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## Case Comments

John Rittinger

Laurent L. Rousseau

John A. Macleod

Thomas J. McCusker

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## CASE COMMENTS

LABOR LAW — PRE-ELECTION STATEMENT OF MAJORITY UNION EXPRESSING AN ABSOLUTE AND ARBITRARY REFUSAL TO DOVETAIL SENIORITY RIGHTS IF ELECTED HELD TO VIOLATE SECTION 8(b)(1)(A) of the TAFT-HARTLEY ACT. — In 1964, Red Ball Motor Freight, a trucking firm located in Shreveport, Louisiana, acquired the independent trucking company of Couch Motor Lines, also located in Shreveport. As a result of this acquisition, the station operated by Couch was closed, and its former employees were transferred to Red Ball's terminal, known as Airport Drive. The former Couch employees, numbering thirty men, were members of Truck Drivers and Helpers Local 568 [hereinafter Teamsters]. After the merger they worked side-by-side at the Airport Drive Terminal with the fifty original employees of Red Ball who were represented by the Union of Transportation Employees [hereinafter UTE]. The management of Red Ball had met with the officers of the two unions prior to the consolidation. At that time it was agreed that the company would initiate representation proceedings to determine which union the majority of the combined employees wished to have represent them. It was also agreed that the existing contract of the winning union would apply to all of the employees.

Immediately prior to the election, UTE informed its members that if the Teamsters were elected, the seniority roster would be dovetailed. UTE alleged to its members that as a result of this action certain UTE members would lose their jobs. UTE then pledged to its members that, if chosen exclusive bargaining agent, it would never agree to dovetailing, but would protect original UTE members' seniority against "all others."<sup>1</sup> The ensuing election and a subsequent one, held three months later, were set aside on the grounds, *inter alia*, that the representations made by UTE had rendered a fair election impossible. The objections to the second election were consolidated<sup>2</sup> with the Teamster's charge that the pre-election statements on dovetailing made by UTE violated section 8(b)(1)(A) of the Taft-Hartley Act. The NLRB adopted the report of the trial examiner which concluded that UTE had announced a bargaining policy with respect to preferential seniority in derogation of a statutory representative's duty to represent all unit employees fairly.<sup>3</sup> The Board further agreed with the trial examiner that this unfair representation by UTE violated section 8(b)(1)(A) of the Taft-Hartley Act.<sup>4</sup> On a petition by the Board to enforce

1 The UTE statement on seniority was contained in a letter sent the day before the election to all UTE members employed at the Airport Drive Terminal. The letter concluded:

Even if seniority is dovetailed, you know a majority of UTE employees will go to the bottom of the board should the Teamsters win.

. . . You can rest assured that the Union of Transportation Employees will never agree that its members will go to the bottom of any seniority list and that your seniority will be respected and protected against all others. . . This is a plain statement of the position of the Union of Transportation Employees. *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 140 n.1 (D.C. Cir. 1967).

2 The Teamsters also charged that the employer had violated §§ 8(a)(1), (2), and (3) of the NLRA by its discriminatory policy of assigning overtime. The Board upheld these charges. *Red Ball Motor Freight, Inc.*, 157 N.L.R.B. 1237 (1966), *aff'd sub nom.* *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

3 *Id.* at 1243-46.

4 *Id.* Labor Management Relations Act (Taft-Hartley Act) § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964) provides that it shall be an unfair labor

its cease and desist order, the United States Court of Appeals for the District of Columbia affirmed and *held*: a majority union's campaign pledge that, if elected, it would arbitrarily refuse to dovetail seniority rights, where made solely in an attempt to secure political power, without any pretense of rational justification, is an unfair labor practice under section 8(b)(1)(A) of the Taft-Hartley Act. *Truck Drivers and Helpers Local 568 v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967).

The above facts illustrate a problem often encountered in merger situations.<sup>5</sup> When two companies merge, the surviving company is, more often than not, faced with two plants and two sets of unions. Since one of the prime motivations for merger is consolidation, the surviving company usually desires to operate with just one union and possibly one plant. To achieve this end, the two unions must be combined into one. Ordinarily, this is accomplished by holding a consent election to eliminate one of the unions. For the numerically stronger union, one of the best ways to insure victory is to promise its members that they will be treated better than the members of the minority union. Since one of the most important rights guaranteed to an employee by his union is his seniority,<sup>6</sup> the numerically stronger union may promise its members that, if elected, it will not enter any agreement to dovetail the minority members' seniority. Such an adamant stand by the larger union, and the resulting fear instilled in the minority union over losing their seniority completely, makes a fair consent election nearly impossible.

The situation in *Truck Drivers Local* was the typical result of such a "no-dovetailing" pledge by the majority union, in this case UTE. Two attempts at holding a fair election had failed. Although Couch and Red Ball had completely merged into one physical plant, and all the employees worked side-by-side at similar jobs, thirty of them were represented by the Teamsters and fifty were represented by UTE. In order to rectify this situation, the NLRB issued its cease and desist order requiring UTE to retract its adamant refusal to dovetail seniority rights.<sup>7</sup>

In upholding this order, the Court of Appeals for the District of Columbia used a novel three step approach. First, the court aligned itself with the Fifth Circuit's decision in *Local 12, United Rubber Workers of America v. NLRB*<sup>8</sup> that a union's violation of its statutory duty of fair representation is an unfair labor practice under section 8(b)(1)(A) of the Taft-Hartley Act. The notion that unfair representation may equal an unfair labor practice was first elaborated by the NLRB in *Miranda Fuel Company*.<sup>9</sup> Basically, the majority of the Board in *Miranda* found that the statutory duty of fair representation imposed upon

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practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7."

5 See generally Kahn, *Seniority Problems in Business Mergers*, 8 INDUS. & LAB. REL. REV. 361 (1955); Mater & Mangum, *The Integration of Seniority Lists in Transportation Mergers*, 16 INDUS. & LAB. REL. REV. 343 (1963).

6 See text accompanying note 33 *infra*.

7 *Red Ball Motor Freight, Inc.*, 157 N.L.R.B. 1237, 1238, 1259 (1966), *aff'd sub nom. Truck Drivers & Helpers Local 568 v. NLRB* 379 F.2d 137 (D.C. Cir. 1967).

8 368 F.2d 12 (5th Cir. 1966).

9 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

a union by section 9 of the National Labor Relations Act (NLRA)<sup>10</sup> is also embodied in section 7 of the Act.<sup>11</sup> The Board noted that section 7 guarantees employees the right "to bargain collectively through representatives of their own choosing,"<sup>12</sup> and held that this right necessarily encompasses the employees' right to have their chosen bargaining representative fulfill its duty to act in a fair and impartial manner. Of course, once the duty of fair representation is read into section 7, a union that violates this duty is automatically guilty of an unfair labor practice under section 8(b)(1)(A).<sup>13</sup> On a petition to enforce the order issued in *Miranda*, the Second Circuit, by a divided court, refused to accept this theory.<sup>14</sup> Judge Medina, speaking for the majority, implied that section 8(b)(1)(A) restricts unions in the same manner that section 8(a)(1) restricts employers and, therefore, does not apply to arbitrary union treatment of a member unrelated to his union membership.<sup>15</sup> However, in *Local 12, United Rubber Workers v. NLRB*,<sup>16</sup> decided three years later, the Fifth Circuit "respectfully [declined] to concur in the reasoning of Judge Medina"<sup>17</sup> and explicitly held that a violation of a union's fair representation duty was an unfair labor practice under section 8(b)(1)(A).<sup>18</sup> The court in *Truck Drivers Local* cited *United Rubber Workers* for establishing a "firmer acceptance"<sup>19</sup> of the theory of NLRB jurisdiction over unfair union representation.

Before the decision of the Board in *Miranda* and the Fifth Circuit in *United Rubber Workers*, the traditional forum for an employee allegedly suf-

10 Labor Management Relations Act (Taft-Hartley Act) § 9(a), 61 Stat. 143 (1947), 29 U.S.C. 159(a) (1964) provides that

[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . .

11 Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. 157 (1964) provides:

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 . . . .

12 *Id.*

13 *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The Board also found the union guilty of an 8(b)(2) violation.

For a more detailed treatment of *Miranda* and further aspects of a union's duty of fair representation, see Aaron, *Some Aspects of Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39 (1961); Albert, *NLRB-FEPC?*, 16 VAND. L. REV. 547 (1963); Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435 (1963); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Herring, *The "Fair Representation" Doctrine: An Effective Weapon Against Union Racial Discrimination*, 24 MD. L. REV. 113 (1964); Sovern, *Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, in N.Y.U. 16TH ANNUAL CONFERENCE ON LABOR 3 (1963); Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962); Weiss, *Federal Remedies for Racial Discrimination by Labor Unions* 50 GEO. L.J. 457 (1962); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System* 67 YALE L.J. 1327 (1958).

14 *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).

15 *Id.* at 178. See also *Miranda Fuel Co.*, 140 N.L.R.B. 181, 201 n.37 (1962) (dissenting opinion), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. PA. L. REV. 711, 716-25 (1964). See generally authorities cited in note 13 *supra*.

16 368 F.2d 12 (5th Cir. 1966).

17 *Id.* at 20.

18 *Id.*

19 *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 141 (D.C. Cir. 1967).

fering from union unfair representation had been the courts. This judicial remedy was first fashioned in *Steele v. Louisville and Nashville Railroad Company*<sup>20</sup> in order to enforce a union's fair representation duty under the Railway Labor Act, but has since been expanded to include unfair representation under the NLRA.<sup>21</sup> The courts have found that a union's statutory right to be the exclusive bargaining agent for all its members carries with it the corresponding statutory duty to represent each of them fairly.<sup>22</sup>

However, the characterization in *Miranda* and *United Rubber Workers* of unfair representation as an unfair labor practice threatened to pre-empt the courts from exercising their traditional jurisdiction in this area. In *San Diego Building Trades Council v. Garmon*,<sup>23</sup> the Supreme Court had held:

When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.<sup>24</sup>

In *United Rubber Workers* the Fifth Circuit considered this problem and was forced to admit that

[r]ecognition of a breach of the union's duty of fair representation as an unfair labor practice will have the necessary effect of bringing such controversies within the primary jurisdiction of the Board, thus requiring some degree of reorientation of current jurisdictional practices.<sup>25</sup>

This dilemma was recently resolved by the Supreme Court in *Vaca v. Sipes*.<sup>26</sup> In *Vaca*, the respondent employee alleged that his union had violated its statutory duty of fair representation, and he sought relief in the state courts of Missouri. The union asserted as a defense the lack of jurisdiction of state courts. It contended that under the Board's decision in *Miranda* and the Fifth Circuit's holding in *United Rubber Workers*, unfair representation was arguably an unfair labor practice under section 8(b)(1)(A), so that state court action was pre-empted by the *Garmon* rule. A majority of the Court refused to accept this argument and held that the pre-emption doctrine does not apply to cases where it cannot fairly be inferred that the intent of Congress was to confer exclusive jurisdiction on the NLRB:

[W]e cannot assume from the NLRB's tardy assumption of jurisdiction in these cases [involving unfair representation] that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional

20 323 U.S. 192 (1944).

21 *Syres v. Oil Workers' Int'l Union*, 350 U.S. 892, *rev'g per curiam* 223 F.2d 739 (5th Cir. 1955); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

22 *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202-03 (1944). This statutory right of exclusive representation is incorporated into the Labor Management Relations Act (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964).

23 359 U.S. 236 (1959).

24 *Id.* at 245.

25 *Local 12, United Rubber Workers of America v. NLRB*, 368 F.2d 12, 21 (5th Cir. 1966).

26 87 S. Ct. 903 (1967).

jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.<sup>27</sup>

The *Vaca* opinion was cited by the court in *Truck Drivers Local* as implicit Supreme Court affirmation of the doctrine of NLRB jurisdiction over unfair labor representation.<sup>28</sup> Judge McGowan, author of the opinion in *Truck Drivers Local*, stated that *Vaca* "assumed in terms the validity of the doctrine,"<sup>29</sup> basing his conclusion on the ground that

[a] necessary premise of the majority's statement that Labor Board jurisdiction in such cases does not exclude court relief was its explicit assumption that unfair representation is an unfair labor practice.<sup>30</sup>

While it is true that the *Vaca* Court only "[assumed] for present purposes"<sup>31</sup> that union unfair representation was a violation of section 8(b)(1)(A), the fact remains that an elaborate decision was based on the probable validity of Board jurisdiction.<sup>32</sup> Thus, drawing support from the Board's *Miranda* decision, *United Rubber Workers*, and an interpretive reading of the Supreme Court's decision in *Vaca*, the circuit court in *Truck Drivers Local* expressly adopted the theory that unfair representation is an unfair labor practice under 8(b)(1)(A) and, therefore, within the jurisdiction of the NLRB.

In the second step of its opinion, the court determined that a union's arbitrary and adamant refusal to dovetail its seniority rosters is an instance of unfair representation, and thus, under the *Miranda* rationale, is also a violation of section 8(b)(1)(A). In reaching this conclusion, Judge McGowan had to balance two fundamental interests: (1) the individual employee's right to seniority; and (2) the union's right to negotiate a settlement for the good of all its members. The importance of seniority to an employee can hardly be overestimated. It is his major form of job security in that it often determines who gets or keeps an available job.<sup>33</sup> Nevertheless, the courts have recognized that an individual's rights are not always supreme. The union must be and is allowed a certain degree of flexibility in bargaining, especially in the negotiation stages.<sup>34</sup>

The NLRB itself has only recently begun to "articulate the characteristics of unfair representation . . ."<sup>35</sup> Hence, in order to decide if a refusal to dove-

27 *Id.* at 913.

28 *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 141-42 (D.C. Cir. 1967).

29 *Id.* at 141-42. Part of this quote erroneously omitted from advance sheet, see *Truck Drivers & Helpers Local 568 v. NLRB*, Nos. 20,077, 20,131, at 8 (D.C. Cir., May 18, 1967).

30 *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 142 (D.C. Cir. 1967).

31 *Vaca v. Sipes*, 87 S. Ct. 903, 915 (1967).

32 The Supreme Court had previously noted that there is a difference of opinion as to whether a breach of the duty of fair representation is an unfair labor practice, but it has left the issue open. See *Humphrey v. Moore*, 375 U.S. 335, 344 (1964); *Local 100, United Association of Journeymen v. Borden*, 373 U.S. 690, 696 n.7 (1963).

