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# Labor Law

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The body of statutory wording, regulations and court and administrative decisions which clusters around such familiar federal landmarks as the Labor-Management Relations Act ("Taft-Hartley")[1] and the Fair Labor Standards Act ("Wage and Hour")[2] fall far short of constituting the entire subject matter of Labor Law. State statutes or the common law of the state may be much more in point in providing the legal framework for solving a particular problem of the employment relationship, whether viewed individually or collectively. The law which governs the various aspects of the "human factor in industry," or which prescribes the ground rules under which the parties themselves govern these aspects, may require consideration, even in a single case, of succeeding levels of legality extending from municipal ordinances to the Constitution of the United States.[3] It continues to be a problem of great difficulty to distinguish those situations where the law of the state is applicable, even though some aspect of interstate commerce is involved, and those where a federal statute has "occupied the field."[4] Even though federal law is controlling because Congress has evidenced an intention to pre-empt the subject matter, the state court is not necessarily prevented from applying that federal law in

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1. 61 STAT. 136 (1947), 29 U.S.C.A. §§ 141-97 (Supp. 1953).

2. 52 STAT. 1060 (1938), as amended, 29 U.S.C.A. §§ 201-19 (Supp. 1952). See Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950).

3. See, *e.g.*, Schneider v. New Jersey, 308 U.S. 147, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939); Hague v. C.I.O., 307 U.S. 496, 59 Sup. Ct. 954, 83 L. Ed. 1423 (1939).

4. See Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 Sup. Ct. 359, 95 L. Ed. 364 (1951); International Union, U.A.W.A., A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651 (1949); LaCrosse Tel. Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18, 69 Sup. Ct. 379, 93 L. Ed. 463 (1949); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1234 (1947); Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 65 Sup. Ct. 1373, 89 L. Ed. 1782 (1945); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 62 Sup. Ct. 820, 86 L. Ed. 1154 (1942). *Compare* Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W.2d 94 (1950), *with* Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 So.2d 112 (1951), and Texas State Federation of Labor v. Brown & Root, Inc., 246 S.W.2d 938 (Tex. Civ. App. 1952). See also Masetta v. National Bronze & Aluminum Foundry Co., 107 N.E.2d 243 (Ohio App. 1952), 5 STAN. L. REV. 358 (1953). See generally Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, 3 LABOR L.J. 750 (1952); Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593 (1948).

deciding the case before it.[5] It may be, however, that Congress has not only written federal law on the subject but is considered to have given exclusive jurisdiction over certain determinations under that law to a particular federal agency. In such a situation, the doctrine of "primary jurisdiction" ousts the state courts — and federal courts, too, in the first instance — from making a similar determination.[6] The decisions of Tennessee appellate courts in the period under consideration provide illustrations of some of these varying relationships between federal and state labor law.

### SUITS AGAINST NONRESIDENT UNIONS

It should go without saying, but it seems to bear repeating, that most cases on labor disputes which go to court present a pathological situation. They are no more representative of good labor relations than the divorce cases are of good marriage relationships. The Supreme Court of Tennessee and the several sections of the Court of Appeals have not been faced in the last year with the problem of determining the validity of objectives and methods in a current dispute between employer and labor union. The nearest approach, perhaps, was in the case of *McDaniel v. Textile Worker's Union of America (CIO)*,[7] which grew out of a strike at the plant of the American Enka Company in Hamblen County. An employee who had been shot crossing a picket line brought an action for damages against the individuals firing shots, the local union and the international organization. These facts do not present a problem peculiar to labor relations, and hence, the decision does not, strictly speaking, fall under the Labor Law heading. Assault, battery and malicious mischief do not lose their ordinary legal significance in terms of civil or criminal consequences under the law of the state merely because they occur on a picket line or in connection with a strike.

The trial judge sustained a plea of abatement on the part of the international union challenging the validity of the 1947 statute which in suits against out-of-state unincorporated associations, permits substituted service of process on the Secretary of State.[8] A jury verdict for damages was returned against the individual defendants and the

5. This is true, for example, as to employee suits under the Fair Labor Standards Act, *supra* note 2. See the discussion of *Todd v. Roane-Anderson Co.* in the section on Overtime Compensation of this article.

