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Labor Relations: Defamation--Libel Liability Limited

Sandra R. Scott

CASE COMMENTS

LABOR RELATIONS: DEFAMATION—LIBEL LIABILITY LIMITED*

Local 496, Letter Carriers v. Austin, 94 S. Ct. 2770 (1974)

As part of its effort to organize nonmember letter carriers, appellant union, the recognized exclusive collective bargaining representative for carriers in Richmond, Virginia, published a list of scabs in its monthly newsletter and prefaced it with a pejorative definition of "scab." Appellees, whose names were included on the list, brought libel actions against the union and its national affiliate under the Virginia "insulting words" statute,[1] and judgments in favor of appellees were affirmed by the Virginia supreme court.[2] On appeal, the unions contended that their statements were protected by the federal labor laws and the first amendment and that the state courts had misconstrued the preemptive effect and malice standard of *Linn v. Plant Guard Workers, Local 114.*[3] The United States Supreme Court reversed,[4] and HELD, the instruction containing the common law definition of "malice" was erroneous because federal labor laws preempt state libel laws unless defamatory statements in labor relations are published with knowledge of their falsity or with reckless disregard for truth.[5]

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*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted in the fall 1974 quarter.

1. VA. CODE ANN. §8-630 (1957).

2. Local 496, Letter Carriers v. Austin, 213 Va. 377, 192 S.E.2d 737 (1972).

3. 383 U.S. 53 (1966).

4. 94 S. Ct. 2770 (1974). Justice Douglas concurred; Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented (companion case to Gertz v. Welch, Inc., 94 S. Ct. 2997 (1974)). No dispute existed between labor and management or between competing unions, nor was there any effort to encourage defection from the appellant union. Of 435 letter carriers in the unit, all but 15 were union members. The list of scabs, which was admittedly designed to force the nonunion carriers to join, had been published twice before, and it was subsequent to a complaint by appellee Austin to both management and union officials that the issue containing the purported definition was published. 94 S. Ct. at 2773. Although labor relations in the postal service are currently under the regulation of the National Labor Relations Act and the NLRB, at the time this case arose Executive Order 11491 was controlling. Both the defendants and the dissenting Justices conceded that the Executive order and the Act are essentially equivalent, and the Court found no persuasive reason to differentiate between them in determining their preemptive impact on state libel laws. *Id.* at 2776-77. The Court alternately held there was no actual defamation because the only factual statement made (that appellees were scabs) was literally true. The rest of the statement, which was a piece of trade union literature attributed to Jack London was considered "rhetorical hyperbole" by the Court. *Id.* at 2782. The dissent maintained that the majority should have distinguished between a defamatory description of an anonymous group and a similar characterization of a specified individual. *Id.* at 2787 (Powell, J., dissenting).

5. This is the definition of "actual malice" enunciated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

The concept of federal preemption of jurisdiction in labor relations[6] began to develop in 1935 as a result of the passage of the Wagner Act,[7] which caused state and federal labor legislation to overlap. Initially, courts allowed state and federal regulation in the same area and asserted federal preemption only in cases of direct conflict.[8] Later, however, exclusive federal jurisdiction was recognized[9] in those areas where federal labor law either protected[10] or prohibited[11] activity,[12] although state regulation was still permitted outside these areas.[13] Federal preemption was further extended in *San Diego Building Trades Council v. Garmon,*[14] which established the primary jurisdiction of

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6. *See generally* Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337 (1972); Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954); Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 COLUM. L. REV. 469 (1972); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I,* 59 COLUM. L. REV. 6 (1959).

7. Act of July 5, 1935, ch. 372, §§1 *et seq.,* 49 Stat. 452.

8. *E.g.,* Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 773-74 (1947); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 751 (1942); Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859).