33 *Humphrey v. Moore*, 375 U.S. 335, 346-47 (1964). See generally *Khan*, *supra* note 5; *Mater & Mangum*, *supra* note 5.

34 See, e.g., *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1953). See also *Blumrosen*, *supra* note 13, at 1475-76.

35 *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 142 (1967). Most of the cases the Board has considered in this area concern unfair representation by a union because of racial discrimination. E.g. *Cargo Handlers, Inc.*, 159 N.L.R.B. No. 17 (1966) (union violated §§

tail could be considered an instance of unfair representation, the court in *Truck Drivers Local* was compelled to look to the traditional criterion employed by the courts under *Steele*. In an analogous situation,<sup>36</sup> the Supreme Court had maintained the balance between protection of individual rights on one hand and union flexibility on the other by requiring the union to use "complete good faith and honesty of purpose in the exercise of its discretion."<sup>37</sup> This was basically an application of the broad principle of *Steele* that a union must "exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discretion against them."<sup>38</sup> The same criterion of rationality and good faith has been employed by the courts when evaluating the validity of a negotiation of seniority rights. The Supreme Court of Wisconsin in *O'Donnell v. Pabst Brewing Company*<sup>39</sup> upheld a union's dovetailing of seniority rosters on the ground that the bargaining which produced the dovetail arrangement was made in good faith and reached a fair and equitable solution to the merger problem.<sup>40</sup> In *Humphrey v. Moore*,<sup>41</sup> the Supreme Court of the United States held that a dovetailing of seniority rosters performed by a union after the merger of two companies was valid because the union arrived at its position honestly, in good faith, and without hostility or arbitrary discrimination.<sup>42</sup> However, in *Ferro v. Railway Express Agency*,<sup>43</sup> the Second Circuit held that a union settlement that sacrificed a minority of the members' seniority rights was invalid because it was based on internal political considerations rather than on any rational standard. The court reasoned:

A bargain which favors one class of employees over another is not necessarily prohibited as a hostile discrimination. . . . However, it is not proper for a bargaining agent in representing all of the employees to draw distinctions among them which are based upon their political power within the union.<sup>44</sup>

Thus, the Second Circuit has removed the political element as a possible justification for an otherwise unfair or irrational arrangement of seniority rights.<sup>45</sup>

The obvious principle to be drawn from these cases is that a union will be allowed the wide range of discretion necessary for a bargaining representa-

8(b)(1)(A) and 8(b)(2) by operating a hiring system in a manner whereby Negroes were discriminated against in job opportunities because of race); *Local 1367, Int'l Longshoreman's Ass'n*, 148 N.L.R.B. 897 (1964) [work quotas maintained on a racial basis are a violation of § 8(b)(1)(A)]; *Independent Metal Workers Local 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964) [refusal by a union to handle a Negro's grievance complaint because of his race is a violation of §§ 8(b)(1)(A), 8(b)(2), and 8(b)(3)].

36 *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). In this case a union entered an agreement extending seniority to include time spent in military service even before employment with Ford Motor Company. The court sustained this provision by holding that it was in accord with public policy and inherently fair. *Id.* at 339. (1953).

37 *Id.* at 338.

38 *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).

39 12 Wis. 2d 491, 107 N.W.2d 484 (1961).

40 *Id.* at —, 107 N.W. 2d at 490.

41 375 U.S. 335 (1964).

42 *Id.* at 350.

43 296 F.2d 847 (2d Cir. 1961).

44 *Id.* at 851.

45 *Blumrosen*, *supra* note 13, at 1480.

tive, as long as its seniority policy is rational and arranged in good faith.<sup>46</sup> However, if as in *Ferro*, the union arbitrarily and unjustifiably abridges a minority group's seniority rights, it will be held guilty of a violation of its statutory duty of fair representation.

Relying on *Ferro*, the court in *Truck Drivers Local* found that the facts presented clearly established that UTE's conduct was such as to fall within the defined judicial class of unfair representation. The UTE statement was adamant and absolute; it would never agree to dovetail the seniority roster. The only reasonable conclusion was that the statement was made purely to gain the votes of the numerically superior UTE members at the expense of the rights of the minority Teamsters.<sup>47</sup>

Hence, the criterion for determining what is an instance of unfair representation in regard to seniority rights is still the judicial standard formulated in *Steele* and applied in such cases as *Ferro*. However, by holding that this unfair representation is also a violation of section 8(b)(1)(A), the court in *Truck Drivers Local* has given an individual whose seniority rights have been unfairly abridged the possibility of obtaining relief in two forums—the courts and the NLRB.

However, the court in *Truck Drivers Local* could not base its ultimate decision on the ground that an adamant refusal to dovetail by an exclusive bargaining agent is an unfair labor practice. Both elections had been set aside. UTE, therefore, was not as yet the exclusive bargaining agent for both groups of employees, and thus, the duty of fair representation had not yet attached to UTE. In the words of Judge McGowan, "the question is whether *threatened* action which *would* violate a union's fair representation duty constitutes an unfair labor practice."<sup>48</sup> The court answered this question in the affirmative, relying on the fact that UTE's threatened refusal to dovetail seniority rights had the effect of presently restraining both the UTE members and the Teamsters from exercising their rights to freely choose a bargaining representative guaranteed under section 7.<sup>49</sup> To UTE members, the "no-dovetailing" statement was in effect the promise of a benefit; namely, their seniority rights would be illegally preserved if they voted for UTE. As such, the promise restrained them from voting for the possibly more advantageous terms of the Teamsters

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46 Various commentators would impose what would seem to be an even stricter duty than that required by case law on unions seeking to justify such an abridgment of seniority rights. Alfred W. Blumrosen has stated that

the duty of fair representation should allow the union, in good faith, to negotiate changes in conditions of employment as to all matters except seniority rights. To justify an abridgment of seniority rights, the union must show not only that it exercised an honest judgment, but also that it made an appropriate decision, one based on objective factors, which would persuade a rational decision-maker, and not compelled by the internal political make-up of the union. Blumrosen, *supra* note 13, at 1482.

Harry H. Wellington writes that even though "position on the seniority ladder is subject to revision, bargaining for its total elimination seems clearly outside the expectation of the employee community." Wellington, *supra* note 13, at 1361.

47 *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 143 (1967).

48 *Id.* at 144.

49 *Id.* at 144-45.



contract.<sup>50</sup> To the Teamsters, the "no-dovetailing" stand of UTE was a direct threat to their seniority which, in effect, forced them to vote for the Teamster contract without considering the UTE contract on its merits. Thus, the freedom of choice of both groups, guaranteed by section 7 and protected from union interference by section 8(b)(1)(A), was restrained by the UTE threat.<sup>51</sup>

In the final analysis, UTE was found guilty of an 8(b)(1)(A) violation not because it violated its duty of fair representation, but because it infringed upon the employees' freedom of choice.<sup>52</sup> It would seem that the right to freedom of choice would still be infringed by the threat, whether or not the actual effectuation of the threat is considered an unfair labor practice. If such is the case, then the court in *Truck Drivers Local* has gone to great lengths in its first two steps to prove that unfair representation in the nature of an arbitrary refusal to dovetail seniority rosters is an unfair labor practice, but this proof was not necessary for the actual decision in the case. Instead, the result hinged on the more traditional theory of freedom of choice guaranteed employees by section 7, and in effect applied the fundamental principles of this concept to the facts.

The query, then, is why the court bothered to extensively treat the complex issue of unfair representation, when its determination was not of vital necessity in resolving the precise question before it. One explanation could be that the holding of the first two steps tended to round out the symmetry of the entire opinion. If unfair representation were not held to be an unfair labor practice, an anomalous situation would result. Specifically, the *threat* of unfair representation would be an unfair labor practice since it would result in impairment of the freedom of choice guaranteed by section 7 and protected by 8(b)(1)(A); the actual *fact* of unfair representation, however, would not be an unfair labor practice, but would only be "illegal" under the statutory duty announced in *Steele*. Also, and perhaps of even greater significance, the case gave the court a forum to present its views on the vital question of unfair

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50 The Teamsters contract called for overtime pay after 8 hours a day, the UTE after 10. Unlike the UTE contract, the Teamsters contract provided for overtime pay for work on the sixth day and double time for work on the seventh. It also had superior vacation plans, an employer-supported pension plan, health and welfare plans, and employee cost-of-living allowances. *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 145 n.16 (D.C. Cir. 1967).

51 An incumbent union's threat that it will cause any employee who supports a petitioning union to lose his job has been held to violate § 8(b)(1)(A) because it deprives the employees of their freedom of choice guaranteed by § 7. *A. O. Smith Corp. v. NLRB*, 343 F.2d 103, 108, 115 (7th Cir. 1965); *Local 511, St. Louis Offset Printing Union, 130 N.L.R.B. 324, 326, 327 (1961)*. A promise of benefit by a union has also been considered disruptive of free choice. *NLRB v. Gilmore Indus., Inc.*, 341 F.2d 240 (6th Cir. 1965); *NLRB v. Gorbea, Perez & Morell, S. en C.*, 328 F.2d 679, 680 (1st Cir. 1964). Furthermore, in framing § 8(b)(1)(A) Congress intended to impose upon unions the same restrictions that the Wagner Act imposed upon employees with respect to violations of employee rights. *International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731, 738 (1961). An employer's promises of benefit have been held to be as effective as threatened detriment in discouraging union activity and have been found violative of § 8(a)(1). *E.g. Joy Silk Mills v. NLRB*, 185 F.2d 732, 739 (1950), *cert. denied*, 341 U.S. 914 (1951).

52 The court recognized that not every promise of benefit or threat of reprisal made by a union in the heat of a campaign will be held an unfair labor practice. In some cases, merely setting aside the election will suffice. But here, it noted, two elections had already been set aside and there was no assurance the situation had been remedied, so a cease and desist order seemed the only effective solution. *Truck Drivers & Helpers Local 568 v. NLRB*, 379 F.2d 137, 144 n.12 (D.C. Cir. 1967).

representation and to align itself firmly with the growing trend to regard such action as an unfair labor practice within the jurisdiction of the NLRB.

By allowing the NLRB to brand as an unfair labor practice the threat of an illegal arrangement of seniority rights, the decision in *Truck Drivers Local* should serve to prevent the stalemates and repeated elections present in the typical merger situation. Moreover, the court's ancillary determination that the exclusive bargaining agent can be guilty of an unfair labor practice for a violation of its duty of fair representation, gives the NLRB the power to demand an equitable and good faith arrangement between unions in consolidating seniority rights *after* a merger. This expansion of NLRB jurisdiction may require the Board to investigate the substantive validity of collective bargaining agreements to determine if seniority rights have been arbitrarily abused. This expansion of Board control may mean an expansion of governmental control over the substantive issues involved in private collective bargaining.<sup>53</sup> However, it appears that the possibility of government interference is an unavoidable by-product if the minority union's seniority rights are to receive the efficacious protection that the NLRB is most suited to give.<sup>54</sup>

*John Rittinger*

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PROCEDURE — CORPORATIONS — A FOREIGN CORPORATION IS SUBJECT TO JURISDICTION IN AN IN PERSONAM ACTION IF ITS INDEPENDENT RESIDENT AGENT IS DOING ALL THE BUSINESS IN THE FORUM STATE WHICH THE FOREIGN CORPORATION COULD DO WERE IT THERE BY ITS OWN OFFICIALS. — Jack Frummer was a resident of New York State. In 1963, while on a visit to England, he was injured while taking a shower in his room at the London Hilton Hotel. The London Hilton is leased and operated by Hilton Hotels (U.K.) Limited [hereinafter U.K. Limited]. Frummer brought an action for personal injuries in the New York Supreme Court of Kings County seeking \$150,000 in damages from U.K. Limited; Hilton Hotels International, Incorporated, the parent of U.K. Limited; and Hilton Hotels Corporation, an affiliate of Hilton Hotels International. Though Hilton Hotels International is partly owned by Hilton Hotels Corporation, the two have somewhat different stock ownership and the shares of each are separately listed on public stock exchanges. In addition to complete ownership of U.K. Limited, Hilton Hotels International is co-owner with Hilton Hotels Corporation of the Hilton Reservation Service [Reservation Service]. The Reservation Service maintains offices in New York City in order to confirm availabilities at any Hilton Hotel and any of fifty associated hotels having no connection with the Hilton chain. Hilton International, Hilton Hotels Corporation, U.K. Limited, and the Reservation Service are distinct corporate entities. The management and books of each corporation are separate. Hilton Hotels Corporation and Hilton Hotels International are Delaware corporations licensed to do business in New York State.

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53 For a detailed study of the advantages of Board action in the area of unfair representation plus a consideration of the problems such jurisdiction would raise, *See generally* Blumrosen, *supra* note 13, at 1504-17; Wellington, *supra* note 13, at 1357-62; Note, *supra* note 15, at 711.

54 Wellington, *supra* note 13, at 1357-62; *See also* Blumrosen, *supra* note 13, at 1514-17.

U.K. Limited moved for an order to dismiss the complaint against it on the ground that the court did not have jurisdiction over its person. The plaintiff argued that service of process on U.K. Limited was valid because it had transacted business in New York through the Reservation Service thereby fulfilling the requirements of section 302(a) of the New York Civil Practice Law and Rules,<sup>1</sup> New York's "long-arm" statute. U.K. Limited's motion for dismissal was denied by the Supreme Court of Kings County and the denial was affirmed by the Supreme Court, Appellate Division. The Court of Appeals of New York, in a four-to-three decision, affirmed and *held*: a foreign corporation is subject to jurisdiction in an in personam action if its independent resident agent is doing all the business which the foreign corporation could do were it in the forum state by its own officials. *Frummer v. Hilton Hotels International, Incorporated*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967), *petition for cert. filed*, 36 U.S.L.W. 3076 (U.S. August 11, 1967) (No. 479).