6. The basic case for the general doctrine is Texas and Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553 (1907). See also Thompson v. Texas Mexican Ry., 328 U.S. 134, 66 Sup. Ct. 937, 90 L. Ed. 1132 (1946); *cf.* Georgia v. Pennsylvania R.R., 324 U.S. 439, 65 Sup. Ct. 716, 89 L. Ed. 1051 (1945). See the discussion of *Broome v. Louisville & N.R.R.* in the section on Railway Labor Suits in State Courts of this article. See generally DAVIS, ADMINISTRATIVE LAW § 197 (1951).

7. 254 S.W.2d 1 (Tenn. App. E.S. 1952), 6 VAND. L. REV. 783 (1953).

8. Tenn. Pub. Acts 1947, c. 32, TENN. CODE ANN. §§ 8681.1-8681.3 (Williams Supp. 1952).

local union. On appeal, the Court of Appeals, Eastern Section, affirmed the judgment against the individual defendants and the local union but remanded the case for trial as to the defendant international labor organization. The opinion by Judge McAmis held the statute providing a mechanism for suit against an out-of-state unincorporated association doing business within the State to be consistent with the due process clause of the Federal Constitution.[9] This overruling of previous decisions as to suits against unincorporated associations in other states by substituted service of process on the Secretary of State has far-reaching implications in many areas of the law.[10] It may be noted that it will have particular significance in making it possible to reach in damage suits out-of-state labor organizations which have had sufficient "minimum contacts" within the State to come within the expanded concept of procedural due process.[11] The Court felt that the 1947 statute also had the effect of eliminating the objection that an unincorporated labor union is not a legal entity and may not be made a party defendant.[12]

### Internal Affairs of Labor Organizations

In their internal affairs and relationships, labor organizations do not fall under a body of law peculiarly applicable to them. Normally being unincorporated, such organizations are classed as one type of the many voluntary, nonprofit associations, and legal procedures and relationships are determined and applied accordingly.[13] However, the hands-off attitude, which normally characterizes the courts' dealings with internal affairs of such associations, has been replaced increasingly in the case of labor unions by a more detailed judicial and legislative regulation of many of such internal as-

9. Decisions of the United States Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945), and Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 55 Sup. Ct. 553, 79 L. Ed. 1097 (1935), are considered by Judge McAmis to have sapped the vitality of Flexner v. Farson, 248 U.S. 289, 39 Sup. Ct. 97, 63 L. Ed. 250 (1919). See Overton, *Broadening the Bases of Individual in Personam Jurisdiction in Tennessee*, 22 TENN. L. REV. 237 (1952); Note, 4 VAND. L. REV. 661 (1951).

10. See the discussion of the principal case in the Trial section, subsection on Jurisdiction over Person, of the article on Procedure and Evidence appearing in this Survey. *Cf.* Knox Bros. v. E. W. Wagner & Co., 141 Tenn. 348, 209 S.W. 638 (1919).

11. See International Shoe Co. v. Washington, 326 U.S. 310, 66 Sup. Ct. 154, 90 L. Ed. 95 (1945); Note, 4 VAND. L. REV. 661, 672 (1951); *cf.* 6 VAND. L. REV. 947 (1953).

12. *But cf.* Powers v. Journeymen Bricklayers' Union, 130 Tenn. 643, 172 S.W. 284 (1914). See Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40 (1941).

13. Gill v. Grand Lodge Brotherhood of Railroad Trainmen, 272 Ky. 328, 114 S.W.2d 123 (1938); United Brotherhood of Carpenters & Joiners of America v. Stephens Broadcasting Co., 214 La. 928, 39 So.2d 422 (1949); Mayer v. Journeymen Stone-cutters' Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890). See Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 933 (1930).

pects.[14] This reflects a conviction that under present conditions such affairs have become a matter of public concern and, particularly, that internal union democracy and proper standards of financial administration cannot be left to self-regulation alone.[15] One indirect approach to the problem is the filing requirements set forth in sections 9(f), (g) and (h) of the National Labor Relations Act.[16] Publicity for such matters as internal election procedures and financial reports is a condition precedent to use of the machinery of the National Labor Relations Board for the purpose of seeking certification as a collective bargaining representative or of filing an unfair labor practice charge. Some state statutes deal directly with such matters as discipline,[17] finances[18] and elections.[19]

