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First Amendment - Labor Law - Labor-Management Reporting and Disclosure Act - Section 101(a)(4) - Employer-Funded Suits

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FIRST AMENDMENT—LABOR LAW—LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT—SECTION 101(a)(4)—EMPLOYER-FUNDED SUITS—The United States District Court for the District of Columbia has held that precluding employers and employer associations from financing suits brought by employees against their unions violates the employer's or employer association's freedom of association and speech, and right to petition.

UAW v. National Right to Work Legal Defense and Education Foundation, 433 F. Supp. 474 (D.D.C. 1977).

In 1973, the International Union of Automobile Workers (UAW) and nine other unions sought declaratory and injunctive relief and damages in the District Court for the District of Columbia against the National Right to Work Committee and National Right to Work Legal Defense and Education Foundation (Foundation).[1] The UAW alleged that the Foundation was a conduit through which interested employers were financing and supporting legal actions brought by workers against the plaintiff unions in violation of section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),[2] prohibiting employer interference in employee suits against unions. The Foundation filed a motion to dismiss for lack of subject matter jurisdiction, asserting that no private right of action was created by this section of the LMRDA.[3] Holding the

1. UAW v. National Right to Work Legal Defense and Educ. Foundation, 366 F. Supp. 46 (D.D.C. 1974).

2. *Id.* at 47. Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding . . . *And provided further,* that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

29 U.S.C. § 411(a)(4) (1970) [hereinafter referred to as section 101].

In addition to the § 101 cause of action, the UAW sought to have the Foundation file reports pursuant to § 203(b)(1) of the LMRDA. This section provides that every person who, pursuant to an arrangement with an employer, undertakes to persuade employees on whether or not to exercise their right to organize and bargain collectively, or affect the manner of exercising that right, shall file a detailed statement of the terms and conditions of the arrangement with the Secretary of Labor. Included in this statement will be receipts from employers and disbursements of any kind. 29 U.S.C. § 433(b)(1) (1970) [hereinafter referred to as section 203].

3. 366 F. Supp. at 47. The court also considered this motion in regard to the filing of reports under § 203. *Id.* The court held that the private litigant (UAW) could invoke the

unions to be aggrieved persons within the meaning of section 102 of the LMRDA,[4] the court concluded that the UAW had standing to bring the section 101 suit.[5]

Subsequently, the UAW brought a motion to compel interrogatories, which Judge Richey granted on June 5, 1974 in his second opinion in this case.[6] The Foundation had attempted to resist the motion. First, it argued that the "no employer interference" proviso to section 101 applied only to those actions where the employee's suit against the union was violative of the employee rights under section 101 of the LMRDA.[7] Second, it asserted that section 101 did not preclude interested employer financing where the employee was suing the union on non-title I sections of the LMRDA since such preclusion would violate section 103 of the LMRDA.[8] The court dismissed the Foundation's first assertion on the basis of the clear, unambiguous language of the act[9] and case law construing it.[10] Find-

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jurisdiction of the court since the district courts had original jurisdiction of any action arising under any act of Congress that regulates commerce (28 U.S.C. § 1337 (1970)), and the purpose of this act was to prevent or eliminate improper practices that burden or obstruct commerce (29 U.S.C. § 401(c) (1970)). 366 F. Supp. at 50. The court later reversed itself on this issue. See UAW v. National Right to Work Legal Defense and Educ. Foundation, 433 F. Supp. 474, 484 (D.D.C. 1977), where, after examining supplemental briefs, it was concluded that only the Secretary of Labor, pursuant to § 210 of the LMRDA, 29 U.S.C. § 440 (1970), may bring a civil action to enforce the reporting requirements. Section 210 provides: "Whenever it shall appear that any person has violated . . . the provisions of this subchapter, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate . . . ." *Id.*

4. 366 F. Supp. at 48. Section 102 of the LMRDA provides that any person (the term person includes labor organizations, as provided in § 3(d) of the LMRDA, 29 U.S.C. § 402(d) (1970)) whose rights are secured by the provisions may bring an action in a United States district court for appropriate relief. 29 U.S.C. § 412 (1970).

5. 366 F. Supp. at 49.

6. UAW v. National Right to Work Legal Defense and Educ. Foundation, 376 F. Supp. 1060 (D.D.C. 1974).

7. *Id.* at 1061. Section 101 of the LMRDA guarantees the employee equal rights, freedom of speech and assembly, stability of dues, protection of their right to sue, and safeguards against improper disciplinary action. 29 U.S.C. § 411 (1970) [hereinafter referred to as title I].

