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Labor Law - When Can a District Court Enjoin a Union Lawsuit as a Possible Unfair Labor Practice

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LABOR LAW—WHEN CAN A DISTRICT COURT ENJOIN A UNION LAWSUIT AS A POSSIBLE UNFAIR LABOR PRACTICE?

Hoeber ex rel. NLRB v. Local 30, United Slate, Tile & Composition Roofers (1991)

I. INTRODUCTION

In *Hoeber ex rel. NLRB v. Local 30, United Slate, Tile & Composition Roofers*,[1] the United States Court of Appeals for the Third Circuit addressed the issue of whether the district court abused its discretion under section 10(l) of the National Labor Relations Act (NLRA) in refusing to enjoin a labor union's suit to enforce an arbitral award.[2] *Hoeber* involved a possible conflict under the NLRA between National Labor Relations Board (NLRB) determinations and arbitration awards.[3] The Third Circuit affirmed the decision of the district court on the grounds that the Regional Director did not have reasonable cause to believe that the arbitration enforcement suit was an unfair labor practice, and alterna-

1. 939 F.2d 118 (3d Cir. 1991).

2. *Id.* at 119. Section 10(l) of the NLRA provides the district court with the authority to enjoin actions by any person that it finds to be engaged in a possible unfair labor practice if such relief would be "just and proper." 29 U.S.C. § 160(l) (1988). For the relevant text of § 10(l), see *infra* note 27. For a discussion of the "just and proper" requirement, see *infra* notes 31-32 and accompanying text.

3. *Hoeber*, 939 F.2d at 120-21. *Hoeber* involved §§ 8(b)(4)(D), 10(k) and 10(l) of the NLRA and § 301 of the Labor-Management Relations Act (LMRA), also known as the Taft-Hartley Act, a 1947 amendment to the NLRA. *Id.* at 120-21. The dispute concerned an employer and union, operating under a collective bargaining agreement, engaged in conflict over who was entitled to do a certain work project. *Id.* at 120. *See generally* ALLAN L. BIOFF ET AL., THE DEVELOPING LABOR LAW (1977).

Section 8(b)(4)(D) of the NLRA provides that an attempt to force an employer to assign work to a particular union is an unfair labor practice. 29 U.S.C. § 158(b)(4)(D) (1988). When an employer files a charge with the NLRB alleging that a labor organization has engaged in an unfair labor practice under § 8(b)(4)(D), § 10(k) of the NLRA mandates that the NLRB must hold a hearing to determine who is entitled to do the disputed work. 29 U.S.C. § 160(k) (1988); *see, e.g.*, THEOPHIL C. KAMMHOLZ & STANLEY R. STRAUSS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 107-09 (4th ed. 1987) (describing special procedures for jurisdictional disputes under § 10(k) and other sections of the NLRA). In addition, § 10(l) of the NLRA allows the federal district courts to enjoin certain unfair labor practices described in § 8 of the NLRA. 29 U.S.C. § 160(l); *see also* HENRY H. PERRITT, JR., LABOR INJUNCTIONS 274 (1986) ("The purpose of § 10(l) injunctions is to preserve the status quo pending adjudication by the NLRB in order to protect the efficacy of the Board's final order."). Section 301 of the LMRA authorizes federal district courts to adjudicate contract violations between an employer and a labor organization, or between labor organizations. 29 U.S.C. § 185 (1988). For the relevant text of § 301, see *infra* note 25.

tively, because the district court did not abuse its discretion under section 10(l).[4]

Part II of this casebrief will present the background of *Hoeber* and analyze the opinion of the court.[5] Part III will discuss the general significance of the case and, more specifically, the significance of the case from the perspective of the Third Circuit practitioner.[6]

II. CASE ANALYSIS

A. *Factual Background*

Gundle Lining Construction Corporation (Gundle) performed liner installation work at a New Jersey landfill.[7] Gundle contracted to complete liner work in one of the cells of the landfills and hired Local 30 of the United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association to perform the work.[8] Gundle and Local 30 signed a Memorandum Agreement on November 18, 1988, by which the parties agreed "to abide by certain collective bargaining terms and conditions 'as of 11/18/88 through completion.' "[9] These "terms and conditions" were embodied in a collective bargaining agreement between Local 30 and The Roofing and Sheet Metal Contractors' Association of Philadelphia and Vicinity (RSMCA).[10] Pursuant to this agreement, Local 30 was to bring grievances against employers before the RSMCA.[11]

On November 6, 1989, Gundle undertook an additional project at the same landfill.[12] Gundle hired workers from Local 172 of the Laborers International Union of North America instead of Local 30 to com-

4. *Hoeber*, 939 F.2d at 128.