The standing of an individual union member, in the absence of statute, to take direct action in court to secure honesty in the finances and elections of his local union was treated by the Supreme Court of Tennessee in *Wilson v. Miller*.[20] The Court, in an opinion by Judge Burnett, affirmed the action of the chancellor in overruling a demurrer to the plaintiff's bill. The bill was brought by an individual member of Local Union 369 of the International Union of Operating Engineers for himself and others similarly situated against the officers of the local and the local. It sought an accounting and restitution of union funds allegedly defalcated and court supervision of an election of union officers. The union constitution and by-laws contained what the Court described as an orderly procedure for the conduct of the internal affairs of the association, including provisions for financial audits, trial of disputes and successive appeals within the organizational structure. A specific provision of the union constitution prohibited court action of any sort "until and unless all . . . provisions for hearing, trial and appeal within the Organization shall have been . . . followed and exhausted. . . ." It was admitted that the plaintiff had not exhausted all such provisions. The Court observed that the general rule under such circumstances is to require the exhaustion of the procedures within the

14. James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329 (1944); Crossen v. Duffy, 90 Ohio App. 252, 103 N.E.2d 769 (1951); Leo v. Local Union No. 612 of Internat'l Union of Operating Engineers, 26 Wash. 2d 498, 174 P.2d 523 (1946); see Aaron and Kamaroff, *Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425 (1949); Kovner, *The Legal Protection of Civil Liberties Within Unions*, [1948] WIS. L. REV. 18; Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951); *cf.* Forkosch, *Internal Affairs of Unions: Government Control or Self-Regulation?* 18 U. OF CHI. L. REV. 729 (1951).

15. See Note, *The Power of Trade Unions to Discipline Their Members*, 96 U. OF PA. L. REV. 537 (1948), and opinions and articles cited in note 14 *supra*.

16. 61 STAT. 143 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. §§ 159(f), (g) and (h) (Supp. 1952).

17. TEX. REV. CIV. STAT. ANN. art. 5154a, § 10 (1947).

18. MINN. STAT. ANN. § 179.21 (West 1946).

19. MINN. STAT. ANN. §§ 179.19-179.20 (West 1946). See generally, Note, 160 A.L.R. 890 (1946).

20. 250 S.W.2d 575 (Tenn. 1952).

association before resorting to the courts,[21] the member in effect contracting to do this when he joins, but that this rule does not apply if the attempt at such exhaustion would be "futile, illusory or vain." The bill in this instance alleged acts indicating bad faith, fraud and arbitrary and oppressive action on the part of defendant union officers. Since the case arose on demurrer to the bill rather than on answer and proof, the facts averred were taken to be true, and the Court concluded that, if they were established, it would be futile and vain for the plaintiff to pursue his internal remedies. As to the election of officers, the opinion stated that such matters "would normally and should be exhausted within the association but since these things are secondary to the relief sought . . . it seems to us that the court of Chancery should likewise take jurisdiction of these matters."[22] The standing of the plaintiff to sue for himself and others similarly situated was comparable, the Court concluded, to a stockholders' derivative suit. The decision in this case is in line with an increasing number of holdings which, though proceeding on differing legal theories, permit action to protect the individual union member in connection with a relationship which in many industrial areas has become a normal concomitant of employment.[23]

### Railway Labor Suits in State Courts

The standing of employees covered by the Railway Labor Act[24] to enforce their rights under collective bargaining agreements in the state courts was treated by the Supreme Court of Tennessee in *Broome v. Louisville & Nashville R.R.*[25] This has proved to be a problem of considerable difficulty in recent years.[26] Much of the difficulty can be traced to certain decisions of the Supreme Court of the United States which have been considered in some respects to be contradictory. In *Moore v. Illinois Central R.R.*,[27] that Court held in 1941 that an individual union member, without exhausting the machinery provided

