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SUABILITY OF UNIONS

ORGANIZED labor has made tremendous advances in the past half century so that today labor unions wield vast power over the national economy. Unrestrained power could well present an intolerable situation, and it is certainly desirable, if not imperative, that unions be subject to judicial process. In the past there has been disagreement and lack of understanding concerning the suability of a labor union. The misconception has been harbored that such an organization could not be sued. Where this impression has not prevailed, there has been disagreement with respect to the proper procedure involved in suing a labor union. The purpose of this article is to consider and to clarify the legal status of unions in the courts. The emphasis will be on procedures whereby a union may be made defendant in a civil suit at law or in equity.

I.

From earliest times the vast majority of labor unions assumed the form of unincorporated associations. As such they had no standing in the courts; they were not natural persons, and they did not meet the statutory requirements of duly chartered corporations. The only way in which a union could sue or be sued was to have all members joined as parties.¹ This was, and to an extent still is, the common-law rule.

Manifestly, a requirement that all members be joined in a civil action affecting the union is cumbersome and leads to frustration of judicial process. Even when members were few, the require-

¹ *Baskins v. United Mine Workers*, 150 Ark. 398, 234 S. W. 464 (1921); *Smith v. I. L. C. W. V.*, 58 Ga. App. 26, 197 S. W. 349 (1938); *Tyler v. Boot and Shoe Workers Union*, 285 Mass. 54, 188 N. E. 509 (1933); *Picket v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906); See GREGORY, LABOR AND THE LAW 380-385 (1946). But see *Newark International Baseball Club, Inc. v. M. A. and T. V.*, 125 N. J. Eq. 575, 7 A. (2d) 170, 172 (1939). The following is there stated: "Independently of statute, chancery has long assumed jurisdiction of suits against labor unions by their own common name."

ment was burdensome and difficult to meet. In the present day, when union membership is greatly increased, the requirement would be an insuperable obstacle to judicial settlement of labor controversies.

Fortunately, equity at an early date recognized the inadequacy of the procedures at law and developed the class action.² This type of action permits service upon a small number of union members as representative of the entire membership. The necessary elements in a class suit are: (1) a class of persons so large that joinder of all would be impossible;³ (2) service upon and joinder of a group of members or officers who fairly represent the interests of the class;⁴ and (3) common interest of the entire membership in the subject matter of the suit.⁵ If a class suit is properly brought and judgment obtained, execution may issue against the funds and property of the union.⁶ Of course, the property of members who were not served and brought into court cannot be reached to pay the judgment. To subject their property to the levy would be a violation of due process.⁷

The class action met a need severely felt in disputes between labor and management. The remedy, however, was not widely used either because it was not well known or because difficulties were encountered in fulfilling the procedural requirements. Perhaps the infrequency of resort to the class action was a result of the general opinion that unions were not amenable to suit.

² *Carpenters Union v. Citizens Committee*, 333 Ill. 225, 164 N. E. 393 (1928); see Witmer, *Trade Union Liability; The Problem of Unincorporated Corporation*, 51 YALE L. J. 40 (1942).

³ *Hartford Life Ins. Co. v. Iss*, 237 U. S. 662 (1915).

⁴ *Am. Steel and Wire Co. v. Wire Drawer's & Die Makers Union*, 90 Fed. 598 (C. C. N. D. Ohio 1898).

⁵ *Ibid*; *Hartford Life Ins. Co. v. Iss*, 237 U. S. 662 (1915).

⁶ *Mausch v. Order of Americus*, 223 Pa. 199, 72 Atl. 528 (1909); *Oster v. Brotherhood of Locomotive Fireman & Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921). The latter case involved a suit in equity to recover on a life insurance certificate issued by a fraternal benefit association.

⁷ *Brady v. Mutual Benefit Dept. Order of Ry. Conductors*, 215 Ky. 177, 283 S. W. 1045 (1926); *Maguire v. Reough*, 238 Mass. 98, 130 N. E. 270 (1920); *Malloy v. Carroll*, 287 Mass. 376, 191 N. E. 661 (1934); *O'Neal v. Brotherhood of R. R. Trainmen*, 216 Mo. App. 212, 261 S. W. 128 (1924) (no individual liability unless so contracted).

