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Labor Law -- 1961 Tennessee Survey

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LABOR LAW—1961 TENNESSEE SURVEY

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I. UNION MEMBERSHIP

In considering basic rights in connection with labor organization, it must be noted that there may be a fundamental conflict between giving dominant emphasis to the interest of the group of organized workers in advancing and maintaining the standards applicable to the group as opposed to giving comparable emphasis to the wishes of the individual employee of a particular employer. The various policy statements contained in the Wagner Act, the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 indicate a public interest (within the scope of federal authority) in the protection of employees' right to organize, to choose their own representatives, to bargain collectively, and otherwise to engage in concerted activities for mutual aid and protection.[1] At the same time, section 7 of the National Labor Relations Act makes clear that, in general, the basic right protected by federal legislation is the uncoerced freedom of employees to make a choice with regard to participation in employee organization and engagement in concerted activities.[2]

This basic freedom of choice may be affected by an agreement requiring union membership meeting the limitations and conditions set forth in section 8(a)3 of the National Labor Relations Act.[3] Section 14(b) of this act, however, states that nothing in the act shall be construed as authorizing agreements requiring labor union membership as a condition of employment in states forbidding the making or application of such agreements.[4] It is under this latter provision that state "right-to-work" statutes can be made applicable even to those employers otherwise subject to the provisions of the NLRA. Tennessee Code Annotated sections 50-208 to 50-212, the Open Shop

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1. See particularly section 2 of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin), 73 Stat. 519, 29 U.S.C. § 401(a)-(c) (Supp. II, 1959-61).
2. 49 Stat. 452 (1947), 29 U.S.C. § 157 (1958).
3. 61 Stat. 140 (1947), 29 U.S.C. § 156(a)3 (1958).
4. 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

Law, represent legislation in this state utilizing the congressional permission implicit in section 14(b) of the NLRA. If a particular employer's business does not affect commerce within the meaning of the federal law, or is in that area where the National Labor Relations Board has declined to assert jurisdiction, then the state statute is independently applicable.[5] Section 50-208 embodies a basic freedom of choice in the employee with regard to the matter of affiliation or non-affiliation with a labor organization. This section, however, purports to deal only with this freedom of choice insofar as it prohibits the denial of employment because of the exercise of the choice.

Two decisions of Tennessee appellate courts during the survey period involve oblique application of the provisions of the Tennessee Open Shop Law. Neither of these decisions involves the utilization of section 50-212 of the act which sets forth the penalty for the violation of its various sections. There has been no reported appellate decision, in fact, showing a utilization of the only remedy which the act contains, namely the criminal penalty in section 50-212. The current cases and those mentioned in preceding surveys demonstrate that the courts of the state have relied upon the policy of the statute in fashioning other remedies against labor organization activity deemed contrary to the spirit of the act.[6] In other words, the statute has been hospitably received in this respect and expanded in its application beyond the literal area covered by the enacted legislation. There are no reported applications of the act insofar as it protects the worker's right to be a member of or join a labor union.

In *Large v. Dick*[7] the action of the trial judge in sustaining demurrers to declarations setting forth a common law tort action for damages was reversed and remanded. There were two separate declarations, each alleging the same facts. It was alleged that the plaintiff had been employed by a contractor to paint a restaurant in Oak Ridge; that while thus engaged, defendant local union and its business agent conspired "maliciously and intentionally to injure plaintiff in his trade" demanding that he be discharged because he was non-union, accompanying the demand with the threat that if he was not discharged immediately a union picket line would be set up around the restaurant. The declaration further averred that in consequence of the threat plaintiff was discharged and has since been unable to work at his trade. Other averments in the declaration undertaking to state a cause of action for violation of the right-to-work statute and the statute[8] forbidding the procurement of breach of contract were elimi-

5. 61 Stat. 140 (1947), 29 U.S.C. § 164(c)1(2) (1958).
6. See Sanders & Bowman, *Labor Law and Workmen's Compensation—1959 Tennessee Survey*, 12 VAND. L. REV. 1231, 1239-40 (1959).
7. 343 S.W.2d 693 (Tenn. 1960).
8. TENN. CODE ANN. § 47-1706 (1956).

nated by amendment.