21. Citing Barthell v. Zachman, 162 Tenn. 336, 36 S.W.2d 886 (1931).
22. 250 S.W.2d at 578.
23. Local 720, International Hod Carriers, etc. v. Bednasek, 119 Colo. 586, 205 P.2d 796 (1949); Collins v. International Alliance, etc., 119 N.J. Eq. 230, 182 Atl. 37 (Ch. 1935); Local No. 11 of International Ass'n, etc. v. McKee, 114 N.J. Eq. 555, 169 Atl. 351 (Ch. 1933); Dusing v. Nuzzo, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. 1941). See generally, Perkins, *Protection of Labor Union Funds*, etc., 27 B.U.L. Rev. 1 (1947); Summers, *Union Powers and Workers' Rights*, 49 Mich. L. Rev. 805 (1951).
24. 44 Stat. 577 (1926), as amended, 45 U.S.C.A. §§ 151 *et seq.* (1943).
25. 250 S.W.2d 93 (Tenn. 1952).
26. See Davis, Administrative Law 670 (1951). *Compare* Transcontinental & Western Air, Inc. v. Koppal, 73 Sup. Ct. 906 (U.S. 1953) (discussed *infra*), *with* Broome v. Louisville & N.R.R., 250 S.W.2d 93 (Tenn. 1952), and Central of Georgia Ry. v. Culpepper, 32 Labor Relations Reference Manual 2142 (Ga. May 11, 1953). In the latter case, the Supreme Court of Georgia reached a decision contrary to that of the Tennessee Court in the *Broome* case on substantially similar facts.
27. 312 U.S. 630, 61 Sup. Ct. 754, 85 L. Ed. 1089 (1941).

under the Railway Labor Act, could bring suit in a state court for damages for his discharge by the defendant railroad contrary to the terms of a contract between the company and the union. The permissive language of the 1934 amendment to the Act regarding referral of disputes to the Adjustment Board[28] was taken to negative any idea of compulsion in the use of the settlement mechanism provided in the Act. Subsequently, in *Slocum v. Delaware, Lackawanna & Western R.R.*,[29] the United States Supreme Court held that a state court did not have jurisdiction to hear an action by a railroad against two unions representing certain of its employees in which the employer sought an interpretation and declaration of rights under an existing contract. It was considered that the jurisdiction of the Adjustment Board under the Railway Labor Act was exclusive over disputes of this character and that no court — state or federal — could invade this jurisdiction. The *Moore* case was distinguished — and decidedly limited — as involving a common law or statutory action for wrongful discharge differing from any remedy which the Adjustment Board could provide, which did not "involve questions of future relations between the railroads and its other employees." One writer has stated: "The small portion of the Moore Case that is left standing seems to be ripe for overruling, in order logically to round out the primary jurisdiction of the NRAB."[30] Instead, the Supreme Court of the United States has in certain respects re-enforced the doctrine of the *Moore* (as-modified-in-Slocum) case. On June 1, 1953, in the case of *Transcontinental & Western Air, Inc. v. Koppal*,[31] it announced:

> "The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum Case, that Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged. Such employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim."[32]

The opinion added, however, that the law of a state may or may not require exhaustion of administrative remedies prior to entertaining a proceeding of the type that falls outside the exclusive jurisdiction of the Adjustment Board and that a federal court in a diversity proceeding would be guided accordingly. In the *Koppal* case it was found that the plaintiff could bring his action for wrongful discharge against the defendant carrier in the United States District Court for the

28. 48 STAT. 1185 (1934), 45 U.S.C.A. § 153(i) (1943).
29. 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795 (1950).
30. DAVIS, ADMINISTRATIVE LAW 672 (1951).
31. 73 Sup. Ct. 906 (U.S. 1953).
32. 73 Sup. Ct. at 910.

Western District of Missouri, but that that court properly applied Missouri law requiring an exhaustion of administrative remedies under the plaintiff's employment contract in dismissing the complaint. The practical effect of this would seem to be to place a further limitation on the doctrine of the *Moore* case but, within its limited sphere, to put at rest questions as to its continued validity.[33]

