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Labor Law -- 1963 Tennessee Survey

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I. Arbitration Process

An active area of litigation today is concerned with the interrelation of the judicial process and the arbitration process in the settlement of labor disputes. It was observed in last year's survey that the Supreme Court of the United States had "embarked on the project of fashioning a body of federal common law governing the enforcement of collective bargaining agreements"[1] since the landmark decision in the *Lincoln Mills* case.[2] A substantial and integral part of this "federal common law" (which covers all matters within the scope of section 301 of the Taft-Hartley Act) deals with the arbitration process—the rights and duties of the parties, and the place of the courts vis-a-vis the arbitrator. Here the Supreme Court, perhaps most notably in the 1960 *Steelworkers* trilogy[3] and in the 1962 *Sinclair* trilogy,[4] has been developing guidelines for the lower federal courts, and the state courts in both of which section 301 suits may be brought. Important new decisions interpreting rights under section 301 have been announced by the Supreme Court within the last few months.[5]

During the past year, in cases originating from Tennessee, the United States Court of Appeals for the Sixth Circuit was confronted with some of the problems posed in this rapidly developing area of

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1. Sanders, *Labor Law—1962 Tennessee Survey*, 16 Vand. L. Rev. 792 (1963).

2. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), 16 Vand. L. Rev. 1252 (1963).

3. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

4. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Drake Bakeries v. American Bakery Workers, 370 U.S. 254 (1962). As might be expected, these two sets of cases have engendered much comment. Articles diseussing them are collected in Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 Mich. L. Rev. 1115 n.3, 1116 n.4 (1964); 16 Vand. L. Rev. 245 (1963).

5. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Humphrey v. Moore, 375 U.S. 335 (1964); John Wiley & Sons v. Livingston, 375 U.S. 928 (1964); Packinghouse Workers v. Needham Packing Co., 376 U.S. 247 (1964).

law. Perhaps the most important case, in this respect, was *Jefferson City Cabinet Co. v. International Union of Electrical Workers.*[6] In this case an employee, who had been absent on authorized sick leave, returned to work and was told there was no work that day but there would be the following day. A large number of employees walked out that afternoon, and the plant was closed down the following day. The employer then filed suit under section 301 of the Labor Management Relations Act (Taft-Hartley Act)[7] for damages, alleging violation of a no-strike clause in the collective bargaining agreement. The court posed the issue in one paragraph:

> Thus, there is no denial by the parties that there was a strike, which was in violation of the no-strike provision of the bargaining agreement. The issue presented is, Can an action to recover damages for this breach of the bargaining agreement be maintained in the District Court or is it a matter which is required by the bargaining agreement to be submtted to arbitration?[8]

It was then noted that it is for the court to decide whether an issue is arbitrable in a mandatory sense under the agreement.[9]

The court of appeals first had to face three of its earlier decisions in which it had held that the suit for damages for breach could be maintained in court, the breach of a no-strike clause not being an arbitrable issue.[10] The court explains these holdings on two grounds:

> [W]e took the position that the no-strike clause was an independent, unequivocal, unconditional obligation on the part of the union: that arbitration of any 'difference' or 'grievance' that might arise was to be used instead of a strike; that there was no right to strike under any conditions; and, accordingly, the right to strike was not an arbitrable issue under the contract. This interpretation of the bargaining agreement is what has been referred to by the Supreme Court in later cases as the 'quid pro quo' theory in a bargaining agreement, namely, that the unconditional no-strike obligation on the part of the union is the consideration given to the employer in exchange for his promise to arbitrate disputes or grievances. Being such, it is not subject to any exceptions, it is not arbitrable.[11]

The court says that if this rationale were still in effect it might control the instant case. But, as the court points out, this rationale was

6. 313 F.2d 231 (6th Cir.), *cert. denied,* 373 U.S. 936 (1963).

7. 61 STAT. 156 (1947), 29 U.S.C. § 185 (1958).

8. 313 F.2d at 232.

9. 313 F.2d at 233, citing Atkinson v. Sinclair Ref. Co., *supra* note 4; Drake Bakeries v. American Bakery Workers, *supra* note 4; United Steelworkers v. American Mfg. Co., *supra* note 3; United Steelworkers v. Warrior & Gulf Nav. Co., *supra* note 3.

10. Vulcan-Cincinnati, Inc. v. United Steelworkers, 289 F.2d 103 (6th Cir. 1961); UAW v. Benton Harbor Malleable Indus., 242 F.2d 536 (6th Cir. 1957); Hoover Motor Express Co. v. Teamsters Union, 217 F.2d 49 (6th Cir. 1954). "The Court held in each case that a breach of the no-strike provision of the bargaining agreement was not a 'grievance' within the scope of the grievance procedure." 313 F.2d at 234.