"Concepts of due process in the assertion of jurisdiction over foreign defendants have changed through the years with the growth of commerce and the ever-increasing mobility of people and things."<sup>2</sup> In 1839, the Supreme Court in *Bank of Augusta v. Earle*<sup>3</sup> stated that a corporation could be subjected to suit only in the state of its incorporation since it had no legal existence outside of such state. In *Pennoyer v. Neff*<sup>4</sup> the Supreme Court qualified this strict rule somewhat by holding that jurisdiction could be asserted over a person so long as he was physically present within the forum jurisdiction. In order to acquire jurisdiction over a foreign corporation under the *Pennoyer* rule, the courts relied upon the consent and presence theories. Under the consent theory, a foreign corporation was subject to suit because the state imposed, as a condition to doing business there, a requirement that the foreign corporation "consent" to be sued in that jurisdiction.<sup>5</sup> Where consent was not found, a foreign corporation could become amenable to process by conducting business to such an extent that it was considered "present" in the jurisdiction.<sup>6</sup>

1 N.Y. Civ. Prac. § 302(a) (McKinney Supp. 1967) provides in part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state . . . .

2 Shepherd, *How Long Is the Long Arm of Due Process?*, 34 INS. COUNSEL J. 297 (1967).

3 38 U.S. (13 Pet.) 519 (1839) (dictum).

4 95 U.S. 714 (1877).

5 The consent theory assumed that a state could prevent a foreign corporation from doing business within its borders. A necessary corollary was that the state could also impose conditions on the doing of business, one of which was that the foreign corporation "consent" to be sued in the forum jurisdiction by virtue of its doing business in the state. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855). *Accord*, *St. Clair v. Cox*, 106 U.S. 350, 356 (1882); *St. Louis v. Ferry Co.*, 78 U.S. (11 Wall.) 423, 429 (1870).

6 Under the presence theory, it was held:

A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.

*Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264, 265 (1917) (emphasis added).

*See St. Louis S.W. Ry. v. Alexander*, 227 U.S. 218, 226 (1913). Thus, the presence theory was formulated as an alternative to the consent theory. However, the presence theory was defective in the sense that the foreign corporation must have been "carrying on business within the State at the time of the attempted service." *International Harvester Co. of*

The modern development of the law in this area began with *International Shoe Company v. Washington*<sup>7</sup> wherein the Supreme Court held that a state could subject a nondomiciliary to in personam jurisdiction where the nondomiciliary has "certain minimum contacts with it [the forum jurisdiction] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>8</sup> *International Shoe* served as a departure from the older consent and presence theories in that it departed from the mechanical or quantitative standards of those theories. Henceforth, "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."<sup>9</sup> In short, the minimum contacts test of *International Shoe* sets the outer constitutional limits for the drafting of state long-arm statutes. Some states have failed to take advantage of *International Shoe* and have retained their older statutes.<sup>10</sup> Other states, notably Illinois,<sup>11</sup> have enacted statutes intended to extend their jurisdiction to the furthest reach allowable under *International Shoe*. The *International Shoe* test does not, however, give the states a free rein in determining the extent of their jurisdiction.<sup>12</sup> The Supreme Court, in *Hanson v. Denckla*,<sup>13</sup> clearly held that

it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.<sup>14</sup> (Citations omitted.)

Section 302, modeled after the Illinois Act, is obviously an attempt by the New York legislature to completely occupy the area of jurisdiction created by *International Shoe*.<sup>15</sup> The transacting business test of section 302(a) requires considerably less contact with the forum jurisdiction than the traditional doing business test.<sup>16</sup> However, section 302, by its own terms, is not of universal

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*America v. Kentucky*, 234 U.S. 579, 585 (1914) (emphasis added). Under either theory, interpretation of the phrase "doing business" was mechanical and quantitative.

7 326 U.S. 310 (1945).

8 *Id.* at 316.

9 *Id.* at 319.

10 See, e.g., ARK. STAT. ANN. 27-340 (1947).

11 ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956).

12 It appeared that the Supreme Court was moving in this direction when it decided *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). In that case, jurisdiction was upheld on the basis of one contract which the Court felt had a "substantial connection" with the forum state. *Id.* at 223. However, the Court's decision may have been motivated, at least in part, by the inconvenience and expense to the plaintiff in bringing suit on the defendant's home ground. See *id.* at 223. *McGee* has been recognized as the "furthest reach" of the *International Shoe* doctrine. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 510 (2d Cir. 1960).

13 357 U.S. 235 (1958).

14 *Id.* at 251. For a detailed analysis of the development of the law from *International Shoe* to *Hanson*, see Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 586-624 (1958). See generally O'Connor & Goff, *Expanded Concepts of State Jurisdiction Over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME LAWYER 223, 225-33, 247-49 (1956).

15 "With the enactment of this statute [§ 302], New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints." McLaughlin, *Practice Commentary*, N.Y. CIV. PRAC. § 302, at 428 (McKinney 1963).

16 "The term 'transaction of business' [in § 302(a)] includes all cases which meet the

applicability since it is confined to causes of action arising out of the foreign corporation's local activities. Because of this, both the majority and dissenting opinions in *Frummer* were quick to point out that section 302(a) was inapplicable since the plaintiff's cause of action did not arise from U.K. Limited's transaction of any business in New York.<sup>17</sup> However, the plaintiff was still able to rely on section 301 of the New York Civil Practice Law and Rules. Section 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."<sup>18</sup> This section retains in the New York courts the traditional power to "subject a foreign corporation to personal jurisdiction because it 'does business' in New York . . ."<sup>19</sup> Thus, the majority in *Frummer* felt that this section allowed the court to obtain jurisdiction over a cause of action arising from the out-of-state activities of a foreign corporation, if the corporation were actually doing business in New York.<sup>20</sup>

Hence, the plaintiff in *Frummer* was faced with a two-fold problem. First, he had to establish the minimum contacts of U.K. Limited through the activities of the Reservation Service since U.K. Limited did not, as such, conduct any activities in New York. This required a circumvention of the corporate separateness doctrine.<sup>21</sup> Secondly, the plaintiff had to prove that the acts of the Reservation Service were sufficient in themselves to constitute minimum contact in the face of New York's established rule that "mere solicitation" is not enough to constitute doing business in New York.<sup>22</sup>

Admitting that "mere solicitation" is not enough to constitute doing business under section 301,<sup>23</sup> the majority of the court in *Frummer* noted that the Reservation Service maintained an office in New York, did public relations work, maintained its own bank account and telephone number, and accepted and confirmed room reservations for the London Hilton.<sup>24</sup> Relying on these additional factors to find more than "mere solicitation," Chief Judge Fuld, speaking for the majority, cited *Bryant v. Finnish National Airline*.<sup>25</sup> In *Bryant*,

older 'doing business' test of jurisdiction as well as cases where the defendant's activities amount to something less than 'doing business.'" O'Connor & Goff, *supra* note 14, at 236.

17 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 535-36, 539, 227 N.E.2d 851, 852-53, 855, 281 N.Y.S.2d 41, 43, 46 (1967).

18 N.Y. Civ. Prac. § 301 (McKinney 1963).

19 McLaughlin, *Practice Commentary*, N.Y. Civ. Prac. § 301, at 401 (McKinney 1963). "[I]t is clear that this [the doing business test] is the test that must be satisfied in order to comply with the jurisdictional requirements of CPLR § 301." *Lumbermen's Mut. Cas. Co. v. Borden Co.*, 265 F. Supp. 99, 101 (S.D.N.Y. 1967) (mem.).

20 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536, 227 N.E.2d, 851, 853, 281 N.Y.S.2d 41, 43 (1967).

21 The respondent has taken the position at all times that Hilton Hotels (U.K.) Limited is nothing more than a wholly owned subsidiary, a fixture and a creature of the Hilton Hotels International Inc., which in turn is a virile offspring of Hilton Hotels Corporation, the parent corporate entity. Brief for Respondent at 14, *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967).

22 *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 480, 151 N.E.2d 874, 876, 176 N.Y.S.2d 318, 321 (1958); *Elish v. St. Louis S.W. Ry.*, 305 N.Y. 267, 269, 112 N.E.2d 842, 843 (1953).

23 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 45 (1967).

24 *Id.* at 537, 227 N.E.2d at 853-54, 281 N.Y.S.2d at 44. The dissent was quick to point out that the Reservation Service did not accept and confirm room reservations at the London Hilton, but that it only confirmed availabilities based on forecasts supplied by the hotels. *Id.* at 541-42, 227 N.E.2d at 856, 281 N.Y.S.2d at 48 (dissenting opinion).

25 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

a 1965 New York Court of Appeals decision, the plaintiff was injured in Paris, allegedly through the negligent operation of the defendant's aircraft. Though the airline operated no aircraft within the United States, it was held to be doing business in New York since it maintained an office in New York City, employed several people and had a bank account in New York, did public relations and publicity work for the airline, and helped to generate its business.<sup>26</sup> However, it should be noted that in *Bryant* it was the defendant airline itself that operated the local office.

Thus, having established that the activities of the Reservation Service were sufficient to establish presence, the majority then faced its major hurdle, *i.e.*, linking these activities to U.K. Limited. As pointed out by the dissent,

a foreign parent corporation will not be subjected to the judicial jurisdiction of a State merely because of its ownership of a subsidiary corporation doing business within the State, if the parent diligently maintains the formal separateness of the subsidiary entity. . . .<sup>27</sup>

By this statement, the dissent seems to imply that this rule should also be applied where the intercorporate relationship is that of affiliate, rather than parent-sub subsidiary. The majority circumvented the corporate separateness problem by finding an agency relationship between U.K. Limited and the Reservation Service. According to the majority:

[T]his appeal deals with the *jurisdiction* of our courts over a foreign corporation rather than the *liability* of a parent company for the acts of a wholly owned subsidiary. . . . The "presence" of Hilton (U.K.) in New York, for purposes of jurisdiction, is established by the activities conducted here on its behalf by its *agent*, the Hilton Reservation Service, and the fact that the two are commonly owned is significant only because it gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency agreement . . . .<sup>28</sup> (Emphasis added.)

By basing its decision on this agency relationship, the majority was forced to distinguish *Miller v. Surf Properties, Incorporated*.<sup>29</sup> In *Miller*, the Court of Appeals had ruled against an attempt to serve an out-of-state motel on the basis of the activities carried on in its behalf by a local independent travel agent. The local agent in *Miller* confirmed availabilities at the defendant's hotel and

<sup>26</sup> *Id.* at 432, 208 N.E.2d at 441-42, 260 N.Y.S.2d at 628-29.

<sup>27</sup> *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 544, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 50 (1967) (dissenting opinion). The dissent cited, among others, *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925) which is regarded as the leading case in this area. *Cannon* is generally cited for the proposition that business activities carried on by a subsidiary in the forum state cannot be the basis for asserting jurisdiction over a foreign parent. The decision was not based on constitutional grounds, however, and the Court left open the question of whether Congress could authorize such a basis for jurisdiction. *Id.* at 336. See also *Velandra v. Regie Nationale Des Usines Renault*, 336 F.2d 292 (6th Cir. 1964) (mere ownership of all stock in a subsidiary is not sufficient in itself to justify holding the parent corporation amenable to jurisdiction); *Echeverry v. Kellogg Switchboard & Supply Co.*, 175 F.2d 900 (2d Cir. 1949).

<sup>28</sup> *Frummer v. Hilton Hotels, Int'l, Inc.*, 19 N.Y.2d 533, 538, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967).

<sup>29</sup> 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).

occasionally solicited customers for the hotel.<sup>30</sup> The *Miller* court refused to assert jurisdiction because it felt that these activities amounted to no more than mere solicitation. The *Frummer* majority pointed out that in *Miller* the New York agent was completely independent of the Florida hotel and that it represented thirty other unassociated Florida establishments. The court quoted from *Bryant* their previous discussion of the *Miller* case.

[W]e found it significant that in the *Miller* case the New York activities were carried on "not [by] an employee of the defendant [Florida hotel] but an independent travel agency representing defendant in New York City."<sup>31</sup>

Turning to the possible ramifications of their decision, the majority noted that it was "not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company,"<sup>32</sup> but pointed out that this is the price which a corporation must pay in return for the benefits of conducting business abroad.<sup>33</sup>

Judge Breitel, author of the dissenting opinion in *Frummer*, began by manifesting a much greater concern for the business community. He noted that

important policy and commercial considerations are involved in preventing or allowing business enterprise to limit liability, suability, and exposure to governmental regulation, by the creation of truly separate corporate entities, with or without separate ownership structures, but especially where the ownership is not identical.<sup>34</sup>

The dissent viewed *Bryant* as one of a variety of unusual situations which the doing business test had been "stretched to cover."<sup>35</sup> But even accepting the *Bryant* decision, the dissenters could not agree with the majority's distinguishing of the *Miller* case. To Judge Breitel, the activities engaged in by the travel agent in *Miller* and the Reservation Service in *Frummer* were identical. He was not swayed by the majority's argument that *Miller* involved a completely independent agent.

That in the *Miller* case a wholly separate enterprise was involved is not the distinction, unless, of course, the separateness of parent and subsidiary corporations is to be wholly ignored, a position which the majority purportedly disavows, but yet takes by "inference."<sup>36</sup>

30 *Id.* at 478-80, 151 N.E.2d at 875-76, 176 N.Y.S.2d at 319-21.

31 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 538, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967). Actually, the quoted statement is ambiguous. The court in *Bryant* may have been implying that jurisdiction was denied in *Miller*, not because of the independence of the local agent, but because *process was served* on the independent agent. Thus, the implication is that it was an improper service of process. See *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 431, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 628 (1965). No such situation obtains in *Frummer* since process was served directly on U.K. Limited. However, the statement still has a certain significance in that it indicates what the *Frummer* majority felt to be a distinguishing factor, *i.e.*, the presence of an independent agent in *Miller*.

32 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 538, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967).

33 *Id.* at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

34 *Id.* at 540, 227 N.E.2d at 855, 281 N.Y.S.2d at 46-47 (dissenting opinion).

35 *Id.* at 539, 227 N.E.2d at 855, 281 N.Y.S.2d at 46 (dissenting opinion).

36 *Id.* at 542, 227 N.E.2d at 856-57, 281 N.Y.S.2d at 48 (dissenting opinion).

