BENCHMEMO: VIRGINIA PIPE AND SUPPLY CO. v. ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, 88-0381-R
to remand; Aug. 11 at 2:00

ATTORNEYS: Plaintiff--John Moore & Anton Stelly (Coates & Davenport)
Defendant--William Osborne, Kathleen Murray, and John Mooney (Biens, Axelrod & Osborne)

Judge, this matter is before you on the plaintiff's motion to reconsider your order of dismissal and to remand this case back to state court.

As you remember, Virginia Pipe is the sister company of Virginia Sprinkler. Virginia Pipe and Virginia Sprinkler originally brought suit in this Court seeking a declaration that they were not single or joint employers as defined in Article 3 of Virginia Sprinkler's collective bargaining agreement with the Union. Virginia Pipe was dismissed as a plaintiff because the Court lacked subject matter jurisdiction under the Fourth Circuit's ruling in A.T. Massey Coal Co. v. UMWA, 799 F.2d 142 (4th Cir. 1986). Virginia Pipe sougt a declaration that it was not bound. In order to avail itself of jurisdiction under § 301 of the Act, a "plaintiff must allege breach of an existing collective bargaining agreement." A.T. Massey, 799 F.2d at 146.

After being dismissed in federal court, Virginia Pipe brought suit in the Circuit Court of Hanover County, seeking injunctive and declaratory relief. The bill of complaint alleges that the Union has filed a grievance against Virginia Pipe and has expressed its intention to force Virginia Pipe to arbitration. Virginia Pipe cites to provisions of Virginia Sprinklers' collective bargaining agreement with the Union and asks the court to declare that it is not bound by the arbitration clauses in the

collective bargaining agreement, that it cannot be bound by the outcome of arbitration between Virginia Sprinklers and the Union, and that the Union be enjoined from forcing Virginia Pipe to arbitration. In essence, Virginia Pipe makes the same claims and seeks the same relief it pursued in federal court.

Hunter Douglas, Inc. v. Sheet Metals Workers International Association, 714 F.2d 342 (4th Cir. 1983) sets forth the analysis to apply for removal of declaratory judgments involving § 301 of the NLRA. In that case, Hunter Douglas, the employer, filed a declaratory judgment action in state court seeking approval of its use of polygraph testing under the collective bargaining agreement. The Union removed the action to federal court, and Hunter Douglas moved to remand. The district court denied the motion to remand and ordered Hunter Douglas to arbitrate. On appeal, the Fourth Circuit noted: "To be removable to federal court under 28 U.S.C. § 1441, a state action must be within the original jurisdiction of the district court, and its jurisdiction must be ascertainable from the face of the complaint. Gully v. First National Bank, 299 U.S. 109, 113 (1936)." Hunter Douglas, 714 F.2d at 345. Here, it is clear from the holding in A.T. Massey that Virginia Pipe's bill of complaint does not fall within the original jurisdiction of the court.

However, Virginia Pipe's action is a declaratory judgment and special rules for removal apply. "Whether a state action for declaratory judgment is removable to federal court is determined by reference to the character of the threatened action. If it is inevitably federal in nature, then federal jurisdiction exists.

[citations omitted] This rule is a refinement of the more general principle that federal jurisdiction in an action for a declaratory judgment is determined by the character of the threatened action, and not of the defense asserted." Hunter Douglas, 714 F.2d at 345. Under this analysis, Virginia's Pipe cause of action would appear to be removable. The Union's threatened action is the enforcement of a collective bargaining agreement it claims exists between Virginia Pipe and the Union because of Virginia Pipe's relationship with Virginia Sprinkler. Jurisdiction for such a claim would lie in federal district court.

The Fourth Circuit's elaboration in Hunter Douglas also supports the position that Virginia Pipe's action is removable:

> Kallen v. District 1199, National Union of Hosp. and Health Care Employees, 574 F.2d 723 (2nd Cir. 1978), is directly on point. There it was held that a state action to vacate an arbitrator's award under a collective bargaining agreement was removable under § 301, even though it was not a suit for "violation" of a labor contract, since the state defendant's collary right of action to enforce the award could have been brought in federal court under that statute.

Hunter Douglas, 714 F.2d at 345. The Fourths went on to endorse the view that federal court jurisdiction should not turn upon which party wins the race to the courthouse. Id.

Additionally, the judicial gloss the Fourth Circuit has given its opinion in Hunter Douglas supports the assertion of jurisdiction in this matter. In Hunter Douglas, the court wrote: "That the complaint failed to note the distinctivley federal nature of labor contract disputes is, of course, irrelevant. If

a labor contract violation is put in issue, a federal question exists to justify removal even though the complaint is cast entirely under state law." In Cook v. Georgetown Steel Corp., 770 F.2d 1272 (4th Cir. 1985), the Fourth Circuit clarified this statement: "That statement was made in the declaratory judgment context, and the threatened action by the union--claiming that the company violated the collective bargaining agreement and was bound to arbitrate--is clearly within the scope of 29 U.S.C. § 185 [§ 301]." Id. at 1276. Since in this case the threatened action is a claim that Virginia Pipe is bound to arbitrate, Cook suggests that the Court should assert jurisdiction and deny the motion to remand.

