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Labor Law—Corporate Owner Not Employer and Not Eligible for Union Pension Benefits Even Though Union Member.—Brauer v. Sheet Metal Workers Pension Plan.

Brauer v. Sheet Metal Workers Pension Plan

In 1965 the plaintiff-appellant in *Brauer v. Sheet Metal Workers Pension Plan*[1] acquired 50 percent of the stock in Crenshaw Sheet Metal and Heating, Inc. (hereinafter Crenshaw, Inc.). Even though he became the registered owner and a vice president of the company, plaintiff's managerial status was in name only, since he continued to work as a sheet metal worker. Plaintiff continued, as he had since 1948, his membership in the same union.[2] From its inception in 1958, Crenshaw, Inc. made contributions to the defendant Pension Plan for plaintiff's benefit.[3] The defendant Pension Plan was not informed of plaintiff's change in status in 1965 as vice president and owner of 50 percent of the stock of Crenshaw, Inc.

Plaintiff was informed in writing in July, 1973, by the defendant Pension Plan that he had acquired a vested pension benefit whereby he would be entitled upon retirement to a monthly pension. In September, the defendant Pension Plan discovered plaintiff's interest in the corporation, whereupon plaintiff was advised that he was ineligible for the pension benefit. In November, 1973, the defendant Pension Plan tendered a refund of the contributions made in plaintiff's behalf, but plaintiff refused to accept and brought this action for declaratory relief, breach of contract, and deceit. Upon defendants' special demurrers, which were sustained, and defendants' subsequent answers to plaintiff's amended complaint, the case went to trial on October 18, 1976, at which time the trial court granted defendants' motion for judgment on the pleadings. Plaintiff followed with a motion for reconsideration and leave to file another amended complaint. This motion was considered by the trial court on April 18, 1977, at which time the motion was denied and judgment entered for defendants.[4] On appeal, the judgment was affirmed. A union member who owns 50 percent of the stock in the corporate employer is not an "employee" for purposes of the National Labor Relations Act[5] and therefore, is not entitled to union pension benefits.[6]

1. 82 Cal. App.3d 159, 146 Cal. Rptr. 844 (1978).

2. *Id.* at 161, 146 Cal. Rptr. at 845. Plaintiff was a member of Sheet Metal Workers International Assoc., Local 108, which is the defendant-appellee together with Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada.

3. 82 Cal. App.3d 161, 146 Cal. Rptr. 846.

4. *Id.* at n. 2. The judgment contains in recital form the statement that "having granted Plaintiff leave to file a Second Amended Complaint, which does not materially differ from Plaintiff's First Amended Complaint, the Court finds as follows: . . ." No second amended complaint was filed except as a proposal made part of the motion to reconsider and it is sufficiently clear the judgment did not intend to provide permission for its filing, since the motion for judgment on the pleadings in fact was granted and the motion for reconsideration denied.

5. 29 U.S.C. §§ 141 *et seq.* (1976).

6. 82 Cal. App.3d 159, 146 Cal. Rptr. at 847 (1978).

For purposes of the National Labor Relations Act, the term "employer" includes any person acting as an agent of an employer either directly or indirectly,[7] and the term "employer" does not include any individual having the status of an independent contractor or any individual employer as a supervisor.[8] The legislative history of the 1947 amendment to the National Labor Relations Act[9] makes it clear that Congress intended the act to be as beneficial to employers as it had previously been to employees.[10] Contemporary tests for determining who is an employer and who is an employee must, of course, reflect the intended meanings of the terms as promulgated by the legislature.[11]

The Cases have taken slightly varying approaches to the test to be applied, but none seem to be in contradiction. One such test is man's common experience of determining the "employer" by ascertaining who has the authority, on his own account, to hire and fire.[12] Another approach, defined as the most significant aspect of the "employer-employee" relationship, is acknowledgment of the employer's right to direct and control the method and manner of doing work.[13] In *Yellow Cab Co. v. Magruder*[14] the court combined these tests to find that a person is an employer if he has the right, even if he does not exercise it, to control and direct the alleged employee, not only as to what shall be done but how it shall be done. The court felt this was the most important factor in determining the existence of an "employer-employee" relationship.[15] In line with this approach are more recent holdings that, to be an "employer" within the meaning of the National Labor Relations Act, a person must be in an employer-employee relationship with the employees against whom he has allegedly committed an unfair labor practice.[16] The most precise test used, however, was that of the National Labor Relations Board in the case of *Foam Rubber City #2 of Florida, Inc.*[17] where the Board held that one who owns 50 percent or more of the stock in a closely-held corporation is an "employer."[18] The *Foam Rubber City* holding

7. 29 U.S.C. § 152(2) (1976).

