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Federal Question Venue -- Unincorporated Associations

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motor vehicle operators,[18] (2) the issuance of a special restricted license for operators of motorcycles, motor scooters, and motor bikes,[19] and (3) the requirement of an examination of eyesight, knowledge of traffic laws and highway signs, and an actual demonstration of ability to operate a vehicle.[20] The court then observed that in taking the examination, each applicant, whether adult or minor, must show "an adeptness in motor vehicle operation and the 'ability to exercise *ordinary* and *reasonable* control in the operation of a motor vehicle.' "[21]

It is the writer's opinion that the Florida court reached a sound conclusion in this case of first impression. The decision follows the more modern trend in negligence law, and the courts will probably extend this line of reasoning to include motorboats, airplanes, and other such dangerous instrumentalities currently being used by minors.

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FEDERAL QUESTION VENUE— UNINCORPORATED ASSOCIATIONS

The plaintiff-railroad brought an action against the defendant-union and others for damages resulting from an illegal strike. The United States District Court for the District of Colorado, treating the defendant unincorporated association like a corporation,[1] overruled the defendant labor union's motion to dismiss for improper venue. The court held the strike illegal[2] and awarded damages to the plaintiff for revenue lost as a result of the strike. The United States Court of Appeals for the Tenth Circuit reversed,[3] holding that the union could be sued under the general venue statute only in the district of its residence[4] and that the union's

18. FLA. STAT. § 322.03 (1965).
19. FLA. STAT. § 322.16 (1965).
20. FLA. STAT. § 322.12 (1965).
21. Medina v. McAllister, 202 So.2d 755, 757 (Fla. 1967) (emphasis supplied).

1. The district court based its reasoning upon Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 188 F. Supp. 721 (D. Vt. 1960), *aff'd*, 307 F.2d 21 (2d Cir. 1962).

2. In December, 1959, and in January, 1960, the National Railroad Adjustment Board issued monetary awards to the Union for breach of collective bargaining agreements by the Railroad, which refused to pay. The Union, without exhausting statutory remedies to enforce the awards, called a strike for May 16, 1960, but the district court issued a temporary restraining order, then a preliminary injunction, and finally a permanent injunction. 185 F. Supp. 369 (D. Colo. 1960), *aff'd*, 290 F.2d 266 (10th Cir. 1961), *cert. denied*, 366 U.S. 966 (1961). However, revenue losses resulted to the Railroad when several large shippers, believing the strike to be a threat, diverted shipments to other freight lines. The Railroad now seeks damages under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1964).

3. Brotherhood of R.R. Trainmen v. Denver & Rio Grande Western R.R., 367 F.2d 137 (10th Cir. 1966).

4. 28 U.S.C. § 1391(b) (1964):

residence was not in Colorado.[5] The Supreme Court of the United States granted certiorari in this federal question venue case of first impression[6] and *held*, reversed: An unincorporated association may be sued in the judicial district where it is doing business or where the claim arose, and the amended general venue provision may be applied.[7] *Denver & Rio Grande Western Railroad Company v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967).

The federal courts have been sharply divided on the question of where venue is proper against an unincorporated association. Some courts have held that venue is proper only where that association has its principal place of business,[8] while other courts have stated that venue is also proper where the association is doing business.[9] The Second Circuit held in *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers*[10] that since venue is a matter of convenience, it should be determined practically. Accordingly, the court in holding that actions could properly be maintained against labor unions wherever they are doing business, based its decision on the reasoning that:

> If an unincorporated union is carrying on sufficient activities in a particular district so that it is deemed to be doing business there, it usually will suffer no undue hardship if required to stand suit there.[11]

In the instant case, the Supreme Court cited and adopted the *Rut-*

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

5. The Court of Appeals relied upon the Supreme Court's holding that such an issue should be resolved by Congress. *See* United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., 382 U.S. 145 (1965); 33 BROOKLYN L. REV. 163 (1966); 51 CORNELL L.Q. 827 (1966); 27 LA. L. REV. 348 (1967).