Hence, the dissenters felt that the majority decision was logical only if "the intercorporate relations are made a determining factor in this very case and generalized disavowals [of the majority] fail to obscure the reasoning process involved."<sup>37</sup>

Viewing the majority opinion in this light, the dissent then analyzed cases where corporate separateness had been disregarded and concluded that such action is justified only where interrelated corporations do not, among themselves, honor the separate nature of their entities.<sup>38</sup> Other cases were distinguished on the ground that in those cases the foreign corporations themselves were directly engaged in doing business in the state.<sup>39</sup>

The dissent then stated what it felt to be the adverse effects of the majority's disregard of the formal separateness of U.K. Limited and the Reservation Service. Primarily, the dissent envisioned that extensions of the long-arm doctrine could "easily lend themselves to reciprocal manipulation against American enterprises operating through subsidiaries or affiliates in other countries."<sup>40</sup> Secondly, the dissent noted that the rule applied in *Frummer* would not remain limited and that "nonresidents would also be able to sue in New York where tort verdicts are regarded as very high . . ."<sup>41</sup>

An analysis of the *Frummer* case in light of *Bryant* and *Miller* suggests that the dissent may well have revealed the true basis of the majority's holding. In *Bryant*, where jurisdiction was upheld, the local activities were performed by the defendant corporation itself. Hence, it was proper for the *Bryant* court, in applying the doing business test, to consider such local activities as the maintenance of an office in New York, the maintenance of a bank account, and the employment of several persons in the New York office.<sup>42</sup> These local activities were all carried out by the defendant in *Bryant* for its own benefit. But in *Miller*, where an independent agent was involved, the court considered only those activities conducted by the agent exclusively for the benefit of that particular defendant. It did not consider that the local independent agent maintained an office in New York, kept its own bank account, and employed several clerks in the operation of his business.<sup>43</sup> These activities were carried out by the agent for its own benefit. If the majority in *Frummer* respected the corporate separateness of U.K. Limited and the Reservation Service, it should have treated the

37 *Id.* at 543, 227 N.E.2d at 857-58, 281 N.Y.S.2d at 50 (dissenting opinion).

38 *See, e.g.*, *Public Adm'r v. Royal Bank of Canada*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967) (subsidiary of Canadian bank was, in fact, if not in name, the Canadian bank); *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965) (wholly owned sub-subsidiary, which sold and serviced British corporation's products in state, was a mere department of British corporation, rather than independent entity); *Rabinowitz v. Kaiser-Frazer Corp.*, 302 N.Y. 892, 100 N.E.2d 177 (1951) (mem.) (separate entity of sales corporation nominal only).

39 *See, e.g.*, *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965) (defendant airline maintained a local office). *See also* *Elish v. St. Louis S.W. Ry.*, 305 N.Y. 267, 112 N.E.2d 842 (1953) (defendant maintained offices in New York, held board meetings there, and carried on other activities).

40 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 546, 227 N.E.2d 851, 859, 281 N.Y.S.2d 41, 52 (1967) (dissenting opinion).

41 *Id.* at 546, 227 N.E.2d at 859, 281 N.Y.S.2d at 52 (dissenting opinion).

42 *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 429-30, 208 N.E.2d 439, 440, 260 N.Y.S.2d 625, 626-27 (1965).

43 *See* *Miller v. Surf Properties, Inc.*, 4 N.Y.2d 475, 151 N.E.2d 874, 176 N.Y.S.2d 318 (1958).



Reservation Service as an independent agent of U.K. Limited. By so doing, the court would have been unable to consider, as it did, that "the Hilton Reservation Service . . . has a New York office, as well as a New York bank account and telephone number."<sup>44</sup> The only activity of the Reservation Service which was exclusively attributable to U.K. Limited was the confirming of availabilities at the London Hilton, and certainly under the holding in *Miller* such activities would not amount to more than "mere solicitation."

Furthermore, the majority may have implied that it was utilizing the corporate relationship in U.K. Limited and the Reservation Service when it stated that "the fact that the two [U.K. Limited and the Reservation Service] are commonly owned is significant only because it gives rise to a valid inference as to the broad scope of the agency . . ."<sup>45</sup> At best, this statement serves as a vague denial that the corporate separateness doctrine has been rebuked. It could, however, also be taken to mean that the intercorporate relation raises an inference sufficient to give the agency argument strength enough to place *Frummer* directly within the range of *Bryant*. It appears reasonable to assume, considering the similarity of the activities found insufficient in *Miller* and the activities that the Reservation Service performed exclusively for the benefit of U.K. Limited, that had this "inference" not been raised, the agency between the two would have been insufficient to comply with the doing business test under section 301. At the very least, the majority would have had a harder case. Thus, while purportedly upholding the corporate separateness doctrine, the intercorporate relation of the defendant and the Reservation Service was probably the deciding factor in the majority's assertion of jurisdiction.

This is not to say, however, that the majority was unwarranted in ignoring the separateness of the two corporations. Many commentators have advocated ignoring the doctrine altogether on the question of jurisdiction. As stated by one authority:

If defendant maintains an agency within the state for regular solicitation, sales, purchasing, or servicing of its product, this fact should suffice even though the agency is an independent corporate entity. . . . [A]n older line of cases which denied jurisdiction over a parent corporation which did business within the state through a subsidiary seems to die hard.<sup>46</sup>

The holding in *Frummer*, interpreted as being based upon the intercorporate relationship of U.K. Limited and the Reservation Service, is a logical step forward within the limits of the minimum contacts test of *International Shoe*. The only fault in the majority opinion is its vagueness when facing the true issue, *i.e.*, whether the corporate relationship of the parties should be a factor in finding jurisdiction.

As noted above, the dissent indicated what it felt to be the deleterious results of this decision. It feared that "foreign jurisdictions" would reciprocate with like decisions or laws against American corporations. Such reasoning

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<sup>44</sup> *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 537, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 44 (1967).

<sup>45</sup> *Id.* at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

<sup>46</sup> F. JAMES, JR., *CIVIL PROCEDURE* 646 (1965).

ignores the fact that such an extension of personal jurisdiction may be warranted. If so, it is certainly reasonable for American corporations to expect the same treatment from foreign tribunals when they derive a benefit from their activities abroad. As stated by the majority, the inconvenience of litigating in a foreign jurisdiction "is part of the price which may properly be demanded of those who extensively engage in international trade."<sup>47</sup> The most serious objection of the dissent, *i.e.*, the rule could be extended to allow nonresident plaintiffs to sue foreign corporations in New York courts, fails to take account of the due process requirements of the *International Shoe* test. Imposing a large evidentiary and financial burden upon a foreign corporation<sup>48</sup> with no corresponding benefit to the forum state's residents would seem to go beyond "traditional notions of fair play and substantial justice."<sup>49</sup> And even assuming that due process requirements would not be violated in such a situation, the doctrine of *forum non conveniens* would always be available.<sup>50</sup>

Offsetting these possible harmful effects is the sensible result of having foreign corporations answerable for claims that properly lie against them. *Frummer* does not attack the right of a corporation to limit its liability by creating affiliate or subsidiary corporations. It does, however, attack a foreign parent's use of a local affiliate to defeat jurisdiction. As one writer has noted, the basic rationale of the corporate separateness doctrine is not violated by such a result.

To the extent that the corporations are kept financially separate and independent, there is good reason to protect management's use of decentralization of its operations to obviate the risk that a liability incurred by one division of its business may be the end of the entire concern. It is an entirely different matter . . . to shield the parent corporation from having to defend claims against the parent because the claimant may be unable to bring suit anywhere but in his home state . . . .<sup>51</sup>

The *Frummer* majority did not hold that the Reservation Service was liable for U.K. Limited's actions. Its assets are still protected against any liability to *Frummer* and, in that sense, the corporate separateness doctrine still applies. The intercorporate relation between U.K. Limited and the Reservation Service was utilized only to determine whether U.K. Limited was subject to New York jurisdiction.

*Frummer* is a far cry from *Bank of Augusta*. Indeed, even *Pennoyer* has

47 *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 538, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 45 (1967).

48 See generally Note, *Jurisdiction Over Foreign Corporations—An Analysis of Due Process*, 104 U. PA. L. REV. 381, 397-99 (1955).

49 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

50 New York courts recognize the doctrine of *forum non conveniens*. However, in New York the doctrine is restricted in the sense that it can only be applied where all parties are nonresidents and the cause of action arose outside of New York. Compare *Creegan v. Szykno*, 24 App. Div. 2d 756, 263 N.Y.S.2d 878 (1965) (mem.) with *Wagner v. Braunsberg*, 5 App. Div. 2d 564, 173 N.Y.S.2d 525, appeal denied, 6 App. Div. 2d 790, 175 N.Y.S.2d 568 (1958). Nevertheless, *forum non conveniens* would be applicable even under the restricted New York version in the situation envisioned by the dissent since the parties would be nonresidents and the cause of action would arise outside of New York.

51 Note, *supra* note 48, at 405.

long been regarded as a relic of the past. One authority has written:

The long arm of due process is indeed far longer than we once might have imagined, and the direction of growth fails to show any indication of regression. On the contrary, the pendulum perhaps must swing some more toward a further relaxation in defining the presence of a foreign defendant in the state.<sup>52</sup>

The trend is obvious. The holding in *Frummer* is merely a continuation of that trend.

*Laurent L. Rousseau*

CONSTITUTIONAL LAW — CIVIL RIGHTS — STATE ENJOINED FROM CONTRACTING WITH CONSTRUCTION COMPANIES WHO OBTAIN THEIR LABOR FORCE FROM RACIALLY EXCLUSIVE CRAFT UNIONS. — In March, 1967, the defendants, as duly elected and appointed officials<sup>1</sup> of the State of Ohio, were about to enter into contracts for the construction of the Medical Basic Sciences Building [hereinafter the Project] on the campus of Ohio State University. The Project was to be financed by state and federal funds. Contracts had been sent to at least four contractors who had submitted bids on the Project, and these contracts had been duly signed and returned. Although the defendants had not yet signed the contracts on the state's behalf, they had made a declaration of intention to sign them.

The plaintiffs, both Negroes, were technically schooled, qualified, and experienced — one as an electrician and the other as a heavy equipment operator. They learned, after making several unsuccessful attempts to obtain direct employment with the construction companies seeking the government contracts, that it was the unwavering practice of these contractors to do all of their hiring through certain craft unions. The plaintiffs had simultaneously been attempting to gain admission to these unions, but had been unsuccessful. The union officials whom they were required to see in order to gain membership were "out" each time the plaintiffs had tried to contact them. Thus, having been effectively prevented from obtaining employment on the Project, the plaintiffs brought a class action in the United States District Court for the Southern District of Ohio to enjoin the state from entering into such contracts on the ground that such action would be a deprivation, under color of state law, of their privileges and immunities as citizens of the United States. Specifically, they charged that the state's intended entry into the proposed contracts was a knowing participation<sup>2</sup> in a pattern of racially discriminatory conduct prohibited

<sup>52</sup> Shepherd, *How Long Is the Long Arm of Due Process?*, 34 INS. COUNSEL J. 297, 303 (1967).

<sup>1</sup> Defendants were James A. Rhodes, Governor of the State of Ohio, Alfred Gienow, Director of the Ohio Department of Public Works, and John D. Herbert, Treasurer of the State of Ohio.

<sup>2</sup> At least one of the contractors who had signed and returned his contract to work on the Project had refused to submit a "responsive bid" assuring his compliance with the anti-discrimination provisions of the defendant Governor's executive order dealing with construction contracts. Upon discovering that no responsive bids had been submitted in that

by the fourteenth amendment of the United States Constitution and by sections 1981<sup>3</sup> and 1983<sup>4</sup> of title 42 of the United States Code.<sup>5</sup> In a well-reasoned opinion by Judge Kinneary, the district court *held*: where a state becomes a joint participant with private persons for the purpose of constructing a public education facility, it has an affirmative statutory obligation to insure compliance by its private partner with the aims of the fourteenth amendment, and any proposed contract between the state and a contractor who hires exclusively through discriminating unions may be enjoined under 42 U.S.C. § 1983. *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967).

Section 1983 was originally enacted in 1871 to protect the rights guaranteed by the fourteenth amendment. It was intended to give a remedy in law and in equity to parties deprived of these constitutional rights by any person acting under color of state law.<sup>6</sup> Bound by its nature to the fourteenth amendment, section 1983 has experienced a parallel development in both construction and interpretation.

The purpose of the fourteenth amendment was set out in the *Civil Rights Cases*<sup>7</sup> as being the prohibition of state action which was of a discriminatory nature. The language of the opinion made it clear that the amendment's proscription of racial discrimination did not extend to the invasion of an individual's rights by nongovernmental persons.<sup>8</sup> This distinction between state action and private action has proved difficult to apply. Generally, it can be said that the concept of state action has been steadily expanded<sup>9</sup> since the *Civil Rights Cases*.

contractor's category, defendant Gienow requested and received from defendant Rhodes a waiver of the assurances requirement as applied to his contract. *Ethridge v. Rhodes*, 268 F. Supp. 83, 85-86 (S.D. Ohio 1967).

3 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1964) provides in part:

That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other . . . .

4 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1964) provides in part:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall . . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

5 Jurisdiction was also asserted under 28 U.S.C. §§ 1331, 1343(3), 2201 (1964).

6 It is abundantly clear that one reason the legislation [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. *Monroe v. Pape*, 365 U.S. 167, 180 (1961).

7 109 U.S. 3 (1883).

8 *Id.* at 11. The court in *Ethridge* noted that union officials' discriminatory conduct would not violate the fourteenth amendment under the doctrine set out in the *Civil Rights Cases*. *Ethridge v. Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

9 Some commentators believe that, for all practical purposes, state action no longer exists as a requirement of the fourteenth amendment. *See, e.g., Williams, The Twilight of State Action*, 41 TEXAS L. REV. 347, 367 (1963); 65 MICH. L. REV. 777, 784 (1967). *See also United States v. Guest*, 383 U.S. 745 (1966), which indicates a tendency toward erosion of the requirement at the Supreme Court level. Although the majority opinion formally reaffirms the necessity of finding state action, it is significant to note that six of the

Indeed, since that decision, state action has been held to encompass those situations in which state authority is brought to bear in sanctioning or facilitating discrimination, even though the actual discrimination occurs at the level of private action.<sup>10</sup>

Perhaps the most significant single extension of the state action concept — and one relied on heavily by the court in *Ethridge* — was the Supreme Court's decision in *Burton v. Wilmington Parking Authority*.<sup>11</sup> In the language of the *Burton* Court, a state's responsibility is to be interpreted "as necessarily following upon 'state participation through any arrangement, management, funds or property.'"<sup>12</sup> In *Burton*, a restaurant located within a large public garage refused to serve the appellant solely because he was a Negro. The restaurant owner was the lessee of the Wilmington Parking Authority, a state agency that owned and operated the garage. The appellant claimed that rights guaranteed to him by the equal protection clause of the fourteenth amendment had been abridged by the restaurant's refusal to serve him, and sought a declaratory judgment that the restaurant not be allowed to operate within a public building in a racially discriminatory manner. The Delaware Supreme Court held that the restaurant owner had acted in a "purely private capacity" and that the appellant was therefore not entitled to relief.<sup>13</sup> The United States Supreme Court, while asserting that the application of "a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task,'"<sup>14</sup> reversed the decision of the state court and held:

[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it *must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment*.<sup>15</sup> (Emphasis added.)

