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Labor Law--The Constitutionality of Compulsory Union Membership of Broadcast Commentators

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LABOR LAW—THE CONSTITUTIONALITY OF COMPULSORY UNION MEMBERSHIP OF BROADCAST COMMENTATORS. *Buckley v. American Federation of Television and Radio Artists*, 496 F.2d 305 (2d Cir. 1974).

In the recent case of *Buckley v. American Federation of Television and Radio Artists*,[1] the United States Court of Appeals for the Second Circuit held that it is not an infringement of first amendment rights to require television and radio commentators to pay compulsory union dues when some benefit is derived from such payment. In the same case the court passed on to the NLRB the task of deciding whether coerced "full-fledged" union membership and adherence to union discipline under closed shop agreements are unfair labor practices when applied to conservative political commentators.

The dispute that gave rise to the instant case concerned two nationally known conservative spokesmen, William F. Buckley and M. Stanton Evans. Both men present political, social and economic commentary over television and radio. Neither has been noted for his support of the labor union movement.

The defendant, American Federation of Television and Radio Artists (AFTRA) is an unincorporated association organized under the laws of the state of New York and affiliated with the AFL-CIO. It is a labor union and collective bargaining agent for artists involved in the field of radio and television. AFTRA is a "labor organization" as defined by the National Labor Relations Act.[2]

Buckley's employer/broadcaster was RKO General, Inc., and Evans' was the Columbia Broadcasting System. These corporations contracted with the plaintiffs in the state of New York. AFTRA had union shop[3] agreements with both employers. Under the agreements all radio and television artists employed by these broadcasters in the state of New York were required to join the union, pay membership dues, and submit to union discipline from the thirtieth day following

1. Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974).

2. "[A]ny organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances . . . ." National Labor Relations Act, 29 U.S.C. § 152(5) (1973).

3. National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1973).

the beginning of their employment as a condition of their continued employment.

The federal statute which specifically authorizes union shops also allows the several states to prohibit such compulsory unionism. These state statutes, known as "right to work laws," are presently in effect in approximately twenty states. New York, where the union agreement with the broadcasters was made, had no such right to work legislation. Therefore, both conservative commentators were required to join the union in order to continue to broadcast their views.

The plaintiffs asserted that since the union shop agreements were permitted by federal legislation, the coerced union membership and payment of dues constituted state action and, as such, were prohibited by the first amendment.[4] The union's *Code of Fair Practice* forbade the members from any act or conduct which was prejudicial to the union and gave the union the right to order its members to cease working for any employer the union wished to boycott. Plaintiffs claimed that such coerced submission to union discipline, enforced by the threat of possible termination of employment, had a chilling effect[5] on their first amendment rights and constituted an unreasonable prior restraint[6] on their rights of free speech.

The district court held that this union authority, since it was achieved through an act of Congress, was an unconstitutional violation of first amendment rights if applied to plaintiffs.[7]

The Second Circuit did not agree. It found that the district court had lacked jurisdiction of much of the case and had ruled incorrectly on the rest. The court remanded to the NLRB the issues of compulsory membership and discipline. These, the court said, amounted to an arguably unfair labor practice under the National Labor Relations Act,[8] and so must be deferred to the exclusive competence of the NLRB.[9] The Second Circuit felt that a federal court could play only a limited role until such time as a grievance was presented to the NLRB and review was properly taken to the courts.

4. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

5. At trial plaintiff Evans testified, "I have felt a chilling effect on my right to express myself in light of the fact that the union exercises over me certain disciplinary powers which could result in fining me or taking me off the air, if I acted in such a way as to prejudice that union." Evans v. American Federation of Television and Radio Artists, 354 F. Supp. 823, 844 (S.D.N.Y. 1973). The trial court found that "Such chilling effect does exist here." *Id.* at 838.

6. Near v. Minnesota, 283 U.S. 697 (1931).

7. 354 F. Supp. at 845-847.

8. National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1973).

9. 496 F.2d at 312.

Although the court refused to decide whether compulsory membership and submission to discipline is constitutional, the court strongly hinted its views. It noted the arguable unfairness of such compulsion and it flatly stated that the plaintiffs' rights to continue media employment would not be endangered should they seek to crystallize their controversy with the union by resigning from full-fledged union membership.[10] The court assured the plaintiffs that, as long as they paid their dues upon resigning from the union, they should be able to obtain a federal district court injunction against termination of employment pending the outcome of that litigation. The court added that there would be an excellent chance that Buckley and Evans would succeed on the merits of a claim that payment of dues is sufficient compliance with the union shop agreements.[11]

The Second Circuit's refusal to rule on the issue of coerced union membership was based on the established doctrine of preemption. This rule of law allows administrative agencies to adjudicate matters over which both the agency and a court might have concurrent jurisdiction. In this case the pre-emption doctrine applies because unfair labor practices are violative of the National Labor Relations Act. Violations of this act are within the jurisdiction of the NLRB. When such subject matter is presented for adjudication, the federal courts must defer to the NLRB in order to prevent conflicting regulation of conduct.[12]

However, the court did take jurisdiction of the dues issue. Since the payment of dues is specifically authorized by federal statute, that requirement was not considered an arguably unfair labor practice, and the court felt no need to defer to the NLRB. The court found that the requirement that Buckley and Evans pay dues did not violate their first amendment rights. While the court did not reach the question whether state action was involved, it explicitly stated that "even if it were . . . the dues requirement is not constitutionally infirm."[13] The court explained that "where there is a proper governmental purpose for imposing a restraint [on the press] and where the restraint is imposed so as not to 'unwarrantedly abridge' acts normally comprehended within the first amendment, there is no abridgement of first amendment rights."[14]

10. *Id.* at 313 n.6.
11. *Id.* at n.5.
12. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).
13. 496 F.2d at 310.
14. *Id.* at 311.

These mandatory dues were found to serve a substantial public interest because the court found that Congress' purpose in authorizing them was to minimize industrial strife and insure the unimpeded flow of commerce by providing a viable collective bargaining apparatus.[15] The court pointed out that compulsory dues are necessary in order to prevent "free riders" from undermining the union's ability to perform this bargaining function. The court described "free riders" as "those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden."[16] The district court had held that Buckley and Evans received no substantial benefits from their union membership and so were not "free riders" and need not pay dues.[17] The appellate court disagreed with the lower court finding that membership in the union pension fund[18] and enjoyment of the benefits of union salary negotiating efforts[19] were insufficient to constitute Buckley and Evans "free riders."

Thus, the court found a legitimate purpose in imposing such a restraint. It further found that the means used, the imposition of union dues, was reasonable and did not "unwarrantedly abridge" free speech. The court said:

> The dues here are not flat fees imposed directly on the exercise of a federal right . . . To the contrary, assuming *arguendo* that government action is involved here, the dues more logically would constitute the employee's share of the expenses of operating a valid labor regulatory system which serves a substantial public service.[20]

The court thus held that in states allowing union shops even conservative broadcast commentators must pay dues to the union considered the sole bargaining agent under the National Labor Relations Act.

The question of coerced union membership and adherence to union discipline, being an arguably unfair labor practice, was left to be settled by the NLRB, but with enough hints as to the temper of the court that a favorable NLRB decision would be surprising.

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15. *Id.*
16. *Id.*
17. 354 F. Supp. at 848.
18. Plaintiffs indicated a willingness to renounce any claim they might have had in the union pension fund, if they would no longer be required to pay union dues.
19. Both plaintiffs received wages above the union base scale.
20. 496 F.2d at 311.