6. The Court granted the writ ". . . because of the seeming conflict. . . ." with the Second Circuit's holding in Rutland. Denver and Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 558 (1967); Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 188 F. Supp. 721 (D. Vt. 1960), *aff'd*, 307 F.2d 21 (2d Cir. 1962).

7. 28 U.S.C. § 1391(b) (Supp. II, 1965-66), *amending* 28 U.S.C. § 1391(b) (1964), became effective on November 2, 1966, and now provides that venue is also proper where the claim arose.

8. *See* Westinghouse Elec. Corp. v. United Elec. Radio & Mach. Workers of America, 92 F. Supp. 841 (W.D. Pa. 1950), *aff'd*, 194 F.2d 770 (3d Cir. 1952); Brotherhood of Locomotive Firemen & Enginemen v. Graham, 84 App. D.C. 67, 175 F.2d 802 (1948), *rev'd on other grounds*, 338 U.S. 232 (1949); Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635 (S.D.N.Y. 1958); McNutt v. United Gas, Coke & Chemical Workers of America, 108 F. Supp. 871 (W.D. Ark. 1952); Griffin v. Illinois Cent. R.R., 88 F. Supp. 552 (N.D. Ill. 1949); Salvant v. Louisville & N.R.R., 83 F. Supp. 391 (W.D. Ky. 1949). *Cf.*, Hadden v. Small, 145 F. Supp. 387 (N.D. Ohio 1951).

9. *See* R & E Dental Supply Co. v. Ritter Co., 185 F. Supp. 812 (S.D.N.Y. 1959); American Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 169 F. Supp. 777 (S.D.N.Y. 1958); Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426 (E.D. Pa. 1956); Portsmouth Baseball Corp. v. Frick, 132 F. Supp. 922 (S.D.N.Y. 1955). *Cf.*, Joscar Co. v. Consolidated Sun Ray, Inc., 212 F. Supp. 634 (E.D.N.Y. 1963).

10. 188 F. Supp. 721 (D. Vt. 1960), *aff'd*, 307 F.2d 21 (2d Cir. 1962).

11. 307 F.2d at 29.

land holding.[12] The Second Circuit had decided in *Rutland* that reason and practicality required likening an unincorporated association to a corporation. In the instant case, however, the Supreme Court not only failed to rule on this basis, but rather based its decision on what it construed to be the congressional intent in establishing *corporate* residence for venue purposes. The Court noted that prior to 1948 when Congress enacted the general corporate venue statute,[13] the courts had established their own guidelines for determining corporate venue.[14] The passage of section 1391(c) settled the issue of proper venue in an action against a corporation. However, at that time Congress made no mention of where venue would properly lie against an unincorporated association either in the statutory provision itself or in its legislative history.[15]

Therefore, the Court reasoned in *Denver & Rio Grande* that if Congress had considered the problem at all, it had intended that the courts would continue to interpret and decide unincorporated association venue requirements in a broad setting because Congress had, in section 1391(c), interpreted corporate residence for venue purposes in a broader setting than the federal courts had allowed.[16] The Court then continued to explain its reason for allowing a labor union to be sued where it is doing business, holding explicitly that there is no question of jurisdiction of the federal courts involved in this situation as there was in *United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.*[17]

However, it would appear that the *Bouligny* case, decided by the Court in 1965, is not so easily dismissed. Admittedly, in *Bouligny* the Supreme Court was not concerned with the question of venue but was rather concerned with whether a labor union should be treated as an entity for determining diversity rather than diversity being determined by the citizenship of each individual union member. The Court refused to treat the labor union as an entity for diversity jurisdiction, opining that such a determination was exclusively for congressional enactment and was not within the realm of judicial determination. However, the Court in *Denver & Rio Grande* held that an unincorporated association should

12. 387 U.S. 561 (1967).