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Justices, through two concurring opinions, agree that § 5 of the fourteenth amendment empowers Congress to pass laws against *all* conspiracies which interfere with fourteenth amendment rights, regardless of whether state action is present. *Id.* at 782 & n.6 (Brennan, J., dissenting in part and concurring in part).

10 *See, e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

11 365 U.S. 715 (1961).

12 *Id.* at 722.

13 *Wilmington Parking Authority v. Burton*, 39 Del. Ch. 10, 157 A.2d 894 (1960), *rev'd*, 365 U.S. 715 (1961).

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

15 *Id.* at 725. The Court in *Burton* was clearly influenced by the fact that the land and building were publicly owned, that the building was dedicated to public uses, and that its acquisition, upkeep and maintenance were paid for by public funds. *Accord*, *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). The defendant in the latter case, a private hospital which had received funds through the Hill-Burton Hospital Survey and Construction Act, was held to have violated the equal protection clause of the fourteenth amendment by its exclusion of Negro physicians, dentists and patients from its facilities. The court found it

significant . . . that the defendant hospitals operate as integral parts of compre-

The evidence presented to the district court in *Ethridge* established that: (1) the defendants knew of the discriminatory pattern practiced by the unions and contractors against Negroes solely on the basis of their race; (2) they knew such a pattern had prevented Negroes from obtaining employment on previous public construction projects; and (3) they knew that the uncorrected continuation of the discriminatory policies of admission and referral by certain craft unions, coupled with the contractors' refusal to hire from sources other than the unions, would "inevitably and automatically" prevent Negroes in certain crafts from obtaining employment on the Project.<sup>16</sup> These facts established, Judge Kinneary applied the principles set out in *Burton* and found that the state had abridged the plaintiffs' fourteenth amendment rights by becoming "a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner — that is, the proposed contractors acting under contract with unions that bar Negroes . . . ."<sup>17</sup> The court then reasoned that the "shocking lack of concern" that the defendants displayed over the situation and their "failure to assure qualified minority workers equal access to job opportunities on public construction projects by acquiescing in the discriminatory practices of contractors and craft unions"<sup>18</sup> represented an abuse of their positions and, therefore, gave the plaintiffs a cause of action under section 1983.<sup>19</sup>

The court next considered the question of whether the plaintiffs' request for injunctive relief ought to be granted. It is Judge Kinneary's affirmative answer to this question that gives the *Ethridge* decision more than ordinary significance. The language of section 1983 clearly allows equitable relief to be granted, but does not require it. Courts have always been mindful of the extraordinary nature of such relief<sup>20</sup> and have awarded it only when it was determined, under established standards, to be the proper method of redress.<sup>21</sup> The standards have long been settled — the threatened injury must be irreparable, and there must exist no adequate remedy at law.<sup>22</sup> Hence, the *Ethridge* court noted that the plaintiffs had the burden of proving that "plain, complete, practical and efficient means of effecting justice may be obtained only through the prompt administration of an injunction in equity."<sup>23</sup>

The defendants naturally asserted that adequate remedies at law were provided for the injury set out in the complaint. Specifically, they cited title 42 of the United States Code, sections 2000e-1 to 15, and the Ohio Revised Code,

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hensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health. Such involvement in discriminatory action "it was the design of the Fourteenth Amendment to condemn." (Footnotes omitted.) *Id.* at 967-68.

16 *Ethridge v. Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

17 *Id.*

18 *Id.* at 88.

19 *Id.*

20 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1431, at 484-85, & nn.5.4-6 (Wright ed. 1958, Supp. 1966).

21 *Giles v. Harris*, 189 U.S. 475, 486 (1903) [the Court refused to grant equitable relief under REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964)].

22 3 W. BARRON & A. HOLTZOFF, *supra* note 20, at 484 & n.5.5.

23 *Ethridge v. Rhodes*, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

chapter 4112.<sup>24</sup> They alleged that through the commissions set up by these statutes and through judicial enforcement of their orders, the plaintiffs could gain access to the labor organizations involved and receive a back pay award for pecuniary damages suffered by reason of their exclusion from work on the Project.<sup>25</sup> The court was not persuaded by these assertions. Judge Kinneary looked beyond the superficial appeal of this argument and emphasized the real and recurrent nature of the injury.

[W]hile the statutory provisions may serve to redress the pecuniary damage resulting from discrimination, they do not take a single step toward mending the psychological damage to both the party discriminated against and others in the class he represents. It is evident from the testimony of the several sociologists who appeared as witnesses in this case that discrimination in the area of employment stunts the educational and technical potential development of the class subject to such inequities.<sup>26</sup>

Citing the landmark case of *Brown v. Board of Education*,<sup>27</sup> the court pointed out that the psychological impact of discrimination is even greater where it is bestowed with governmental sanction.<sup>28</sup> Speaking of discrimination in public education, the Supreme Court in *Brown* made the following pertinent comment:

To separate them [Negroes] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>29</sup>

Accordingly, the court in *Ethridge* held that the intangible nature of the injury prevented its accurate monetary valuation thereby precluding the adequacy of pecuniary relief afforded by any statute.<sup>30</sup>

Apart from the inadequacy of any money award, the court found other reasons why the plaintiffs could not obtain meaningful relief through the existing state and federal civil rights commissions. A history of ineffectiveness surrounded the Ohio Civil Rights Commission. In this regard, the Director of the Ohio Civil Rights Commission testified that the Commission had been "ineffec-

24 Although not argued by the defendants, it should be noted that money damages alone could have been awarded under § 1983.

25 OHIO REV. CODE ANN. § 4112.05(G) (Page Supp. 1966) provides in part:

If . . . the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, . . . the commission . . . shall issue and . . . cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such further affirmative or other action as will effectuate the purpose of [this chapter], including, but not limited to, hiring, reinstatement, or upgrading of employees with, or without, back pay, admission or restoration to union membership . . . .

The defendants' allegation that the plaintiffs could receive a back pay award through the commission established under the federal statute was ill-founded. The award of money damages as a federal remedy is available only through federal courts after the commission has failed to achieve voluntary compliance through conciliation. See text accompanying notes 38-49 *infra*.

26 *Ethridge v. Rhodes*, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

27 349 U.S. 294 (1955); 347 U.S. 483 (1954).

28 *Ethridge v. Rhodes*, 268 F. Supp. 83, 89 (S.D. Ohio 1967).

29 *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

30 *Ethridge v. Rhodes*, 268 F. Supp. 83, 89 (S.D. Ohio 1967).

tual in remedying discrimination in the craft unions.<sup>31</sup> This ineffectiveness had previously been noted by at least one commentator<sup>32</sup> who ascribed the general obsolescence and ineptitude of state fair employment practice commissions to a general timidity of operation and a reluctance to broadly and rapidly enforce anti-discrimination statutes. This same commentator concluded that states that have such commissions have not managed to improve the problem of discriminatory employment,<sup>33</sup> and cited the State of Ohio as a typical example.<sup>34</sup> The Director of the Ohio Commission also testified that "the case by case approach which must be followed by that body results in too long a delay before any meaningful steps will be made toward eliminating discrimination."<sup>35</sup>

Turning to the federal statute, the court noted that normal administrative delay was compounded by the fact that the federal remedy could be used only after the state administrative remedy had been sought.<sup>36</sup> Therefore, it appeared that no form of speedy, effective relief was available to the plaintiffs under either the federal or state administrative remedy. Hence, with no adequate remedy at law available, Judge Kinneary issued his sweeping injunctive order<sup>37</sup> which seemingly leaves no room for future racial discrimination in connection with employment on the Project.

31 *Id.*

32 Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).

33 *Id. passim.*

34 *Id.* at 25.

35 *Ethridge v. Rhodes*, 268 F. Supp. 83, 89 (S.D. Ohio 1967). For similar criticism, see Hill, *supra* note 32, at 33-34 where the author noted:

[T]he length of time it takes to settle a case is a discouraging factor to potential complainants. To the end of 1947, the average time required to dispose of a case was three months. . . . "This is obviously too long a period to be effective for a worker who has experienced discrimination, since it is not likely that he can afford to remain unemployed for more than a few weeks while his complaint is being handled. If many weeks go by and the Commission has not yet come to a decision, the worker . . . probably has to get another job. When he does, the chances are he is no longer interested in the one where he experienced the discrimination."

36 78 Stat. 259-60 (1964), 42 U.S.C. § 2000e-5(b) (1964) provides in pertinent part:

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . upon receiving notice thereof, no charge may be filed under [this section] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

37 *Ethridge v. Rhodes*, 268 F. Supp. 83, 89-90 (S.D. Ohio 1967). The order restrains and enjoins the defendants, "their successors in office, agents, representatives, and employees" from:

- (1) Entering into the contracts already submitted by defendants to, and on their parts executed by, the construction firms . . . for the construction of [the Project] under the proposal and agreements which bind such contracting firms in their intended performance of the said contracts;
- (2) Entering into contracts for the construction of said [Project] with any persons who are bound by any agreement, or otherwise, to secure their labor force exclusively or primarily from any organization or source that does not supply or refer laborers and craftsmen without regard to race, color, or membership in a labor union;
- (3) Entering into contracts for the construction of the said [Project] with any persons who are bound by any agreement, or otherwise, with a labor organization, which requires, as a condition of employment, that employees hired by such persons become members of labor organization [*sic*] within a certain number of days after



Because of the far-reaching impact of the decision in *Ethridge* and the court's dismissal of the remedies afforded by title VII of the Civil Rights Act of 1964<sup>38</sup> [hereinafter title VII], a closer analysis of the objectionable features of that statute seems necessary. As previously mentioned, had the court directed the plaintiffs to seek relief under title VII, "no charge [could have been] filed . . . by the person aggrieved before the expiration of sixty days after proceedings [had] been commenced under the State . . . law."<sup>39</sup> After receiving notice that the state had terminated its proceedings under the state law, the plaintiffs would then have had thirty days to file a charge of discrimination with the Equal Employment Opportunity Commission<sup>40</sup> [hereinafter EEOC]. With receipt of this charge, the federal procedure would finally have been triggered. The EEOC at this point would have undertaken an investigation to determine whether there was reasonable cause for believing that the charge was true. Finding the charge valid, the EEOC would have sought to eliminate the discrimination through conciliation.<sup>41</sup> If these conciliatory attempts had failed to achieve "voluntary compliance" by the discriminating party within sixty days from receipt of the charge, the EEOC would have notified the person aggrieved. Only then could the plaintiffs have brought a civil action in a federal court.<sup>42</sup> It has been held that this attempt at conciliation "was intended by Congress to be and is a jurisdictional prerequisite to the institution of a civil action under Title VII . . . ."<sup>43</sup>

If the EEOC had determined, however, that the charge was without merit, it is not clear whether the plaintiffs would thereby have been deprived of their right to institute a civil action under title VII. Although the ambiguities apparent in the statutory language make this a difficult question,<sup>44</sup> one commentator has stated: "[T]he Commission . . . [has] taken the position that no requirement exists of a determination by the Commission of reasonable cause in order for a suit to be brought."<sup>45</sup> Also revealing is this comment from the floor debates preceding the enactment of the statute.

The Commission may find the claim invalid; yet the complainant still can sue . . . if he finds reasonable cause for doing so. In short, the Commission does not hold the key to the courtroom door. . . .

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employment, and membership in such labor organizations is not equally available to all persons without regard to race or color.

It is further ordered, adjudged and decreed that:

- (1) With respect to the construction of the [Project], [the defendants], their successors in office, agents, representatives, and employees may enter into contracts only with persons who will obligate themselves and be legally eligible and prepared actually to secure a labor force only from sources that will reasonably insure equal job opportunities to all qualified persons . . . without regard to race, color, or membership or non-membership in a labor union. *Id.*

38 42 U.S.C. §§ 2000e, 2000e-1 to -15 (1964).

39 78 Stat. 259-60 (1964), 42 U.S.C. § 2000e-5(b) (1964).

40 42 U.S.C. § 2000e-5(d) (1964).

41 *Id.* § 2000e-5(a) (1964). For a full discussion of the procedure under title VII, see Berg, *Equal Employment Opportunity Procedure Under Title VII of the Civil Rights Act of 1964*, 55 ILL. B.J. 654 (1967).

42 42 U.S.C. §§ 2000e-5(e), (f) (1964).

43 *Dent v. St. Louis-San Francisco Ry.*, 265 F. Supp. 56, 58 (N.D. Ala. 1967).

44 42 U.S.C. § 2000e-5(a) (1964) provides no clue as to the rights of an aggrieved party whose charge has been determined to be without merit by the EEOC.

45 Berg, *supra* note 41, at 655.

. . . .  
 . . . A complainant has an absolute right to go into court, and this provision does not affect that right at all.<sup>46</sup>

It seems, then, that the determination of the EEOC as to the validity of the charge was not intended to be legally binding. Another district court has stated:

It seems clear . . . that the requirement of resort to the Commission was designed to give a discriminator opportunity to respond to persuasion rather than coercion, to soft words rather than the big stick of injunction; that the requirement was not designed to serve as a screen to prevent frivolous complaints from reaching the courts.<sup>47</sup>

Under title VII, therefore, an aggrieved party can bring an action in a federal court upon the EEOC's determination that his charge is not valid, or, if his charge is found valid, upon the EEOC's failure at the end of sixty days to eliminate the discrimination through methods of conciliation. It is only after this extensive amount of time and procedure that the plaintiff arrives at the point that he could have immediately reached under section 1983. Of course, there is the possibility that the conciliatory effort might have ended the discrimination and abolished the need for court action, but such an occurrence seems to be the exception rather than the rule.<sup>48</sup> Moreover, since any action taken under title VII would have been against the union or the contractors,<sup>49</sup> the completeness of the relief granted would have been significantly less than that afforded by section 1983.