Judge Felts' opinion for the Supreme Court of Tennessee concluded that the allegations made by the plaintiff, if taken as true, stated a case against the defendants for intentional infliction of damage which was actionable if done without privilege or legal justification. The opinion, particularly on the petition to rehear, made it clear that the decision is not based upon a violation of the right-to-work statute but on the common law principle that "the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."[9] It was explained further that the defendants could not establish justification for the infliction of damage by showing that it was their purpose to advance their interest as union men, as well as to deny the plaintiff the right to work because he was non-union. The court treated as authoritative the many cases at common law which hold that a labor union has no right to picket or boycott or threaten such action for the purpose of compelling an employer to discharge an employee unless he becomes a member of the union. The court cited approvingly a 1940 text treatment which declared it to be settled law that non-union employees discharged by reason of the execution of a closed shop contract have a right of action against the union for interfering with their right of employment.[10] The opinion recognized that in many states the efforts of a labor organization to secure an all-union shop are legal and that in such states the organization will be privileged or justified in asserting its combined power to secure the discharge of a non-union man.[11] The opinion declared, however, that it could not be thought that action directed to such an end could be recognized as privileged or justified in a state such as Tennessee which has an open shop or right-to-work law. The portion of the opinion on the petition to rehear made it clear, however, that this reference to the Tennessee right-to-work statute involved no direct application of that statute but simply made reference to it in determining the common law of the state as to the justification for the particular conduct.

The principle enunciated and applied in this case is what is known as the prima facie tort doctrine, first articulated in England in 1889 and 1892 in *Mogul Steamship Co. v. McGregor, Gow & Co.*[12] In this case the defendant shipowners had combined for the purpose of securing control of the carriage of goods between England and certain

9. Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) (Holmes, J.), quoted at 343 S.W.2d at 694.
10. 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 46, at 112 (1940).
11. The court cites PROSSER, TORTS 743 (2d ed. 1955).
12. [1889] 23 Q.B. 598 (C.A.), *aff'd*, [1892] A.C. 25.

Chinese ports. The defendants utilized methods such as rebates and refusals to carry goods in an effort to bar any outside shipping company from access to the trade. The plaintiff's new transport line went bankrupt as a result of the defendants' methods. The court held that while the combination had intentionally ruined the new company, there was justification in the defendants' right "to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage."[13] Thus the opinion, while enunciating the principle that the intentional infliction of harm is actionable unless justified, found justification in the advancement of self-interest by the defendant shipowners.

The application of the *Mogul Steamship* principle to the efforts of organized labor was first suggested by Mr. Justice Holmes, dissenting in the Massachusetts case of *Vegelahn v. Guntner*.[14] He felt that the policy of allowing free competition justified "the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."[15] It is clear that he felt that this principle applied to the competition between the organized and the unorganized for available work. While this point of view was undoubtedly adopted as expressing the common law in many states[16] and was approved by the American Law Institute in its *Restatement of Torts*,[17] it is obviously incompatible with the underlying policy of the right-to-work statute, as the court found in this case.

In *Martin v. Dealers Transport Co.*[18] a bill for an injunction had been filed by representatives of a class consisting of Tennessee employees of the defendant automobile transport company. The bill sought to prevent the enforcement of a union shop agreement between defendant company and defendant local union at Louisville, Kentucky. It was conceded that the agreement in question was legal and could be enforced in Kentucky since it has no right-to-work law, but it was contended that the agreement was illegal and unenforceable in Tennessee, by reason of the policy in the right-to-work statute. The chancellor found that the agreement in question did violate the public policy of the state of Tennessee, and enjoined its application to the class of employees represented by the plaintiffs. The opinion of Judge Bejach in the court of appeals dealt primarily with issues relating to

13. [1889] 23 Q.B. 598, 613 (C.A.).
14. 167 Mass. 92, 44 N.E. 1077 (1896).
15. *Id.* at 1081.
16. See cases cited in PROSSER, TORTS 743 (2d ed. 1955).
17. See, *e.g.*, RESTATEMENT, TORTS §§ 775, 788, 810 (1939).
18. 342 S.W.2d 245 (Tenn. App. W.S. 1960).

whether or not the state court had jurisdiction in such a matter and whether or not the chancellor erred in ruling that the agreement in question violates the law and public policy of Tennessee.

The opinion rejected the contention of the appellant union that in the above situation exclusive jurisdiction was in the National Labor Relations Board. The opinion disposed of this complicated topic of pre-emption by citing the 1949 case of *Colgate-Palmolive-Peet Co. v. NLRB*.[19] There, in the review of a board order in an unfair labor practice proceeding involving the carrying out of a closed shop agreement (legal under the Wagner Act), the United States Supreme Court had held that the NLRB has no authority to convert into an unfair labor practice that which was expressly authorized by Congress. The Tennessee court's reasoning on this point is summed up in the following statement: "If the National Labor Relations Board did not have jurisdiction to declare something unfair labor practice under the terms of a closed shop contract, it seems obvious to us it would be similarly without authority under a union shop contract such as is involved in the instant case."[20] The inadequacy of this reasoning in light of the numerous developments relating to pre-emption since 1949 will not be discussed in detail.[21] On the other hand, it would likely be concluded that the pre-emption doctrine would be inapplicable if the situation were analyzed under the principles controlling pre-emption. The court very properly pointed out that the decision of the Supreme Court of the United States in *Railway Employees v. Hanson*[22] involves a specific authorization under the Railway Labor Act,[23] as amended in 1951, which is completely different from the provision in the National Labor Relations Act on the matter of union shop agreements and state law.