Other doctrines have been utilized to subject unions to legal process. A union which has engaged in business as an entity in insuring its members has been estopped, in an action on the insurance certificate, to deny it was a suable legal entity.⁸ In other cases the suability of a union has been regarded as a question of procedure rather than a question of substantial law. Accordingly, failure to object to suit in the association name is a waiver of error, and the defect cannot be raised for the first time on appeal.⁹ It is apparent that neither estoppel nor waiver are reliable doctrines on which a plaintiff may depend in his suit against a union. Estoppel has been utilized in special situations, and unions cannot be expected to waive defects in procedures which may lead to civil liability.

Still another basis for suability of unions is the recognition given them as legal entities in modern legislation.¹⁰ Recognition of unions as legal entities for particular purposes tends to lead to their recognition as such for the purposes of suit. This tendency, however, is not uniform throughout the states and should not be relied upon by a plaintiff who seeks to sue a union.

II.

The uncertainty of the status of labor unions in the courts has existed from the inception of such unincorporated associations in the United States. One might expect that remedial legislation would be fast in coming, but the contrary was the fact. The common-law rule still prevails in many states.¹¹ In other words, all

⁸ *Clark v. G. L. B. R. T.*, 328 Mo. 1084, 43 S. W. (2d) 404 (1931); *Varnado v. Whitney*, 166 Miss. 663, 147 So. 479 (1933); *Winchester v. G. L. R. B.*, 203 N. C. 735, 167 S. E. 49 (1932).

⁹ *Operative Plasterer's Assn. v. Case*, 93 F. (2d) 56 (C. C. A. 4th 1937); *Iron Molders Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 9th 1908); *Barnes v. Chicago Typographical Union*, 23 Ill. 402, 83 N. E. 932 (1908); *U. M. W. v. Cromer*, 159 Ky. 605, 167 S. W. 891 (1914).

¹⁰ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922); *Nissen v. International Brotherhood*, 199 Iowa 1028, 295 N. W. 858 (1941); *Labonite v. Cannery Workers and Farm Laborer's Union*, 197 Wash. 543, 86 P. (2d) 189 (1938).

¹¹ *Pullman Standard Car Mfg. Co. v. Local Union No. 2928*, 152 F. (2d) 493 (C. C. A. 7th 1945); *Becker v. Calman*, 313 Mass. 625, 48 N. E. (2d) 688 (1943).

members must be joined as parties in a suit involving the union, or a class action must be brought.

Most states today have statutes which permit suit by or against a union or unincorporated association in the common name.¹² While these enactments do not obviate all difficulties, they at least ease the initial problem of how and whom to sue.

An exhaustive analysis of the various state statutes will not be attempted here, but a general indication may be made as to their provisions. Some statutes provide that members of the union or certain officers and agents of the union may be served as representative of the union.¹³ Other statutes permit suit in the association name, service being made upon designated individuals.¹⁴ Generally, after the case has proceeded to judgment, the joint funds and property of the union may be levied upon to satisfy the plaintiff's claim.¹⁵ The individual property of members served may also be reached.¹⁶

In Texas an unincorporated association may be sued in the common name by service upon "the president, secretary, treasurer, or general agent."¹⁷ But where such service is had, any judgment obtained is binding on the joint property only. Service may be had on individual members as well, and the judgment may be enforced against them individually after the joint property has been exhausted. It is specially provided that "execution shall not issue against the individual property of the . . . members until execution against the joint property has been returned without satisfaction."¹⁸

¹² Collected citation to these statutes may be found in 2 TELLER, *THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING*, § 465 (1940).

¹³ IND. ANN. STAT. § 277 (Burns 1926); NEV. REV. LAWS 1912, § 5001.