Although not mentioned by the *Ethridge* court, the granting of equitable relief under section 1983, in lieu of the available state statutory remedy, does not seem to violate any rules on pre-emption. As one writer recently noted, the availability of section 1983, independent of any existing state remedies, has been made clear by the Supreme Court.

[T]he question as to whether section 1983 provided a remedy in the federal courts when a state remedy was available remained unanswered for over 70 years. . . . The federal nature of the rights protected under this section would seem to indicate that the federal courts were a more appropriate

46 110 CONG. REC. 14191 (1964) (remarks of Senator Javits).

47 *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184, 188 (M.D. Tenn. 1966).

48 The Equal Employment Opportunity Commission (EEOC), established under title VII, has been in operation since June, 1965. The record is clear; its impact on employment discrimination has been negligible. . . . There is no basis for hope that this disheartening situation will improve with time. The defects and shortcomings of title VII are now manifest and should be corrected by Congress at the earliest opportunity. The present EEOC is hopelessly mired in a complaint-based system of enforcement; it has insufficient investigative powers and resources; its limited enforcement powers are complicated and ineffective; it has no legal or administrative ability to undertake manpower development or economic opportunity programs that will support its enforcement activities. *Notre Dame Conference on Federal Civil Rights Legislation and Administration: A Report*, 41 NOTRE DAME LAWYER 906, 918-19 (1966).

49 42 U.S.C. §§ 2000e-5(a), (1964) lists only employers, employment agencies, and labor organizations as parties who may be charged with unlawful employment practices under title VII.

50 Note, 42 U.S.C. § 1983 — *Civil Remedy — Its Circumvention and Emasculation*, 12 How. L.J. 285, 286-87 (1966).

forum for their enforcement. Finally . . . the Supreme Court resolved this discrepancy by holding [in *Lane v. Wilson*, 307 U.S. 268 (1939)] that federal jurisdiction existed independently of the existence of any state remedies, statutory or otherwise.<sup>50</sup>

Indeed, this availability was also made explicit by the Supreme Court in *McNeese v. Board of Education*<sup>51</sup> wherein the Court stated:

The purposes [of section 1983] were severalfold — to override certain kinds of state laws, to provide a remedy where state law was inadequate, “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice”, and to provide a remedy in the federal courts supplementary to any remedy any State might have.<sup>52</sup>

Judge Kinneary's cognizance that the plaintiffs were entitled to a speedy and certain relief marks the initiation of a judicial power play against discrimination in employment. By this decision, the court has exerted definite pressure against the state officials. The defendants' obedience to the injunction will exert the pressure of economic survival on the contractors, who will in turn be forced to exert a similar pressure on the unions. The logical result will be an end to racial discrimination, not only on the Project, but on all other state construction sites as well. Through his decision, Judge Kinneary demonstrated an awareness of the enormity of the influence that government contracts can bring to bear on private employment policies. This influence has previously been noted.

[T]he correlation of government contract powers with equal employment opportunities constitutes an underlining of public policy, which is of extreme importance because it is so readily understandable. *The fact that the government is prepared to give notice of its policy to all affected groups and persons and to the general public by presenting the possibility of such action as contract cancellation, termination or suspension and a declaration of ineligibility for future contracts, makes pointed and real, to at least a certain number of individuals and groups, a set of rights and duties which were formerly largely diffuse and academic.*<sup>53</sup> (Emphasis added.)

Since its enactment, title VII of the Civil Rights Act of 1964 has been limited in its effectiveness by the absence of a forceful sanction for its violation. Hopefully, the *Ethridge* decision will serve notice on Congress that effective civil rights legislation is not yet a reality.

*John A. Macleod*

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<sup>51</sup> 373 U.S. 668 (1963).

<sup>52</sup> *Id.* at 671-72. *Accord*, *Monroe v. Pape*, 365 U.S. 167, 183 (1961); *Powell v. Workmen's Compensation Bd.*, 327 F.2d 131, 135 (2d Cir. 1964); *York v. Story*, 324 F.2d 450, 456 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964); *Madera v. Board of Education*, 267 F. Supp. 356, 363-64 (S.D.N.Y. 1967).

<sup>53</sup> Conway, *State and Local Contracts and Subcontracts*, 14 BUFFALO L. REV. 130, 130-31 (1964).

ANTITRUST LAW — SELLER'S REFUSAL TO DEAL AND CANCELLATION OF BUYER'S LEASE BECAUSE BUYER WOULD NOT AGREE ON A MAXIMUM PRICE IS NOT VIOLATIVE OF SECTION 1 OF THE SHERMAN ACT. — In November, 1962, Mobil Oil Company and Robert Quinn executed a retail dealer's contract. At the same time, by a separate agreement, Mobil agreed to lease to Quinn the premises on which he was to operate his dealership. Both agreements were to be automatically renewed each year, with each party having the right to terminate upon proper notice. Quinn was successful in the very first year of operation. However, in November, 1963, Mobil informed Quinn that, if he did not agree to reduce the price of his gasoline, his rent for the next year would be substantially increased. Quinn refused to do this, but his lease was ultimately renewed with only a slight increase in rent. His success continued throughout the second year. However, shortly thereafter, Mobil began a program of harassment in order to induce Quinn to agree on a maximum price. Instead of sending Quinn money that it owed him, Mobil sent him a shipment of goods that he did not order. Also, Quinn's gasoline deliveries were delayed. Finally, when these pressures failed to produce an agreement, Mobil notified Quinn that it was cancelling his retail contract and the lease. Quinn vacated the premises shortly after November of 1964. He then filed suit in the United States District Court for the District of Massachusetts, charging that Mobil had restrained trade in violation of section 1 of the Sherman Act by cancelling the lease and the contract. Quinn sought \$30,000 in damages.<sup>1</sup> The complaint alleged the above facts, but failed to allege any contract, combination, or conspiracy by Mobil to fix a maximum resale price. The district court dismissed Quinn's amended complaint because it failed to allege a federal antitrust violation.<sup>2</sup> In affirming the decision of the district court, the United States Court of Appeals for the Fifth Circuit, by a divided court, *held*: a unilateral<sup>3</sup> refusal to deal and a cancellation of a buyer's lease by a seller because the buyer does not agree to fix a maximum price dictated by the seller is not violative of section 1 of the Sherman Act when the complaint fails to allege any contract, combination, or conspiracy by the seller to fix such retail prices. *Quinn v. Mobil Oil Company*, 375 F.2d 273 (1st Cir. 1967).

Section 1 of the Sherman Act provides in part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."<sup>4</sup> Notwithstanding this provision, a seller's right to unilaterally refuse to deal with a buyer was protected by the Supreme Court in *United States v. Colgate & Company*.<sup>5</sup> In *Colgate*, the Court reasoned:

The purpose of the Sherman Act is . . . to preserve the right of

1 Brief for Appellee at 2, *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967).

2 *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967) (the district court's dismissal of the complaint was not reported). Quinn was pro se in the court of appeals and, presumably, also in the district court. It is possible that this accounts for his failure to allege a contract, combination, or conspiracy.

3 BLACK'S LAW DICTIONARY 1701 (4th ed. 1951) defines unilateral as: "One sided; ex parte; having relation to only one of two or more persons or things."

4 26 Stat. 209 (1890), 15 U.S.C. § 1 (1964).

5 250 U.S. 300 (1919).

freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.<sup>6</sup>

Later Supreme Court cases have considerably narrowed the seller's discretion. An expressed or implied agreement to set resale prices, made between a manufacturer and the jobbers and retailers whom he supplies, has been held violative of section 1 of the Act.<sup>7</sup> Furthermore, section 1 is violated where the seller receives cooperation from wholesalers in regard to sales to retailers who do not observe the seller's price policy.<sup>8</sup>

Finally, in 1960, the landmark case of *United States v. Parke, Davis & Company*<sup>9</sup> was decided. Parke Davis was engaged in a program of preventing retailers, through refusals to deal, from cutting prices on Parke Davis products. Company representatives called on wholesalers and retailers to explain the company policy. The names of those retailers not cooperating with this policy were furnished to the wholesalers who, in turn, refused to sell to them. In finding the company guilty of a section 1 violation, the Supreme Court held:

So long as *Colgate* is not overruled, this result [the economic effect of sellers refusing to deal with price cutters] is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal." *When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act.*<sup>10</sup> (Emphasis added.)

This opinion clearly limits the seller's privilege to deal with whom he pleases. In fact, Justice Harlan, dissenting in *Parke Davis*, felt that the majority opinion in effect overruled *Colgate*.<sup>11</sup>

Along with this historical development, the court in *Quinn* had to con-

6 *Id.* at 307.

7 *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920).

8 *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

9 362 U.S. 29 (1960).

10 *Id.* at 44. The Court in *Parke Davis* implied that, if a state fair trade law had been in existence, the Sherman Act would not have been violated. *Id.* at 31 & n.2. It has been further noted:

The state fair trade laws exempt from the prohibitions of their common law and antitrust laws specified resale price maintenance contracts or agreements. In general, the state fair trade laws provide that no contract relating to the resale of a commodity which bears the trade-mark, brand, or name of the producer of such commodity and which commodity is in free (fair) and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state by reason of specified provisions which may be contained in such contract. 2 TRADE REG. REP. ¶ 6,017, at 9033 (1967). While fair trade laws have been enacted in 42 states, such laws have been declared unconstitutional, in whole or in part, in 23 of these states. *Id.* at ¶ 6,041, at 9087-88.

Section 2 of the McGuire Act, 15 U.S.C. § 45(a) (1964) grants immunity from federal antitrust law violations to transactions carried out under state fair trade laws.

11 *United States v. Parke, Davis & Co.*, 362 U.S. 29, 49 (1960) (dissenting opinion).

sider three recent decisions that involved a buyer who had been cut off because he refused to abide by the seller's price policy. *Simpson v. Union Oil Company*<sup>12</sup> dealt with a gasoline retailer who had been cancelled because he did not keep an agreement with the Union Oil Company to set a specific price. There was evidence that Union Oil had been using consignment agreements in many retail outlets for a similar purpose. The Supreme Court struck down Union's system and said:

If the "consignment" agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices.<sup>13</sup>

In a recent case from the Fifth Circuit, *Broussard v. Socony Mobil Oil Company*,<sup>14</sup> Mobil had a retailer's contract and a lease with the operator. The company successfully pressured Broussard into entering an agreement to fix maximum prices, but after the dealer had lost profits under the agreement, he broke it. When Mobil could not persuade him to reinstate the contract, it cancelled his contract and lease. There was evidence that Mobil had a similar agreement with one other dealer.<sup>15</sup> The court found that this refusal to deal by Mobil violated section 1.

The Supreme Court considered the problem of maximum price agreements in *Kiefer-Stewart Company v. Joseph E. Seagram & Sons*.<sup>16</sup> In this case, two liquor companies that held themselves out as competitors agreed to sell only to those buyers who observed a maximum price. Since the plaintiff did not adhere to these prices, the companies refused to sell to it. In holding that this refusal to deal violated section 1, the Court stressed that maximum price agreements between competitors "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."<sup>17</sup>

Attempting to read these three cases together, the judges in *Quinn* reached results that required three separate opinions. Judge McEntee, who wrote the opinion of the court, felt that the plaintiff's failure to allege a contract, combination, or conspiracy was a fatal defect and affirmed the district court's dismissal of the suit on that ground.

Hence, it is not the actual decision in *Quinn* that gives the case its significance. Rather, it is the concurring opinion of Judge Coffin and the dissenting opinion of Chief Judge Aldrich, both of whom discussed Quinn's claim on its merits, that clearly illustrate the diverse and conflicting concepts that may be drawn from the above discussed case law.

Judge Coffin began by stating that Quinn's complaint should have been

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12 377 U.S. 13 (1964).

13 *Id.* at 16.

14 350 F.2d 346 (5th Cir. 1965).

15 *Id.* at 349.

16 340 U.S. 211 (1951).

17 *Id.* at 213.

dismissed even if it had contained an allegation of contract, combination, or conspiracy. He dealt first with the fact that the attempted price fixing was aimed at a maximum price. He argued, "admittedly without the benefit of authority,"<sup>18</sup> that the anti-competitive effects of maximum price fixing were different from the anti-competitive effects of minimum price fixing and, therefore, the fixing of maximum prices should not be proscribed by the antitrust laws. Judge Coffin distinguished *Kiefer-Stewart* by noting that it involved an agreement between competitors. He noted that the Court in *Kiefer-Stewart* rejected, on the basis of the separate corporate entities of the defendants, a contention that because of common ownership the two companies were only instrumentalities of a single manufacturing-merchandising unit and, therefore, could not conspire to violate the act. He felt that the implication of this rejection was that an agreement to set maximum prices made by a single manufacturing-merchandising unit would not violate the antitrust laws.<sup>19</sup> He felt that *Broussard* was wrongly decided since it involved such a single manufacturing-merchandising unit setting a maximum price. Judge Coffin admitted that it was possible to read *Simpson* as "proscribing a price fixing agreement between a single supplier and a single retailer."<sup>20</sup> However, he distinguished *Simpson* from *Quinn* on two grounds: (1) the oil company in *Simpson* was using the same device with over 3,000 other dealers whereas in the instant case there was no evidence that Mobil had taken any action with other retailers; (2) the contract in *Simpson* was to set a specific price, whereas here it was to set a maximum price.<sup>21</sup> Since Judge Coffin felt that a maximum price agreement permits a dealer to meet competitive prices and a specific price agreement takes away this freedom, he concluded that the *Simpson* rule should not apply to this case.

Chief Judge Aldrich, in dissent, seemingly was not disturbed by the fact that *Quinn's* complaint failed to allege the formal requirements of a section 1 violation. In comparing the instant case to *Broussard*, he noted that at one time *Broussard* had entered into an agreement with Mobil to fix a maximum price, while *Quinn* had refused to do so. He refused to distinguish the cases on this ground.