8. 376 F. Supp. at 1063-64. Section 103 of the LMRDA provides: "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and by-laws of any labor organization." 29 U.S.C. § 413 (1970) [hereinafter referred to as section 103].

9. 376 F. Supp. at 1062. The court pointed out that § 101 applied to "an action in any court, or in a proceeding before any administrative agency" and that the proviso in question precluded financing by employers in "any such action, proceeding, appearance, or petition." *See* note 2 *supra.*

10. *Id.* at 1062-63. The court relied on NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968), and Roberts v. NLRB, 350 F.2d 427 (D.C Cir. 1965). The

ing that the Foundation had misconceived the purpose of section 103 of the LMRDA, the court also dismissed the second assertion.[11]

Upon the grant of the UAW's motion to compel the interrogatories,[12] the Foundation petitioned the Court of Appeals for the District of Columbia for a stay and a mandamus to vacate the order compelling discovery and to dismiss the section 101 cause of action either for lack of subject matter jurisdiction or because of the unconstitutionality of the second proviso of section 101.[13] The stay was granted,[14] but the court of appeals was unable to reach the merits of the mandamus petition on the record before it. Since the Foundation claimed to be a neutral group, within the meaning of *NAACP v. Button*,[15] rather than a front for interested employers, and thus not subject to the provisions of section 101, the determination of what type of organization the Foundation was in fact had to precede any consideration of the constitutional question. The case was therefore remanded to the trial court.[16]

Supreme Court in *Marine & Ship Workers* concluded that this first proviso to § 101(a)(4), which required the union member to exhaust reasonable internal procedures before instituting legal action, gave the NLRB the discretion for four months not to hear an unfair labor charge filed by the employee against the union while the union member sought internal relief. In *Roberts*, the court of appeals held that this proviso did not preclude the NLRB from exercising its powers under the National Labor Relations Act. But it did authorize the Board to withhold exercise of their authority for four months if reasonable internal procedures had not been exhausted by the union member in his unfair labor practice charge against the union. Although these two cases dealt with the scope of the first proviso of section 101 and not with the second, which was in question in *UAW*, the cases, by applying this proviso to unfair labor practice charges, indicate that section 101 is not limited to employee suits against the union for violation of employee rights under § 101 of the LMRDA. 376 F. Supp. at 1062.

11. The purpose of section 103, which provides that nothing in the LMRDA shall limit an employee's rights or remedies under any law, before any court, or under any constitution or by-laws of a labor organization, was to preserve generally employee rights of action under the NLRA. It cannot preserve a right to employer financing since employers have never been under an obligation to pay for employee suits against the unions. 376 F. Supp. at 1064.

12. The UAW sought information as to the amounts contributed to the Foundation by 116 persons listed on its business advisory committee, the names of the 37 companies who gave more than five hundred dollars in 1972, and the names of 37 companies drawn at random from those contributing between one hundred and five hundred dollars in 1972. *See* National Right to Work Legal Defense and Educ. Foundation v. Richey, 510 F.2d 1239, 1241 n.4 (D.C. Cir. 1975), *cert. denied*, 422 U.S. 1008 (1975).

13. *Id.* The Foundation claimed the section violated its freedom of speech and association and its right of petition.

14. *Id.*

15. 371 U.S. 415 (1963) (to preclude the NAACP by statute from supplying NAACP staff attorneys to private litigants in desegragation actions would be a violation of the NAACP's first amendment rights). *See* note 52 and accompanying text *infra*.

16. 510 F.2d at 1243.

Because the Foundation continued to disobey discovery orders, Judge Richey invoked rule 37(b)(2)(A) of the Federal Rules of Civil Procedure[17] which in effect established the Foundation as an association funded by employers to promote employer interests,[18] an interested rather than a neutral group. The UAW thereupon filed motions for interlocutory summary judgment and preliminary injunction.[19] The Foundation counterclaimed by renewing its contention that the proviso to section 101(a)(4) was unconstitutional in that it infringed on its first amendment rights.[20] In his final opinion, issued on June 2, 1977,[21] Judge Richey considered these motions in relation to the section 101 cause of action originally filed by the UAW on October 24, 1973.[22] After first concluding that the UAW had established a section 101 violation by the Foundation,[23] the district court held that by precluding the financing of employee suits against unions, the section 101 proviso violated the Foundation's first amendment rights.