5. For a discussion of the factual background of the case, see *infra* notes 7-29 and accompanying text. For a discussion of the district court's ruling, see *infra* notes 30-42 and accompanying text. For a discussion of the Third Circuit's analysis and holding, see *infra* notes 43-72 and accompanying text.

6. For a discussion of the rationale of the court's holding, see *infra* notes 73-82 and accompanying text. For a discussion of the impact of the ruling on the Third Circuit practitioner, see *infra* notes 83-85 and accompanying text.

7. *Hoeber*, 939 F.2d at 119.

8. *Id.* at 119-20. Gundle had been awarded several contracts to perform work at the landfill. Hoeber v. Local 30, United Slate, Tile & Composition Roofers, 759 F. Supp. 212, 214 (E.D. Pa.), *aff'd*, 939 F.2d 118 (3d Cir. 1991). Local 30 had performed work for Gundle in connection with at least three of these projects. *Id.*

9. *Hoeber*, 939 F.2d at 119-20. This project, which was the second project Local 30 performed for Gundle, began in the fall of 1988 and was completed in February 1989. *Hoeber*, 759 F. Supp. at 214.

10. *Hoeber*, 759 F. Supp. at 214.

11. *Id.* Under the collective bargaining agreement, Local 30 was required to request that the RSMCA convene a Joint Conference Board to hear grievances. *Id.* The Joint Conference Board arbitrated disputes between employees who had collective bargaining agreements with the RSMCA and the employers of these employees. *Id.*

12. *Id.*

plete this second project.[13] Members of Local 30 witnessed Local 172 beginning work on the new project and, on November 8, 1989, Local 30 began to set up a picket line under the belief that non-union employees were performing the work.[14] However, Local 30 workers realized within a matter of hours that the work was being performed by Local 172, whereupon they promptly removed their picket line.[15] Local 30 engaged in no further economic pressure after this discovery.[16]

On November 13, 1989, Gundle filed an unfair labor practice charge with the NLRB, alleging that Local 30 violated section 8(b)(4)(D) of the NLRA by picketing the second project site.[17] On November 14, 1989, Local 30 informed Gundle of its intention to file a grievance with the RSMCA over Gundle's failure to abide by the Memorandum Agreement in hiring Local 172 workers to perform the November 1989 liner project.[18] Constrained by its collective bargaining agreement with the RSMCA, Local 30 limited its claim under the grievance to damages, and did not request the specific work granted to Local 172.[19] On January 17, 1990, the Joint Conference Board of the RSMCA ruled that the Memorandum Agreement covered the work project begun in November 1989.[20]

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13. *Hoeber*, 939 F.2d at 120. Local 30 argued that its members were entitled to perform this work under the Memorandum Agreement. *Id.*

14. *Id.*

15. *Hoeber*, 759 F. Supp. at 214.

16. *Hoeber*, 939 F.2d at 121. Local 30 did not engage in any further picketing or boycotting relating to the dispute, aside from seeking legal remedies. *Id.*

17. *Id.* at 120. Section 8(b) of the NLRA addresses unfair labor practices committed by unions, and was added by the LMRA. *See* 29 U.S.C. § 158(b) (1988). The original NLRA (the Wagner Act) targeted only unfair labor practices engaged in by employers. *See id.* § 158(a). Under § 8(b)(4)(D) of the NLRA, it is an unfair labor practice for a union:

> [T]o threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . . .
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

Hoeber, 939 F.2d at 120 (quoting 29 U.S.C. § 158(b)(4)(D)). The NLRB dealt with this charge in its § 10(k) ruling. For a discussion of the § 10(k) proceedings, see *infra* notes 21-24 and accompanying text.

18. *Hoeber*, 759 F. Supp. at 214. On December 5, 1989, Local 30 requested that the RSMCA convene a Joint Conference Board to hear Local 30's grievance against Gundle. *Id.* It is unclear whether this action was in response to Gundle's unfair labor practice charge filed a day earlier.

19. *Id.* at 215. Local 30 "only sought to reserve its right to pursue a remedy for Gundle's alleged breach of the Memorandum Agreement." *Hoeber*, 939 F.2d at 120.