13. 28 U.S.C. § 1391(c) (1964):

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

14. 387 U.S. 561 (1967).

15. *Id.*, wherein the Court stated that:

[T]here was no settled construction of the law in the courts in 1948, and there is none yet. Nor was there anything to indicate that Congress had considered a labor union's residence to be in only one place or had ever intended a limited view of residence with respect to unincorporated associations. . . . [W]e view the action of Congress in 1948 as simply correcting an unacceptably narrow definition of corporate residence which had been adopted by the courts, while maintaining its silence with respect to the unincorporated association.

16. *Id.* at 561.

17. *Id.* at 563. See also 382 U.S. 145 (1965).

be treated as an entity for federal question venue purposes under section 1391(b).[18]

On the other hand, Mr. Justice Black in his cogent dissent appeared to lean toward the *Bouligny* reasoning when he pointed out that:

> [T]hough venue, relating to the convenience of the litigants, is quite different from jurisdiction, relating to the power of a Court to adjudicate . . . and though Congress may have more constitutional leeway to deal with venue than with jurisdiction . . . venue rules nevertheless pose policy considerations which are and should be weighed by Congress and not by this Court.[19]

Moreover, Mr. Justice Black specifically stated that ". . . the Court oversteps its boundaries in doing that which Congress did not choose to do in expanding the venue provisions. . . ."[20]

Under the *Coronado* decision[21] (later incorporated into Rule 17(b) of the Federal Rules of Civil Procedure) the Court had held that a labor union should be treated as an entity in federal question litigation. In the instant case, the Court consistently held that for venue purposes in an action based upon federal question jurisdiction, a labor union should be treated as an entity. However, in the *Bouligny* decision the Court refused to apply the same reasoning and held that a labor union is not an entity in determining diversity of citizenship jurisdiction. The Court held that such treatment must be determined by Congress. Thus, an unincorporated association is an entity for purposes of federal question venue (*Denver & Rio Grande*) and jurisdiction (*Coronado*). However, in the absence of legislation it is not such an entity for the purpose of determining diversity of citizenship (*Bouligny*).

The *Denver & Rio Grande* Court would perhaps have reached the same just result that it reached by distinguishing *Bouligny* and basing its decision not on the mysteries of what Congress chose to ignore, but rather on the practical logic and sound reasoning of a California court which held that the unincorporated association of today is so similar to a corporation that it must be treated as such.[22] Moreover, the court stated that in the face of modern-day realities such a result must be reached at least on the procedural level.[23]

18. *Id.* at 560. One wonders if the Court will also treat an unincorporated association as an entity for the purposes of the diversity venue statute, 28 U.S.C. § 1391(a) (Supp. II, 1965-66), *amending* 28 U.S.C. § 1391(a) (1964).

19. 387 U.S. 569-570 (1967) (citations omitted).

20. *Id.* at 570.

21. United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922).

22. Juneau Spruce Corp. v. International Longshoremen's & Warehousemen's Union, 229 P.2d 424 (Cal. App. 1951).

23. *Id.* at 429:

> [The] traditional view grew up when labor unions were small unimportant organizations, and is no longer in accordance with the facts. . . . It is obvious that such organizations are no longer comparable to voluntary fraternal orders or partner-

Also at issue in the instant case was the November, 1966 amendment of section (b) of the general venue statute.[24] The *Denver & Rio Grande* Court held that an amendment to a procedural rule will be applied retroactively to litigation pending at the time that the amendment becomes effective "absent some contrary indications by the Congress and absent any procedural prejudice to either party. . . ."[25] The 1966 amendment provided that venue would also be proper where the claim arose in suits against individuals based wholly or in part upon federal question jurisdiction. In the instant case the Court of Appeals reached its decision on September 21, 1966, and denied rehearing on October 24, 1966.[26] Thus, it was unable to consider the amended statute. The Supreme Court held that the Court of Appeals improperly determined residence in applying section 1391(b) as it read when the action was brought.[27] The Court also held that if the district court on remand should determine that the union was not a resident of Colorado in that it was not doing business there, then retroactive application of the amended statute should be invoked, and the court should then determine whether the claim arose in Colorado.[28]