8. 29 U.S.C. § 152(3) (1976).

9. 1137 U.S. CONG. SERV. (1947).

10. *Id.* at 1137. Under existing law in 1947 "employer" was defined to include any person acting in the interest of an employer, but the House Bill changed this to include only legally recognized relationships such as that of "employer-agent." This was done because the National Labor Relations Board had, on numerous occasions, held an "employer" responsible for the acts of persons acting outside the scope of any authority flowing from the employer.

11. Mednick v. Albert Enterprises, Inc., 508 F.2d 297, 299 (5th Cir. 1975). The court stated that the terms "independent contractor," "employee," and "employer" are not to be construed in their commonlaw senses when used in federal legislation litigation.

12. Fruco Const. Co. v. McCleland, 192 F.2d 241, 244, 245 (8th Cir. 1951).

13. Hammes v. Suk, 291 Minn. 233, 190 N.W.2d 478, 481 (1971).

14. 49 F. Supp. 605 (D.C. Md. 1943).

15. *Id.* at 607.

16. *See* Local 98, United Ass'n of Journeymen & Apprentice v. Flamegas Detroit Corp., 52 Mich. App. 297, 217 N.W.2d 131, 136 (1974).

17. 167 NLRB 623, 66 LRRM 1096 (1967).

18. *Id.* at 623, 66 LRRM at 1098. This case, which was followed here, established a new Board policy in overruling a previous line of cases which held that children of corporate shareholders are includable in bargaining units as employees of the corporation. Now, where the parent is a substantial shareholder, *i.e.*, owner of 50 percent or more, such children are ineligible for inclusion in bargaining units of corporate employees. In effect, then, the 50 percent owner, as well as the corporation, is the employer.

established the rule currently followed by the Board.[19]

In the instant case, the California Court of Appeal was faced not only with the central issue of whether a substantial stockholder of a corporation was an "employee" for the purposes of the National Labor Relations Act and therefore entitled to union pension benefits, but also whether the determination was to be made with reference to federal or state law. The court disposed of this issue rather easily by relying on a number of cases, the principal one of which was *Butchers' Union Local 229 v. Cudahy Packing Co.*[20] There, the California Supreme Court, relying on the United States Supreme Court's holding in *Textile Workers Union v. Lincoln Mills,*[21] declared that when state courts exercise concurrent jurisdiction with federal courts, they must, in adjudicating an action which could have been brought in the federal courts under the National Labor Relations Act, apply federal substantive law.[22]

The court made no mention, as perhaps it should have, of the fact that there are recognized exceptions which obviate preemption of state law. A recent Alaska court decision held that the N.L.R.A. did not preempt state antidiscrimination legislation and did not deprive state courts of jurisdiction.[23] A federal district court in New York stated that in determining applicability of any exception to the rule that the National Labor Relations Act preempts state authority in certain cases of labor relations, the court must examine state interests in regulating the activity at issue and potential interference with the federal regulatory scheme.[24] Also, a federal district court in an Indiana case held that state claims based on internal union rules are not per se preempted by federal law; rather, preemption is a safeguard against conflicting state and federal regulation of identical conduct.[25]

The court examined the factual situation here only to the extent necessary to determine the plaintiff's status as the owner of 50 percent of the stock in the corporate employer and comparing its finding to the Board's ruling in the line of cases beginning with *Foam Rubber City #2;*[26] holding, therefore, that the plaintiff was an "employer" for purposes of the National Labor Relations Act. Since the key argument of the plaintiff's case was apparently estoppel,[27] the court looked to the pension plan agreement, which provided in pertinent part that the Pension Plan trustees have the power "To construe the provisions of this Trust Agreement and the Pension Plan and any such construction adopted by the

19. *See* Toyota Midtown, Inc., 233 NLRB 106, 96 LRRM 1565 (1977) *and* Cerni Motor Sales, Inc., 201 NLRB 918, 82 LRRM 1404 (1973).