20. *Hoeber*, 939 F.2d at 120. The Joint Conference Board "directed Gundle

In early March 1990, the NLRB held hearings pursuant to section 10(k) of the NLRA on Gundle's unfair labor practice charge against Local 30.[21] On June 28, 1990, the NLRB issued its ruling, which did not discuss the validity of either the Local 30 or Local 172 contract; rather, the NLRB awarded the work to Local 172 based on other factors.[22] These other factors included employer preference, area practice and efficiency of operations.[23] In addition, as part of its ruling, the NLRB informed Local 30 that it was not to attempt to "coerce Gundle into assigning the work to it [Local 30] by any means proscribed by NLRA § 8(b)(4)(D)."[24]

On March 26, 1990, *before* the NLRB had made its section 10(k) ruling, Local 30 filed a civil action in the United States District Court for the Eastern District of Pennsylvania pursuant to section 301 of the Labor Management Relations Act of 1947.[25] Local 30 sought enforcement

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to compensate individuals from Local 30 who were deprived of work opportunities." *Id.* These payments represented dues, wages and benefit contributions required by the collective bargaining agreement and Memorandum Agreement. *Hoeber*, 759 F. Supp. at 215.

21. *Hoeber*, 759 F. Supp. at 215. Section 10(k) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [§ 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen [unless the parties voluntarily settle the dispute within ten days].

29 U.S.C. § 160(k) (1988) (quoted in *Hoeber*, 939 F.2d at 120 n.2). The NLRB could have granted the work to either union based on the contract or other non-contractual factors. *See, e.g.*, NLRB v. Radio & Television Broadcast Eng'rs, Local 1212, 364 U.S. 573, 579 (1961) (holding that when two unions hold valid contracts with employer, Board must make award of work in 10(k) proceeding on basis of factors other than contract).

22. *Hoeber*, 939 F.2d at 120. In *Radio Engineers*, the Supreme Court required the NLRB to make an affirmative award of the work as between the unions despite the dual contracts. *Radio Engineers*, 364 U.S. at 586. These factors were those the NLRB "deemed important in arbitration proceedings, such as the nature of the work, the practices of this and other companies and of this and other unions." *Id.* Similarly, in *Hoeber*, "the [NLRB] . . . specifically declined to evaluate the validity of the two unions' competing contractual claims." *Hoeber*, 759 F. Supp. at 217.

23. *Hoeber*, 759 F. Supp. at 215.

24. *Hoeber*, 939 F.2d at 121. The Regional Director characterized Local 30's § 301 suit as coercive and thus in violation of § 8(b)(4)(D) of the NLRA. *Id.* For a discussion of the Regional Director's arguments, see *infra* notes 27-29 and accompanying text.

25. The LMRA, also known as the Taft-Hartley Act, is a 1947 amendment to the NLRA. *See generally* BIOFF ET AL., *supra* note 3. Section 301 of the LMRA governs suits brought by and against labor unions for breach of contract. 29 U.S.C. § 185 (1988). Section 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

of the award of the Joint Conference Board.[26] The petitioner, Francis W. Hoeber, the Acting Regional Director of the Fourth Region of the National Labor Relations Board, then brought the present action under section 10(l) of the NLRA, seeking to enjoin Local 30 from litigating this section 301 suit.[27] In doing so, the Regional Director characterized the section 301 suit brought by Local 30 as a coercive practice violative of section 8(b)(4)(D).[28] The Regional Director requested an injunction of the lawsuit until the NLRB had a chance to rule on whether the suit was an unfair labor practice.[29]

B. *The District Court's Ruling*

The district court denied the Regional Director's petition for a section 10(l) injunction.[30] Under section 10(l), the district court is not required to issue an injunction unless it finds that such relief would be "just and proper."[31] Relief is "just and proper" when the district court finds (1) "reasonable cause" on the part of the Regional Director to believe that certain unfair labor practices have occurred, and (2) that "issuance of an injunction is 'necessary to prevent a frustration of the remedial purposes of the Act.' "[32] The district court recognized that the

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Id. § 185(a).

26. 29 U.S.C. § 185(a).

27. *Hoeber*, 939 F.2d at 119, 121. Section 10(l) provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [§ 8(b)(4)(A), (B) or (C) or § 8(e) or § 8(b)(7)], the preliminary investigation of such charge shall be made forthwith . . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order *as it deems just and proper*, notwithstanding any other provision of law . . . . In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to [§ 8(b)(4)(D)].