A second phase of this case presents a much more difficult problem. The court rejected the contention of the local labor union which had made the agreement with the company in Louisville to the effect that since the agreement was valid and enforceable in Kentucky where it was made, it should be given full faith and credit and enforced in Tennessee. The court declared that this was a situation where the law of the forum prevails over the law of the place of contracting.[24] The court cited previous decisions where the Tennessee court has refused to enforce in Tennessee obligations which were legal in the

19. 338 U.S. 355 (1949).
20. 342 S.W.2d at 248.
21. See discussions of the pre-emption problem and the factors which must be looked into in the survey articles at 10 VAND. L. REV. 1110 (1957), 11 VAND. L. REV. 1287 (1958), 12 VAND. L. REV. 1231 (1959), 13 VAND. L. REV. 1159 (1960).
22. Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).
23. 62 Stat. 909 (1951); 45 U.S.C. § 152 (1958).
24. The court quoted 17 C.J.S. *Contracts* § 16 (1939).

state where they were made but which were considered as contrary to the public policy of the state of Tennessee. The court also stated that there is no merit in the contention that the injunction in this case interferes with the free flow of commerce between the states. It accepted the testimony of one of the complaining employees that interstate commerce would be expedited by such an injunction because shipments would reach their destination while the Louisville driver sleeps.

This decision presents great difficulties in analysis because of the absence of information as to a number of pertinent facts. The statement of facts does not indicate precisely what the class of employees is that is represented by the plaintiffs; there is nothing to indicate precisely where the plaintiffs were hired, where job assignments were given and where the duties of the complainants began or ended; there is nothing to indicate the precise relationship of the plaintiffs to the state of Tennessee, that is, whether it was a matter of residence only, or assignment or place of work only, or some undefined combination. The underlying problem is obviously one which could present a great deal of difficulty and the solution of it is by no means clear when the applicable provisions of the National Labor Relations Act are examined. There is the added factor of a person being engaged in work involving the crossing of state lines. Employment and job assignment in Tennessee are subject to the Tennessee statutory policy. If neither of these phases take place within the state there would appear to be nothing upon which the policy could operate. Ultimately, a federal question would be presented calling for decision by the Supreme Court of the United States.

II. FEDERAL COURT PROCEEDINGS

Title 3 of the Labor-Management Relations Act of 1947 authorizes certain suits in United States district courts by and against labor organizations and makes special provisions for venue and the service of legal process. Section 301 authorizes the institution of such suits by and against labor organizations for the violation of contracts between an employer and the collective bargaining agent. Section 303 of this act makes unlawful a variety of boycotts and other unlawful combinations (the same as those forbidden as union unfair labor practices under section 8(b)4 of the National Labor Relations Act) and authorizes damage suits in the United States district court for those injured in their business or property by reason of the forbidden conduct. The effect of these special provisions and limitations with respect to amount in controversy, jurisdiction, venue, and service of process is made apparent in a case such as *Stein v. American Federa-*

tion of Musicians[25] where the jurisdictional basis of the federal court suit was diversity of citizenship. The question presented in the case was whether the American Federation of Musicians should be regarded as an entity comparable to a corporation for purposes of federal court diversity jurisdiction. Judge Miller's opinion declared that the union is not to be treated like a corporation with respect to residence, but rather is to be treated as a voluntary, unincorporated association, resident wherever it has members. Since this includes Tennessee, there was not complete diversity between the plaintiff and the defendants and therefore the required basis of federal jurisdiction was absent.

Two decisions of the United States Court of Appeals for the Sixth Circuit during the survey period involve damage suits against labor organizations pursuant to section 303 of the Labor-Management Relations Act. In each case the reviewing court found that unlawful secondary pressure had occurred and sustained judgments for substantial items of damage attributable to such conduct.

In *United Mine Workers v. Osborne Mining Co.*,[26] the suit had been filed in the United States District Court for the Eastern District of Tennessee by a Kentucky corporation. The plaintiff's theory was that the defendants had induced and encouraged employees of neutral employers to engage in a concerted refusal in the course of their employment to mine and transport coal, all for the purpose of forcing the plaintiff to recognize the UMWA as a representative of plaintiff's employees, the UMWA not having been certified as such representative under the National Labor Relations Act. There was also a claim based on violation of the common law of Tennessee. The district court, after a lengthy hearing, had adopted 124 findings of fact and 14 conclusions of law and rendered judgments for the plaintiff mining company in the amount of $165,000 compensatory damages and $50,000 punitive damages. The court of appeals affirmed the action of the district court as against the appeal of the union regarding the proof of unlawful secondary pressure, and also as against the appeal of the mining company regarding the adequacy of the damages which had been granted.

