defendant. The case was certified for interlocutory appeal.[4] *Held, affirmed*: A class action that would have been characterized as spurious under the old federal rules can be maintained only if the claim of each class member meets the jurisdictional amount. *Zahn v. International Paper Co., Inc.*, 469 F.2d 1033 (2d Cir. 1972).

The circuit court based its decision primarily on two Supreme Court cases, *Clark v. Paul Gray, Inc.*[5] and *Snyder v. Harris.*[6] In *Clark*, the Court adopted the "aggregation principle" with regard to class actions under old Rule 23. This principle demands that when two or more plaintiffs are joined in a single suit, each must meet the jurisdictional amount.[7] Class actions under old Rule 23 were classified into true, spurious, and hybrid actions;[8] *Clark*

[1] The Rule as amended in 1966 provides in part:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

[2] 28 U.S.C. § 1332 (1972).

[3] Zahn v. International Paper Co., Inc., 53 F.R.D. 430, 431 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972).

[4] Pursuant to 28 U.S.C. § 1292(b) (1972).

[5] 306 U.S. 583 (1939).

[6] 394 U.S. 332 (1968).

[7] Pinel v. Pinel, 240 U.S. 594 (1916) (suit by two children claiming to have been omitted from father's will by mistake); Troy Bank of Troy, Ind. v. G.A. Whitehead & Co., 222 U.S. 39 (1911) (holders of two notes, secured by a single vendor's lien, suing to assert the lien).

[8] Old Rule 23 provided in part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against a class is

(1) joint, or common, or secondary in the sense that the owner of a primary

applied the aggregation rule only to spurious and hybrid suits.[9]

In 1966, amendments to the Rules eliminated the former classifications. The class action in *Snyder* arose after the adoption of these amendments, but would have been classified as a spurious class action under the old rules. The question arose whether the discarding of the old restrictions liberalized the rules to the extent that the aggregation theory could be eliminated in all class actions, just as it always had been in old true class suits.[10] The Supreme Court rejected the challenge and held that both the old categories and the doctrine of aggregation still applied to the determination of the jurisdictional amount in spurious class actions.[11]

Zahn is easily distinguishable from *Snyder*. In the *Snyder* case, none of the named plaintiffs fulfilled the $10,000 requirement of Section 1332;[12] whereas, in *Zahn*, each of the named parties were

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right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

See also, CHAFEE, SOME PROBLEMS OF EQUITY at 244-58 (1950) [hereinafter cited as CHAFEE]. The types of class suits were said to vary from each other based on the differences in their binding effects. The true class suit was used when if it were not for the class action device joinder of all parties would have been mandatory; all unnamed parties were bound by the judgment. In hybrid actions there were common questions of fact and property requiring distribution among the parties; the outcome was binding with respect to the property but had no effect on unnamed parties. Spurious class actions provided for permissive joinder of numerous, interested parties who had claims with common questions of law or fact; the judgment was binding only on the parties actually before the court. CHAFEE, *supra* at 252-53. Under the 1966 rule, the judgment in any class action is binding upon the entire class.

[9] 306 U.S. at 588-89. The true class actions were those in which the rights of the class members were common and undivided. *See* Snyder v. Harris, 394 U.S. 332, 335 (1968). The aggregation doctrine had not been applied in simple joinder cases when these types of rights were involved. *See* Troy Bank v. Whitehead & Co., 222 U.S. 39 (1911).

[10] The Court in *Clark* held that old Rule 23 did not preclude dismissal of a class action when only the named plaintiff met the jurisdictional requirement. Thus, plaintiffs in *Snyder* urged that the 1966 amendments eliminated the classifications of old Rule 23 and with them the utility of the aggregation doctrine in class actions. Although Justice Fortas recognized the possibility, Snyder v. Harris, 394 U.S. 332, 343 (1968) (dissenting opinion), the majority did not address the question of whether class members with insufficient claims may join with plaintiffs who have a $10,000 claim. *See* Alvarez v. Pan American Life Ins. Co., 375 F.2d 992, 996-97 (1967) holding to this effect under old Rule 23.

[11] 394 U.S. at 342 (1968).

[12] *Id.* at 333.

able to show a good faith claim equal to the jurisdictional amount.[13] The Supreme Court held in *Snyder* only that each of the named plaintiffs in a diversity class action must meet the jurisdictional requirement. *Zahn* goes further and states that not only the named plaintiffs, but each member of the class must have a good faith claim equal to the statutory amount.