29 U.S.C. § 160(l) (1988) (emphasis added).

28. *Hoeber*, 939 F.2d at 121.

29. *Id.* This unfair labor practice charge, if brought, would have been the second one brought by Gundle and would have been based wholly on the § 301 suit. *Hoeber*, 759 F. Supp. at 218. There is no evidence from the record as to whether or not this second charge was filed. The NLRB dealt with the first unfair labor practice charge, based on Local 30's picketing, in its § 10(k) ruling. *Id.* For a discussion of the procedural history of *Hoeber*, see *supra* notes 7-28 and accompanying text.

30. *Hoeber*, 759 F. Supp. at 219.

31. 29 U.S.C. § 160(l). For the relevant text of § 10(l), see *supra* note 27.

32. *Hoeber*, 759 F. Supp. at 216 (quoting Scott v. El Farra Enters., 863 F.2d 670, 674 (9th Cir. 1988)). Looking to the legislative history of the NLRA, the

NLRA's "reasonable cause" requirement afforded great deference to the Regional Director's interpretation of the statute.[33] Nevertheless, the district court found that Local 30's prosecution of the section 301 suit did not satisfy the "reasonable cause" requirement.[34]

In reaching the conclusion that Local 30's suit did not represent an unfair labor practice within the reasonable cause requirement, the district court used the two-pronged standard set forth in *Bill Johnson's Restaurants, Inc. v. NLRB*.[35] In *Bill Johnson's*, the Supreme Court required that, to enjoin a civil suit as a possible unfair labor practice, the district court must find that the union or employer had (1) an improper motivation and (2) a lack of reasonable legal basis for the suit.[36]

The district court held that the Regional Director did not have reasonable cause to believe that Local 30 had committed an unfair labor practice.[37] First, in applying the reasonable basis segment of the *Bill Johnson's* test, the court held that Local 30's section 301 suit was not in direct conflict with the NLRB's section 10(k) decision.[38] The district court explained that the suit "seeks damages for breach of contract while the 10(k) decision did not address the contractual rights of the claim but merely allocated the work to Local 172 for other reasons."[39]

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district court concluded that the bill's purpose was "the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining." *Id.* (quoting S. REP. No. 105, 80th Cong., 1st Sess. 8, 27 (1947)).

33. *Id.* at 218. The district court stated:

> It is without question that the NLRB exercises primary jurisdiction in construing the NLRA and in determining what is or is not an unfair labor practice. Hence the adoption of the lenient "reasonable cause" standard for purposes of awarding section 10(l) relief. However while the district court should not require that an unfair labor practice be proven in order to issue an injunction . . . , sufficient facts must be presented from which the district court can reasonably assume that an unfair labor practice is taking place, and that questions of labor policy are involved which are best left to the NLRB to solve.

Id. (footnote omitted).

34. *Id.*

35. 461 U.S. 731 (1983). *Bill Johnson's* was decided in the context of a possible NLRA § 8(a)(1) unfair labor practice by an employer. *Id.* at 735. Courts have applied the *Bill Johnson's* standard to § 8(b)(1) and 8(b)(4) unfair labor practice charges brought by unions. *See, e.g., Hoeber*, 759 F. Supp. at 216 n.5; International Longshoremen's & Warehouseman's Union v. Pacific Maritime Ass'n, 773 F.2d 1012, 1015 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

36. *Bill Johnson's*, 461 U.S. at 748-49 ("Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit.").

37. *Hoeber*, 759 F. Supp. at 219.

38. *Id.*

39. *Hoeber*, 939 F.2d at 122 (explaining reasoning of district court). This conclusion essentially means that the supremacy doctrine did not enter into the district court's decision. If the NLRB had ruled on the validity of the contracts in its § 10(k) ruling and found Local 30's contract invalid, this determination would take precedence over the arbitral award. Therefore, there would be no

Second, the district court found no improper motivation because the lawsuit was not intended to coerce Gundle to assign Local 30 the work.[40]

In addition to failing to satisfy the *Bill Johnson's* reasonable cause requirement, the district court found that the section 301 suit did not fall within the types of activities that Congress intended to prevent in enacting section 10(l) of the NLRA, namely, those that obstruct the free flow of business pending NLRB claim resolution.[41] Therefore, the district court concluded that an injunction was not necessary to prevent the frustration of the purposes of the NLRA.[42]