The case in question grew out of events taking place at Jellico, Tennessee in 1954 and 1956, particularly in and around the Osborne Mining Company's tipple at Jellico. The opinion of Circuit Judge Weick in this case stated that the facts as found by the district judge "present a frightening picture of violence and intimidation." He selected for reference mention of incidents involving the prevention of

25. 183 F. Supp. 99 (M.D. Tenn. 1960).
26. 279 F.2d 716 (6th Cir. 1960).

trucks from unloading coal at Osborne's tipple, including an incident in August, 1954, when trucks of coal entering Jellico were stopped by groups of men in the streets and the drivers were arrested by a deputy sheriff who was a member of the union. This was done on warrants charging operation of trucks with improper equipment and without a Tennessee license. The opinion of the court of appeals found no basis for interfering with the district judge's findings of fact. He found that the acts of violence and intimidation were intended to and that they had created a reign of terror in the Jellico area in order to promote the UMWA's organizing campaign. In addition, he found that such acts were intended to and did induce and encourage employees of employers other than Osborne to engage in a concerted refusal to mine and haul the coal, the objective being to force Osborne to bargain with the UMWA as the representative of its employees.

The Court of Appeals for the Sixth Circuit, in approving the judgment against the union in this case, distinguished *NLRB v. International Rice Milling Co.*,[27] where it had been held that a secondary boycott had not occurred when the union pickets threw rocks at a truck driver who sought to approach the premises which were the site of the primary dispute. The court of appeals stated that the activities of the defendants in this case were not directed against a single neutral party, but against many neutral employers and their employees. The court declared that while Osborne had two employees at the tipple, most of its employees were in its strip mines and that the situs of the dispute was the pit where the miners were working and not the tipple. In any event, the court accepted the trial court's determination that the UMWA had not confined activities to the tipple or any picket line at the tipple, but that they were spread throughout the area. The opinion stated that even in picketing at the premises of a primary employer, the union must exercise its rights consistent with the right of neutral employers to remain uninvolved in the dispute. The court of appeals reached the general conclusion that none of the findings of fact of the trial court were so clearly erroneous as to permit it to set them aside.

With respect to the issue as to whether the truck drivers or the sublessee mine operators were neutral employees within the meaning of the act (Osborne being the lessor of the properties in question) the court indicated that this is essentially a question of fact rather than law and that the trial court had found that Osborne did not control either the secondary employers or their employees. The opinion declared that prior to the Taft-Hartley amendments of 1947 the employees of the lessee mine operators and the truckers would have

27. 341 U.S. 665 (1951).

been considered as employees of Osborne, but in this instance the evidence supported the findings of the trial judge as to the existence of the independent contractor relationship. The court declared further that the activities of the UMWA were directed against both primary and secondary employers and employees, but that this did not oust the federal court of jurisdiction. The rationale was that the acts were so interrelated as to be virtually impossible to separate and the federal district court had jurisdiction to consider and determine a claim based upon a violation of the common law of Tennessee, since the claim was joined with the federal claim and supported by the same evidence.[28] The opinion drew the conclusion that there was support for holding the defendant labor organizations responsible under the common law doctrine of *respondeat superior* for the acts of their agents and servants and that section 6 of the Norris-LaGuardia Act[29] did not immunize unions from the activities shown here. The opinion reversed the judgment in favor of Love & Amos, a sales agency for Osborne. The court concluded that the damage to the sales agency was too incidental and remote for recovery under section 303 of the Labor-Management Relations Act and that if Love & Amos were damaged as a result of any activities of the defendants directed at it, an adequate remedy would exist under state law.

In *Local 984, International Brotherhood of Teamsters v. HumKo Co.*,[30] the United States Court of Appeals for the Sixth Circuit found adequate support for the findings and conclusions reached in the United States District Court for the Western District of Tennessee, Western Division, with the exception of the allowance of attorneys fees as items of damage. The appeal was from three judgments which had been entered by the district court. One judgment had been recovered by the HumKo Company, with which the defendant union had a dispute at Memphis, Tennessee. Another judgment was recovered by a mechanical contracting firm in Memphis which had undertaken the construction of a refinery for HumKo at Champaign, Illinois. A third judgment had been recovered by the Kuhne-Simmons Company, Inc., a company which had been engaged in the construction of the facility at Champaign.