11. 313 F.2d at 234.

subsequently rejected by the Supreme Court in the *Drake Bakeries* case.[12] Thus a no-strike clause is not, just because of its nature, taken out of the scope of arbitrable issues. There was another ground upon which the Sixth Circuit had rested its decision in the earlier cases. In each of them, the arbitration clauses involved were narrowly drawn; in fact, in two of the cases only employees could file a grievance and invoke arbitration.[13] Although the 'quid pro quo' theory has, in effect, been rejected, this other ground delineates a factor which still must be considered: that is, is the breach of a no-strike clause an issue that must be arbitrated under the provisions of this particular bargaining agreement? In the instant case, the court held that it was, and that the employer must submit his claim for damages to arbitration. In reaching this conclusion, the court pointed out that the contract referred to arbitration of disputes as well as grievances. The contract also provided: "*A claim* that the Company or *the Union has violated some provision of this contract* or failed to perform some obligation assumed under this contract *is an arbitrable* grievance within the meaning of this contract."[14] (Emphasis added.) The court considered this language crucial in determining that, under this contract, the breach of a no-strike clause was a matter for arbitration.

The Court of Appeals for the Sixth Circuit decided another case growing out of the same labor dispute.[15] The employer discharged a large number of the strikers, whereupon the union filed a grievance and requested their reinstatement. The employer refused to arbitrate. The district court granted summary judgment direeting arbitration and the court of appeals affirmed.

It was the employer's contention that (a) the union's violating the contract by striking had in effect repudiated it, and this relieved the employer of performing his part, and (b) the union had filed its grievance too late and therefore had not complied with the procedural requirements set forth in the collective agreement. The court quickly disposed of the first contention, citing a number of Supreme Court cases which have held that a collective bargaining agreement establishes a "generalized code" and is not to be judged necessarily by ordinary contract law.[16] As for the second contention, the court held

12. Drake Bakeries v. American Bakery Workers, *supra* note 4, at 261.

13. Vulcan-Cincinnati, Inc. v. United Steelworkers, *supra* note 10; UAW v. Benton Harbor Malleable Indus., *supra* note 10. On this factual difference these earlier holdings probably remain valid. See Drake Bakeries v. American Bakery Workers, *supra* note 4, at 264, n.13; Yale & Towne Mfg. Co. v. International Ass'n of Machinists, 299 F.2d 882, 885 (3d Cir. 1962).

14. 313 F.2d at 236 (Emphasis added by the court.)

15. International Union of Elec. Workers v. Jefferson City Cabinet Co., 314 F.2d 192 (6th Cir. 1963).

16. Drake Bakeries v. American Bakery Workers, *supra* note 4, at 261-63; United Steelworkers v. American Mfg. Co., *supra* note 3, at 567; United Steelworkers v. Warrior & Gulf Nav. Co., *supra* note 3, at 578-79.

that whether there has been sufficient compliance with grievance procedures is a question to be determined initially by the arbitrator.[17]

Another dispute which similarly caused two cases to reach the Sixth Circuit arose out of the merger of the Louisville and Nashville and the Nashville, Chattanooga and St. Louis railroads. In approving the merger, the Interstate Commerce Commission imposed certain conditions for the protection of employees of the two railroads who might be adversely affected by the merger. The ICC order provided that disputes concerning the afforded protection may be referred, by either party, to an arbitration committee. The order left to the carrier and the employees' representative the formation, procedures, and duties of such committee. Subsequently, the railroad and the union entered an agreement adopting the ICC order and implementing it with respect to the arbitration process.

Certain employees, who claimed they were discharged as a result of the merger, brought suits against the railroad for benefits allegedly due to them under the conditions imposed by the ICC. The district court held that the employees must submit to arbitration and dismissed the action.[18] Thereupon the railroad filed a complaint seeking a declaratory judgment in order to resolve a dispute as to the proper method of arbitration. The railroad contended it should be in compliance with the agreement between the railroad and the union. The employees, still contending that they were proceeding under the ICC order, argued that they could each negotiate with the railroad as to the establishment of a machinery for arbitration. The district court rejected this contention, and held that arbitration must be in accordance with provisions of the agreement between the railroad and the union.[19]

These two cases were consolidated on appeal before the Sixth Circuit, which affirmed both judgments.[20] The court held that the phrase "may be referred [to arbitration]" that appears in the ICC order was mandatory, not permissive, and thereafter the agreement between the railroad and the union provided the procedure for carrying this out. The court held that this agreement then became binding upon the parties, and that this in no way prejudiced the rights of the employees.

II. PICKETING

The Labor-Management Reporting and Disclosure Act of 1959

17. In reaching this conclusion, the court relied heavily upon Livingston v. John Wiley & Sons, 313 F.2d 52 (2d Cir. 1963). That case has since been affirmed by the Supreme Court. John Wiley & Sons v. Livingston, *supra* note 5.

18. Arnold v. Louisville & N.R.R., 180 F. Supp. 429 (M.D. Tenn. 1960).

19. Louisville & N.R.R. v. Cantrell, 215 F. Supp. 229 (M.D. Tenn. 1962).

20. Batts v. Louisville & N.R.R., 316 F.2d 22 (6th Cir. 1963).

amended section 8(b) of the National Labor Relations Act to make it an unfair labor practice for a union to engage in picketing which has as an object the forcing of an employer to recognize the union as the representative of the employees, provided, among other conditions, the union has not filed a petition for certification within a reasonable time, not to exceed thirty days.[21] Section 10 of the Act[22] was amended to provide that the NLRB regional attorney could seek injunctive relief pending final adjudication by the Board of a charge that a union had engaged in recognition picketing, if there is reasonable cause to believe the charge was true.