C. *The Third Circuit's Analysis*

The United States Court of Appeals for the Third Circuit reviewed the district court's refusal to issue an injunction in three steps.[43] First, the Third Circuit reviewed the district court's finding that the Regional Director had set forth a substantial legal theory to support the existence of an unfair labor practice charge under section 8(b)(4)(D).[44] Because this is a question of law, the Third Circuit stated that it had plenary review.[45] Second, after finding that a substantial legal theory existed under section 8(b)(4)(D), the Third Circuit used a deferential standard to review the district court's finding that Local 30 was not engaged in an unfair labor practice.[46] Third, the Third Circuit reviewed the district court's denial of injunctive relief under the "just and proper" standard to determine if the district court had abused its discretion.[47]

In addressing the first issue regarding the existence of a substantial legal theory, the *Hoeber* court followed *Hirsch v. Building & Construction Trades Council*.[48] In *Hirsch*, the Third Circuit required that the Regional Director show that the legal theory underlying the unfair labor practice charge was " 'substantial and not frivolous.' "[49] In *Hoeber*, the Regional

reasonable basis for the suit and an injunction would be appropriate under the authority of the supremacy doctrine. For a brief discussion of the supremacy doctrine, see *infra* note 78 and accompanying text.

40. *Hoeber*, 759 F. Supp. at 217. Local 30's lack of motivation was evidenced by the fact that it could only seek contract damages under its collective bargaining agreement. *Id.* For a discussion of the importance of the characterization of the requested relief, see *infra* notes 80-82 and accompanying text.

41. *Hoeber*, 939 F.2d at 122. The types of activities contemplated by Congress were strikes, pickets and boycotts. *Id.*

42. *Id.*

43. *Id.* at 123.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 530 F.2d 298 (3d Cir. 1976).

49. *Hirsch*, 530 F.2d at 302 (quoted in *Hoeber*, 939 F.2d at 123-24). The court in *Hirsch* stated:

> Since the § 10(l) proceeding is thus ancillary to the main unfair

Director argued that Local 30's picketing provided a "reasonable cause for finding an unfair labor practice and that "prosecution of [the suit] is inherently coercive, because it brings pressure to bear on Gundle to reassign its liner installation work from Local 172 to Local 30."[50] The *Hoeber* court reluctantly accepted this argument as establishing the "substantial and nonfrivolous" legal theory required by *Hirsch*.[51]

Once the Third Circuit had established that the Regional Director had a substantial legal theory, the court reviewed the district court's application of the facts of the case to the Regional Director's theory.[52] The Third Circuit agreed with the district court that Local 30 "merely sought its contract damages for Gundle's breach of the Memorandum Agreement," and that any intention to coerce Gundle into hiring Local 30's workers was completely lacking.[53] The Regional Director contended that the possibility that Local 30's section 301 suit could result in Gundle's having to pay twice for the same work made the action inherently coercive.[54] The Third Circuit dismissed this argument, however, stating that double paying "would only be an unfortunate result of Gundle's decision to enter into conflicting labor agreements."[55] The court further explained that if it found that prosecution of a section 301 suit necessarily constituted improper coercion, the court would be creating a rule in which an employer could unilaterally avoid a union contract.[56]

> labor practice action committed to the Board's exclusive jurisdiction, the Regional Director faces a relatively insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to § 10(l). . . . [H]e need only demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is "substantial and not frivolous."

Id.

50. *Hoeber*, 939 F.2d at 124.

51. *Id.* The court was disturbed by the Regional Director's reliance on the scant picketing by Local 30 to support the jurisdictional basis for its § 10(l) proceeding: "This theory on its face, despite our unease with the NLRB's reliance on Local 30's picketing, would appear to be sufficient to satisfy the 'substantial and nonfrivolous legal theory' factor required by *Hirsch*." *Id.*

52. *Id.* at 125.

53. *Id.* at 124. The Third Circuit did not accept the Regional Director's argument that "seeking enforcement of an arbitral award based on a breach of contract to assign work is identical to seeking the disputed work itself." *Id.* at 124 n.10. The court distinguished these types of damages on two grounds. First, awarding damages for a breach of contract claim would require the union to mitigate those damages. *Id.* Second, breach of contract remedies usually do not include awards of disputed work. *Id.*

54. *Id.* at 124.

