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Labor Relations

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instant case) and made in ignorance of a case of measles contracted by the child subsequent to his last hospitalization.

It seems apparent that, while the Business Records Act has waived the necessity for cross examination concerning certain hearsay records, under the rule of the *Young* case opinions contained in the record must meet the same standards as oral testimony.

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LABOR RELATIONS

Federal Pre-Emption under Taft-Hartley—Interference with Employment as an Unfair Labor Practice as well as a Common Law Tort. In *Selles v. Local 143*[1] the plaintiff had been a member of the defendant union in which there was, early in 1952, some internal strife. Selles was one of several members of the union who organized a meeting of those dissatisfied with union policies concerning election of officers and dissemination of information about union funds. Some 150 members who were not sympathetic to Selles marched en masse into the meeting hall and broke up the meeting.

Within a few days following, Selles went to the union's hiring hall to get a job assignment and was told there was no work for him. It was determined as an ultimate fact that this was done in retaliation for Selles' activities in organizing the grievance meeting. Selles was not regularly employed for more than a year thereafter, and was finally compelled to find less remunerative nonteamster work.

Selles filed a complaint with the National Labor Relations Board. After they took jurisdiction, he withdrew the complaint and brought suit in superior court on a common law tort theory—interference with employment—and recovered damages measured by his loss of earnings.

On appeal the union maintained that its alleged misconduct constituted an unfair labor practice under the Labor Management Relations Act[2] and that, by this act, Congress had preempted the field. The court, while agreeing that the union's conduct amounted to an unfair labor practice under this section of the LMRA, nevertheless[2]

[1] 50 Wn.2d 660, 314 P.2d 456 (1957).

[2] 61 STAT. 140 (1947) 29 U.S.C.A. § 157 (1956). "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in 158 (a) (3)."

61 STAT. 140 (1947), 29 U.S.C.A. § 158 (b) (1) (A) (1956). "It shall be an unfair

held that the state courts retained jurisdiction. In so deciding the court followed *United Construction Workers v. Laburnum Construction Corp.*,[3] holding that a state is not precluded from affording common law tort remedies which are not available under the LMRA. The Washington court grounded its decision on the theory that while under certain circumstances the NLRB could grant reinstatement to employment with back pay, it had available no remedy measured by back pay for a union member who did not seek reinstatement to his job with back pay, but who accepted his disassociation from the job as a *fait accompli,* and pursued only a common law tort remedy.

In so deciding, the court chose between two recent but earlier Washington cases which were seemingly inconsistent on the question of state court jurisdiction as opposed to federal preemption in cases of union interference with an employee's job.[4] These were the cases of *Mahoney v. Sailors' Union of the Pacific*[5] and *Baun v. Lumber and Sawmill Workers' Union.*[6]

In the *Mahoney* case the plaintiff was a sailor whose employment depended upon his holding a valid "shipping card." The hiring procedure when a job was open consisted of examining the cards of the available sailors, and giving the job to that man whose card bore the earliest date. At a Seattle union meeting Mahoney made insulting remarks aimed at the union management, for which charges were brought against him through internal union procedures set out in the union's constitution and by-laws. A union trial was held in San Francisco, at which Mahoney was not present, and it was decided that he should be expelled.

Meanwhile, the Seattle office, not immediately adopting the expul-

labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in Sec. 157; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"...

61 STAT. 140 (1947), 29 U.S.C.A. § 158 (b) (2) (1956). "It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

61 STAT. 140 (1947), 29 U.S.C.A. § 158 (a) (3) (1956). "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." [Proviso]

[3] 347 U.S. 656 (1954).

[4] The line of federal supreme court decisions bearing upon the extent to which the LMRA has pre-empted the field to the exclusion of state court jurisdiction appears in 30 WASH. L. REV. 1 and 31 WASH. L. REV. 39.

[5] 45 Wn.2d 453, 275 P.2d 440 (1954).

[6] 46 Wn.2d 645, 284 P.2d 275 (1955).

sion order, issued Mahoney a new shipping card. But by the time Mahoney's card was old enough to qualify him for a job the Seattle office declined to assign him. Mahoney, thus deprived of his livelihood, brought suit in equity in superior court, seeking reinstatement to the union, damages measured by his loss of back pay, and protection of his property rights in union funds, i.e. burial and health and welfare benefits. The trial court found for Mahoney on the grounds that (a) his conduct was not in violation of the union's rules, (b) the union violated its own rules by holding the hearing in a remote place, and (c) expulsion from the union deprived Mahoney of a property right without due process.

At the second hearing of the case before the supreme court the union argued, as in the *Selles* case, that its alleged misconduct amounted to an unfair labor practice under the LMRA,[7] and that this being so, the state court lacked jurisdiction. On the grounds that the LMRA provided a procedure under which the union could be required to cease discriminating against Mahoney and to give him back pay,[8] the court held that Mahoney's recovery in Washington state courts for the union's tortious conduct should be limited to protecting the property rights Mahoney had in the union funds. The court accomplished this by ordering Mahoney's reinstatement in the union, but at the same time specifically denying that it had power to order such reinstatement "in so far as such order was intended as a means of forcing the union to cease such unfair labor practice."[9]

In the *Baun* case[10] the jurisdiction question could have been settled without reference to federal preemption. Here the plaintiff seeking damages for the union's tortious interference with his employment as a sawmill superintendent. The union again argued federal preemption under the LMRA,[11] but this argument was rejected on the grounds that there was no unfair labor practice involved since, among other reasons, a sawmill superintendent is not an "employee" under the meaning attached to that word by the act. This being so, there was no federal remedy available whatever, so the state could take jurisdiction. However, the opinion added:

> Further, we put our conclusion that Washington courts have jurisdiction of the subject matter of this litigation on the still broader base that

[7] See footnote 2, *supra*.
[8] 29 U.S.C.A. § 160 (c) (e) (1956).
[9] 45 Wn.2d at 461, 275 P.2d at 448.
[10] 46 Wn.2d 645, 284 P.2d 275 (1955).
[11] See footnote 2, *supra*.