9. Garner v. Teamsters Local 776, 346 U.S. 485, 500-01 (1953).

10. *E.g.,* Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (state not allowed to enjoin peaceful picketing and patrolling of respondent's premises); UAW v. O'Brien, 339 U.S. 454 (1950) (state not permitted concurrent regulation of peaceful strikes for higher wages); Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945) (sanctions imposed under Florida statute requiring annual reports and $1.00 fee of every labor union operating in the state held to circumscribe the freedom of choice of collective bargaining agents).

11. *E.g.,* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) (union filed charges of unfair labor practices with the NLRB, which declined to exercise its jurisdiction; held, state board's jurisdiction was still preempted); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955) (union strike to force an employer to assign particular work to its members constituted prohibited unfair labor practice and, as such, state jurisdiction was preempted); Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (picketing by union to coerce employers to compel or influence their employees to join the union held to be within the jurisdiction of the NLRB to prevent unfair labor practices and thus state courts were precluded from intervening). *Contra,* United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (employer brought a common law tort action in the Virginia state courts for damages against three labor unions for conduct involving threats of violence; although such conduct constituted an unfair labor practice prohibited by the NLRA, the Court upheld the applicability of state law).

12. Activities protected by §157 and prohibited by §158 of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.* (1970).

13. International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958); UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 265 (1949) (Briggs-Stratton case).

14. 359 U.S. 236 (1959). The petitioner unions wanted the respondents, copartners in the lumber business, to agree to employ union members exclusively. When the respondents refused, claiming one of the unions must first be selected as a bargaining agent by a majority of the employees, the unions began peaceful picketing to compel execution of the proposed contract. Respondents were subsequently awarded damages under California state law for the resulting economic injuries. Since the NLRB had declined to exercise its jurisdiction, the status of the conduct had not been adjudicated. The court held that the state must nevertheless defer to the exclusive competence of the NLRB because the conduct was "arguably" within its jurisdiction. *Id.* at 246.

the National Labor Relations Board in areas arguably protected or prohibited by federal law.[15]

The concept of federal preemption in labor affairs rests on the supremacy of federal law[16] and the need for a balanced, uniform national labor relations policy.[17] But the acknowledged existence of areas of valid state regulation[18] resulted in recognition of certain exceptions to the preemption doctrine. For example, the state's compelling interest in maintaining public order has consistently been held to justify state regulation in cases of actual or threatened violence, even where the conduct was clearly an unfair labor practice prohibited by federal law.[19] Initially, a state's interest in protecting its citizens from defamation was also considered sufficient basis for invoking an exception to the preemption doctrine.[20] The defamation exception to the preemption doctrine did not, however, always override the traditional policy favoring uninhibited, robust, and wide open debate in labor disputes.[21] The resultant balancing problem seemed to be resolved in *Garmon* by the apparent elimination of defamation as an exception. Although the Court acknowledged the validity of state jurisdiction in areas of peripheral concern to federal labor policies and in matters involving deeply rooted local interests,[22] its exclusive reference to violence or threats to public order[23] was subsequently interpreted as authority for restricting preemption doctrine exceptions to cases of actual or threatened violence.[24]

Seven years later in *Linn v. Plant Guard Workers, Local 114*,[25] the Su-

15. This extension was procedural. When it is unclear whether an activity is governed by federal labor law, the Court held that determination of its status must be left exclusively to the NLRB. Therefore, when a case involves an activity arguably protected or prohibited, it must first go before the NLRB. *Id.* at 244-45.

16. *See* U.S. CONST. art. VI, §2.

17. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

18. UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245, 265 (1949) (Briggs-Stratton case); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 748-49 (1942).

19. *E.g.*, UAW v. Russell, 356 U.S. 634, 649 (1958) (Warren, C.J., dissenting); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 138-39 (1957); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64, 669-70 (1954).

20. Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (states have a right to restrict the abusive exercise of free speech because continuing unquestionably false representations is not a constitutional prerogative); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (states may take adequate steps to protect the rights and privacy of their citizens when there exists a clear and present danger of invasion of such rights).

21. 320 U.S. at 295 (use of loose language or undefined slogans recognized to be part of the usual give-and-take of economic controversies); Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (states may not impair the exercise of the right to free discussion of industrial relations that are matters of public concern).