55. *Id.* at 125 (quoting *Hoeber*, 759 F. Supp. at 218).

56. *Id.* This explanation particularly holds true in the specific case of an employer entering into two contracts for the same work. If the employer can avoid one contract by entering into another, the purposes of collective bargaining are frustrated. This of course presumes that the union that signed the initial contract is not truly engaged in an unfair labor practice. Otherwise, the purposes of § 10(l) would be frustrated. For a further discussion of the tension

The *Hoeber* court then distinguished *International Longshoremen's & Warehousemen's Union v. Pacific Maritime*,[57] in which the Ninth Circuit enjoined a section 301 suit on the grounds that the NLRB had already determined that the suit was an unfair labor practice.[58] Therefore, the *Pacific Maritime* court had to uphold the NLRB's finding unless it was arbitrary and capricious.[59] By contrast, in *Hoeber*, the NLRB had not yet ruled on the section 301 suit, so the district court was in the position of predicting the ruling of the NLRB instead of having to defer to the NLRB's decision.

Once the Third Circuit determined that the Regional Director was not entitled to an injunction because he failed to show that the suit was coercive, the court reviewed the district court's decision that an injunction was not the "just and proper remedy."[60] The Third Circuit agreed with the district court that the section 301 suit did not present the de-

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between deference to the NLRB and protection for unions and collective bargaining, see *infra* notes 77-82 and accompanying text.

57. *Hoeber*, 939 F.2d at 125. The NLRB cited International Longshoremen's & Warehousemen's Union v. NLRB, 884 F.2d 1407 (D.C. Cir. 1989), and International Longshoremen's & Warehousemen's Union v. Pacific Maritime Ass'n, 773 F.2d 1012 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

58. *Hoeber*, 939 F.2d at 125. This suit concerned "time-in-lieu payments." "Time-in-lieu" payments are compensation for one employee group that was entitled to perform certain work, but did not because the work was assigned to another group. *See, e.g.*, Sea-Land Serv. v. International Longshoremen's & Warehousemen's Union, Local 13, 939 F.2d 866, 868 n.2 (9th Cir. 1991).

59. *Hoeber*, 939 F.2d at 125. If the NLRB's decision was not arbitrary and capricious, the supremacy doctrine applies and the NLRB decision takes precedence over an arbitral award. *Pacific Maritime*, 773 F.2d at 1017. Note that in *Hoeber*, the § 10(k) determination did not involve the charge that the § 301 suit was an unfair labor practice; rather, it addressed Gundle's charge that the picketing by Local 30 constituted an unfair labor practice. *Hoeber*, 939 F.2d at 121. Therefore, the Joint Conference Board's award did not conflict with the NLRB's § 10(k) decision. For a description of the § 10(k) proceedings, see *supra* notes 21-24 and accompanying text.

The *Hoeber* court also was forced to distinguish *NLRB v. Local 1291*, which stated that:

> The valuable part of a right to a particular job is the right to be paid for it. It follows that if workmen, who are entitled to a job under the terms of a labor contract, agree to forego the obligation of working, but not the concomitant right to payment, they have not disclaimed any significant right.

NLRB v. Local 1291, 368 F.2d 107, 110 (3d Cir. 1966), *cert. denied*, 386 U.S. 1033 (1967). In *Hoeber*, the court distinguished *Local 1291* by pointing out that the holding in *Local 1291* "was merely that we would enforce an NLRB 10(k) determination." *Hoeber*, 939 F.2d at 126 n.14.

In addition, the *Hoeber* court did not discuss *International Longshoremen's & Warehousemen's Union v. NLRB*, but it is distinguishable as well. In that case, the union's filing of grievances challenged an NLRB § 10(k) award of work to a second union. International Longshoremen's & Warehousemen's Union v. NLRB, 884 F.2d 1407, 1413 (D.C. Cir. 1989). In *Hoeber*, however, Local 30 requested only money damages, leaving open the possibility that there may not be a conflict with the § 10(k) award to Local 172. *Hoeber*, 939 F.2d at 120.