The Supreme Court of Tennessee in *Broome v. Louisville & Nashville R.R.*[34] felt that the facts fell within the doctrine of the *Slocum* case and that thus there was no jurisdiction in a state court to hear the complaint. In the *Broome* case, certain individual members of the Brotherhood of Locomotive Firemen and Enginemen filed their bill in the Chancery Court of Knox County to establish their rights under a collective bargaining contract between the union and the defendant railroad. The bill asserted a wrongful discharge as a result of a conspiracy between the carrier and the union and prayed specific performance of the contract, reinstatement and judgment for back wages lost. The opinion by Judge Gailor affirmed the dismissal of the bill, reasoning that the instant case was quite different from the *Moore* case, since the relief sought would affect not only past relations but also the future status of the complainants and other employees with the union and the railroad. It was concluded that, since the state court had no jurisdiction to entertain the bill, it had no jurisdiction to make a declaration concerning the necessity of exhausting administrative remedies before bringing the bill. It will be noted that, while the facts in this case fall somewhat in between the *Moore* and *Slocum* situations, the decision of the Tennessee Supreme Court is quite in keeping with the latest restatement of the rule in *Transcontinental & Western Air, Inc. v. Koppal.*[35]

The *Broome* opinion spoke of the situation as being an illustration of Congress "occupying the field" with a federal regulation. The case made clear, however, that in this instance the federal occupancy has resulted in placing "primary jurisdiction" with respect to the determination in the first instance of certain types of disputes exclusively in the National Railroad Adjustment Board. Whether Congress intended to put exclusive jurisdiction in an agency is a problem of statutory construction for the courts in interpreting the statute creating the agency.[36] Congress may "occupy the field" in a certain area of

33. See note 30 *supra.*
34. 250 S.W.2d 93 (Tenn. 1952).
35. 73 Sup. Ct. 906 (U.S. 1953).
36. An intent to confer such "primary jurisdiction" may be inferred from factors such as an assumed need for the experience of specialists and for uniformity in regulation. See Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795 (1950); Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 42 Sup. Ct. 477, 66 L. Ed. 943 (1922); cf. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553 (1907). See Note, 94 L. Ed. 806 (1950); [1950] U. OF ILL. L.F. 460. Garrison, *The National*

regulation without providing for such exclusive jurisdiction in an agency.[37] For example, the National Labor Relations Act has no provision at all for processing disputes comparable to those referred to the Adjustment Board under the Railway Labor Act.

### OVERTIME COMPENSATION

In *Todd v. Roane-Anderson Company*,[38] the Tennessee Court of Appeals, Eastern Section, applied the regulations of the Wage-Hour Administrator, U.S. Department of Labor, and the Portal-to-Portal Act of 1947[39] in affirming a judgment for the defendant-employer, a cost-plus contractor with the United States, in a suit for overtime compensation. The plaintiff-employee's claim was based on employment during World War II at Oak Ridge on the Roane-Anderson pay roll in a supervisory classification at a straight hourly rate. His claim apparently rested on three theories: (a) oral contract, (b) the overtime provisions of the Fair Labor Standards Act[40] and (c) the overtime provisions of the Walsh-Healey Public Contracts Act.[41] First, the Court found that the evidence did not preponderate in favor of the alleged oral contract, relying particularly on an assumed illegality under prevailing wage stabilization policies of a promise to pay time and one-half for hours in excess of 40 per week. Second, the claim under the Fair Labor Standards Act was disposed of by the Court's conclusion that the evidence did not show that plaintiff engaged in as much as 20 percent manual work of the character he was allegedly supervising. Hence, in accordance with its understanding of the administrative regulations defining an "executive," the Court of Appeals did not interfere with the finding of the court below that the plaintiff was exempt as an executive under Section 13(a)(1) of the Fair Labor Standards Act.[42] In any event, the Court concluded, the claim would

*Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937), indicates the work of that agency.

37. Under § 9 of the Interstate Commerce Act, 24 STAT. 382 (1887), 49 U.S.C.A. § 9 (1929), there is provision for concurrent jurisdiction over the recovery of damages in the courts and in the Interstate Commerce Commission. Alternative routes for the relief of the federal taxpayer are provided in the federal district courts and the Tax Court. *Compare* 62 STAT. 932 (1948), 28 U.S.C.A. § 1340 (1950), *with* 53 STAT. 82 (1939), as amended, 56 STAT. 876 (1942), 26 U.S.C.A. § 272(a)(1) (1945).

38. 251 S.W.2d 132 (Tenn. 1952).