The effect of *Zahn* will be that, absent legislation specifically conferring jurisdiction,[14] class representatives suing for wrongs having a relatively small pecuniary impact on a large number of persons will be unable to place their classes within the limited jurisdiction of the federal courts. This position will effectively eliminate the federal courts as a forum for redress of grievances of lesser severity based on state law, thereby frustrating many of the suits that the class action was designed to accommodate. Therefore, a basic policy examination must be made to analyze the soundness of the *Zahn* decision and determine whether the federal class action device is a viable method for vindicating small claims based primarily on state law.

The court in *Zahn* stressed that its holding sustained the congressional purpose of Section 1332 as interpreted in *Snyder*: to check the rising caseloads in federal courts.[15] This rationale, however, runs counter to the basic purposes of Rule 23. The class action was designed to allow for the prosecution of small claims that otherwise could not practically be litigated;[16] it avoids unnecessary future litigation and effects an adjudication among all interested parties in a single suit;[17] the rule serves to deter certain condemned conduct, resulting in fewer claims arising.[18] In *Eisen v.*

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[13] 53 F.R.D. at 431.

[14] 28 U.S.C. § 1331 (1972) has a similar $10,000 jurisdictional requirement for all matters arising "under the Constitution, laws, or treaties of the United States." The exception from this requirement is when "express provision therefor is otherwise made in a statute of the United States. . . ." Legislation has been introduced to establish a right to a federal class action for consumer protection which would thereby eliminate the amount in controversy requirement. *See generally*, Starrs, *The Consumer Class Action*, 49 B.U. L. REV. 211, 407 (1969).

[15] 469 F.2d at 1039 (1972).

[16] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 72 at 306 (2d ed. 1970) [hereinafter cited as WRIGHT].

[17] CHAFEE, *supra* note 8, at 204.

[18] It is reasoned that the potentiality of becoming a defendant in a class action is an incentive to refrain from activity that might be injurious to the public-at-large. If such activity (*e.g.*, the alleged pollution in *Zahn*) declines, then it

Carlisle & Jacquelin,[19] the Second Circuit recognized these purposes:

> By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.[20]

The litigation in *Eisen* was based on a violation of the Sherman Act; therefore, federal jurisdiction was based on Section 1331. In *Zahn*, the Second Circuit indicates that it is more inclined to make the federal class action device available to claims based on federal statutes than state law. Traditionally, lower courts have disfavored diversity cases,[21] and traces of *Swift v. Tyson* may be present in the *Zahn* holding.[22] Consistency dictates, however, that Rule 23 should be interpreted without regard to the basis of jurisdiction. As long as diversity jurisdiction is interpreted to require the application of state law, it is irrelevant to the application of the Rules that the claims are granted by state rather than federal law.

Litigants must, of course, respect this apparent tendency of the federal courts to discourage diversity suits. Therefore, a plaintiff must seek theories to avoid the potential loss of the federal forum. A dissent in *Zahn* espouses one possibility—the concept of ancillary jurisdiction:

> [I]f a case is properly in a federal court, that court has subject matter jurisdiction over the case or controversy in its entirety and therefore can adjudicate related claims of ancillary parties who have no independent grounds.[23]

In *Zahn*, the district court retained jurisdiction over the parties

necessarily follows that fewer claims will accrue to the courts.

[19] 391 F.2d 555 (2d Cir. 1968).

[20] *Id.* at 560. *See also* Darr v. Yellow Cab Co., 433 P.2d 732 (1967); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968).

[21] WRIGHT, *supra* note 16, § 27 at 89.

[22] 41 U.S. (16 Pet.) 1 (1842). This celebrated case held, through Justice Story, that the federal courts should apply a uniform common law of the federal courts when sitting in diversity jurisdiction. The principle was, of course, reversed by Erie v. Tompkins, 304 U.S. 64 (1938), which said that no general federal common law existed.