20. 66 Cal.2d 925, 59 Cal. Rptr. 713, 428 P.2d 849 (1967). *See also* Lehto v. Underground Constr. Co., 69 Cal. App.3d 933, 138 Cal. Rptr. 419 (1977) *and* O'Malley v. Wilshire Oil Co., 59 Cal.2d 482, 30 Cal. Rptr. 452, 381 P.2d 188 (1963).

21. 353 U.S. 448, 456-57 (1957).

22. 66 Cal.2d at 930-31, 59 Cal. Rptr. at 716, 428 P.2d at 852-54 (1967).

23. *See* Bald v. RCA Alascom, 569 P.2d 1328 (1977).

24. *See* N.L.R.B. v. State of N.Y., 436 F. Supp. 335 (E.D.N.Y. 1977).

25. Steele v. Brewery & Soft Drink Worker's Local 1162, 432 F. Supp. 369, 376 (N.D. Ind. 1977).

26. 167 NLRB 623, 66 LRRM 1096 (1967).

27. 82 Cal. App.3d at 161, 146 Cal. Rptr. at 846 (1978). The defendant Pension Plan had informed the plaintiff in writing that he had acquired a vested pension benefit.

Board in good faith shall be binding upon any and all parties or persons affected thereby."[28] In light of this provision in the plan, the court held that the plaintiff had not supported his estoppel theory with a showing; or any sufficient allegation in the complaint,[29] that the trustees had acted arbitrarily, capriciously or in bad faith; and therefore, their actions were final and not subject to judicial review.[30]

Perhaps most damaging to plaintiff's estoppel theory was that once the plaintiff had been found not to be an "employee," the payments to the employee's pension fund were proscribed and declared unlawful by the National Labor Relations Act itself.[31] On this point, the court relied on previous cases such as *Rittenberry v. Lewis,*[32] in which it was held that only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries.[33]

The California court was clearly not paying deference to the National Labor Relations Board. The court merely acknowledged what had been previously held by the United States Supreme Court, *i.e.*, that a court may not substitute its own definition of a statutory term for that of an agency charged with administer-

28. 82 Cal. App.3d at 159, 146 Cal. Rptr. at 848 (1978).

29. *Supra* note 4.

30. 82 Cal. App.3d at 160, 146 Cal. Rptr. at 848 (1978).

31. 29 U.S.C. § 186 (1976) provides in pertinent part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employers employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful or any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdeameanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

32. 238 F. Supp. 506 (E.D. Tenn. 1965).

33. *Id.* at 509.

ing the statute.[34] That there is a rational basis for a ruling that one who owns 50 percent of a corporation is an employer can hardly be argued. Even though the plaintiff in the instant case continued at his job as a sheet metal worker, he nevertheless had the power of an employer, whether he ever exercised such power or not.

A possible ground for appeal of the decision in the instant case was the fact that, even though federal law controlled the case, plaintiff's motion for reconsideration of a second amended complaint was denied by the trial court. Under the federal rules,[35] amendments to the complaint are rather freely allowed in the interest of justice. The California rule is essentially the same as the federal rule, but there is no equivalent policy statement regarding freely given consent to amend.[36] Otherwise, the court's reasoning was sound and serves notice that the state courts, or at least the California state courts, have adopted or, perhaps more accurately, deferred to the National Labor Relations Board's assessment that a 50 percent owner is an employer. In effect, if you own too much of the business, then you can't wear two hats; the sizes are simply too divergent.

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34. *See* N.L.R.B. v. Hearst Publications, 322 U.S. 111, 123 (1944). There, the N.L.R.B. found that newsboys who sold newspapers on the streets were "employees" within the meaning of the Wagner Act and ordered the employer to bargain with the union which represented those employees.

35. *See* F. R. Civ. P. 15(a).

36. *See* Cal. Civ. Proc. Code § 471.5(a) (West 1977).