In his analysis, Judge Richey initially acknowledged the directive of the court of appeals that the constitutional issues could not be decided until the organizational nature of the Foundation was determined,[24] but concluded that, with the rule 37 order, sufficient facts were established by the entire record to allow him to view the Foundation as an interested employer association and thereby proceed to adjudicate the constitutional counterclaim defense.[25] Judge Richey thus considered whether there were any infringements on the Foundation's first amendment rights. Under the facts, the Founda-

17. UAW v. National Right to Work Legal Defense and Educ. Foundation, No. 783-73 (D.D.C., Jan. 26, 1976). When a party refuses to comply with a court order compelling discovery, the court can make another order. This second order establishes the matters, which were to be answered by the first order, in favor of the party obtaining the order. FED. R. CIV. P. 37(b)(2)(A) [hereinafter referred to as rule 37]. The rule 37 order was entered because of the Foundation's willful failures to comply with the discovery order.

18. 433 F. Supp. at 480-81.

19. *Id.* at 478.

20. *Id.*

21. *Id.* at 477.

22. *Id.* at 478. *See* notes 1 & 2 and accompanying text *supra.*

23. It was undisputed that the Foundation had funded at least one union member in the litigation against his labor organization and that the suits were "actions in any court" within the meaning of § 101(a). The UAW had only to prove that the Foundation was an "interested employer or employer association" within the meaning of the statute and this, the court concluded, was established by the rule 37 order. 433 F. Supp. at 480-81.

24. 433 F. Supp. at 481.

25. *Id.*

tion was an association supporting employee litigation against unions and could not bring actions on its own. The court recognized that under *California Motor Transport Co. v. Trucking Unlimited,*[26] the right of access to the courts is included in the right of petition, and therefore held section 101 violative of the Foundation's right. Relying on *Abood v. Detroit Board of Education,*[27] where the court determined that an individual's freedom to associate for the advancement of beliefs was protected by the first amendment, and *NAACP v. Button,*[28] where it was stated that association for litigation may be the most effective form of policial association, the court concluded there was also infringement on the Foundation's right of association and speech.[29]

But the first amendment is not an absolute prohibition of state infringement. The court agreed with the UAW that a sufficiently compelling state interest would justify infringement as long as the means chosen to effectuate that state interest minimized possible infringement; thus, the court balanced the infringement against the asserted compelling state interests.[30] The court reasoned that the interests in the prevention of interference by employers in the relations between unions and their members, and the prevention of

26. 404 U.S. 508 (1972). Plaintiff and defendant were competitive highway carriers. Defendant conspired to monopolize trade and commerce in the transport of goods by instituting state and federal proceedings designed to defeat plaintiff's transporting rights. The Supreme Court held that although the right of access to the courts is included in the right of petition, the first amendment would not under the facts preclude application of the Sherman Antitrust Act.

27. 431 U.S. 209 (1977). In *Abood,* one of the provisions of the collective bargaining agreement required nonunion teachers to pay a service charge to the union equal to regular dues required of union members. The nonunion teachers argued, and the Court agreed, that this violated their right of freedom of association "because they have been prohibited not from actively participating, but rather from refusing to associate." *Id.* at 234.

28. 371 U.S. 415 (1963). For a discussion of the case, see note 52 and accompanying text *infra.*

29. 433 F. Supp. at 482.

30. *Id.* The basis for the court's balancing test was Wooley v. Maynard, 430 U.S. 705 (1977) and Buckley v. Valeo, 424 U.S. 1 (1976). In *Wooley,* the state claimed two interests in requiring a state motto to be displayed on license plates. The first was facilitating the identification of passenger vehicles and the second was promoting the appreciation of history, individualism, and state pride. The Court held that neither of these were sufficiently compelling to justify infringement of first amendment rights. The *Buckley* Court held that the governmental interest in preventing the corruption spawned by the coercive influence of large financial campaign contributions was sufficiently compelling to validate the contribution restrictions of the Federal Elections Campaign Act of 1971, 18 U.S.C. § 608(b)(1)-(3) (Supp. V 1975), and was closely drawn to avoid unnecessary infringement. *See* 424 U.S. at 25, 28-29.

employer abuse of section 101(a)(4) rights, were not sufficiently compelling to outweigh the infringement on the Foundation's first amendment freedoms.[31] Therefore, the section 101 proviso was unconstitutional. Additionally, even if the UAW could offer sufficiently compelling interests to permit some abridgement of first amendment rights, the rule of *Shelton v. Tucker*[32] permitted infringement by a statute only if the statute is drawn to impose the slightest degree of infringement possible. The court concluded that the section 101 proviso would still be unconstitutional due to its indiscriminate broadness.[33]

UAW represents a departure from the traditional attitude of the courts toward labor relations.[34] The LMRDA, one of the many national labor laws,[35] reaffirmed the national labor relations policy of favoring collective bargaining and the maintenance of a free flow of commerce.[36] It was enacted by Congress to ensure the observance of

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31. 433 F. Supp. at 483.