¹⁴ CALIF. CODE CIV. PRO. (1873 as amended 1907) § 388; MONTANA REV. CODE 1921, § 9089; TEX. ANN. REV. CIV. STAT. (Vernon 1925) art. 6134.

¹⁵ ARIZ. LAWS, 1947, c. 81, § 1; FLA. LAWS, 1943, c. 21968, § 11; KAN. LAWS, 1943, S. B. 264, § 10; LA. LAWS, 1946, Act. No. 180, § 3(a); NEBR. LAWS, 1947, S. B. 225, § 1.

¹⁶ DEL. LAWS, 1947, H. B. 212, § 8.

¹⁷ TEX. ANN. REV. CIV. STAT. (Vernon 1925) art. 6133, 6134.

¹⁸ TEX. ANN. REV. CIV. STAT. (Vernon 1925) art. 6137.

III.

The federal courts have been among the first to subject labor unions to judicial process. In the *Danbury Hatters* case¹⁹ a suit for treble damages resulting from interstate boycott was sustained under the Sherman Anti-Trust Act. In that case officers and members of the offending union were joined as defendants, and both joint and individual property were made subject to the judgment. While the union was not recognized as a legal entity in this case, the results were as satisfactory to the plaintiff as if full recognition had been given.

The landmark *Coronado*²⁰ case established that unions were entities that could be sued at least where the cause of action was based on a federal substantive right. The United States Supreme Court stated:

“Equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued, . . . so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such organizations as labor unions has come to be recognized . . .”²¹

The court observed that unincorporated labor unions have been recognized as entities for various legislative purposes and concluded that such associations should be suable in the common name, process being served upon their principal officers. The opinion of the Court showed a reliance upon the concept of the equitable class suit, the doctrine of necessity, and the recognition of unions as entities expressed or implied in social and economic legislation. It is to be noted however that the *Coronado* case was not generally followed in the state courts.²²

¹⁹ *Loewe v. Lawlor*, 208 U. S. 274 (1908), 235 U. S. 522 (1915).

²⁰ *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 (1922); 2 MOORE'S FEDERAL PRACTICE § 17.17 (1938).

²¹ 259 U. S. 344, 387 (1922).

²² The following cases refused to follow the *Coronado* case. *Dist. No. 21, United Mine Workers v. Bourland*, 169 Ark. 796, 277 S. W. 546 (1926); *Walker v. Brotherhood of Locomotive Engineers*, 186 Ga. 811, 199 S. E. 146 (1938); *Gahill v. Plumbers, Gas and*

The new Federal Rules of Procedure,²³ effective in 1938, have taken cognizance of and accepted the doctrine of the *Coronado* case. Rules 4(d) (3), 4(d) (7), and 17(b) provide that an unincorporated association may be sued in its common name, process being served upon an officer, managing or general agent, or any other agent authorized by appointment or law (federal or state) to receive service.

The recently enacted Labor Management Relations Act²⁴ (also known as the Taft-Hartley Act) is positive in its provisions for suit against unions. Section 301 (a) declares:

"Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce . . . , or between 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."

Section 301(b) states that any labor organization "may sue or be sued as an entity and in behalf of the employees whom it represents," and Section 301 (d) provides that service of legal process "upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization."²⁵ According to Section 301(b)

"... any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

The plain wording of Section 301 limits its application to actions

Steam Fitters & Helpers Local 193, 238 Ill. App. 123 (1925); *Tyler v. Boot and Shoe Workers Union*, 285 Mass. 54, 188 N. E. 509 (1933); *Grant v. Carpenters Dist. Council*, 322 Pa. 62, 185 Atl. 273 (1936); *West v. Baltimore & Ohio R. R.*, 103 W. Va. 417, 137 S. E. 654 (1927). *But see* federal cases following the *Coronado* case. *Moffat Tunnel League v. United States*, 289 U. S. 113 (1933); *Levering & Carrigues Co. v. Morrin*, 61 F. (2d) 945 (1934).

²³ 28 U. S. C. § 723 (c) (1940); see 1 MOORE'S FEDERAL PRACTICE § 4.20 (1938).