The United States District Court for the Eastern District of Tennessee had occasion to construe the foregoing statutory sections in *Phillips v. UMW*.[23] It is not necessary to go into the somewhat complicated background facts which are fully set out in the district court opinion. Suffice it to say that picketing began and thereafter the employer filed charges alleging that the unions had engaged in an unfair labor practice by conducting organizational and recognition picketing in violation of section 8 (b)(7). Pending final disposition of these charges by the Board, the regional attorney petitioned the district court for a temporary injunction. The union contended that recognition was not an object of the picketing, and furthermore, a petition for certification had been filed with the Board within a reasonable time. The court dismissed the first contention noting that under section 10, which authorizes injunctive relief, it is only necessary that there be reasonable cause to believe that there has been an unfair labor practice. The court held that upon the evidence, without judging the merits of the employer's charges, there was at least reasonable cause to believe that recognition was an object of the picketing.

A more problematical question was whether the union had filed a petition for certification within a reasonable time (not to exceed thirty days) from commencement of the picketing. A petition was pending before the Board when picketing began on December 26, 1962. This petition was withdrawn by the union without prejudice on January 29, 1963. Subsequently, a new petition was filed on February 25, 1963. The question, as posed by the court, was whether the petition which was pending when picketing began operated to toll the thirty day limitation until the petition was withdrawn January 29. If so, the petition filed February 25 was timely, being filed within thirty days of January 29. The court, however, said that the pendency of a petition which is later withdrawn cannot effectively toll

21. 73 Stat. 525 (1959), 29 U.S.C. § 158(b)(7)(c) (Supp. I, 1959).
22. 73 Stat. 544 (1959), 29 U.S.C. § 160 (Supp. I, 1959).
23. 217 F. Supp. 552 (E.D. Tenn. 1963).

the limitation. The court held that "a certification petition upon which an election can be ordered by the Board must be filed within the thirty day period and must remain filed until acted upon by the Board in order to permit the continuance of recognition picketing."[24] The court therefore issued a temporary injunction restraining the union from engaging in recognition picketing.

Subsequent to the issuance of the injunction the union filed a charge with the Board against the company alleging violation of section 8(a)(1) and (2) of the Act.[25] Upon investigation, the Board found reasonable cause for the issuance of a complaint, which complaint would have issued had not the employer signed an informal settlement agreement. Upon this state of facts, a consent order approved by the Board and the unions was tendered to the court proposing to dissolve the previously issued temporary restraining order. The employer filed a petition to intervene opposing the dissolution of the injunction and seeking to institute contempt proceedings for violation of the injunction. The court denied the petition to intervene and held the employer had no standing to enforce the injunction by contempt.

Section 10, which authorizes the regional attorney to seek injunctive relief, provides that there shall be no application for an injunction if a charge has been filed against the employer under section 8(a)(2) and there is reasonable cause to believe the charge is true and that a complaint will issue. The Board contended that this would require that the injunction be dissolved. The court observed that the proviso in section 10 does not literally apply to a situation where an injunction has already been granted, but held that such a strict interpretation would defeat the obvious intent of Congress. The court construed the section to prevent the Board from seeking *or maintaining* an injunction when a meritorious charge under section 8(a)(2) appears to exist against the employer. The court thereupon entered the consent order, thereby dissolving the injunction.[26]

The Tennessee Supreme Court, during the past year, reiterated the proposition that state courts continue to have jurisdiction to prohibit future acts of violence connected with picketing, despite the doctrine of federal preemption which is applicable to much of labor relations law.[27] In this case, upon the expiration of a bargaining agreement,

24. 217 F. Supp. at 558.

25. 61 Stat. 156 (1947), 29 U.S.C. § 158 (a) (1), (2) (1958).

26. Phillips v. UMW, 218 F. Supp. 103 (E.D. Tenn. 1963).

27. Kingsport Press, Inc. v. International Printing Pressmen, 372 S.W.2d 289 (Tenn. 1963).

many unfruitful bargaining sessions ensued which resulted in the union calling a strike. A large number of pickets allegedly blocked access to the plant and threatened those attempting to enter. The company went into state court and sought a temporary injunction against further acts of violence. The union contended that exclusive jurisdiction over this cause rested in the National Labor Relations Board. The Tennessee Supreme Court affirmed the chancellor's grant of an injunction, holding that a state could enjoin future acts of violence, intimidation, and threats of violence; that this is within the traditional police power of the state, and not preempted by the NLRB.[28] The court noted that the injunction was directed to acts of violence, and was not "a blanket injunction against all picketing peaceful or otherwise."[29]

III. Secondary Boycotts

Recently a large number of cases, many dealing with so-called secondary boycotts, have grown out of the labor strife and economic unrest existing in the coal mining region of eastern Tennessee.[30] The past survey year has presented its share of such cases.