In the instant case the Court held that an unincorporated association is amenable to suit wherever it is doing business and where the claim arose. Thus, it appears that in interpreting residence of an unincorporated association under section 1391(b), the Court assimilated the doing business provision of section 1391(c) which concerns only corporate residence for venue purposes. Consequently, at present if an unincorporated association is sued in an action based wholly or in part upon a federal question, the association will be held to reside in the judicial district where it is doing business and will be amenable to suit there as well as where the claim arose.

It should be noted that the Court of Appeals' "improper" application of section 1391(b), as it read when the action was brought, relied upon the Supreme Court's reasoning that unincorporated associations and corporations should not be analogized because such an analogy could be advanced only by Congress and not by the courts.[29] Even Mr. Justice Black in his dissent in the instant case noted that if the case had been

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ships; that they are sui generis, and approximate corporations in their methods of operation and powers. This being so, at the procedural level at any rate, wherever it can be done without violation of some rule of law, the ends of justice will be more properly served if the courts apply to such organizations the rules applicable to voluntary fraternal orders or partnerships. . . . To consider such organizations under present day conditions as mere social or fraternal orders or partnerships is to close one's eyes to the realities now existing.

24. 28 U.S.C. § 1391(b) (Supp. II, 1956-66), *amending* 28 U.S.C. § 1391(b) (1964).

25. 387 U.S. 563 (1967).

26. 367 F.2d 137 (10th Cir. 1966).

27. 387 U.S. 563 (1967).

28. *Id.* at 563-564.

29. United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145 (1965).

". . . remanded solely for a determination of the propriety of venue under the 1966 amendment"[30] he would not have dissented.

The lot of the unincorporated association, particularly the labor union, has for more than a century been the stepchild of federal court action. If in the instant case the Supreme Court had held as it did on the basis of practicality instead of attributing unspoken intentions to the 1948 Congress, and if the Court had faced the reality that a labor union of today is different from a corporation only by way of the fact that it lacks a "birth certificate" and had by virtue of this fact treated them alike, the Court would be applauded for its reasoning. Nevertheless, the Court is to be commended upon the results at which it arrived in spite of the tortured approach to its conclusion.

LINDA RIGOT

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT: EMPLOYER'S LIABILITY TO THIRD PARTIES

ODECO hired a contractor to repair an oil tank on a fixed oil drilling platform in the Gulf of Mexico. Two employees of the contractor were injured when the tank exploded. The employees received workmen's compensation from the contractor under the Longshoremen's and Harbor Workers' Compensation Act[1] and also brought suit for damages against ODECO. ODECO filed a third party complaint against the contractor which was dismissed by the trial court. On appeal to the Court of Appeals, Fifth Circuit, *held,* affirmed: A third party tortfeasor is barred from indemnity against an employer under the Act unless the employer breached a duty it owed to the third party which was also the cause of the injury to the plaintiff-employee. *Ocean Drilling & Exploration Company v. Berry Brothers Oilfield Service,* 377 F.2d 511 (5th Cir. 1967).

Section 905 of the Longshoremen's and Harbor Workers' Compention Act provides:

> The liability of an employer prescribed in section 904 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employment at law or in admiralty on account of such injury or death . . . .[2]

30. 387 U.S. 570 (1967) n.10.

1. 44 Stat. 1424 (1927), *as amended,* 33 U.S.C., ch. 18 (1964).

2. Similar provisions are found in almost all workmen's compensation statutes. A. LARSON, 2 LARSON'S WORKMEN'S COMPENSATION LAW, § 76 (1965), [hereinafter cited as 2 *Larson's*], *e.g.,* FLA. STAT. § 440.11 (1965).