22. 359 U.S. at 243-44.

23. *Id.* at 247-48.

24. Liner v. JAFCO, Inc., 375 U.S. 301, 306-07 (1964); Local 207, Bridge Workers v. Perko, 373 U.S. 701, 705-06 (1963); Local 100, Journeymen v. Borden, 373 U.S. 690, 693-94, 698 (1963). The majority's position in *Garmon* was similarly interpreted in the concurring opinion by Justice Harlan, 359 U.S. at 253.

25. 383 U.S. 53 (1966). During a union's campaign to organize employees, leaflets were circulated containing defamatory statements about the petitioner manager. The

preme Court reasserted defamation as an exception to the federal preemption doctrine. Basing its decision on the state's compelling interest in protecting its citizens' reputations[26] and on the National Labor Relations Board's inability to provide a remedy,[27] the Court held that the state had jurisdiction to redress libel resulting from union tactics during an organizational campaign. The availability of a state remedy for libel was not considered inconsistent with national labor policy. Because the remedies provided by the NLRB and by the state addressed different concerns, both could be applied in appropriate cases.[28] The Court carefully limited this preemption exception, however, by requiring proof of damages and actual malice.[29] Thus, state redress was allowed only when the malice standard of knowing falsity or reckless disregard for truth was met and actual damages were proved. The adoption of these restrictive requirements made it difficult to qualify for state jurisdiction and thereby protected the traditional freedom of speech policies in labor disputes.

Linn was one of several indications in the decade after *Garmon* that the Court might retreat from its strong preemption position. In decisions that distinguished *Garmon* on the issues of fair representation,[30] arbitration,[31] and breach of contract,[32] the Court again appeared willing to extend the exceptions category. By 1970 some members of the Court had expressed the desire for a reexamination of the preemption doctrine.[33] In *Amalgamated*

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employer had filed unfair labor practice charges with the NLRB, which refused to issue a complaint. Petitioner then filed a civil libel action under state law in federal court. The court of appeals affirmed the district court's dismissal on preemption grounds, citing *Garmon,* and the U. S. Supreme Court reversed in a 5-4 decision.

26. "Moreover, we believe that 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances." *Id.* at 61.

27. "The injury that the statement might cause to an individual's reputation . . . has no relevance to the Board's function. The Board can award no damages, impose no penalty, or give any other relief to the defamed individual." *Id.* at 63.

28. It was argued that if state action were allowed, the NLRB would be ignored. But the Court disagreed, holding: "[I]t may be expected that the injured party will request both administrative and judicial relief." *Id.* at 66.

29. *Id.* at 64-65. The Court adopted the *New York Times* malice standard by analogy "to effectuate the statutory design with respect to preemption." *Id.* at 65.

30. Vaca v. Sipes, 386 U.S. 171 (1967). A union member charged the union with breach of its statutory duty of fair representation, which the NLRB had previously recognized as an unfair labor practice. The Court found the conduct of settling a grievance short of arbitration not to violate the fair representation duty, but held the *Garmon* doctrine not applicable to the situation.

31. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (where there was an agreement between union and employer containing a provision for grievance arbitration in unresolved disputes, the Court held the state court had jurisdiction to issue an order compelling arbitration even though an alternative remedy was available before the NLRB).

32. Smith v. Evening News Ass'n, 371 U.S. 195 (1962) (the alleged conduct, breach of a collective bargaining contract between the union and employer, was conceded to be an unfair labor practice, but the Court held the suit could be maintained by an individual employee in the state court).

33. *See* Taggart v. Weinacker's, Inc., 397 U.S. 223, 227-28 (1970) (in a concurring opinion, Chief Justice Burger suggested adding trespass to the body of decisions that already allow states to regulate violence and defamation); Longshoremen's Local 1416 v.

