IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4993
(Summary Calendar)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Local Union No. 390, ET AL.,

Plaintiffs-Appellees,

versus

QUANTUM CHEMICAL CORPORATION, USI Division,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:92cv355)

(February 3, 1993)

BEFORE KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

In this labor law case, Defendant-Appellant Quantum Chemical Co. (Quantum) appeals the district court's grant of a preliminary injunction preventing Quantum from implementing its overtime policy. Concluding that the district court abused its discretion in granting such relief, we vacate the preliminary injunction.

I

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

FACTS AND PROCEEDINGS

This dispute arises from Quantum's implementation of an "on call duty" policy (the new policy) to supplement its preexisting policy (the old policy). Under the old policy, overtime work was assigned on the basis of a list that ranked workers in order, from those with the least number of accumulated overtime hours to those with the most. Whenever an unscheduled need for overtime work arose, the company would begin to call workers by telephone in that order. If no one from the list agreed to come into work, the process would be repeated a second time. If there was still no one willing to come in, the company would bring in either a supervisor or an outside contractor from a second list.

Because its workers had demonstrated an unwillingness to work overtime when called in the past, Quantum initiated the new policy on the authority of the following language contained in the newly negotiated collective bargaining agreement: "Because of the absolute necessity of keeping the Plant in continuous production, employees will be required to work overtime." The new policy requires workers to be "on call" on a rotating basis every day of the week, including weekends. Throughout such periods, each "on call" employee is required to carry an electronic pager. If called, the employee must respond within twenty minutes; and once the employee responds, he or she must report to work within "a reasonable time" or face disciplinary actionsQincluding the possibility of discharge. We reiterate, however, that an employee would be called under the new policy only if the established method

under the old policy failed to produce the required overtime workers. And, under the new policy, the employees are free to swap their rotation schedules.

The unions objected to the new policy through the appropriate grievance procedures. In addition, the unions filed suit in federal district court under § 301 of the National Labor Relations Act (NLRA),[1] alleging breach of collective bargaining agreements and seeking a temporary restraining order and a preliminary injunction to prevent implementation of the new policy pending completion of arbitration. The district court granted the temporary restraining order, and subsequently granted the preliminary injunction, reasoning that arbitration would not compensate the employees for lost time and that therefore an injunction was appropriate to preserve the status quo.

Quantum timely appealed, arguing that under the Norris-LaGuardia Act (NLGA)[2] the district court lacked jurisdiction to issue the injunction. Alternatively, Quantum urges that even if the district court had jurisdiction to issue the injunction, it abused its discretion in doing so in the instant case.

II

ANALYSIS

The NLGA limits the jurisdiction of federal courts to issue injunctions in labor disputes, providing in pertinent part:

> No court of the United States . . . shall have

[1] 29 U.S.C. § 185.

[2] Id. §§ 101-115.

> jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy in this chapters.[3]

The Supreme Court clarified this provision in Boys Markets, Inc. v. Retail Clerks Union,[4] holding that a court may issue an injunction to prevent an action, the continuation of which would frustrate the arbitration agreement.[5] An injunction under such circumstances is permissible, the Court reasoned, because it was the "limited use of equitable remedies to further the important public policy" of favoring voluntary arbitration.[6]

Both parties concede that the exception created by Boys Markets is a narrow one. Subsequent decisions of this court have applied the rule of Boys Markets and its progeny,[7] which guide our determination in the instant case. In Local Union 733 of IBEW v. Ingalls Shipbuilding,[8] we articulated a two prong test when we held that injunctions to preserve the status quo should not be

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[3] Id. § 101.

[4] 398 U.S. 235 (1970).

[5] In Boys Markets, the action at issue was a strike by the employees. The Court classified this as a "tactic[] that arbitration is designed to obviate." Id. at 249. The Court also reasoned that the issuance of the injunctive relief would "merely enforce[] the obligation that the Union freely undertook under a specifically enforceable agreement to submit disputes to arbitration. Id. at 252-53.

[6] Id. at 253.

[7] Most importantly, see Buffalo Forge Co. v. Union Steelworkers of America, 428 U.S. 397 (1976).