32. 364 U.S. 479 (1960). In *Shelton*, an Arkansas statute, ARK. STAT. ANN. § 80-1229 (1960), required a teacher to file an annual report of every organization to which he had belonged or regularly contributed within the preceding five years. The Court stated:

> The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.

364 U.S. at 490.

33. 433 F. Supp. at 483. *See also* Kusper v. Pontikes, 414 U.S. 51 (1973); United States v. Robel, 389 U.S. 258 (1967). In *Kusper*, a voter was barred from voting in a Democratic primary for state and federal offices because she had voted in a Republican city primary within the preceding twenty-three months. This twenty-three month rule was a provision of the Illinois Election Code, ILL. ANN. STAT. ch. 46, § 7-43(d) (Smith-Hurd 1965). The Court held the statute unconstitutional. The state interest against raiding, whereby voters in sympathy with one party vote in another party's primary to distort the result, could be controlled by less drastic means. *Robel* dealt with § 5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. § 784(a)(1)(D) (1970), which provides that when a communist-action organization is under final order to register, it shall be unlawful for any member of the organization "to engage in any employment in any defense facility." The defendant, who was charged with violating the act, claimed that it violated his first amendment rights. The Court agreed; the statute held a person guilty for being a member of an organization without a showing that the organization posed a threat to our government.

34. See Bond, *The NLRA and the Forgotten First Amendment*, 28 S.C.L. REV. 421, 421 (1977), for a discussion of the protective role taken by the courts towards unions.

35. COMMERCE CLEARING HOUSE, 1977 GUIDEBOOK TO LABOR RELATIONS 20-21 (17th ed. 1977) [hereinafter referred to as GUIDEBOOK]. Our national labor policy has its roots in the Railway Labor Act, the Norris-LaGuardia Act, the National Labor Relations Act, the Taft-Hartley Act, and the Labor-Management Reporting and Disclosure Act of 1959. *Id.* at 19-21 (discussion of the purposes of these acts).

36. *Id.* at 21.

high standards of responsibility and ethical conduct on the part of both employers and unions in administering the affairs of their organizations. Furthermore, the proviso to section 101 was specifically directed to the impropriety of interested employers or employer associations financing suits in which they were not a party.[37]

In holding this proviso to be in conflict with the Constitution, the court veered from the direction seemingly set for it by the court of appeals. The court of appeals viewed the Foundation's argument as resting on its claim that it was a neutral group.[38] Implicit in the issue as framed by the court of appeals—whether the Foundation met the neutrality test—was the premise that Congress could constitutionally preclude financing by an interested employer association.[39] Had Judge Richey followed the appeals court's assumption, he would have dismissed the Foundation's counterclaim upon finding that the Foundation was an interested employer association. The district court, however, upon concluding that the Foundation had the status of an interested employer association, proceeded to balance the infringement on the Foundation's first amendment freedoms against the "compelling interests" suggested by the UAW and found the latter to be inadequate.

The analysis of the district court in concluding that prevention of employer interference was not sufficiently compelling to justify the infringement appears to be deficient in two respects. First, employer interference in affairs between an employee and his union is contrary to established statutory and judicial labor policy. Statutes implementing this principle began with the Erdman Act of 1898,[40] and continued with the Railway Labor Act of 1926,[41] the Norris-

37. 99 CONG. REC. 2988 (1959). Republicans and Democrats agreed that, overall, the § 101 proviso was a good provision. The debate was over whether any employer, interested or not, should be precluded from financing the suit. *Id.*

38. 510 F.2d at 1243.

39. *Id.* The court stated:

> We do not understand petitioners to argue that Congress may not prohibit direct financing by an interested employer through a sham or cover entity. Their argument rather must rest on their assertion that they are a neutral body, and the constitutional question they present thus cannot be decided without a determination of what type of organization the Foundation is in fact.

Id.

40. Erdman Act, ch. 370, § 10, 30 Stat. 424 (1899) (repealed 38 Stat. 108 (1915)) (yellow dog contract was outlawed).

41. 45 U.S.C. § 152 (1970) (employee rights of self-organization were assured without employer interference).