Association of Street Employees v. Lockridge,[34] however, the Court reaffirmed its position and provided an explanation of the *Garmon* rule and the various exceptions to it. Pointing out that the preemption doctrine, although of judicial origin, is based on the presumed intent of Congress, the Court held that the basic tenets of *Garmon* should not be disturbed unless altered by congressional action or further judicial insights.[35] Accordingly, the exceptions to the rule should be narrowly interpreted and should not be construed as indications of a retreat from *Garmon*.[36]

The holding in the principal case, that defamatory statements in labor relations must meet the "knowing falsity or reckless disregard of truth" malice standard adopted in *Linn*, reflected the Court's decision that *Linn* was controlling,[37] even though the factual setting of the two cases differed considerably. *Linn* involved a defamatory statement[38] made by a union against management during an employee organizational campaign. The instant case involved a confrontation between nonunion employees and the exclusively recognized union during its efforts to achieve total union membership.[39] The Court's holding in *Linn* was carefully limited so that the existence of a union organizing campaign and a labor dispute appeared essential for its application.[40] The Court established the first criterion in the instant case by viewing the union's activity as a "continuing organizational drive"[41] and specifically rejecting any distinction between prerecognition and postrecognition efforts.[42]

Ariadne Shipping Co., 397 U.S. 195, 201-02 (1970) (concurring opinion by Justice White, joined by Chief Justice Burger and Justice Stewart, urged that state power be preempted only for actually protected or prohibited activities, and expressly called for a reconsideration of *Garmon* to that extent).

34. 403 U.S. 274 (1971). Pursuant to a union security clause in a collective bargaining agreement, a petitioner union procured respondent's discharge from employment on grounds he had lost his good-standing union membership for nonpayment of dues. Although the action was arguably protected or prohibited by the National Labor Relations Act, respondent filed suit in state court charging the union with breach of contract. The state court awarded respondent damages, assuming that breach of contract was an exception to the general federal preemption doctrine. The Supreme Court reversed in a 5-4 decision, holding that the exception was not to be extended to terms of a union-employee contract that have been implied by law.

35. *Id.* at 302.

36. *Id.* at 297.

37. 94 S. Ct. at 2774. Justice Douglas concurred only in the result, on the grounds that all libel laws are constitutionally prohibited by the first and fourteenth amendments. *Id.* at 2784.

38. 383 U.S. at 56. The leaflet stated the manager had deprived employees in Saginaw, Michigan, of the right to vote in three NLRB elections, had robbed them of pay increases, and had been lying to the union.

39. 94 S. Ct. at 2773. The dissent noted that the union was solidly entrenched, with 96% of the letter carriers already members. *Id.* at 2786.

40. "We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him." 383 U.S. at 55.

41. 94 S .Ct. at 2772.

42. *Id.* at 2779.

Therefore, the application of *Linn* seemingly depended on whether the instant situation constituted a labor dispute. Although union-employee disputes would apparently satisfy this prerequisite,[43] the Court did not attempt to assess the situation in such terms. In fact, this approach was expressly rejected.[44] The Court instead stated that adoption of the *Linn* standard should depend on whether the policies of the federal labor laws protecting freedom of speech were "significantly implicated."[45] Thus, any defamatory publication arguably relevant to a situation in which federal free speech labor law policies are significantly implicated will require proof of actual malice and damages to qualify for the application of state remedies.[46]

The dissent rejected the contention that the scope of the *Linn* rule should be extended to the instant situation.[47] Noting that the Court in *Linn* was concerned with providing individuals some protection against injury to reputation in the classic situation of a labor-management confrontation,[48] the dissent pointed out that no labor dispute existed in the instant case until the union became discontented because the appellees were exercising their legal right not to join the union.[49] The majority's decision was seen as allowing the union to create the controversy, and then to claim the *Linn* malice standard as a bar to liability for defamation. Consequently, the dissent expressed concern that both management and union would now be able to defame the individual worker with little risk of accountability.[50]

Although the dissent characterized the majority's extension of the *Linn* rule as an expansion of the term "labor dispute,"[51] in fact the Court simply discarded the requirement of a labor dispute and proceeded to delineate the boundaries within which the *Linn* rule would apply. According to the majority, a defamatory publication in any situation concerning labor relations will invoke partial preemption so long as federal labor free speech policies are sufficiently involved.