. . . I see no difference in substance between pressure to induce the making of an unlawful agreement and pressure to reinstate one that has been broken. To the extent that it be suggested that the rejected agreement in *Broussard* is what brought the case within the act, this would not only be an unfortunate distinction, since any future "*Quinn*" could establish rights for himself simply by making the requested agreement one day and breaking it the next, but also, it seems to me, an illogical one.<sup>22</sup> (Emphasis added.)

In relying on the proscription of maximum price agreements in *Kiefer-Stewart*, the dissenting judge noted that the Court did find there an actual

18 *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 276 (1st Cir. 1967) (concurring opinion).

19 *Id.* at 277.

20 *Id.* at 278.

21 *Id.*

22 *Id.* at 279 (dissenting opinion).

horizontal agreement<sup>23</sup> to fix a maximum price. But, relying on *Simpson*, he argued that the presence of only one manufacturer was irrelevant.

*Simpson* thus seems to me to hold that a coercively extracted vertical agreement<sup>24</sup> depriving a retailer of pricing discretion violates the act, and hence that where the requisite coercion to procure the vertical agreement is shown, a horizontal conspiracy such as that alleged in *Kiefer-Stewart* is unnecessary.<sup>25</sup>

Next, the Chief Judge raised a point which, though not relevant to the existence of a contract, combination, or conspiracy, does bear on the philosophy behind the *Colgate* doctrine. As discussed above, the rationale of the *Colgate* rule is that a seller is free to deal with whom he chooses; if a buyer is cut off by a seller, he is free to take up relations with another seller. However, as Chief Judge Aldrich pointed out, this argument breaks down when applied to the instant case since not only is Mobil a seller to Quinn, it is also his landlord.<sup>26</sup> When it refused to deal with Quinn, it not only cut off his source of supply, it effectively drove him out of business. He could not immediately turn to another seller.<sup>27</sup>

Hence, Chief Judge Aldrich read *Kiefer-Stewart* and *Simpson* together as declaring that coercively extracted vertical agreements to fix maximum prices are illegal. He added that no distinction should be made between temporarily successful coercive measures, as in *Broussard*, and those that are totally unsuccessful, as in the instant case.<sup>28</sup>

In light of the Supreme Court's pronouncement that the purpose of the Sherman Act is to "preserve the right of freedom to trade,"<sup>29</sup> Chief Judge Aldrich's "substance over form" approach merits serious consideration. Admittedly, there is not the slightest hint that Mobil acted in concert with anyone. However, as Chief Judge Aldrich pointed out, *Simpson* can be read as prescribing a price fixing agreement between one seller and one buyer.<sup>30</sup>

Even before *Parke Davis* was decided, it had been suggested that, in an attempt to avoid the *Colgate* doctrine, courts were striving to find any kind of activity that could constitute a combination or conspiracy when the seller had

23 BLACK'S LAW DICTIONARY 870 (4th ed. 1951) defines horizontal price fixing contracts as: "Contracts between producers or between wholesalers or between retailers as to sale or resale prices."

24 *Id.* at 1733 defines a vertical price fixing contract:

A contract between producers and wholesalers or distributors, between producers and retailers, or between wholesalers or distributors and retailers, and not between producers themselves, between wholesalers themselves, or between retailers themselves as to sale or retail prices.

25 *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 280 (1st Cir. 1967) (dissenting opinion).

26 *Id.*

27 Judge Aldrich analogized this situation with that found in *Northern Pacific Ry. v. United States* 356 U.S. 1 (1958) where the Supreme Court held that a vertical agreement between a railroad-landowner and a shipper-land purchaser, in which the purchaser agreed, in partial consideration for the sale of land, to prefer Northern Pacific over the other carriers, violated section 1.

28 *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 281 (1st Cir. 1967).

29 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

30 *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 280 (1st Cir. 1967) (dissenting opinion).



refused to deal with a buyer for price fixing reasons.<sup>31</sup> Arguably, this was done because these situations, whether or not they amounted to combinations or conspiracies, were violative of the basic policies of the antitrust laws. After *Parke Davis*, one court noted that in these days of complex business dealings it will be very difficult for a seller to stay within the narrow privilege that still exists and yet effectuate price policies through refusals to deal.<sup>32</sup> Applying the *Parke Davis* rule to the instant case, it could certainly be said that Mobil's activities in harassing Quinn and driving him out of business went beyond a "simple refusal to deal."<sup>33</sup> But since Mobil had no contract with Quinn, it did not "effect adherence" as did the seller in *Parke Davis*. The Supreme Court has declared, however, that the Sherman Act "is aimed at substance rather than form."<sup>34</sup> This pronouncement has led one commentator to raise the question whether the non-existence of a contract ought to be enough to allow a manufacturer to escape the sanctions of the Act which his refusal to deal would otherwise receive.<sup>35</sup> Relying on *Broussard*, Chief Judge Aldrich reasonably answered this question in the affirmative. He noted that if *Broussard* is to be distinguished from *Quinn* on the formal basis that in *Broussard* there existed a contract to fix prices and in *Quinn* no such agreement was completed, then a buyer who agreed to set a maximum price and the next day broke the agreement would be protected by the Act, while a buyer who simply refused to enter into such an agreement would not be.<sup>36</sup>

Nor should the fact that Mobil was trying to set a maximum price free it from liability. As the above discussion of *Kiefer-Stewart* illustrates, the Supreme Court was primarily concerned with the restrictive effects that such agreements have on businessmen. Though the agreement there was between competitors, the same rationale should apply in *Quinn* because, in both cases, the individual entrepreneur is deprived of his freedom to operate as he deems best. Admittedly, the additional factor that Mobil was also Quinn's landlord does not aid the finding of a contract, combination, or conspiracy. Yet it does show the tremendous leverage a seller in Mobil's position has to control the market. Such a situation calls for less concern for the letter and more for the spirit of the Sherman Act. The effect on competition of a seller's action should depend "on power, not numbers."<sup>37</sup>

Whether Chief Judge Aldrich's persuasive argument represents only a momentary departure in the treatment of antitrust problems cannot be certain at this point. However, the fact that he reached his opinion by interpreting recent case law may signify that in deciding refusal to deal cases courts have begun to deal with the realities of the market place.

*Thomas J. McCusker*

31 Note, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1128-29 (1949).

32 *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

33 *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

34 *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947).

35 Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 880 (1955).

36 *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 279 (1st Cir. 1967) (dissenting opinion).

37 Note, *supra*, note 31, at 1124.

ADMIRALTY — PALLET HELD TO BE A "PACKAGE" FOR PURPOSES OF LIMITATION OF CARRIER'S LIABILITY UNDER SECTION 4(5) OF THE CARRIAGE OF GOODS BY SEA ACT. — I.T.T. Export Corporation [I.T.T.] made up a shipment of 2,160 television tuners in New York for Standard Electrica, S.A. [Standard], a Brazilian corporation. The tuners were boxed in fifty-four cartons, each carton containing forty tuners. I.T.T. then put these cartons on nine separate pallets, each pallet containing six cartons. These pallets consisted of wooden skids, upon which six cartons were stacked in three tiers of two cartons, covered by a wooden top deck, the whole load being banded together with 1½-inch steel straps. I.T.T. then engaged Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft [Hamburg] as carrier. Hamburg arranged for the pallets to be transported to Brazil on the *Jytte Skou*, a Danish vessel on time charter to Hamburg.<sup>1</sup> When I.T.T. delivered the shipment to the New York City dock where the *Jytte Skou* was loading, Hamburg delivered a dock receipt to I.T.T. This receipt showed under the column "No. of Pkg." the figure "9." The dock receipt also recited a standard clause informing the shipper that he was obliged to declare the value of the goods in his shipment in accordance with the provisions of the yet to be issued bill of lading.

In due course, Hamburg issued a bill of lading on the shipment to I.T.T. It showed the shipment under the column "No. of Pkg." as "9 pallets." In addition, clause 24 of the bill of lading recited a standard clause derived from section 4(5) of the Carriage of Goods by Sea Act of 1936 [COGSA]:<sup>2</sup>

In the event of any loss, damage or delay to or in connection with goods exceeding in actual value \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit . . . the carrier's liability, if any, shall be determined on the basis of a value of \$500 per package or per customary freight unit, unless . . . a higher value shall be declared by the shipper in writing . . .<sup>3</sup> (Emphasis added.)

In addition, Hamburg included in clause 24 of the bill of lading the following definition of "package": "It is agreed that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."<sup>4</sup> I.T.T. did not exercise its option to declare its shipment at a value in excess of \$500 per package.

I.T.T. routinely transferred the bill of lading to Standard. When the *Jytte Skou* unloaded her cargo at Rio de Janeiro, Hamburg discovered that seven pallets of television tuners had been stolen, en route from the United States, by parties unknown.<sup>5</sup> The estimated value of the 1,680 missing tuners was

<sup>1</sup> Letter from Wharton Poore to Thomas J. Reed, August 31, 1967, on file with the NOTRE DAME LAWYER.

<sup>2</sup> 46 U.S.C. §§ 1300-15 (1964).

<sup>3</sup> *Standard Electrica, S.A. v. Columbus Lines, Inc.*, 262 F. Supp. 343, 344-45 (S.D.N.Y. 1966), *aff'd sub nom. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3079 (U.S. July 24, 1967) (No. 409).

<sup>4</sup> *Id.* at 345.

<sup>5</sup> Brief for Appellant at 3, *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967).

\$16,800. Standard accepted the two remaining pallets of tuners and wrote a letter of complaint to Hamburg, stating that only two packages were discharged out of a shipment of nine packages. In reply, Hamburg's agent described the lost shipment as "9 Pallets containing 54 cartons of television equipment. . . ."<sup>6</sup> Hamburg offered to settle the claim for the missing tuners for \$3,500, calculated at \$500 per pallet of six cartons. Standard refused this offer and filed a libel in rem and in personam before the United States District Court for the Southern District of New York.

In the district court, the facts set out above were stipulated, and the sole issue presented was whether a pallet, holding six separate enclosed cartons, consisting of a deck beneath the load, a deck atop the load, held together with 1½-inch steel bands, the sides open to the carrier's inspection, could be held to be one "package" within the meaning of section 4(5) of the COGSA which provides:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in *an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier. . . .*<sup>7</sup> (Emphasis added.)

Notwithstanding Standard's argument that the pallets were made up solely for loading and shipping convenience, the trial court held the pallets to be "packages" within the meaning of section 4(5) of the COGSA.<sup>8</sup> Standard accepted the tendered \$3,500 without prejudice and appealed to the United States Court of Appeals for the Second Circuit. That court, one judge dissenting, affirmed and *held*: a pallet is a "package" within the meaning of section 4(5) of the Carriage of Goods by Sea Act of 1936. *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3079 (U.S. July 24, 1967) (No. 409).

The COGSA embodies the Hague Rules governing ocean bills of lading. It applies to bills of lading on below decks shipments in international commerce inbound and outbound from United States ports. It may also be incorporated by reference in the bill of lading to cover cargo shipped between ports in the United States, and cargo shipped on-deck.

The Hague Rules themselves were first drafted at a meeting of the International Law Association held at the Hague in August, 1921.<sup>9</sup> The Rules were

6 *Standard Electrica, S.A. v. Columbus Lines, Inc.*, 262 F. Supp. 343, 345 (S.D.N.Y. 1966), *aff'd sub nom. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967).

7 49 Stat. 1211 (1936), 46 U.S.C. § 1304(5) (1964).

8 *Standard Electrica, S.A. v. Columbus Lines, Inc.*, 262 F. Supp. 343, 345 (S.D.N.Y. 1966), *aff'd sub nom. Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943 (2d Cir. 1967).

9 H.R. REP. No. 2218, 74th Cong., 2d Sess. 4 (1936).

then laid before the International Maritime Conference held in Brussels in October, 1922, but work on the Rules was not concluded until the following year.<sup>10</sup> In 1924, before the Brussels Convention was officially opened for signature, the English passed their own Carriage of Goods by Sea Act which incorporated most of the provisions of the Hague Rules.<sup>11</sup> The United States sent representatives to Brussels, and the Convention was signed for the United States by the American ambassador to Belgium in June, 1925.<sup>12</sup> However, the Convention was not ratified by the Senate until 1935.<sup>13</sup> A year later, legislation (COGSA) was enacted by Congress to replace the Harter Act of 1893.<sup>14</sup>

The primary purpose for establishing the Hague Rules was to regularize the terms contained in ocean bills of lading.<sup>15</sup> Secondly, the Rules sought to limit the warranty of seaworthiness as applied to cargo in general maritime law,<sup>16</sup> and to raise the limitation on a carrier's liability for lost, stolen, damaged, or destroyed cargo to £ 100 "per package or unit," absent a declaration of higher valuation by the shipper.<sup>17</sup> When the United States finally adopted the Hague Rules, the Senate reserved the right to amend article IV, section 5 of the Rules to read "\$500 . . . per package or unit."<sup>18</sup>

The French draft of the Brussels Convention, which the United States State Department translated before adoption, antedated the English Carriage of Goods by Sea Act of 1924. This may explain why the State Department translation of the French draft followed the wording of the English statute. It translated "*par colis ou unité*," appearing in article IV, section 5 of the French draft, as "per package or unit."<sup>19</sup> Actually, the word "*colis*" has three primary

10 *Id.* at 4, 5.

11 14 & 15 Geo. 5, c. 22 (1924).

12 H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936).

13 79 CONG. REC. 4758 (1935).

14 80 CONG. REC. 5609 (1936).

15 This point is mentioned in the preamble to the Brussels Convention as it appears in 79 CONG. REC. 4754 (1935). See also S. REP. NO. 742, 74th Cong., 1st Sess. (1935) *passim*; H.R. REP. NO. 2218, 74th Cong., 2d Sess. 3, 5 (1936); 79 CONG. REC. 4757 (1935) (remarks of Senator Thomas of Utah).

16 See 46 U.S.C. § 1304(a) (1964).

17 79 CONG. REC. 4757 (1935) where Senator Thomas stated:

The convention will do more, however, than produce international uniformity . . . . In particular, a shipper will be allowed 1 year within which to bring suit for damages to his cargo (instead of the very short period which now appears in most bills of lading), and carriers who have received goods sound and have delivered them damaged will be required to pay for that damage unless they prove that there has been no negligence on their part. Carriers also will not be allowed to limit their liability below \$500 per package.