The dispute between HumKo, Inc., and the defendant labor organization occurred in connection with the negotiation of a new collective bargaining agreement covering employees at the company's Memphis plant in mid-1957. Certain members of the local in Memphis, together

28. Citing Hurn v. Oursler, 289 U.S. 238 (1933) and United Mine Workers v. Meadow Creek Coal Co., 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959).
29. 47 Stat. 71 (1932), 29 U.S.C. § 106 (1958).
30. 287 F.2d 231 (6th Cir. 1961).

with an officer and agent, went to Champaign and formed a picket line at the site of the HumKo facility there which was in process of construction. The construction work was halted for a period of two weeks as a result of this picketing and the suit in this case was concerned with the damages that were said to have resulted. The opinion sets forth an extensive summary of the findings of fact and the conclusions of law entered by the district court in this case. The opinion contains a sample of some of the findings and the testimony upon which the finding was based, and then concludes that its examination of all the evidence left the court with a definite and firm conviction that no mistake had been committed; that there was substantial evidence to support the findings of the trial judge; and that the object or purpose of the picket line at the refinery in Champaign was to stop construction work on the refinery and that this object was achieved as a result of the picketing operation. The court stated further that there was substantial evidence to support the finding that when the union officials at Memphis sent union members from Memphis to Champaign, they had secondary picketing as an object; that there was neither intention nor effort to assert pressure upon the salaried, supervisory and engineering employees of HumKo at Champaign; that since the plant at Champaign was not in production there could not have been any lawful primary picketing at this plant. The court rejects the idea that the international union (one of the appellants) did not participate in, authorize or ratify the conduct of the local or the agents and members of the local. The court found that the participation of the international representative in this instance in the Memphis negotiations, his actual notice of what was going on at Champaign and his actual knowledge of a complaint filed with the NLRB by a neutral employer at Champaign all indicated participation, authorization and ratification by the international union. The court of appeals did not find any of the items of damage assessed against the defendant labor organization to be excessive or not supported by evidence, with the exception of an item relating to attorneys fees.

In *Phillips v. Local 662, International Brotherhood of Electrical Workers*,[31] the regional director of the NLRB was seeking an injunction against the defendant union because of alleged violations of sections 8(b)4(i) and (ii)B, as required under the Taft-Hartley Act. Members of the defendant union had been employed by a radio station in Chattanooga prior to the purchase of the station's facilities by a new company. The new company had terminated the employment of the union members and hired non-union employees. The respondent labor organization had picketed the main offices and studios of the

31. 192 F. Supp. 643 (E.D. Tenn. 1960).

station in the Patten Hotel, picketed a mobile unit of the station at certain street locations in Chattanooga, and mailed out a large number of notices containing a list of business concerns which were continuing to place advertising over the "struck" radio station, with the statement that such concerns "do not merit your patronage and support." The list was mailed to the business concerns mentioned in the notice and to other businesses, one of which had written on the margin, "We would rather not add you to the list." Chief Judge Darr of the United States District Court for the Eastern District, Southern Division, awarded a temporary injunction against the defendant labor organization, with an indication that the mailing of the notice went further than persuasion and encroached upon the freedom of neutral persons to operate their business without undue pressure.

The opinion went on to state that the mobile unit of the radio station was primarily used in advertising business establishments by parking it in front of the establishment and arranging a telephone connection with the studio. The opinion of Chief Judge Darr declared that the mobile unit would not be a substitute for the studio and office headquarters of the station and that the picketing of it would constitute illegal pressure upon neutral persons. He pointed out that the picketing at the Patten Hotel, which is concededly allowable under the circumstances of this case, will afford the union adequate opportunity to inform the public of the area of its claims.

Two comments may be made about the case. The mailing of the notices to the advertisers and the pressure placed upon such business concerns would not have been unfair labor practices subject to this temporary injunction proceeding prior to the Landrum-Griffin amendments to the National Labor Relations Act in 1959. Under the wording as it existed prior to 1959, the forbidden pressure had to involve inducing the employees of an employer to engage in a concerted refusal of activity where an object was to force the cessation of business with another person. Under the 1959 amendment, however, section 8(b)4-(ii)B forbids a labor organization to threaten, coerce or restrain any person where an object is the forcing or requiring of any person to cease doing business with any other person. Under section 8(b)4(i)B, if the pressure is applied to "any individual employed by any person" for the proscribed object set forth above, it is only necessary to show that such individual was induced or encouraged in order to make out a violation. The head of a business concern would not be treated as an "individual employed by any person." Apparently in this case the judge considered that the mailing of the notice to the advertisers was coercive, with an object of securing a withdrawal of business from the struck station.