[23] 469 F.2d at 1036 (1972).

that possessed the required amount in controversy.[24] If the majority had adopted the ancillary approach, however, *Clark* and *Snyder* would not have controlled their decision, and other class members could have been brought into federal court. As the Supreme Court observed in *Supreme Tribe of Ben-Hur v. Cauble*,[25] if a federal court has valid jurisdiction over a cause of action, it should also entertain all other "ancillary" claims, *i.e.* claims of class members that do not meet the jurisdictional amount requirement.[26]

There are, however, two arguments that can be used to rebut this use of ancillary jurisdiction. First, while the ancillary concept confers jurisdiction upon a court to hear an entire controversy even though some claims do not equal the jurisdictional amount requirement, this principle is not unqualified. In *Fulton Nat'l Bank v. Hozier*,[27] the Court said that in order for a claim to qualify as ancillary, it must be "in direct relation to property or assets actually drawn into the court's possession or control by the principle suit."[28] The *Hozier* limitation on the use of ancillary jurisdiction is analagous to the definition of the true class action of old Rule 23. *Snyder* expressly held that the aggregation doctrine did not apply to that type of class suit.[29] A *Hozier* type of ancillary jurisdiction would therefore add nothing to federal jurisdiction under Rule 23.

The *Hozier* theory, however, has been expanded beyond its original limitations. In *Moore v. N.Y. Cotton Exchange*,[30] the Supreme Court awarded relief on defendant's counter-claim, citing its ancillary jurisdiction, even after plaintiff's original complaint was dismissed on the merits. The Court awarded relief on defendant's counter-claim, which was not based on federal law, relying on its ancillary jurisdiction. The Court reasoned that despite the

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[24] 53 F.R.D. at 434 (1972).

[25] 255 U.S. 356 (1921).

[26] The Court held that once diversity jurisdiction is established, jurisdiction of the subject matter is not destroyed when defendants who are residents of the same state as plaintiffs are later joined; these claims are ancillary to the main proceeding and therefore the proper subject of federal jurisdiction.

[27] 267 U.S. 276 (1925).

[28] *Id.* at 280.

[29] 394 U.S. at 335 (1968).

[30] 270 U.S. 593 (1926).

dismissal on the merits, it retained jurisdiction over the subject matter of the entire controversy and could therefore act on defendant's state claim. In *Moore* the Court relied on the ancillary jurisdiction theory even though defendant could not have met the common-interest requirements of *Hozier*; therefore, the case must be regarded as an extension of the ancillary jurisdiction concept.[31]

While the extension described in *Moore* would provide a convenient mode of litigation, it is doubtful that the principle survives *Snyder*. The holding in *Snyder* indicates that departures from established judicial interpretations of the jurisdictional grant of the federal courts from Congress are in violation of Rule 82.[32] In *Snyder*, abandonment of the rule against aggregation was said to be an unconstitutional extension of the federal court's jurisdiction. Accordingly, extending ancillary jurisdiction beyond the requirements of *Hozier* (i.e. common-interest requirements analagous to the Pinel Doctrine, *viz.* aggregation) would likewise be held unconstitutional.

There is a second reason why ancillary jurisdiction cannot be employed to allow the use of Rule 23 to adjudicate the claims of the unnamed plaintiffs in *Zahn*. Assuming that the small claims are ancillary to the action of the named plaintiffs, they can be considered ancillary only to the independent claims of the named parties and not to a class action.[33] Ancillary jurisdiction cannot become effective until the court has determined, by its own sub-

[31] Most of the cases that have allowed aggregation have done so only when plaintiffs were of the same family. *See*, Hatridge v. Aetna Cas. & Surety Co., 415 F.2d 809 (8th Cir. 1969). The ALI has proposed an application of this rule-of-thumb, *ALI Study on the Division of State and Federal Jurisdiction, § 1301(e)*. Professor Wright suggests that this is an unfounded limitation of ancillary jurisdiction since the family cases differ from others only in degree. WRIGHT, § 36 at 124.

[32] The Rule provides in part:

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

[33] Since the three named plaintiffs in *Zahn* met the statutory requirements, it is arguable that the court obtained jurisdiction, at least for purposes of exercising jurisdiction for the benefit of the other members, over a *class action* within the requisites of Rule 23(a). The rule provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable. . . ." It could, of course, be argued that since there are only three plaintiffs, joinder is not impracticable. *See* Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D.C. Minn. 1971). In *Vernon* it was said that the term "impracticable" does not mean impossibility, but difficulty or inconvenience.

stantive standards, whether it has original subject matter jurisdiction.[34] In *Zahn*, the court held that it had jurisdiction over only three plaintiffs. The court determined that it did not have jurisdiction over a class;[35] therefore, use of Rule 23 would be unwarranted.