18 The text of the reservation is as follows:

That notwithstanding the provisions of article 4, section 5, and the first paragraph of article 9 of the convention, neither the carrier nor the ship shall in any event be or become liable within the jurisdiction of the United States of America for any loss or damage to or in connection with goods in an amount exceeding \$500, lawful money of the United States of America, per package or unit unless the nature and value of goods have been declared by the shipper before shipment and inserted in the bill of lading. *Id.*

19 The French text of the Brussels Convention is set out parallel to the State Department translation in 2 INTERNATIONAL LEGISLATION 1344-59 (Hudson ed. 1931). The French version of article IV, § 5 reads as follows:

Le transporteur comme le navire ne seront tenus en aucun cas des pertes ou dommages causés aux marchandises ou les concernant pour une somme dépassant 100 liv. sterl. *par colis ou unité*, ou l'équivalent de cette somme en une autre monnaie à moins que la nature et la valeur de ces marchandises n'aient été

English equivalents: package, parcel, or case.<sup>20</sup> Consequently, the original draft of the convention used an ambiguous word to define the unit of cargo to which the £ 100 limitation of liability attached. The resulting rendition of "colis" as "package" hardly clarified the unit to which the limitation is attached. In enacting the COGSA, Congress attempted to clear up some of the ambiguity in section 4(5) of the Hague Rules by replacing the word "unit" with "customary freight unit,"<sup>21</sup> but the word "package" was left without further clarification.

The ambiguity of section 4(5) has led the courts to reach many confusing, and at times, even astounding results. An uncrated truck has been held to be a "package" for purposes of the limitation of liability under section 4(5),<sup>22</sup> as has a yacht shipped above deck under a bill of lading incorporating section 4(5) by reference.<sup>23</sup> A giant amusement crane, shipped in 126 uncrated parts, has been evaluated as either 126 "packages" or 126 "customary freight units" for purposes of determining the carrier's liability.<sup>24</sup> A freezer trailer load of fish was determined to be a "package."<sup>25</sup> On the other hand, a partially enclosed tractor was held not to be a "package."<sup>26</sup> A locomotive and tender, shipped as is, was held to be one "customary freight unit," rather than one "package."<sup>27</sup> "Customary freight unit" has consistently been construed to mean the unit of quantity, weight, or measurement customarily used to compute the freight charges on the goods shipped.<sup>28</sup> As a rule, this alternate method of evaluating liability is ordinarily only used upon a determination that the article in question is not a "package."<sup>29</sup>

The judicial gloss placed upon the word "package" since COGSA's passage in 1936, has had the net effect of emptying "package" of any content it may once have had as a term of the shipping trade. This situation has been compounded by the introduction of automated cargo handling techniques and new containerized cargo units. The ubiquitous and labor-saving pallet, which gave rise to the dispute in *Standard Electrica*, is now used to speed up dockside and shipboard handling of small-sized boxes, cartons, and cases.

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déclarées par le chargeur avant leur embarquement et que cette déclaration ait été insérée au connaissement. *Id.* at 1352-53 (emphasis added).

20 CASSELL'S NEW FRENCH DICTIONARY 165 (5th ed. 1951).

21 See 79 CONG. REG. 13342 (1935).

22 *The Margaret Lykes*, 57 F. Supp. 466, 471 (E.D. La. 1944). *Accord*, *Anticosti Shipping Co. v. St. Amand*, 19 D.L.R.2d 472 (1959); *But cf.* *Studebaker Distrib., Ltd. v. Charlton Steam Shipping Co.*, [1938] 1 K.B. 459, 467 (1937) (sixty unboxed automobiles held not to be packages).

23 *Pannell v. United States Lines Co.*, 263 F.2d 497 (2d Cir.), *cert. denied*, 359 U.S. 1013 (1959).

24 *Stirnemann v. The San Diego*, 148 F.2d 141, 143 (2d Cir. 1945).

25 *United Purveyors, Inc. v. Motor Vessel New Yorkers*, 250 F. Supp. 102, 106 (S.D. Fla. 1965) (dictum).

26 *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135, 137 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959).

27 *Petition of Isbrandtsen*, 201 F.2d 281, 286 (2d Cir. 1953).

28 *Id.*; *The Bill*, 55 F. Supp. 780, 783 (D. Md. 1944). See generally Case Note, "Units" and "Customary Freight Units" in the *Carriage of Goods by Sea*, 22 MOD. L. REV. 550 (1959).

29 See, e.g., *Gulf Italia Co. v. The Exiria*, 160 F. Supp. 956 (1958), *aff'd sub nom.* *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir.), *cert. denied*, 360 U.S. 902 (1959).

On the basis of the above discussed case law, it is not surprising that the court in *Standard Electrica* failed to reach a unanimous decision on whether a pallet is a "package." Chief Judge Lumbard began the majority opinion by declaring that the overriding purpose of the COGSA was "the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power."<sup>30</sup> He found no meaningful legislative history to help the court determine what Congress meant by the term "package" in 1936.

Only certain general observations may be made as to the reason why "package" was selected as an appropriate unit upon which the limitation of liability was placed in our 1936 Act . . . . No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size . . . .<sup>31</sup>

The majority admitted that the drafters of the COGSA could not have foreseen the alteration in cargo handling techniques that led to the use of palletized cargo and containerized shipping units.<sup>32</sup> In addition, the court found that "no court has yet considered how the limitation of liability is to be construed in light of this technological change."<sup>33</sup> However, the majority could not bring themselves to accept Standard's contention that, since a pallet is merely a unit of convenience to expedite handling, it should not be considered a "package." The court found that "[e]ach pallet had the physical characteristics of a package and was clearly a 'bundle put up for transportation.'"<sup>34</sup>

The majority was also impressed by the fact that the shipper, rather than the carrier, chose to make up the cargo on pallets.<sup>35</sup> Judge Lumbard placed great weight on the parties' shipping documents, noting that under the terms of the bill of lading the shipper could have placed a higher value on each pallet. He reasoned that this option offers a shipper ample opportunity to protect his interest in the cargo.<sup>36</sup> Finally, the majority concluded that any effect the changes in shipping techniques and cargo handling should have on the language of section 4(5) is proper for congressional rather than judicial determination.

If through the passage of time this statutory limitation [section 4(5)] has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the courts.

We are mindful that any other decision would only contribute to confusion as to the meaning of the word "package" as used in § 4(5) . . . and would place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment.<sup>37</sup>

Judge Feinberg, in dissent, declared that the original purpose of the COGSA was to raise the minimum liability limitations in bills of lading and

30 *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

31 *Id.* at 945.

32 *Id.*

33 *Id.*

34 *Id.* at 946.

35 *Id.*

36 *Id.*

37 *Id.* at 946-47.

“to protect cargo interests like appellant.”<sup>38</sup> He inferred that the statute must be construed so as to protect shippers, rather than carriers.<sup>39</sup> He asserted that a modern and fair characterization of “package” was set out in *Mitsubishi International Corporation v. S.S. Palmetto State*.<sup>40</sup> In *Mitsubishi*, another panel of the Second Circuit held that the article in question, a thirty-two ton roll of sheet steel, was a “package” because it was *completely enclosed* in a wooden box. Applying the “completely enclosed” criteria, the dissenting judge naturally found that the open-ended pallets in *Standard Electrica* could not be packages.

I would normally expect a package at least to completely enclose the goods in question. Here, the tuners were *completely enclosed* in cartons — each carton was obviously a package. Strapping six cartons together on a platform with a board on top . . . did not make a package out of the six cartons . . . .<sup>41</sup> (Emphasis added.)

In concluding, Judge Feinberg found irrelevant the fact that it was the shipper who chose to put up his cargo in pallets and that he had the option to declare his cargo's true value.<sup>42</sup>

Clearly, the majority's opinion does nothing to clarify the meaning of “package” in section 4(5) of the COGSA. In stressing the fact that *Standard* was free to raise the \$500 limit, the majority, in effect, begs the question; namely, how is a shipper to decide whether his goods are sufficiently protected by section 4(5) in the absence of a clear definition of “package.” The increased tariff rates that would attach to any higher valuation of the goods by the shipper mitigates the idea that shippers should “play it safe” whenever a doubtful situation arises.

Also, some consideration should be given to the effect that *Standard Electrica* and similar decisions could have on American merchant shipping as a whole. *Standard Electrica* stands as clear warning to shippers that the courts will shift the risk of loss on palletized cargo to the shipper and his underwriter. With no efficient recourse available against the carrier, insurers are bound to raise their rates on palletized cargo. In an attempt to avoid these consequences, shippers may well revert to bringing their cargo down to the docks in small, inconvenient cartons and parcels that will be adequately protected by section 4(5). As a result, the modern, automated, labor-saving loading devices, designed to expedite the handling of goods put up in pallets or other large containers, would be of no avail. Already, the wages attained for sailors and longshoremen by the National Maritime Union and the Independent Longshoremen's Union have had a serious effect on the United States shipping industry.<sup>43</sup> Because the majority of both United States and foreign flag carriers operate under an inter-

38 *Id.* at 947 (dissenting opinion).

39 *Id.* (dissenting opinion).

40 311 F.2d 382, 384 (2d Cir. 1962), *cert. denied*, 373 U.S. 922 (1963).

41 *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 947-48 (2d Cir. 1967) (dissenting opinion).

42 *Id.* at 948.

43 See *The Troubled Waters in Shipping*, DUN'S REV. & MODERN INDUS., June, 1965, at 226, 230, 232. The inference from this discussion of union featherbedding and related attempts to overstaff ships and docks presented in this article is quite clear—the NMU and ILA are killing their industry.

national cartel system in which most freight rates are fixed,<sup>44</sup> high rising labor costs prevent United States carriers from attaining a profit margin near that of their foreign competitors. To keep the high cost of American labor from eliminating any hope of profit, United States carriers have necessarily turned to all the modern means of automated cargo handling available. But these devices can only be used successfully if shippers prepare their cargo in pallets or other large shipping units. Hence, by discouraging such action on the part of shippers, the decision in *Standard Electrica* only adds to the already perilous plight of American merchant shipping.

As a judicial solution to these problems, the *Mitsubishi* criterion championed by Judge Feinberg has some appeal. If the application of "package" is restricted to "an article completely enclosed" in some container,<sup>45</sup> shippers, carriers, and underwriters will be better able to evaluate their relative positions under section 4(5) and adjust their insurance plans accordingly. The one unfortunate aspect of the holding in *Mitsubishi* is that if a "package" means a "fully enclosed article," then all forms of containerized cargo units would seem to fall within the \$500 per package limitation of liability. Hence, the burden of loss for a freezer trailer or other containerized goods would remain on the shipper.

Perhaps, a better method of dealing with the "package" problem is that suggested in *Gulf Italia Company v. The Exiria*.<sup>46</sup> In this case, the District Court for the Southern District of New York held that a partially enclosed tractor could not be a "package" under section 4(5) of the COGSA. In reaching their decision, the court in *Gulf Italia* pointed out that "[a] large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package.'"<sup>47</sup> The court rationally concluded that under such circumstances Congress could not have intended that the carrier be able to limit its liability "to a pittance of only \$500."<sup>48</sup> The court then proceeded to evaluate the shipper's loss in terms of the "customary freight unit" used to bill the shipper for the trip.<sup>49</sup> Applying this common-sense approach to the situation presented in *Standard Electrica*, the meaning of "package" in section 4(5) should not be extended to include the whole pallet and would, therefore, be confined to the six cartons that comprised the pallet. This position is logical. Attempts to extend "package" beyond the original comprehension of the term defeat any hope of the uniformity that the Hague Rules sought to achieve.

Of course, the best answer to the problems brought about by the increased size of modern cargo units would be a complete revision of section 4(5). Apparently, the majority was unaware of the international nature of the COGSA since it called for congressional revision of section 4(5).<sup>50</sup> This course would

44 For a general discussion of the cartel system, see *Warring Ship Lines Fight Cartels*, BUSINESS WEEK, Oct. 13, 1962, at 83-87.

45 *Mitsubishi Int'l Corp. v. S.S. Palmetto State*, 311 F.2d 382 (2d Cir. 1962), cert. denied, 373 U.S. 922 (1963).

46 160 F. Supp. 956 (S.D.N.Y. 1958), aff'd sub nom. *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir.), cert. denied, 360 U.S. 902 (1959).

47 *Id.* at 959.

48 *Id.*

49 The district court found 34.6 shipping units, apparently 40 cubic feet each. *Id.* at 960.

50 *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft*, 375 F.2d 943, 946-47 (2d Cir. 1967).



not be wise without a corresponding international adjustment of the standards for limiting liability in the Hague Rules themselves. Otherwise, the primary purpose of the Hague Rules — increased uniformity in ocean bills of lading — would be defeated. No doubt any change in the treaty would be a task for shippers, carriers, underwriters, bankers and diplomats. Nevertheless, the following schedule for limiting a carrier's liability is suggested.

#### CARRIER'S LIMITATION OF LIABILITY FOR GOODS

In the event of loss, damage or delay in delivery of goods for which a carrier is liable, the following evaluations of the limitations of the carrier's liability shall apply, unless the shipper shall declare in writing the actual value of the goods shipped, and deliver his declaration to the carrier before the goods are shipped, to be attached to the bill of lading as prima facie evidence of the value of such goods.

(a) Any goods shipped by case, crate, barrel, bag, or other fully enclosed cargo unit less than 40 cubic feet shall be evaluated at a maximum of \$500 per unit.

(b) Any goods shipped by case, crate, barrel, bag or other fully enclosed cargo unit exceeding 40 cubic feet shall be evaluated at a maximum of \$2,500 per unit.

(c) Any goods shipped by a pallet which exceeds 40 cubic feet shall be evaluated at a maximum of \$2,500 per pallet.

(d) Goods shipped in bulk shall be evaluated at the rate of \$500 per unit of quantity, weight or measurement used in the computation of the freight rate charged for shipping the goods.

(e) Any goods shipped that are not classifiable under subsections (a) through (d) above shall be evaluated at the rate of \$500 per unit of quantity, weight or measurement used in the computation of the freight rate charged for shipping the goods.

*Thomas J. Reed*

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