With regard to the picketing of the mobile unit, the court was applying what is known as the "Washington Coca-Cola doctrine." The general effect of this doctrine is that picketing should be restricted to the principal place of business of an employer with whom there is a primary dispute if there is adequate opportunity at that location. Where this is true, the picketing of locations other than a principal place of business, such as at a truck making delivery at a customer's place of business, amounts to prohibited secondary pressure. There is some question as to the continuing validity of this doctrine in light of the decision of the Supreme Court of the United States in the General Electric "reserved gate" case.[32] In this decision in May, 1961, the Supreme Court upheld the NLRB's doctrine that it would constitute prohibited secondary pressure for a union to picket a gate reserved solely for the employees of independent contractors at the plant of the employer with whom the union had a primary dispute. The opinion makes clear, however, that to the extent that any of the contractors were performing work of a sort that would normally be performed by the company's production and maintenance employees, the picketing could continue; that is, that it would not be forbidden secondary pressure. If the logic of this idea of permitting picketing wherever work is being performed associated with the employer's normal operations is carried out, it might very well result in a finding that the picketing of a mobile radio unit was primary rather than secondary.

In *NLRB v. Lassing*,[33] the Court of Appeals for the Sixth Circuit denied enforcement to a Board order. The Board had found that the respondent employer had violated sections 8(a)1 and 8(a)3 of the National Labor Relations Act by discharging three employees because they had joined the union, and had violated sections 8(a)1 and 8(a)5 by refusing thereafter to bargain with the union.[34] In the per curiam decision denying enforcement of the Board's order, it was stated that the respondent had considered the matter of continuing to truck gas with its own equipment and employees. It had, however, decided to adopt a common carrier system of gas delivery as soon as anything occurred which would increase costs, and in any event when the truck licenses expired in 1959. In January of 1959, respondent's drivers joined the union. When a negotiating conference was requested, the drivers were informed that the decision had been made to contract with a common carrier and that they were being terminated. The opinion goes on to state that the company had refused the requested

32. Local 761, Internat'l Union of Elec. Workers v. NLRB, 81 S.Ct. 1285 (1961).
33. 284 F.2d 781 (6th Cir. 1960).
34. 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958).

recognition by the union because the coming of the union was the "added expense" which brought to fruition its planned abandonment of its previous method of shipping.

The court referred to its previous decisions in *NLRB v. Adkins Transfer Co.*[35] and *NLRB v. R. C. Mahon Co.*,[36] in which it had held that a company may suspend operations or change its method of doing business with resulting loss of employment so long as the change is motivated by financial or economic reasons, rather than the avoidance of obligations under the National Labor Relations Act. The court of appeals rejected the NLRB's contention that this case is distinguishable from the above cases because the company accelerated its proposed change upon learning that its three employees had joined the union before demands for increased pay had been made. It stated that the company was justified in believing that such demands would be made and could not be met.

> The advent of the Union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation. It is completely unrealistic in the field of business to say that management is acting arbitrarily or unreasonably in changing its method of operations based on reasonably anticipated increased costs, instead of waiting until such increased costs actually materialize.[37]

III. Rights Under Collective Agreements

In *Cameron v. J. C. Lawrence Leather Co.*,[38] a discharged worker brought suit in a Tennessee circuit court to recover for breach of the collective agreement between the defendant employer and a labor organization. The court of appeals, in the opinion by Presiding Judge McAmis, affirmed the judgment below dismissing the suit. The opinion states that the plaintiff had been discharged on the basis of medical findings that a congenital anomaly in his back predisposed him to accidental injury while performing the duties regularly assigned to him. The plaintiff had been in the defendant's employ for several years and the above physical condition was not discovered by the defendant until the plaintiff was re-examined upon being recalled to work following a layoff.

The court's opinion states that the weight of the proof is that the plaintiff's back condition was permanent and that competent physicians had indicated to the defendant that it would be dangerous for the employee to continue in the type of work he performed. The court

35. 226 F.2d 324 (6th Cir. 1955).
36. 269 F.2d 44 (6th Cir. 1959).
37. 284 F.2d at 783.
38. 342 S.W.2d 65 (Tenn. App. W.S. 1960).

stated that it is convinced that the defendant acted in good faith and upon the basis of medical findings. The court indicated that the question is thus presented whether the employer was within his rights under the collective agreement in acting as he did. Reference is made to the Management Rights Clause of the collective agreement, which refers to the right to "discharge for just cause" and also to another section which refers to the same right as existing in the company. It was pointed out that there is no express provision in the agreement referring to the right of the employer to discharge an employee because of physical disability. The opinion seems to accept the proposition that the power to discharge for just cause refers to disciplinary discharges rather than discharges based upon disability. It then asserted that this right of the employer to discharge for physical incapacity to perform substantially the contract was not to be taken as excluding whatever rights exist under the law and under a proper construction of the contract. The opinion indicates that the general authority reserved in the Management Rights Clause relating to management of the plant and direction of the working force (apart from the reference to discharge) gives the authority to discharge under the circumstances of this case.