A.T. Massey, however, implicitly creates an exception to the "general principle that federal jurisdiction in an action for a declaratory judgment is determined by the character of the threatened action, and not of the defense asserted" enunciated in Hunter Douglas. As you remember in A.T. Massey, Massey had not entered into a collective bargaining agreement with the union, but one of its subsidiaries, Omar, had entered into a collective bargaining agreement. Claiming Massey was bound by Omar's signature on the collective bargaining agreement, the union attempted to force Massey to arbitration. Massey resisted and filed a declaratory judgment action in federal court. The district court did not look to the character of the threatened action--the union's suit under the collective bargaining agreement--but dismissed the action because Massey failed to

allege a "violation" of § 301. The Fourth Circuit affirmed and agreed with the district court's reasoning:

> [T]he plaintiff must allege breach of an existing collective bargaining agreement in order to avail itself of jurisdiction under § 301 of the Act. Since Massey sought a declaration that it was not bound by the 1984 NBCWA [collective bargaining agreement] or the December 23, 1985 collective bargaining agreement, it did not bring itself under the explicit jurisdictional language of the Act. The later suit brought by the union in the West Virginia district court has no such jurisdictional infirmity since it seeks a declaration that Massey and its affiliated companies were bound by the 1984 NBCWA, an admittedly existing agreement.

Id. at 146. Therefore, although the court would have jurisdiction over the coercive suit brought by the declaratory judgment defendant--the union--under § 301, a district court does not have jurisdiction where an employer seeks a declaratory judgment that it is not bound by a collective bargaining agreement. (A.T. Massey may be limited to its unique facts in that the Fourth Circuit was able to reach the ultimate issues posed by Massey's declaratory judgment action in deciding the Union's action. But for now, A.T. Massey governs.)

The fact that the declaratory judgment action was brought in state court rather than federal court in this instance is insignificant. Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1 (1983). The same rules apply to evaluating jurisdiction of a declaratory judgment, and presumedly the exception articulated in A.T. Massey.

Therefore, I believe you should remand the case back to the Hanover Circuit Court. That court will determine if it must

analyze the question of arbitration under federal law as articulated in AT&T Technologies, Inc. v. Communication Workers of America, et al., 89 L.Ed. 2d 648 (1986) or under state contract law.

When the Union removed the case, it also filed a motion to dismiss along with a draft order. The order of dismissal was entered, inadvertently I believe, and should be vacated with the order to remand. You have previously vacated it pending the resolution of the motion to remand.

The Union's position does not shed much light on this matter. The Union takes the position that the Court has jurisdiction over Virginia Pipe's claim, but because Virginia Pipe fails to state a claim upon which relief can be granted, the action should be dismissed. The Union's argument confuses jurisdiction under § 301 with substantive claims and confuses removal jurisdiction with preemption. The Union argues that resolution of Virginia Pipe's claim will involve analysis of the collective bargaining agreement. Federal law governs the interpretation of such agreements and there is a strong need for consistency of interpretation and application of federal labor law. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). Despite the possibility of the application of federal law to Virginia Pipe's action, the Union still must demonstrate to the Court how it has jurisdiction to hear this matter. It can't. Section 301 is the only possible applicable provision, and the Fourth Circuit has expressly ruled that this provision does not

provide jurisdiction in this case. The fact that a state court may have to apply principles of federal labor law does not in and of itself create removal jurisdicition.

The Union interprets A.T. Massey to mean that an employer's claim seeking to declare that it is not bound by a collective bargaining agreement should be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The language of A.T. Massey quoted above suggests, however, that such an employer's suit should be dismissed for lack of subject matter jurisdiction--Rule 12(b)(1). A district court does not have subject matter jurisdiction to hear cases challenging the inapplicability of § 301.

Finally, the Union suggests that the court must have removal jurisdiction of this matter because § 301 preempts the field. It relies on the Supreme Court's decision in Lingle v. Norge Division of Magic Chef, Inc., No 87-259 (Decided June 6, 1988). In Lingle, the Supreme Court considered whether a state retaliatory discharge claim was pre-empted by a collective bargaining agreement and the remedy provided by § 301. The Court held that "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles--necessarily uniform throughout the nation--must be employed to resolve the dispute."

Pipe, you stated if Virginia Pipe filed its action in state court and the Union removed the suit to this Court, "then the issue of whether Va. Pipe is a joint employer with Va. Sprinkler would be squarely before the court." Memo. Op. at 5. This statement was premised on the assumption that the Union would argue that Va. Pipe is bound by the collective bargaining agreement and therefore § 301 applies. Since the Court would have to make an inquiry as to whether § 301 does apply, it would resolve the underlying substantive issue. The Union has not taken this approach, but argues that although § 301 doesn't apply, it pre-empts Va. Pipe's cause of action. I believe this argument is incorrect and the case should be remanded to the Hanover Circuit Court.