Another way the excluded parties in *Zahn* could have obtained federal jurisdiction would have been by interveniing, as a class, into the suit of the parties who did fulfill the jurisdictional amount. This would call for the use of Rule 23 to adjudicate the intervenors' suit. This type of class intervention was permitted by the Second Circuit in *Dickinson v. Burnham.*[36] In *Dickinson*, an action was brought against a corporate fund that had been established by stockholders to assist the company through financial difficulties. Intervenors brought suit on behalf of themselves and other subscribers to the fund. The court held this intervention to be a hybrid class action under old Rule 23.[37] Under old Rule 23, judgment in a hybrid class action was not binding on unnamed parties who did not opt-in.[38] Since each of the subscribers who did intervene as part of the class did meet the jurisdictional amount in controversy requirement,[39] the court did not have to deal with the problem of whether the hybrid class action members needed to establish independent jurisdictional grounds. Generally, intervenors entering an action through permissive intervention based on common questions of law or fact must independently satisfy jurisdictional requirements.[40] Assuming that intervention as a class had been al-

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[34] WRIGHT, § 9 at 19.

[35] 53 F.R.D. at 434 (1972). In *Ben-Hur*, the district court had obtained jurisdiction of a class suit by means of diversity jurisdiction. It was held that once diversity jurisdiction was established, jurisdiction of the subject matter was not destroyed when defendants of the same residency as plaintiffs were later joined. The additional claims were held to be ancillary to the main proceeding; therefore the proper subject of federal jurisdiction. In *Zahn*, the court held that original jurisdiction over the class action was never established because the class itself did not meet the statutory requirements.

[36] Dickinson v. Rinke, 11 F.R.S. 489 (S.D.N.Y. 1948), *aff'd sub nom.* Dickinson v. Burnham, 197 F.2d 973, *cert. denied*, 344 U.S. 875 (1952).

[37] 197 F.2d at 974 (1952).

[38] CHAFEE, *supra* note 8, at 245.

[39] 11 F.R.S. at 492 (1948).

[40] *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 24.18[1] (2d ed. 1969). These same problems of establishing independent jurisdictional ground would be present if the class members attempted to intervene individually.

lowed, the unnamed parties in *Zahn* could not have met the requirements of *Snyder* to form an independent ground of jurisdiction. Accordingly, if the general rule regarding jurisdictional requirements with respect to permissive intervention is followed in class interventions, it is doubtful that such a method can be used to obtain the use of Rule 23.

The concepts of ancillary jurisdiction and permissive intervention may provide an arguable basis for the federal courts to entertain all of the claims of the class in one action. It is submitted, however, that a better approach is to limit the ruling of *Snyder* to the facts of the case and to reason that only named plaintiffs need to fulfill the jurisdictional requirements for amount in controversy.[41] It would also avoid the creation of a needless procedural morass with the use of class intervention based on ancillary jurisdiction.

Both the district court and the Second Circuit, however, indicated that the *Zahn* result was a logical extension of *Snyder*. This position appears to be based on the fact that *Snyder* expressly repudiated the theory that the amount in controversy should be considered the claim of the entire class.[42] Semantically, there should be no distinction between a representative and an unnamed class member with respect to jurisdictional requirements. This interpretation, however, defeats the purpose of the class action rule and is not constitutionally required.

Professor Kaplan, a leading draftsman of the 1966 Amendments outlined the hopes of the Advisory Committee in proposing new Rule 23. He stated:

> Like other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear. . . . Not only must new rule 23 be considered a fresh datum for deciding whether diversity of citizenship requirements are satisfied by the original parties or intervenors; it also presents a new complex in deciding questions of permissible 'aggregation' of amounts in controversy.[43]

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[41] This would be consistent with the rule regarding residency and determination of citizenship that was announced in *Ben-Hur*. *See* note 36 *supra*.

[42] 394 U.S. at 334 (1968).

[43] Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 399-400 (1967).

This position was repudiated by the Supreme Court in *Snyder*. The Court relied on a theory that the aggregation doctrine had been a part of the substantive common law so long that its modification would have effected an extension of the federal court's jurisdiction in violation of Rule 82.[44] There should be no constitutional infirmity, however, if the Court's interpretation of the amount in controversy requirement were limited to the facts of *Snyder*.

In *Snyder*, because of the application of the aggregation doctrine, there was no federal jurisdiction. In *Zahn*, jurisdiction exists in regard to certain parties and the question is whether this jurisdiction includes unnamed parties who do not possess the jurisdictional amount. The federal court's jurisdictional grant from Congress should be interpreted by applying the judicial ban on aggregation only to the named plaintiffs in the class action situation. The policy that produced the new Rule and the far-reaching effects of a contrary position justify such an interpretation.

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[44] 394 U.S. at 337 (1968).

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