39. 61 STAT. 84 (1947), 29 U.S.C.A. §§ 251-62 (Supp. 1952). See Interpretative Bulletin, 29 CODE FED. REGS. § 790 (1949).

40. 52 STAT. 1060 (1938), as amended, 63 STAT. 910 (1949), 29 U.S.C.A. §§ 201-19 (1947, Supp. 1952).

41. 49 STAT. 2036 (1936), as amended, 66 STAT. 308 (1952), 41 U.S.C.A. §§ 35-45 (1952, Supp. 1952).

42. 52 STAT. 1067 (1938), as amended, 53 STAT. 1266 (1939), 29 U.S.C.A. § 213(a)(1) (1947). For the current regulations defining an executive employee for purposes of this exemption, see 29 CODE FED. REGS. § 541.1 (1949) and the Wage-Hour Administrator's Explanatory Bulletin, 29 CODE FED. REGS. §§ 541.99-541.119 (1949). The Court's understanding in this case does not appear to be consistent with the Administrator's interpretation, since one of the necessary

have been barred by the Portal-to-Portal Act's provision for good faith reliance on administrative approval by a federal agency.[43] Third, the Walsh-Healey Public Contracts Act[44] was found to be inapplicable because no provision exists under that Act for private enforcement of claims. It may be observed that the case is of little general importance, since it turned primarily on the evidence adduced and legal questions which in many respects are strictly limited to the particular time, place and circumstances.

### VACATION BENEFITS

Repercussions of a 1946 coal strike came before the Tennessee Court of Appeals, Middle Section, in *Turner v. Tennessee Products & Chemical Corp.*[45] As of March 31, 1946, the United Mine Workers, *per* John L. Lewis, President, terminated the bituminous contract dated April 1, 1945, pursuant to a power reserved in that agreement. This resulted in a work stoppage at mines covered by the agreement, including the Whitwell mine of the Tennessee Products and Chemical Corporation. Seizure of the struck mines by the Federal Government was followed on May 29, 1946, by an agreement between Secretary of Interior Krug, acting as Coal Mines Administrator, and John L. Lewis, covering conditions of employment during government operation. This included a provision that "all employees with a record of one year's standing (June 1, 1945 to May 31, 1946) shall receive as compensation for the . . . vacation period the sum of $100. . . . Pro rata payments for the months they are on the pay roll shall be provided for those mine workers who are given employment during the qualifying period and those who leave their employment."[46] Although agreeing to operate another mine under the Krug-Lewis agreement, the Tennessee Products and Chemical Corporation on June 1, 1946, notified the Coal Mines Administrator that it was discontinuing operations at the Whitwell mine because of financial losses. It was in turn notified by Vice-Admiral Moreel, Deputy Coal Mines Administrator, that his office "interposes no objections at this time" to the discontinuance, since mine operations under the seizure were for the account of the company and at its risk.[47] The plaintiffs in the case coming before the Tennessee Court

requirements for the executive exemption is payment on a *salary basis* which is not subject to reduction because of variation in hours worked. 29 CODE FED. REGS. § 541.118 (1949). See Walling v. Morris, 155 F.2d 832 (6th Cir. 1946); Walling v. Yeakley, 140 F.2d 830 (10th Cir. 1944).

43. 61 STAT. 88 (1947), 29 U.S.C.A. § 258 (Supp. 1952). See 29 CODE FED. REGS. §§ 790.13-790.19 (1949).

44. See note 41 *supra.*

45. 251 S.W.2d 441 (Tenn. 1952).

46. 251 S.W.2d at 443.

47. *But cf.* United States v. Pewee Coal Co., 341 U.S. 114, 71 Sup. Ct. 670, 95 L. Ed. 809 (1951), and the dissenting opinion of Chief Justice Vinson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667, 72 Sup. Ct. 863, 96 L. Ed. 1153 (1952).

For court decision related to the 1946 coal-mine seizure, see United States v

of Appeals were employed at the Whitwell mine. They had quit work when the 1945 contract was terminated in March. They did not thereafter perform work for Tennessee Products at Whitwell or elsewhere, although some similarly situated employees did work at another mine of the Company and received the vacation benefits provided by the Krug-Lewis agreement quoted above. Each plaintiff's claim was for the $100 vacation benefits.