²⁴ 61 STAT. 136 (1947); 29 U. S. C. A. § 141-147 (Supp. 1947).

²⁵ Section 301(c) places venue (1) in the district in which the organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

for breach of contract. Since the rule prevailing in the federal courts has permitted suit against a union in its common name, one may ask what the statute has accomplished? The answer is that diversity of citizenship and minimum amount in controversy are no longer requirements for action, and an employer in an industry affecting commerce has a new and expanded remedy in the federal courts which may not be available in the state courts. The limitation on the enforceability of the judgment is to be specially noted. The congressional intent was to exempt the property of individual members of the union. "Thus the members . . . secure all the advantages of limited liability without incorporation of the union."²⁶ It is also to be noted that Section 301 apparently deals only with actions for damages. The section does not relieve a plaintiff from the requirements of the Norris-LaGuardia Act if injunction is sought.

A subsequent section provides for union liability for boycotts carried on for enumerated illegal purposes. Section 303(a) declares that it is unlawful "for the purposes of this section only in an industry or activity affecting commerce for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object therein is . . ." (1) to compel an employer to cease dealing with any other person, (2) to compel any other employer to bargain collectively with a union not yet certified as the representative of his employees, (3) to compel any employer to bargain with a union other than that which has been certified as the representative of his employees, or (4) to compel an employer to assign work to a particular union (unless the employer is failing to comply with an order or certification of the National Labor Relations Board). Section 303(b) authorizes suit in a federal district court for damages by anyone injured in his

²⁶ SEN. REP. NO. 105, 80th Cong., 1st Sess., 15-18 (1947).

business or property by reason of violation of subsection (a), and the procedural provisions and limitations of Section 301 (relating to suit for breach of contract) are made applicable. Section 303 is to be distinguished from Section 301, the former section creates a statutory liability in damages for the tort of boycott in interstate commerce.

Amenability of labor unions to suit in federal courts has progressed from the old common-law rule of non-recognition to the present status of suability in the common name. It is to be hoped that future legislation and decisions will leave no ambiguities in regard to the status, responsibilities and benefits which will attach to such organizations in the federal courts.

IV.

Assuming that a union is amenable to suit, practical difficulties stand in the way of recovering and realizing upon a judgment for damage. One of the most serious of these is the question of agency.

It is said that a union is liable for the acts of its officers and members according to the common law principles of agency. If an act is expressly or impliedly authorized, or within the apparent authority of the actor, or ratified, liability follows. Proof that particular acts of violence or trespass were actually or apparently authorized or ratified by the union membership or by its responsible leadership is hard to obtain. One can well imagine the difficulty of proving that a random act of violence to person or property during a strike, participated in by hundreds, was the authorized or ratified act of an agent of the union. The probability of such agency being found may very likely depend upon the consequent liability imposed. If the members are individually liable, then it may be expected that the courts will be more reluctant to find agency, while if only the association property is liable, then perhaps agency will be more readily found.

Congress apparently felt that the common-law doctrine of agency was not sufficiently favorable to unions in the federal

courts, for the Norris-LaGuardia Act,²⁷ passed in 1932, included a section further restricting liability. Section 6 of that Act declared:

"No officer or member of any association or organization, and no association or organization . . . shall be held responsible or liable . . . for unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

This section removed the danger that a union or its officers or members would be liable for tortious acts which were apparently authorized or which might be found to be generally within the scope of activity of a union agent. A recent Supreme Court case²⁸ indicates that Section 6 means exactly this and that a union, its officers and members can be held liable for torts only on strict proof of actual authorization or ratification of the acts of the tortfeasor.

Under the Labor Management Relations Act the common-law doctrine has been re-established. Section 301 states that for the purposes of this section "in determining whether any person is acting as an agent of another person . . ., whether the specific acts performed were actually authorized or subsequently ratified, shall not be controlling."²⁹ An employer who sues for breach of contract under Section 301 or for damages caused by boycott under Section 303 may rely on the orthodox principles of the law of agency.