The archetypical secondary boycott is the situation where a union striking against the primary employer, also brings pressure upon ("boycotts") a secondary employer (as by inducing his employees to strike) with the objective of forcing the secondary employer to cease doing business with the primary employer. Of course, the usual situation normally does not fall within such simple, classical lines; therefore, the courts must decide whether a given case does or does not come within the specific restrictive language of the statute. Section 8(b)(4)(A) of the National Labor Relations Act[31] makes it an unfair labor practice for a union to engage in the secondary boycott activity therein described. Section 303 of the Taft-Hartley Act[32] declares the identical activity unlawful and permits anyone injured thereby to sue for damages in the district court.

An extremely close and difficult case in this area was *Gibbs v.*

28. The court relied upon Youngdahl v. Rainfair, 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); United Electrical Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942).

29. 372 S.W.2d at 292. In the Youngdahl case, *supra* note 28, the Arkansas state court issued a sweeping injunction against all picketing. The United States Supreme Court affirmed to the extent that the injunction prohibited threatened violence and obstruction, but set it aside to the extent that it enjoined peaceful picketing.

30. *E.g.*, Sunfire Coal Co. v. UMW, 313 F.2d 108 (6th Cir.), *cert. denied*, 375 U.S. 924 (1963); Flame Coal Co. v. UMW, 303 F.2d 39 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); Gilchrist v. UMW, 290 F.2d 36 (6th Cir.), *cert. denied*, 368 U.S. 875 (1961); UMW v. Osborne Mining Co., 279 F.2d 716 (6th Cir.), *cert. denied*, 364 U.S. 881 (1960).

31. 61 Stat. 156 (1947), 29 U.S.C. § 158(b)(4)(A) (1958).

32. 61 Stat. 158 (1947), 29 U.S.C. § 187 (1958).

UMW.[33] The Grundy Mining Company planned to open new mines, pursuant to which they hired the plaintiff Gibbs as mine superintendent. At the same time, Gibbs was given the trucking contract to haul the coal from the mines. Grundy opened a mine without a union contract and on the same day picketing began, followed by violence and threats of violence. Efforts to open the mine finally ceased. Gibbs received one pay check for what amounted to a half-a-month's salary, and, apparently, never did any hauling under the trucking contract. Gibbs then filed suit against the union to recover compensatory and punitive damages, alleging the union had violated section 303 of the Taft-Hartley Act and was also guilty of a common law conspiracy.[34] His theory was that the union had directed its activities toward Grundy to cause it to cease doing business with Gibbs, both with respect to his employment contract and his trucking contract. The jury returned a verdict for the plaintiff, awarding 60,000 dollars compensatory damages for termination of the employment contract, 14,500 dollars for termination of the trucking contract, and 100,000 dollars in punitive damages.

The defendant union moved for a judgment n.o.v. or a new trial on a number of grounds. The most troublesome of these, for the court, rested on the fact that much of the union activity occurred on the premises of Grundy Mining Company. Gibbs' suit was predicated on the theory that he was injured by secondary activity directed toward Grundy. The union contended that, if anything, there was primary activity directed toward Grundy, as shown by the fact that the union activity was on the premises of Grundy. Therefore, says the union, there could be no unlawful secondary boycott. In support of this, the union relied on the *General Electric* "reserved gate" case[35]

33. 220 F. Supp. 871 (E.D. Tenn. 1963).

34. It will be noted that under the federal statute a plaintiff can recover only for damages sustained. 61 Stat. 158 (1947), 29 U.S.C. § 187(b) (1958). Therefore, to recover punitive damages the plaintiff must sue under state law. This claim is usually joined with the federal action, a point which will be discussed later in the text.

35. International Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961). That case involved a General Electric plant which had five gates, one of which was posted for the exclusive use of employees of independent contractors working within the General Electric plant. The National Labor Relations Board held that peaceful picketing which included the "reserved gate" constituted a secondary boycott in violation of section 8(b)(4)(A). The Court of Appeals for the District of Columbia enforced the Board's order. The Supreme Court, after reviewing primary situs and common situs cases, approved the separate gate rationale—that is, picketing will violate section 8(b)(4)(A) if it occurs, though at the primary situs, at a gate for employees of secondary employers if the gate is clearly marked and set apart from other gates, and if the employees who use it do work unrelated to the normal operations of the primary employer. The Supreme Court, however, reversed the Board and the court of appeals because the record was not clear as to whether or not some of the employees of independent contractors who used the "reserved gate"

which it said stands for the proposition that picketing at the situs of the primary employer cannot violate the secondary boycott provisions of section 8(b)(4)(A). The district court went to some lengths to distinguish the *General Electric* case, partly on the basis of the scope of the review of a jury verdict vis-a-vis the Labor Board. The court noted that all the union activity occurred on the premises of General Electric, while in the instant case the activity occurred at various places at various times. Finally, the court pointed out that in the Supreme Court case there was no question but that General Electric was the object of the primary activity, "whereas whether Grundy was the object of primary or secondary activity or both is one of the disputed issues in the principal case."[36] The jury, by holding for Gibbs on this issue, found that Grundy was the object of secondary activity, at least in respect to inducing Grundy to cease doing business with Gibbs. This, according to the court, is not irreconcilable with the fact that the activity occurred on Grundy's premises. The court said: "While the situs of the union activity would be evidence which the jury might properly consider in determining the object of such activity, where the object is at issue, the situs is not itself controlling in establishing a secondary boycott."[37]