It should be noted that the whole basis of the court's opinion would be changed in this case if it would frankly recognize that the plaintiff's physical condition could provide "just cause" for the discharge. It would appear to be much sounder to adopt this rationale than to utilize the very general language relating to management of the plant and direction of the working forces. The contract had specific language relating to discharge as well as a requirement that just cause exist. The contract language itself imported no limitation as to the nature of the just cause. If the contract had specific language dealing with the problem, one would assume that the parties to the agreement expected that language to be utilized rather than implications which do not appear on the face of the contract. The writer believes that the result would be the same as that reached in this case if the facts as found by the court are to be taken as true.

The third appeal in *Textile Workers Union v. Brookside Mills, Inc.*[39] was reported during the survey period. This case was concerned with the computation of vacation payments to employees of a firm which went out of business. The defendant had denied claims for vacation pay by those employees who had been laid off for thirty days or more, it being asserted that this broke the continuity of service required by the collective bargaining agreement under which the vacation payments were provided. The opinion by Presiding Judge McAmis

39. 341 S.W.2d 758 (Tenn. App. E.S. 1960).

rejected the defendant's contentions and affirmed the chancellor's construction of the term "continuous service." The court of appeals refused to find that the chancellor erred in accepting testimony in regard to defendant's policy with respect to disregarding layoffs for economic reasons. In a previous decision in this case, the Supreme Court of Tennessee had declared that where a layoff was for a substantial period of time and for bona fide economic reasons, it would effect a break in continuity of service, but that a brief and insubstantial layoff ought not to be treated as an interruption of service. The court in this case stated that the supreme court had not been attempting to lay down an absolute rule applicable under all circumstances regardless of how the parties themselves had construed the contract, which would control the decision on the remand. The opinion seems to be suggesting that the evidence of classification of employees as revealed by the defendant's own records could properly have been treated as determinative of the category of a particular employee for purposes of ascertaining that employee's amount of vacation pay.

In *Aluminum Co. of America v. Walker*[40] suit was filed by five employees of the defendant company for unemployment compensation benefits which had been disallowed by the board of review because of the refusal of these employees to accept jobs offered to them. The chancellor held that the jobs offered were not suitable within the meaning of the Tennessee Employment Security Law, and the company appealed on the ground that there was material evidence to support the conclusion of the board of review. The Supreme Court of Tennessee, in an opinion by Justice Tomlinson, reversed the decree of the chancellor, and restored the order of the board of review except with respect to a portion of one claim.

The plaintiffs in this case had both been employed by the company a number of years previously as laborers. Three of the plaintiffs had progressed in their respective departments to the classification of first class electrician, one to the classification of battery attendant, and a fifth to truck repairman. At the time of the layoff for lack of work, each of the plaintiffs was offered the next best available job in the employer's plant for which he was qualified, which was that of "laborer" or its equivalent. The compensation level for the offered job was approximately $80 per week, which was $30 to $50 less than the jobs from which plaintiffs had been laid off.

Under the collective bargaining agreement in effect at the plant, there was a provision dealing with the recall of employees who had been laid off for lack of work, reading as follows: "If an employee is unemployed at the time of his recall, he is eligible for recall in his own

40. 340 S.W.2d 898 (Tenn. 1960).

job classification in any department of the Company on the basis of his seniority. If a laid off employee accepts work in a department other than his own he is eligible for recall to his own job classification, on the basis of seniority, only in his own department."[41] The court interpreted this provision as meaning that, for example, so long as an electrician remained idle he had a chance of being recalled as an electrician in any department where such a job became open. The court went on to say that, under the above-quoted provisions, if any of the plaintiffs had accepted the job of laborer offered to him, he would not have been eligible for recall to a job in his own classification in any department except the department in which he was working at the time he was laid off.

The court concluded that the plaintiffs had refused the jobs as laborers because of the disadvantages which would be placed upon them under the quoted provision of the collective agreement. The opinion referred to Tennessee Code Annotated section 50-1324, relating to the determination of whether work offered is suitable, and concluded that in this case material evidence supported the board of review's finding that the work offered was "suitable." The court's opinion declared that even though it might be assumed that the plaintiffs' refusal was for good cause, there still remained the question as to whether there was support in the record for the board's finding that the men failed "without good cause" to accept the work offered, as this statutory term is used within the spirit and intent of the Employment Security Law. The opinion states: "It may be that these men exercised good judgment in refusing the next best available job on the chance that there might be made available in the reasonably near future a job of their old classification in some department of their employer. Under the evidence and plight of this case, however, this was not a risk which must be charged to the official unemployment funds."[42]

IV. ARBITRATION

Efforts to enforce and to declare void a particular arbitration award resulted in decisions by the Court of Appeals for the Sixth Circuit and by the Supreme Court of Tennessee during the survey period. A three-man board of arbitration, considering a grievance filed on behalf of a dock loader who had been discharged for sleeping on the job, had sustained the grievance of the discharged employee. The award then provided that the aggrieved employee was to be reinstated