The question of responsibility of a union for a "wildcat strike" occurring during the life of a collective contract is related to the problem of agency. The first inquiry is whether, on a sound construction of the contract, the union undertakes that there will be

²⁷ 47 STAT. 70 (1932), 29 U. S. C. A. § 101-115 (1932).

²⁸ *United Brotherhood of Carpenters and Joiners v. United States*, 330 U. S. 395 (1947) (three justices dissenting).

²⁹ THE BUREAU OF NATIONAL AFFAIRS, *THE NEW LABOR LAW*, E(3)36, quotes Senator Taft, the co-author, as saying in congressional debates: "I think the word 'agent' . . . means an agent under the ordinary rules of agency, an agent of the labor union, the organization, as such. The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent."

no concerted disruption of work. If so, the union should be liable on its contract. If not, the next inquiry is whether the persons participating in or directing the "wildcat strike" were agents of the union. If they were, the union would seem to be liable.

The recent *American-Hawaiian Steamship Co. case*³⁰ indicates that liability for a "wildcat strike" may be difficult to sustain. The action was brought by the Steamship Co. for breach of contract in delaying the sailing of one of its vessels. The contract stipulated that there would be no stoppages and that the union would furnish a crew. The crew walked off the ship upon a failure to comply with their demand for higher wages. The court exonerated the union from liability stating that the union could not compel the crew to work but merely point out available positions. This construction of the contract apparently secured to the Steamship Co. only the assurance that the union would attempt, in good faith, to comply with the contract.

A recent Texas statute³¹ expressly declares that both unions and management should be responsible for the fulfillment of their contracts. Section 1 of the statute is as follows:

"A labor organization whose members picket or strike against any person, firm or corporation shall be liable in damages for any loss resulting to such person, firm or corporation by reason of such picketing or strike in the event that such picketing or strike is held to be a breach of contract by a court of competent jurisdiction."

This language clearly recognizes unions as entities which are subject to suit.

One may question that this statute expresses strict liability for "wildcat strikes." The caption and preamble may be looked to for a further indication of the legislative intent. Plausible arguments may be advanced both for and against strict union liability.

³⁰ *American-Hawaiian S. S. Co. v. Sailors Union of the Pacific*, 37 F. Supp. 829 (N. D. Calif. 1941).

³¹ *Tex. Laws 1947, c. 132, TEX. ANN. REV. CIV. STAT. (Vernon 1925) art. 5154-b.* For a fuller discussion of this statute see BELL, *LAWS REGULATING LABOR UNIONS PASSED BY 50TH LEGISLATURE OF TEXAS* (1947).

Future social and economic developments will dictate the advisability of legislation along this line.

Even in an authorized strike, where violence or other questionable acts occur, the litigant may encounter formidable difficulties. "Strikers may go to the very line between lawful and unlawful."³² This line may well prove elusive and indistinct in many instances, while only the injury remains unquestioned.

Although the plaintiff secures a judgment against the union, his troubles are not ended. For this judgment to be of value, he must first locate union property to be levied upon, not always an easy task. The litigant is also confronted with the likelihood that his judgment against a local union will not be binding upon the national organization.³³ The plaintiff cannot guard against this possibility as it seems to be controlled by the internal organization of the union. The situation is analogous to a parent and subsidiary corporation. In some instances, however, service upon the local may give jurisdiction over the national organization.³⁴

Assuming that the plaintiff has a good cause of action with no question of recovering on the judgment, the advisability of litigation should be considered. The desirability of maintaining friendly relations with the union may well be a restraining factor where an employer contemplates suit.

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³² *Great Northern Ry. Co. v. Local G. F. L. of I. A. of M.*, 283 Fed. 557 (D Montana 1922).

³³ *Christian v. International Assn. of Machinists*, 7 F. (2d) 481 (E. D. Ky. 1925).

³⁴ *Operative Plasterers Assn. v. Case*, 93 F. (2d) 56 (App. D. C. 1937).