The union also claimed that there could be no action for damages under section 303 of the Taft-Hartley Act as the object of the activity was to further claimed job rights with Grundy, and not to induce Grundy to cease doing business with Gibbs. Contrary to this contention, the court held that there was testimony to support the jury's verdict that this was "an object" of the union activity. "The fact that the union may have had some object or objects other than and in addition to causing Grundy to cease doing business with Gibbs could not prevent the activity from constituting a secondary boycott insofar as Gibbs was concerned, and therefore actionable by him as such."[38]

Finally, the union contended that the activity here involved could not constitute an actionable secondary boycott as to Gibbs, since he, as mine superintendent for Grundy, was not an "other person" within the meaning of section 8(b)(4)(A). The court agreed, holding that

did conventional maintenance work of the same type performed at times by General Electric's own employees. 366 U.S. at 682.

The negative conelusion to be drawn from the case is that, absent such a completely distinct entrance, peaceful picketing otherwise permissible at the primary situs will not constitute forbidden secondary pressure.

36. 220 F. Supp. at 875-76.

37. 220 F. Supp. at 876. Thus the situs was evidence tending to show that Grundy was the primary, and not the secondary object, but this evidence was not eontrolling. There is a good discussion of some of the problems involved in this case in Carrier Corp. v. NLRB, 311 F.2d 135 (2d Cir. 1962), *reversed sub nom.*, United Steelworkers v. NLRB, 84 Sup. Ct. 899 (1964).

38. 220 F. Supp. at 877.

it is clear from the section that "employees and supervisors of any struck or picketed primary employer who may lose their employment are not within the meaning of 'other person' and would have no statutory action for any loss so occasioned."[39] By bringing Gibbs within this holding, the court treats Grundy as a primary employer. Yet on the first two questions we discussed above, the court, in upholding the jury's verdict, found that Grundy was the secondary object of union activity. The court reconciles this saying: "Although, as found by the jury, an object of the picketing of Grundy was to cause it to cease employment of Gibbs, and Grundy may have been 'neutral' or secondary to the dispute between UMW and Gibbs, there also clearly existed a primary dispute between UMW and Grundy."[40]

Though Gibbs could not maintain his federal statutory action for loss of his employment contract, the court held that there was evidence to sustain the jury's verdict on his state common law conspiracy count on this cause of action. Furthermore, although Gibbs was not an "other person" with respect to his employment contract, he was an "other person" with respect to his trucking contract and therefore could maintain his statutory action on this question.

The court, in reviewing the jury's award, held that there was no evidence of damages incurred by loss of the trucking contract, and the union's motion for a directed verdict should have been sustained on this issue. The court also held that the jury's verdict with respect to loss of the employment contract was excessive to the extent of 30,000 dollars, and the award of punitive damages was excessive to the extent of 55,000 dollars. The court said that unless plaintiff agreed to appropriate remittiturs, a new trial would be ordered.

Another secondary boycott case from the coal mining area went before the Sixth Circuit Court of Appeals.[41] Here the plaintiff coal mining company sued for damages under the federal statute and under the state law prohibiting unlawful interference with business. The court of appeals affirmed a judgment for plaintiff based on a jury verdict. The evidence showed that truck drivers working for the company which transported plaintiff's coal were shot at and otherwise threatened and intimidated. The court held that this constituted a secondary boycott in violation of section 303 of the Taft-Hartley Act.

The union argued that Congress, by providing this remedy for secondary boycott activity, preempted this field, thus precluding recovery of punitive damages under state law. The court said: "The District Court had jurisdiction to entertain a claim for damages

39. *Id.* at 878.
40. *Id.* at 878.
41. White Oak Coal Co. v. UMW, 318 F.2d 591 (6th Cir. 1963), *cert. denied,* 375 U.S. 966 (1964).

under the federal statutes even though such claim was joined with a non-federal action for unlawful interference with business."[42] The court cited one of its earlier decisions in which this point was discussed more fully.[43] There, in a similar case, the court pointed out that the same evidence supports the claim under federal law as supports the claim under state law. There are not two separate causes of action, but rather two grounds supporting a single cause of action. In such a case, the federal court may retain jurisdiction and pass upon the non-federal ground, under the rationale of *Hurn v. Oursler*.[44]

In *Allen v. UMW*,[45] the Sixth Circuit was presented with a similar case involving many of the same issues as the one just discussed. The court affirmed the jury's verdict for plaintiff, largely on the basis of the foregoing case.