In an opinion by Judge Felts, the Court of Appeals affirmed the decision of the circuit court in granting the company's motion for a directed verdict. There was no evidence from which it could be found that the Krug-Lewis agreement was applicable to plaintiffs' employment, since they had severed the employment relationship in March and the agreement in question was not accepted by the company with respect to the Whitwell mine. In fact the opinion stated, the contract in question was never accepted by or made applicable to either party to the suit. The Court accepted the evidence of the company that the plaintiffs were never on its pay roll after March 31, 1946. Because of plaintiffs' failure to comply with a court rule, the Court did not find it necessary to consider whether the company had treated the plaintiffs as its employees after the above date for purposes of preventing their receiving unemployment compensation benefits. These workers had been drawing vacation benefits in previous years, and they were entitled thereto under the 1945 agreement. Obviously, such benefits are a considerable aspect of the value of total compensation received for the job.[48] Hence, a denial to these workers of even pro rata benefits has elements of harshness. Technically, however, their difficulty is traceable directly to the termination of the 1945 agreement in March, 1946. While it may be assumed that the Mine Workers' president took that move in the expectation of gaining economic benefits for coal miners generally, it necessarily suspended such benefits as were tied to the contract. The Court concluded here that nothing ever replaced that contract insofar as the plaintiffs were concerned. It placed particular reliance upon the fact that the plaintiffs had ceased to be employees when the contract was terminated and the strike began on March 31, 1946.

The above reasoning suggests certain questions. A strike normally does not terminate the employment relationship.[49] Persons normally employed whose work has ceased in connection with a current labor

United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947); Krug v. Fox, 161 F.2d 1013 (4th Cir. 1947); Jones & Laughlin Steel Corp. v. United Mine Workers, 159 F.2d 18 (D.C. Cir. 1946).

48. See *In re* Wil-low Cafeterias, Inc., 111 F.2d 429 (2d Cir. 1940); Division of Labor Law Enforcement v. Ryan Aeronautical Co., 106 Cal. App.2d 833; 236 P.2d 236 (1951); Textile Workers Union of America v. Paris Fabric Mills, Inc., 18 N.J. Super. 421, 87 A.2d 458 (County Ct. 1952).

49. See definition of "employee" in section 2(3) of the National Labor Relations Act, 61 STAT. 137 (1947), 29 U.S.C.A. § 152(3) (Supp. 1952).

dispute are disqualified from receiving unemployment compensation.[50] They are considered to be attached to the labor force of the particular employer rather than available for work in the general labor market.[51] Hence, it would seem important in a case such as this to have a very complete development of the facts to show whether or not it could be said that a current labor dispute continued to exist at the Whitwell mine beyond the date of the Krug-Lewis agreement. A decision to cease operations prior to that date, for example, would have been important in showing that such a current labor dispute no longer existed. If the company took steps to defeat unemployment compensation on the ground of the continuation of a current labor dispute, that would suggest it had not decided to cease operations and was treating the plaintiffs as its striking employees. The Whitwell mine was included among those seized under Government order.[52] It has been held that such a seizure constitutes a "taking" of private property for which, in the event of loss, compensation must be made by the Federal Government pursuant to the Fifth Amendment.[53] If the Whitwell mine could be considered, in light of a full development of all pertinent facts, to be a "going concern" through May 29, 1946, then it would appear that plaintiffs should have received at least their pro rata vacation benefits, and any losses chargeable thereto should have been recovered by the company from the United States.[54] A release of a mine from governmental seizure because it is not a "going concern" should, of course, constitute relief from all subsequent obligations, contractual or otherwise, associated with operation. These comments are not meant to suggest that the decisions of the trial and appellate courts in this case were improper on the merits. They are intended to reflect the opinion, however, that facts which would seem to be important in determining the question were not developed — or at least were not stated in the opinion.

## LEGISLATIVE DEVELOPMENTS — 1953[55]

During the 1953 session of the Tennessee General Assembly, principal interest in terms of Labor Law centered on efforts to legalize the

50. TENN. CODE ANN. § 6901.29 (Williams Supp. 1952); see Milne Chair Co. v. Hake, 190 Tenn. 395, 230 S.W.2d 393 (1950); Block Coal & Coke Co. v. United Mine Workers, 177 Tenn. 247, 148 S.W.2d 364, 149 S.W.2d 469 (1941).