60. *Hoeber*, 939 F.2d at 126.

gree of harm necessary to warrant injunctive relief under section 10(l).[61] This finding presented an alternative reason for upholding the district court's decision.[62]

The Third Circuit offered three reasons for denying injunctive relief. First, the Third Circuit noted that Local 30 had merely filed a lawsuit; it had not acted to "obstruct the free flow of business or threaten harm to the public."[63] In addition, the Third Circuit stated that the filing of a lawsuit "carries with it significant constitutional protections, implicating the First Amendment right to petition the government for redress of grievances, and the right of access to courts."[64] These protections are implicit in the *Bill Johnson's* standard, which requires a showing of an improper motivation for the suit and lack of reasonable basis in the law for a lawsuit to be enjoined.[65] Second, the court reasoned that injunctive relief was at best a temporary measure and thus would not protect from Gundle having to pay twice for the same work.[66] Even if the district court were to grant the injunction, the ultimate resolution of the issue could lead to the reinstitution of the section 301 suit, and, possibly, double payment.[67] Finally, the Third Circuit noted that the NLRB had failed to intervene in Local 30's section 301 suit and had raised the same arguments as in the present case.[68] Therefore, an injunction was "not the only means by which the [NLRB] could achieve its objective."[69] Therefore, the Third Circuit held that the district court had not abused its discretion in refusing to enjoin Local 30's section 301 suit.[70]

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61. *Id.* The Third Circuit echoed the district court's conclusion that the purpose of § 10(l) was the elimination of " 'obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.' " *Hoeber*, 759 F. Supp. at 216 (quoting S. REP. No. 105, 80th Cong., 1st Sess. 8, 27 (1947)). The Third Circuit stated:

> Local 30 merely filed a lawsuit; it did not engage in actions that obstruct the free flow of business or threaten harm to the public. Therefore, the district court, in focusing on "the large objectives of the Act," . . . correctly held that prosecution of Local 30's suit did not create the degree of harm necessary to justify an injunction.

Hoeber, 939 F.2d at 126 (citation omitted).

62. *Hoeber*, 939 F.2d at 126.

63. *Id.*

64. *Id.*

65. *Id.* By requiring the high standard of improper motivation and an objective lack of legal basis, the *Bill Johnson's* test can be understood as implicitly deferring to the right of individuals to sue. For a discussion of the *Bill Johnson's* standard, see *supra* notes 35-36 and accompanying text. The Third Circuit recognized this principle when it restated the district court's conclusion that *Hoeber* did not meet the *Bill Johnson's* test. *Hoeber*, 939 F.2d at 126. Because Local 30 sought only money damages, there was no presence of improper motivation. *Id.*

66. *Hoeber*, 939 F.2d at 127.

67. *Id.*

68. *Id.*

69. *Id.* The NLRB had considered intervening but declined to do so. *Id.*

70. *Id.*

While the Third Circuit accepted the Regional Director's legal theory, the court affirmed the district court's conclusion that the facts of the case did not support that theory.[71] Alternatively, the Third Circuit held that the district court did not abuse its discretion in concluding that an injunction was not "just and proper" under the circumstances.[72]

III. CONCLUSION

A. *Rationale of the Holding*

The conflict in *Hoeber* involved sections 301 of the LMRA and 10(l) of the NLRA.[73] On the one hand, the court recognized the validity of the Memorandum Agreement and the collective bargaining agreement between Local 30 and Gundle.[74] The Third Circuit, however, could only honor the arbitral award within the confines of the NLRB's section 10(k) ruling and the requirements of section 10(l).[75] When actions by unions draw closer to possible unfair labor practices (enjoinable under § 10(l)), or conflict with existing NLRB determinations (enjoinable under § 10(k)), deference to the arbitral award and process is unwarranted.[76]

Underlying the interplay of the statutes at issue in *Hoeber* is a fundamental tension. This tension is between deference to the NLRB and protection for aggrieved unions and the collective bargaining process.[77] Deference to the NLRB is clearly reflected in the "supremacy doctrine," under which existing NLRB determinations take precedence over arbitral awards.[78] On the other hand, protections for unions and the collec-

71. *Id.* at 128.

72. *Id.* at 126. For a discussion of the "just and proper requirement," see *supra* notes 31-32 and accompanying text.

73. Section 301 is part of the LMRA, a 1947 amendment to the NLRA. *See* 29 U.S.C. § 185(a) (1988). Section 301 gives effect to the arbitration agreements signed by employers and unions by allowing enforcement of an arbitral award in federal court. *See id.* For the text of § 301, see *supra* note 25. Section 10(l) of the NLRA provides for the granting of injunctive relief after preliminary investigation of an alleged unfair labor practice. For the text of § 10(l), see *supra* note 27 and accompanying text.