Finally, the court of appeals faced its last secondary boycott case of the survey year in *Walters v. International Association of Plumbers*.[46] Plaintiff was a small non-union contractor engaged in the installation and repair of air conditioning systems. He agreed to install such a system in a building being constructed by Red Food Stores. The local union picketed the construction site. Red Food Stores removed plaintiff from the job and did not give him any work subsequently. Plaintiff recovered damages against the local and the international union for engaging in an unlawful secondary boycott. In a brief per curiam opinion, the court of appeals affirmed the judgment as to the local, but held that there was no evidence that the international participated and dismissed the complaint as to it.

IV. National Labor Relations Board

Under *Universal Camera Corp. v. NLRB*,[47] the findings of fact made by the National Labor Relations Board are to be affirmed by the reviewing court if they are supported by substantial evidence on the record considered as a whole. This record includes the credibility findings of the Board's Trial Examiner, for unlike the Board and the reviewing court which have only the printed record, the examiner hears witness and sees their demeanor while testifying. For this reason, the Court in *Universal Camera* stated the examiner's credibility findings are entitled to great weight. However, the Court said that these findings are not entitled to any more weight than they

42. 318 F.2d at 605-06.
43. UMW v. Osborne Mining Co., *supra* note 30.
44. 289 U.S. 238 (1933).
45. 319 F.2d 594 (6th Cir. 1963).
46. 323 F.2d 578 (6th Cir. 1963).
47. 340 U.S. 474 (1951).

deserve in light of reason and judicial experience. Needless to say, these credibility findings can on occasion prove troublesome to the reviewing court.[48]

An interesting case concerning credibility arose during the past year.[49] The trouble began on a busy Saturday afternoon at a large grocery store in Memphis. According to employer testimony a union agent was in the store trying to foment a work stoppage by employees; the store discharged one employee for inattention to his work and another employee began repeatedly shouting that the company "couldn't discharge the boy merely because he was a union member." The second employee was discharged and no claim was made with respect to these two employees. Subsequently, two other employees left the store and later began picketing with homemade placards. Company testimony was to the effect that one of these employees had told the store manager that he was quitting. The two employees testified that they left the store after they had been fired. Sometime later the store denied their requested reinstatement, and the union filed charges with the Board alleging that these two employees had been discriminatorily discharged.

The employees said that they had been discharged on that Saturday afternoon, but said that they had not gone outside to engage in a strike. The trial examiner did not credit their statements, in either respect, as he found that they were not discharged, but that they had engaged in a union-sponsored strike. Since this was a protected activity they were entitled to reinstatement. These findings were adopted by the Board.

The court of appeals, on a petition to set aside the order affirmed the finding that they were not discharged, as this was supported by substantial evidence. But the court held that the examiner's finding that the employees had left the store to engage in a strike was not supported by substantial evidence, pointing out that the only direct evidence on this was the employees' denial that they left for this purpose. Accordingly, the Board's cross-petition for enforcement of its order was denied.

In two other Board cases originating in Tennessee, the Sixth Circuit denied enforcement in one and granted enforcement in the other. In *NLRB v. Southern Electronics Co.*,[50] the Board had found that the company had violated section 8(a)(1), (3), and (4) of the Act[51] by "refusing to reinstate five employees because of their union

48. See NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421, 425-26 (6th Cir. 1964).

49. Dunn Bros., Inc., v. NLRB, 321 F.2d 185 (6th Cir. 1963).

50. 312 F.2d 255 (6th Cir. 1963).

51. 61 Stat. 156 (1947), 29 U.S.C. § 158(a)(1), (3), (4) (1958).

adherence and because they had given testimony at a Board hearing."[52] In a brief order the court denied enforcement, holding that the findings and order of the Board were not supported by substantial evidence.

In *NLRB v. Oman Construction Co.*,[53] an employee had been laid off and refused re-employment. The Board, adopting the findings of the examiner, held that the employee's layoff and refusal of re-employment was because of his union activities; thus it was discriminatory and in violation of section 8(a)(3) and (1). The court, in a brief per curiam opinion, held that substantial evidence supported the findings, and decreed enforcement of the Board's order.

The Tennessee Supreme Court had occasion to pass upon the jurisdiction of the National Labor Relations Board in *Caton v. Pic-Walsh Freight Co.*[54] The plaintiffs in this case were truck drivers employed by the defendant company and were members of the defendant Teamsters Union. In 1960 they were transferred from Memphis to St. Louis; although continuing to drive over the same routes between the two cities, they lived and reported for work in St. Louis. The collective bargaining agreement had a system of terminal seniority; that is, seniority was based on time employed at the terminal, rather than on total time employed by the company. Seniority determined who would make the available runs. Plaintiffs, being low men on the seniority roster at the St. Louis terminal, took a cut in the number of runs and income. Plaintiffs filed a grievance with the union which then approved the transfer. They then filed charges with the NLRB, but these were subsequently withdrawn. Plaintiffs then filed this lawsuit for damages, alleging that the transfer was an unlawful conspiracy between the company and the union to deprive them of their seniority or livelihood. The Tennessee Supreme Court held that this was, in substance, a charge of a non-violent unfair labor practice, and that federal law and tribunals had pre-empted the jurisdiction of the state courts in such a matter. This decision should be contrasted with the decision of the Supreme Court of the United States in *Humphrey v. Moore*.[55] It would appear to be basically inconsistent in rationale with *Humphrey v. Moore* in that the rights in the present case are rights arising under a previous collective agreement (subject to Section 301 of the Taft-Hartley Act) and it is well-established that the enforcement of such rights can be