41. 340 S.W.2d at 900.
42. *Id.* at 902. See Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 323, 322 (1955).

to his former position with no loss of seniority rights but with loss of pay from the time of his discharge until the date of his employment. The award went on to state that the grievant was derelict in his duty in leaving his post, getting into an automobile and falling asleep, but that the decision on the grievance should take into consideration the surrounding circumstances and the manner in which the company had handled the grievance. The labor organization involved in this case filed suits in the United States district court under section 301 of the Labor-Management Relations Act of 1947 to enforce the decision of the board of arbitration. The defendant company moved to dismiss on the ground that the court lacked jurisdiction because no federal question was involved. The district court felt that the motion to dismiss was well-taken because of the absence of a federal question, citing *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[43] In *Oil, Chemical & Atomic Workers International Union v. Delta Refining Co.*,[44] the Court of Appeals for the Sixth Circuit, in an opinion by Judge Pope, remanded the case with directions to permit the appellant union to amend its complaint, if it could do so, to show that there was an appropriate federal question in spite of the *Westinghouse* decision. The court stated that it cannot be said categorically that the action to enforce the arbitration award is foreclosed as a "uniquely personal right" of an employee under the *Westinghouse* rule. The court went on to say, "The mere fact that an arbitration award may result in payment of back pay to an employee, or his reinstatement after discharge, does not, in and of itself, bring the case within the *Westinghouse* rule. An award of that character may be the necessary end result of an action under Sec. 301(a) to vindicate the Union's rights under a collective bargaining agreement."[45] In spite of the decisions indicating that an award similar to the one here could be enforced in federal court, the opinion concluded that the motion to dismiss was proper in the light of the state of the pleadings before the trial court. The court declared that the complaint was inadequate even under the liberal rules to show that an appropriate case for relief was made out.

Overall v. Delta Refining Co.,[46] involved the same arbitration award. The proceeding in this instance was instituted by the company in state court against the discharged employee and his union to have the

43. 348 U.S. 437 (1955). See the discussion of this case in Sanders & Bowman, *Labor Law and Workmen's Compensation—1959 Tennessee Survey*, 12 VAND. L. REV. 1231, 1241 (1959).

44. 277 F.2d 694 (6th Cir. 1960).

45. *Id.* at 696. The court cites its previous decisions to this effect, in Local 19, Warehouse Union v. Buckeye Cotton Oil Co., 236 F.2d 776, 779, 781, (6th Cir. 1956), A. L. Kornman Co. v. Amalgamated Clothing Workers, 264 F.2d 733 (6th Cir.), *cert. denied*, 361 U.S. 819 (1959).

46. 340 S.W.2d 910 (Tenn. 1960).

arbitration award declared void. The basis of plaintiff's complaint was that the arbitrators had exceeded their authority and compromised the matter submitted to them. The chancellor sustained the employer's bill, and made a declaration setting aside the award.

The Supreme Court of Tennessee, in an opinion by Justice Swepston, reversed the decree below, and rendered judgment declaring the rights of the parties to be in accordance with the award of the arbitrators. The opinion sets forth in full text the grievance filed by Overall in this case, the sections of the collective agreement relating to arbitration, the powers of the arbitration committee, the section of the agreement relating to the power of management to discharge for proper cause, and excerpts from the award of the majority of the board of arbitration. The court rejected the contention of the company that the award recognized that the discharge was made for proper cause because it found that the aggrieved employee had been derelict in his duty. It was pointed out that the award on its face showed that the grievance should be sustained, which indicated that the discharge was not for proper cause. The court then examined the right of the arbitration committee to award reinstatement of an employee. The court agreed with counsel for the company that if the arbitrators had in fact found that the discharge was for proper cause, they could have gone no further and any attempt to award a lesser penalty would have been plainly beyond their power and "absolutely void." The court then stated:

> Are we going to hold then that when the committee has found that the discharge was not for proper cause, their award shall end at that point with a period? That would hardly seem to be a rational solution of the problem, or conduct consistent with the nature of an arbitration award. That would leave the employee or the union in his behalf (whatever the law may be in that regard we do not need to concern ourselves with at this time) to commence a litigation for the purpose of reaping the benefit of the award.[47]

The court quoted from other opinions relating to the power of arbitrators, and also quoted in full a section of *American Jurisprudence* concerning the certainty of terms in the arbitration award. The court concluded that the action taken by the majority of the arbitrators in this instance was not inconsistent with the reserved powers of management under the collective agreement, in spite of the absence of an express reference to reinstatement. The action of the arbitration committee, it is stated, did not amount to an altering of any provision of the contract, but to the contrary, the committee did "a very sensible thing."

47. *Id.* at 913.