74. For a discussion of the Memorandum Agreement and the decision of the Joint Conference Board, see *supra* notes 9-20 and accompanying text.

75. *Hoeber*, 939 F.2d at 126-27.

76. For a discussion of the NLRB's contention that Local 30's picketing constituted an unfair labor practice, see *supra* notes 21-24 and accompanying text.

77. In the present case, the conflict existed in part because the NLRB had not yet issued a ruling on the § 8(b)(4)(D) charge of Gundle relating to the § 301 suit. *See Hoeber*, 939 F.2d at 121 n.4.

78. When the NLRB has already made a determination, the supremacy doctrine clearly applies. The supremacy doctrine dictates that NLRB determinations preempt contrary arbitral awards. *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 272 (1964) ("Should the Board disagree with the arbiter . . . , the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under

tive bargaining process have foundations in the Constitution and in the LMRA.[79]

What brings this tension to light is the particular set of facts before the court. If, for example, Local 30 could have sought not only money damages but specific performance, the Third Circuit might not have ruled in Local 30's favor.[80] In addition, if the NLRB had already determined that the section 301 suit by Local 30 was an unfair labor practice under section 8(b)(4)(D), the court could not have ruled against the Regional Director.[81] However, because these situations did not exist, the Third Circuit was able to affirm the district court's decision without contradicting any existing circuit court interpretations.[82]

B. *Third Circuit Practitioner*

While the fact-specific nature of *Hoeber* may tend to limit its direct precedential value, a practitioner may draw two inferences about the Third Circuit from this case. First, the court is interested in practical solutions and second, the court is interested in fair results.

Hoeber shows that the Third Circuit wants to be practical in applying legal remedies. The inevitable result of all of the actions involved in *Hoeber* was that Local 172 was going to do the liner work and Local 30

§ 301."). There are two overarching reasons behind deferring to administrative agencies. First, properly delegating authority to agencies allows the legislative branch of government to function. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.2 (1984). Without the ability to delegate authority, Congress would not be able to meet the sheer burden of lawmaking, rulemaking and adjudication. *Id.* Second, deferring to an agency represents respect for the expertise that the agency has acquired in its particular subject area. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."). For example, the NLRB has considerable authority in defining who is an employee for purposes of coverage of the NLRA. *See, e.g.*, NLRB v. Hearst Publications, 322 U.S. 111, 130 (1944).

79. In § 201 of the LMRA, Congress stated:

> It is the policy of the United States that—
> (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees. . . .

29 U.S.C. § 171(a) (1990).

80. This approximates the situation in *ILWU v. NLRB*, discussed *supra* at notes 57 & 59. The arbitral award of work would conflict with the NLRB's award of work as a part of its § 10(k) determination. The supremacy doctrine would then apply to that part of the § 10(k) decision.

81. *See, e.g.*, International Longshoremen's & Warehousemen's Union v. Pacific Maritime Ass'n, 773 F.2d 1012, 1017 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986).

82. For a discussion of how the *Hoeber* court distinguished adverse circuit court cases, see *supra* note 59.

was going to receive money damages from Gundle. The problem was to articulate legal theories that would yield a similar result to this ultimate outcome. The court was able to juggle the conflicts mainly because of the three reasons cited above, particularly the request for money damages. The damage request enabled the court to overcome any possible 10(k) or supremacy doctrine hurdle, which could have been the primary impediment to ruling in favor of Local 30.[83]

In addition, the Third Circuit was interested in reaching a fair decision. This inference stems from the court's failure to give any significant deference to the Regional Director's characterization of the section 301 suit as an unfair labor practice.[84] Also, the court manifested this goal of fairness in expressing its disfavor of Gundle's attempt to avoid the contract with Local 30 by charging Local 30 with an unfair labor practice for three hours of good faith picketing.[85]

C. *Summary*

In *Hoeber*, the Third Circuit held that the prosecution of a section 301 suit is not necessarily in conflict with an adverse 10(k) ruling by the NLRB, and, accordingly, denied the NLRB's request for an injunction. In doing so, the court neatly balanced seemingly conflicting provisions of the NLRA and the LMRA and demonstrated a proclivity for fair and practical decisions.

Daniel J. Brennan

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83. For a discussion of the NLRB's § 10(k) ruling, see *supra* notes 21-24 and accompanying text.

84. *Hoeber*, 939 F.2d at 125.

85. *Id.*