> the traditional jurisdiction of a state court to enforce a common law tort liability has not been removed, *at least in such a case as the present,* by the labor management relations act, even though the tortious conduct constitutes an unfair labor practice.[12] (Emphasis court's.)

The opinion then lists the elements present in the *Baun* case which would take the case out of the rule of *Mahoney,* a case which, remarkably, is not mentioned in the *Baun* opinion. These are:

1. The plaintiff was not seeking to enjoin or restrain activities of either the union or the company.
2. He was not seeking reinstatement in his position.
3. He was not seeking back pay.
4. He merely sought damages for unlawful interference with his employment, a remedy which the NLRB cannot provide and which "does not involve any question of present or future relations between the company and himself, or the company and its other employees."[13]

The *Selles* case, then, appears to fit squarely under the alternative holding in the *Baun* case, and, since it does not expressly overrule *Mahoney,* leaves the status of the rule in Washington substantially as follows: whether or not an employee can recover damages measured by back pay from a union which has interfered with his employment by conduct which also amounts to an unfair labor practice under the LMRA will depend on (a) what he seeks besides back pay, and (b) how he asks for what he wants.

If the plaintiff wants to recover back pay from the union on the common law tort theory of interference with employment, he can do so under the theory of *Baun* and *Selles* even though the union's conduct constitutes an unfair labor practice under the LMRA, but *only* if he limits his prayer for relief to that remedy which has traditionally been available for common law torts, that is, damages for harm already done him. If he so couches his pleadings, *Baun* and *Selles* indicate that recovery of damages measured by back pay would be available in Washington courts.

On the other hand, the *Mahoney* case says that recovery of back pay can be had only through the NLRB if the plaintiff union member seeks back pay on broad pleadings that contemplate the prevention of continuing or future unfair labor practices by the defendant union. This distinction, based as it is on the interest of the Congress in preventing unfair labor practices, as opposed to the traditional state

[12] 46 Wn.2d at 651, 652, 284 P.2d at 280.
[13] 46 Wn.2d at 652, 284 P.2d at 280.

interest of requiring tortfeasors to make the injured whole, is logically supportable, though it seems to give an unusual importance to pleading niceties.

In 1957 the United States Supreme Court granted certiorari[14] in *Gonzales v. International Association of Machinists*,[15] a California case factually similar to *Mahoney*. In that case the expelled union member sought reinstatement to the union, and damages for loss of wages and mental distress on a breach of contract theory. The California court granted all relief sought, basing its award of damages measured by back pay on the ground that it was "not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership."[16] If this decision is affirmed by the Supreme Court, new doubt would be cast on the efficacy of *Mahoney*. FRED BRUHN

LOCAL GOVERNMENT LAW

Local Government Law—Declaratory Judgment—Municipal Corporations. P, a Pasco taxpayer, brought an action for declaratory judgment and injunction, claiming the city of Pasco could not lease municipally owned land for a parking lot. D city relied upon the following: RCW 35.24.010: "Every city of the third class... may control and dispose of [property] for the common benefit..."; RCW 35.24.300: "The city council... shall have power to... control, lease, sublease, convey or otherwise dispose of [property]...;; to lease any waterfront and other lands adjacent thereto owned by it...; to lease... portions of its streets which bound upon or terminate in its waterfront...; and Laws 1955, c. 294: "The city council of the city of Pasco... shall have power to lease, sell, or otherwise dispose [of the land in question]...."

Held, (6-3) for P taxpayer. *Miller v. Pasco,* 50 Wn.2d 229, 310 P.2d 863 (1957). The court's reasoning and conclusions were as follows:

(1) P was a proper party plaintiff under the Uniform Declaratory Judgments Act, RCW 7.24, because he was a taxpayer "and otherwise meets the qualifications of an interested person, as defined by RCW 7.24.020." If this means taxpayers are proper parties plaintiff to bring declaratory judgment actions to contest the legality of acts of municipal officers, then the decision is of first impression on this point in Washington. (See 87 A.L.R. 1243; 114 A.L.R. 1366.)

(2) RCW 35.24.010 does not give power ot lease, because "may control" does not give power to *delegate* control, and "dispose of" means to sell. RCW 35.24.300 does not give power to lease anything except waterfront lands, because specific provisions control the general grant of power to lease.

(3) Laws 1955, c. 294, is unconstitutional. Washington Const. art. 2, § 28, prohibits special laws granting corporate powers. This applies to municipal corporations.

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[14] 352 U.S. 966 (1957).
[15] 142 Cal. App.2d 207, 298 P.2d 92 (1956).
[16] 298 P.2d at 99.