[8] 906 F.2d 149 (5th Cir. 1990).

issued unless: (1) the employer agreed in the labor contract not to engage in self-help, or "[t]he arbitration process to which the parties have agreed would be frustrated or rendered nugatory by the self-help measure"; and (2) the "traditional requirements for a preliminary injunction" are present.[9] The arbitration process is rendered meaningless "only if any arbitral award in favor of the union would fail to undo harm occasioned by the lack of an injunction to preserve the status quo pending arbitration."[10]

In its memorandum opinion, the district court accurately set forth the rule of Boys Markets as applied in this Circuit. Considering the second of the two alternative elements contained in the first prong of the Ingalls test, the court concluded that the arbitration process was meaningless under the circumstances because it could never compensate the employees for the time they had lost while "on call." The view that this harm was sufficiently irreparable to require an injunction is reflected in the court's statement that

> [t]he harm done to union members under Quantum's `on call' policy is the ongoing, uncompensated and irreparable loss of these workers' off-duty time and freedom. . . . That most precious and most perilous of all mortal assets, time, and the freedom to utilize what little time we have outside of the pursuit of our daily breadsQto loaf, fish, watch football, have a drink at the local bar, or play with childrensQhas been eaten away, never to be regained.

Even under the deferential abuse of discretion standard that

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[9] Id. at 152.

[10] Id.

we apply to the grant or denial of a preliminary injunction,[11] we are here convinced that the district court erred in granting an injunction for the reasons expressed. Although we have never decided whether the loss of time by workers "on call" is an injury sufficient to warrant an injunction pending arbitration of that issue, we have, in another context, expressed the view that the inconveniences associated with being "on call"SQeven when the sole employee so situated was on call for a continuous one-year period without the possibility of rotation or swapping duty time with othersSQwas not such an extreme burden given that the employee could use the "on call" time effectively for his own purposes.[12] In the instant case, the numerous employees on call duty would rotate; they could swap their "on call" assignments; and they had "a reasonable time" to report to work.[13] When we view the totality of the circumstances that the district court here had before it, we are convinced that the court abused its discretion by holding that the inconveniences visited on each of the workers by the new policy while it was their respective turns to be on call rises to a high

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[11] Allied Pilots Ass'n v. American Airlines Inc, 898 F.2d 462, 465 (5th Cir. 1990).

[12] Bright v. Houston Northwest Medical Center Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (en banc) (holding time spent "on call" was not compensable "working time" for purposes of Fair Labor Standards Act so long as the employee can use the on call time effectively for his or her own use).

[13] In Bright, we held that a similar twenty minute restriction did not prevent the employee from effectively using his free time while "on call." The fact that the employees in the instant case were from a rural area is not persuasive given that the employee in Bright lived 25 to 30 minutes from his place of employment.

enough level to require that the statute quo be preserved by an injunction pending arbitration.

Our conclusion is further buttressed by our Ingalls decision, in which we held that an injunction to prevent drug testing pending arbitration was unwarranted. In that case, we rejected the argument that arbitration would be meaningless because it would not remedy the humiliation, the harm to the reputation, or the invasion of privacy anticipated to be suffered by the employees. Certainly those harms are no less serious than the occasional loss of time, cited here as justification for the district court's injunction.

Moreover, in Ingalls we cited with approval the First Circuit case of Independent Oil and Chemical Workers of Quincy, Inc. v. Proctor & Gamble Manufacturing Co, in which that court held that the restructuring of work-shift scheduling and change of dress code were not sufficiently serious to warrant an injunction.[14] Here, the district court attempted to distinguish the instant case on the fact that the policy in the First Circuit case changed only the times when off-duty time could be taken, whereas Quantum's new policy changed the amount of off-duty time availability. We do not find this distinction persuasive, especially when we note, as we did in Ingalls, that the new policy in Proctor & Gamble "virtually eliminated the workers' previous ability to swap shifts freely."[15]

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[14] Ingalls, 906 F.2d at 152-53 (citing Independent Oil & Chem. Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co., Inc., 864 F.2d 927 (1st Cir. 1988)).

[15] Ingalls, 906 F.2d at 153 (citing Proctor & Gamble, 864 F.2d at 928).

Rather, we find that here the district court abused its discretion in granting the injunction to prohibit implementation of the new policy pending arbitration.

Consequently, the injunction granted by the district court is VACATED.