52. 312 F.2d at 255.
53. 316 F.2d 230 (6th Cir. 1963).
54. 211 Tenn. 334, 364 S.W.2d 931 (1963).
55. Humphrey v. Moore, *supra* note 5. Here the Court found the complaint charged a breach of contract. "It is clear that suits for violation of contracts between an employer and a labor organization may be brought in either state or federal courts." 375 U.S. at 345 n.6.

maintained in a state court as well as a federal court although federal law controls.

Finally, the Sixth Circuit Court of Appeals had to interpret a section of the National Labor Relations Act in *NLRB v. Strickland.*[56] In a proceeding against a union for alleged unfair labor practices, the Board issued subpoenas directing two union representatives to appear and testify. They appeared, but their attorney would not permit them to testify, contending that there was no proof of service of the subpoenas. The General Counsel of the Board, pursuant to section 11(2) of the Act,[57] applied to the United States District Court for an order requiring them to appear and give testimony, which order was granted by the court.[58] The court of appeals affirmed, treating only one of appellant's contentions at any length: that proof of service must be made before the district court has jurisdiction under section 11(2). The court held that this meant that proof must be made in the district court, and not that proof must have been made before the Board.

V. RIGHTS OF EMPLOYEES

Under this heading has been grouped some miscellaneous cases, the common characteristic of which might be said to be that each involves, in various ways, the assertion of some right by employees.

Thus, in one case,[59] the plaintiff employee had filed charges with the local union against its business agent for alleged discrimination in referrals of employment. The charges were referred to the Executive Board which dismissed them. Plaintiff tried again but this time the membership voted not to accept them. Plaintiff then filed a charge with the NLRB, but the Board, after investigation, declined to issue a complaint. The local union then fined plaintiff 100 dollars for violating the international's constitution by filing a charge with the NLRB without first having exhausted all available remedies within the union. Plaintiff refused to pay the fine. As a result, his tendered dues were not accepted and his union membership suspended. The union did, however, refer plaintiff for employment.

Plaintiff then filed suit for injunctive and other relief alleging the union had wrongfully fined and suspended him in violation of section 101 of the Labor-Management Reporting and Disclosure ("Landrum-Griffin") Act of 1959.[60] The district court held that

56. 321 F.2d 811 (6th Cir. 1963).
57. 61 Stat. 150 (1947), 29 U.S.C. § 161(2) (1958).
58. NLRB v. Strickland, 220 F. Supp. 661 (W.D. Tenn. 1962).
59. McCraw v. United Association of Journeymen, 216 F. Supp. 655 (E.D. Tenn. 1963).
60. 73 Stat. 522 (1959), 29 U.S.C. § 411 (Supp. I, 1959). Relief was sought under section 102 of the Act, 29 U.S.C. § 412 (Supp. I, 1959).

imposition of the fine violated section 101(a)(4), which prohibits unions from disciplining members for instituting actions before courts or administrative agencies. One proviso is that the member must first exhaust reasonable hearing procedures within the union. The court held that plaintiff's filing of charges with the union on two occasions was a sufficient exhaustion of internal remedies. The court concluded that the fine violated section 101(a)(4), and the refusal to accept plaintiff's dues, suspension of his membership, and the exclusion of him from union activities was a denial of equal rights and a denial of freedom of speech and assembly in violation of section 101(a)(1) and (2). The court thereupon ordered that the fine be set aside and that the union accept the tendered dues. The court, however, refused to award damages, finding the union's violation had resulted in no loss to plaintiff.

In *Russ. v. Southern Ry.*,[61] plaintiff brought an action under the Railway Labor Act[62] seeking enforcement of an award and order of the National Railway Adjustment Board. Plaintiff, an engineer, and one Cox, the fireman, were the engine crew on a train which was involved in a collision with a motor car on May 8, 1958. The NRAB found that the operator of the motor car violated several safety rules and that this was the proximate cause of the accident. However, as plaintiff and Cox were also violating a safety rule, they were dismissed from service on May 15, 1958. Cox was subsequently restored to service on September 27, 1958. The NRAB, in treating plaintiff's claim for restoration to service, held that there could not be this disparity in discipline, and ordered plaintiff restored to service as of September 27, 1958, with back pay from that date. In opposing the order, the carrier contended that the Board could not substitute its judgment for management in matters of discipline. The court, after discussing the limited scope of review and the Board's expertise, affirmed the order. The court, like the Board, emphasized the railroad's early reinstatement of Cox. The court apparently was moved by the fact that the plaintiff was sixty-six years old, had worked for the railroad thirty-six years, and had had an unblemished record until this accident.