LaGuardia Act,[42] the National Labor Relations Act,[43] and the Taft Hartley amendments.[44] There is also a myriad of cases that barred employer interference. For example, the provisions of the Railway Labor Act were upheld against constitutional attack in *Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks,*[45] where the Court held that the employer had no right to interfere with the employee's choice of union representation. *International Association of Machinists v. NLRB*[46] emphasized the NLRA's policy to free collective bargaining from employer influence. In *NLRB v. Gissel Packing Co.,*[47] the Court held that an employer's first amendment right to communicate his views did not outweigh an employee's rights to associate freely as provided by the NLRA. Thus, by concluding that employer interference was not sufficiently compelling, the district court ignored the labor relations policy that has been developed by our legislative and judicial systems.

The second deficiency in the court's balancing test was its failure to consider the Foundation's purpose in financing the suits. It is certainly arguable that the Foundation's purpose was simply to use the suit as a sham device to decrease union power by harassing unions and lowering union esteem in the eyes of the employees.[48]

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42. 29 U.S.C. §§ 101-115 (1970) (assured against employer intrusion in union affairs but failed to provide positive measures with respect to those matters).

43. 29 U.S.C. §§ 151-167 (1970) (provided positive protection for employee self-organization against employer interference through the use of an unfair labor practice proceeding).

44. 29 U.S.C. § 186 (1970) (forbade employers giving money to a union).

45. 281 U.S. 548 (1930). The defendant railroad company promoted the Association of Clerical Employees-Southern Pacific Lines in opposition to the plaintiff, Brotherhood of Railway & Steamship Clerks, which had been previously authorized by a majority of the company's railway clerks. The activities constituted an interference with the liberty of the clerical employees in selecting representatives for the purposes set forth in the Railway Labor Act.

46. 311 U.S. 72 (1940). The Supreme Court set aside a collective bargaining agreement due to various unfair labor practices committed by an employer in his attempts to aid the union's organizational drive.

47. 395 U.S. 575 (1969). To counter a union's organizational campaign, the employer sent out various publications to his employees. Because these publications were threatening and not factual, the Supreme Court concluded that the employer committed an unfair labor practice.

48. Because the Foundation never disclosed the purposes of its contributors (which subsequently led to the rule 37 sanction), this is only a presumption. Judge Richey admitted that the "proviso serves to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers." 366 F. Supp. at 48. See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 HARV. L. REV. 851, 871

This would not have been the first time a court was faced with a sham device disguised as a first amendment claim. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[49] the Supreme Court considered the truckers' contentions that while a publicity campaign appeared to be directed toward persuading a Pennsylvania governor to veto a so-called "fair truck" bill, it was actually an attempt by the railroads to hurt the trucking industry as a whole in violation of the Sherman Antitrust Act. Although the Supreme Court held the campaign to be legitimate, it stated that there could be situations where a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to hurt competitors and that the first amendment would not prevent the application of the Sherman Antitrust Act in those cases.[50] Similarly, in *California Motor Transport Co. v. Trucking Unlimited*,[51] it was held that the first amendment does not insulate an industry's use of the judicial system from federal antitrust prohibitions, where the purported attempt to influence the government through the judicial system was a mere sham to hinder competitors. The *Noerr* dictum and *Trucking Unlimited* are extremely persuasive, for if Congress could constitutionally infringe on first amendment rights and prohibit employers from harassing competitors, it could also prohibit employers from harassing unions.

The court relied on *Button*[52] to support the proposition that association for litigation may be the most effective form of political association, but ignored the basic distinction the court of appeals

(1960) [hereinafter cited as Aaron], where it was stated that the purpose of the proviso was to prevent union members from "fronting" for attacking employers.

49. 365 U.S. 127 (1961). See 15 U.S.C. §§ 1-2 (1970) for the applicable provisions of the Sherman Antitrust Act.

50. 365 U.S. at 144.

51. 404 U.S. 508 (1972).