Paradoxically, the Court's extension of the *Linn* exception to the preemption doctrine had an effect consistent with expansive federal preemption—a restriction of state jurisdiction. As the initial result of the Court's decision in *Garmon,* a defamation occurring during a labor dispute was considered to be exclusively within the primary jurisdiction of the NLRB, with state jurisdiction preempted even when the NLRB chose not to exercise its authority.[52]

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43. See the Norris-LaGuardia Act's definition, which specifically includes union-employee disputes. 29 U.S.C. §113 (1970).

44. 94 S. Ct. at 2778.

45. "[A]pplication of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Id.*

46. *Id.* at 2779.

47. *Id.* at 2786 (Powell, J., dissenting).

48. *Id.* at 2785.

49. *Id.* at 2786. The NLRA expressly protects the right to refrain from joining in concerted activities with fellow employees. 29 U.S.C. §157 (1970).

50. 94 S. Ct. at 2785 (Powell, J., dissenting).

51. *Id.*

52. *See* note 15 *supra* and text accompanying note 24 *supra;* Currier, *Defamation in*

Defamation occurring outside the context of a labor dispute, however, remained solely within state jurisdiction.[53] *Linn* departed from the *Garmon* doctrine by recognizing only partial federal preemption in cases of defamation during a labor dispute.[54] Thus, the state was allowed restricted jurisdiction[55] over defamation during a labor dispute as well as complete jurisdiction of defamation not involved in labor disputes. By extending the stringent malice standard of *Linn,* which had been employed to permit limited state jurisdiction *in* labor disputes, into the area beyond the context of such controversies, the instant case restricts the previously unlimited state jurisdiction of defamation outside the labor dispute context.[56]

The principal case also effectively limits liability for defamation in labor affairs outside the context of labor disputes. The requirement of proof of actual malice is a much more exacting standard than that generally imposed by state law[57] and will be met in correspondingly fewer cases. When it cannot be met, the defamed individual will be left without a remedy, and the perpetrator of the defamation will be immune from the consequences of his tortious conduct, which would otherwise have been imposed under state law. The degree to which this limitation of liability will encourage unions or management to defame individual employees will depend in part on the parameters of this extension of *Linn,* which in turn will depend on the courts' subsequent interpretation of the flexible and somewhat ambiguous phrase, "significantly implicated."

The instant case quite possibly extended *Linn* unnecessarily. The compelling state interest in protecting citizens' reputations recognized in *Linn* was needlessly subordinated. It seems unlikely that federal labor policies favoring uninhibited debate in labor disputes could be subverted by allowing state libel laws to apply outside the context of labor disputes. Yet the Court advanced no other reason for extending the application of *Linn* beyond the labor dispute context. Furthermore, this extension was at the expense of the individual employee. Unless the Court interprets its "significantly implicated" phrase narrowly, the instant case would realistically seem to leave the individual largely unprotected against defamation in labor matters.

SANDRA R. SCOTT

Labor Disputes: Preemption and the New Federal Common Law, 53 VA. L. REV. 1, 11-14 (1967).

53. See text accompanying note 13 *supra.*

54. 383 U.S. at 55, 63. *See* Currier, *supra* note 52, at 19-20.

55. It is restricted because state jurisdiction is permitted only when malice, defined as "knowing falsity or reckless disregard for truth," can be proved. The *state* libel law's definition of "malice" is not considered.

56. This applies only to the malice standard. The requirement of proof of damages no longer constitutes a restriction in light of the Court's recent decision that states may not allow recovery except for actual injury. Gertz v. Welch, Inc., 94 S. Ct. 2997, 3011 (1974).

57. *Id.* at 3008.