The plaintiff in another case arising under a different statute did not fare so well.[63] He had been employed by the defendant company from 1945 until 1954 when he entered military service. While he was in the service, the company and the union entered an agreement providing severance pay for employees laid off for lack of work. After being released from the service on July 28, 1958, plaintiff applied

61. 218 F. Supp. 634 (E.D. Tenn. 1963).
62. 48 Stat. 1189 (1934), 45 U.S.C. § 153 (1958).
63. Hire v. E.I. DuPont De Nemours & Co., 324 F.2d 546 (6th Cir. 1963).

for reinstatement on July 31, 1958, and was placed on the recall list of laid-off employees in accordance with his rightful uninterrupted seniority. Plaintiff applied for severance pay on August 18, 1958, and the company refused his application on August 28, 1958. Plaintiff brought an action on October 9, 1961, under section 9 of the Universal Military Training and Service Act[64] to recover the severance pay allegedly due him. The defendant company asserted that the action was barred by the Tennessee statute of limitations which provides in pertinent part: "civil actions based upon the alleged violation of any federal or state statute creating monetary liability for personal services rendered . . . shall be commenced within three (3) years from the accruing of the cause of action."[65] The district court[66] had held that this did not apply and that as a veteran plaintiff was entitled to the benefits provided in the collective agreement. The court of appeals,[67] reversing, held that severance pay was compensation for services rendered, and thus there was in the instant case, in the statutory language, a "monetary liability for personal services rendered"; that even though the labor agreement provided for the severance pay, the federal act (the Universal Military Training and Service Act) gave it vitality, and defendant's liability would not exist except for the federal act. The court held that the action was based upon a violation of federal law within the meaning of the Tennessee statute of limitations, which statute, therefore, barred this action.

The Sixth Circuit Court of Appeals was also confronted with an interesting question on venue.[68] Plaintiffs were officials in a Nashville local of an international union. They brought an action in the Middle District of Tennessee, under the Labor-Management Reporting and Disclosure Act[69] alleging that the International and District Lodge No. 57 conspired to expel or disaffiliate plaintiff's Local 42. They alleged that District Lodge 57, in Chattanooga, adopted a resolution asking the International to expel Local 42, whereupon the International, in session in Kansas City, Kansas, approved the request and expelled Local 42.

Section 102 of the statute provides that any action against a labor organization shall be brought in the district where the violation

64. 70 Stat. 509 (1956), 50 U.S.C. § 459 (1958).

65. TENN. CODE ANN. § 28-305 (1956).

66. Hire v. E.I. DuPont De Nemours & Co., 211 F. Supp. 164 (1962).

67. Hire v. E.I. DuPont De Nemours & Co., 324 F.2d 546 (6th Cir. 1963).

68. Local 42, International Bhd. of Boilermakers v. International Bhd. of Boilermakers, 324 F.2d 201 (6th Cir. 1963).

69. 73 Stat. 519-41 (1959), 29 U.S.C. §§ 401 to 531 (Supp. I, 1959).

occurred.[70] The court was faced with the question of whether the violation had occurred in the Eastern District of Tennessee, where the resolution was adopted, the District of Kansas, where it was approved and executed, or the Middle District of Tennessee, where, in a sense, the resolution had its effect. The court, while not deciding between the two other choices, held that the alleged violation had not occurred in the Middle District of Tennessee; therefore, venue was not properly laid in the district where the complaint was filed.

The Tennessee Court of Appeals was confronted with the task of classifying some employees in *Burns v. Temperature Control Co.*[71] This was a suit by a subcontractor to recover for work done in construction of a state mental institution in Greeneville, Tennessee. Plaintiff also sought a declaration of his rights and those of his employees under the Tennessee Prevailing Wage Act.[72] Plaintiff had been refused payment when the State Department of Labor determined that plaintiff failed to classify and pay his employees according to the work they were doing. Thus, the state refused to pay the prime contractor who refused to pay plaintiff. Subsequently, the state paid the money due into court pending final determination of the rights of plaintiff and his employer. The question was whether the employees were laborers, as classified by plaintiff, or sheetmetal workers. None of them were journeyman sheetmetal workers, but they had training and experience in this field. The court found that the employees assembled and hung metal duct works using tools of the sheetmetal trade, and this was done with little or no supervision. The court held that this constituted performing sheetmetal work. The court recognized that the employees did manual labor in unloading and stacking the metal strips, but said this was incidental to their primary work. The court, affirming the trial judge, held that these employees should be classified and paid as sheetmetal workers.

70. 73 Stat. 523 (1959), 29 U.S.C. § 412 (Supp. I, 1959). The section also provides that the action may be brought where the defendant labor organization has its principal office, but this clearly was not applicable.

71. 371 S.W.2d 804 (Tenn. App. E.S. 1962).

72. TENN. CODE ANN. §§ 12-406 to -424 (1956).