51. See Leser, *Labor Disputes and Unemployment Compensation*, 55 YALE L.J. 167, 177 (1945); *cf.* Freeman, *Availability: Active Search for Work*, 10 OHIO ST. L.J. 181 (1949).

52. See cases cited in note 47 *supra*.

53. United States v. Pewee Coal Co. 341 U.S. 114, 71 Sup. Ct. 670, 95 L. Ed. 809 (1951).

54. *Ibid.*; see dissenting opinion of Chief Justice Vinson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667, 72 Sup. Ct. 863, 96 L. Ed. 1153 (1952).

55. The writer would like to acknowledge the assistance of Charles K. Cosner, Assistant Chief Counsel of the Tennessee Department of Employment

union shop.[56] Under the existing law of the State, it is unlawful to deny employment, existing or prospective, by reason of union membership, nonmembership or the nonpayment of union dues.[57] The proposed bill to legalize collective bargaining contracts which, in general, would require union membership as a condition of continuing employment was killed, although it carried the label of an "administration" measure. Likewise, a so-called "full-crew" bill regarding the number of employees on railroad trains was defeated.

Bills were passed and signed by the Governor which would (a) require payment of prevailing wages to workers on state-financed construction projects,[58] (b) increase to 54 the maximum hours per week permitted for female telephone workers[59] and (c) amend the Employment Security Law in several respects.[60] The amendments to the statute governing the payment of unemployment compensation benefits changed the definition of wages to exclude "tips," except where the employee has accounted for them to the employer,[61] and increased maximum weekly benefits from $22 to $26.[62] Qualifying wages in the base period, necessary to receive benefits, were raised, however, which should have the effect of offsetting to a considerable degree any increased cost due to higher weekly benefits. Another change would, in effect, cancel entirely the wage credits of an employee discharged for "gross misconduct" prior to the disqualifying act.[63] Appeal periods in benefit cases were cut from fifteen to ten days,[64] a penalty tax rate was provided for employers reflecting a "deficit" in terms of contributions and benefits paid out[65] and the limitation period on refunds of contributions erroneously paid was increased from one to four years.[66]

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Security, in furnishing information upon which the aspects of this summary related to unemployment compensation are based. Mr. Cosner is not responsible for any expression of opinion contained herein.

56. The National Labor Relations Act invalidates, within its coverage, a contract requiring union membership as a condition of hiring — *i.e.*, a closed shop. 61 STAT. 140 (1947), as amended, 65 STAT. 601 (1951), 29 U.S.C.A. § 158(a)(3) (Supp. 1952). A proviso to this same section of the Act permits the operation of a contract making union membership, under certain limitation, a condition of remaining in employment — *i.e.*, a union shop. The power of state law to restrict this proviso is specifically provided. 61 STAT. 151 (1947), 29 U.S.C.A. § 164(b) (Supp. 1952).

57. TENN. CODE ANN. §§ 11412.8, 11412.10. (Williams Supp. 1952).

58. Tenn. Pub. Acts 1953, c. 168. This act apparently contemplates utilization of the wage determinations made under the Davis-Bacon Act, 46 STAT. 1494 (1935), as amended, 49 STAT. 1011 (1940), 40 U.S.C.A. § 276a (1952), for federal construction projects.

59. Tenn. Pub. Acts 1953, c. 242.

60. Tenn. Pub. Acts 1953, c. 244.

61. *Id.* § 1.

62. *Id.* § 2.

63. *Id.* § 3.

64. *Id.* § 4.

65. *Id.* § 5.

66. *Id.* § 6.

In another bill,[67] there was clarification of the authority of the Commissioner of Employment Security to pay unemployment benefits to Korean war veterans as contemplated under the Federal Veteran's Readjustment Assistance Act of 1952.[68]

67. Tenn. Pub. Acts 1953, c. 173.
68. 66 STAT. 663 (1952), 38 U.S.C.A. §§ 901 *et seq.* (Supp. 1952).