52. 371 U.S. 415 (1963). In *Button*, the NAACP was concentrating upon financing litigation aimed at ending racial segregation in the public schools of Virginia. At NAACP meetings, one of the NAACP attorneys would explain what was legally necessary to fight desegregation and on occasion would pass around blank forms seeking to encourage citizens to file actions, which would be financed by the NAACP against the school boards. In 1956, the Virginia legislature added chapter 33 to the Virginia Code, VA. CODE §§ 54-74, -78, -79 (1974), which forbade the solicitation of legal business by a "runner" or "capper". Chapter 33 defined "runner" or "capper" to include "an agent for an individual or organization which retains an attorney in connection with an action to which it is not a party and in which it has no pecuniary right or liability." Despite the state's interest in regulating professional conduct, the Court held chapter 33 to be violative of the NAACP's right of petition, speech, and association. 371 U.S. at 430.

highlighted between a neutral group and an interested employer.[53] In *Button,* solicitation and litigation were held to be forms of political expression, the means to obtaining the end of racial desegregation.[54] In contrast, the Foundation-supported litigation served no political ends, only the employer's own selfish end of decreasing the unions' power[55] by forcing them into harassing litigation and interfering with internal union disputes. Moreover, in *Button,* a possible conflict of interests between the interest group (NAACP) and the individual plaintiff was unlikely since the individual and the NAACP were both seeking racial desegregation. In *UAW,* however, a conflict of interests between the interest group (Foundation) and the individual plaintiff was more probable. The individual is only concerned with his own personal claim, whereas the Foundation is seeking the overall effect of interfering with the union through individual law suits. Because an individual may have a weak case, he may be better off by accepting an out-of-court compromise rather than attempting to achieve a more substantial sum at trial.[56] Because this type of compromise would frustrate the attainment of the Foundation's goals, the Foundation attorney representing the employee might not make the employee aware of his alternative.[57]

Finally, the statute is not as broad as Judge Richey construed it.[58] The legislature never intended to prevent all employers from getting into court. If the employer or employer association is a party to the action, the proviso is inapplicable. Moreover, only "interested" employers[59] are within the proviso's limitations. Personal friends or banks who are incidental employers are not so precluded from financing suits.[60] These factors, combined with the many Supreme Court decisions holding the public welfare to be a sufficiently compelling interest to justify infringement on first amendment rights by

53. *See* notes 38-39 and accompanying text *supra.*

54. 371 U.S. at 430.

55. *See* notes 52-54 and accompanying text *supra.*

56. See Birkby & Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts,* 42 TEX. L. REV. 1018, 1036-37 (1964), for a discussion of interest group litigation.

57. *Id.* at 1036.

58. 433 F. Supp. at 483. *See* notes 30-33 and accompanying text *supra.*

59. See Aaron, *supra* note 48, at 871-72, for a discussion of the problem that is created by use of the phrase "interested employer."

60. *See* 105 CONG. REC. 6724-25 (1959), where the Senate discussed the proviso's effect if the word "interested" were not included in the phrase "interested employer or employer association."

statutes worded equally as broad,[61] undercut the persuasiveness of Judge Richey's opinion.

The decision to allow any interested employer or employer association to fund litigation brought by employees against their unions may have several undesirable effects. First, it may result in a flood of litigation. Since the suit will be financed by the employer, the employee will not need to consider the likelihood of winning or the relation between the potential recovery and his court costs and attorney fees. He will merely bring the suit and hope that its outcome is favorable. Second, it may result in abuses of our judicial process. If an employee has a disagreement with his union or is no longer supportive of it, he may file a suit with no legal basis merely as a form of retaliation against the union. Yet, in spite of these undesirable effects, the district court departed from the protective role courts have taken towards unions.[62] The court of appeals[63] and other courts which might be faced with this problem in the future should not support this departure. If an employee wants to bring an action against the union, it must be his decision, and his decision alone. To permit the employer to intervene threatens the industrial peace that underlies our labor policy.[64]

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61. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Burroughs v. United States, 290 U.S. 534 (1934); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928). In *Communist Party*, § 7 of the Subversive Activities Control Act, 50 U.S.C. § 792(a) (1970), was held constitutional. Protection of the public welfare was held to be sufficiently compelling to justify the registration of communist groups with the Secretary of State. In *Burroughs*, the protection of the public against corruption was sufficiently compelling to permit the Federal Corrupt Practices Act, 2 U.S.C. §§ 241-245 (1970), to require all political committees to file the names of all contributors with the Clerk of the House of Representatives. Because protection of the public welfare was a sufficiently compelling interest, the *Bryant* Court upheld a state statute, N.Y. Civ. Rights Law § 53 (McKinney 1976), that required the Ku Klux Klan to register with the Secretary of State.

62. *See* note 34 and accompanying text *supra*.

63. The case is pending before the court of appeals. UAW v. National Right to Work Legal Defense and Educ. Foundation, Nos. 77-1739, 77-1766, 77-1767 (D.C. Cir. June 2, 1977).

64. *See* Guidebook, *supra* note 35, at 21.