FEDERAL CIVIL PROCEDURE: SUPREME COURT RULES THAT UNINCORPORATED ASSOCIATIONS ARE SUBJECT TO SUIT WHERE "DOING BUSINESS"

IN *Denver & R.G.W.R.R. v. Brotherhood of Railroad Trainmen*[1] the Supreme Court held that for general venue purposes the residence of a multi-state unincorporated association includes not only its principal place of business, but also any district in which it may be found to be "doing business." Denver & Rio Grande Western Railroad brought an action against the Brotherhood of Railroad Trainmen to recover losses incurred as the result of an illegal strike by the Brotherhood.[2] The union's motion to dismiss for improper venue was denied by the district court and the railroad secured damages.[3] On appeal, the Court of Appeals for the Tenth Circuit reversed, holding that under the applicable general venue statute, section 1391 (b), venue properly lay only in Ohio where the union had its principal place of business.[4] The Supreme Court granted certiorari and reversed the decision of the Tenth Circuit, holding that the circuit court had incorrectly applied section 1391 (b). The case was remanded to the district court for consideration of the "doing business" question, and for determination of the applicability of the 1966 amendments to the general venue provisions should the union be found not to be doing business in Colorado.

At common law the unincorporated association was viewed as a group of individuals rather than a legal entity, and hence to sue an association one had to join all of its members.[5] In *United Mine Workers v. Coronado Coal Company*[6] the Supreme Court held that such associations may be sued as separate entities where jurisdiction is grounded upon a federal question, a holding now embodied in

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[1] 387 U.S. 556 (1967).

[2] *Id.* at 557; *see* Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen, 185 F. Supp. 369 (D. Colo. 1960), *aff'd*, 290 F.2d 266 (10th Cir. 1961), *cert. denied*, 366 U.S. 966 (1961) (strike permanently enjoined).

[3] 387 U.S. at 558.

[4] Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R., 367 F.2d 137 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967).

[5] *E.g.*, Karges Furniture Co. v. Woodworkers Local 131, 165 Ind. 421, 423-24, 75 N.E. 877, 878 (1905); Picket v. Walsh, 192 Mass. 572, 589-90, 78 N.E. 753, 760-61 (1906).

[6] 259 U.S. 344, 391 (1922).

Rule 17 (b) of the Federal Rules of Civil Procedure. Prior to 1942, venue requirements also restricted suit of an unincorporated association in cases arising under the laws of the United States, for the entire membership was required to reside in a single district before an association could be considered an "inhabitant" of that district, and thus suable there.[7] This stricture, and the requirement of complete diversity jurisdiction,[8] resulted in immunity from suit in federal court for most large unincorporated associations. In *Sperry Products Incorporated v. Association of American Railroads,*[9] however, the Court of Appeals for the Second Circuit held that unincorporated associations were to be viewed as independent entities under a special venue statue governing patent cases, and that they were "inhabitants" of the the district where their principal place of business was located. Advancing policy considerations, Judge Hand concluded that unincorporated associations should be treated as corporations for general venue purposes as well.[10] At that time, corporations were "inhabitants" of their principal place of business, and subsequent cases extended Hand's result to unincorporated associations under general venue statutes.[11]

Neirbo Company v. Bethlehem Shipbuilding Corporation,[12] in effect, expanded corporate venue situs to include all places where a corporation was licensed to do business, and in 1948 the venue provisions of the Judicial Code were revised to codify this change and further expand corporate venue to include districts in which a corporation could be said to be "doing business."[13] Neither the committee report[14] nor the revisor's notes to the Code changes[15] revealed any evidence that, in enacting the new provisions, Congress had considered the matter of venue for unicorporated associations. After the 1948 amendments, a split of authority developed among the

[7] *See, e.g.,* Sutherland v. United States, 74 F.2d 89, 93 (8th Cir. 1934).

[8] Judiciary and Judicial Procedure Act of 1948, 28 U.S.C. § 1332 (1964); *see* United Steelworkers Union v. R. H. Bouligny, Inc., 382 U.S. 145 (1965).

[9] 132 F.2d 408 (2d Cir. 1942), *cert. denied,* 319 U.S. 744 (1943).

[10] *Id.* at 411.

[11] *See, e.g.,* Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635, 637-38 (S.D.N.Y. 1958); McNutt v. United Gas Workers, 108 F. Supp. 871, 875 (W.D. Ark. 1952); Salvant v. Louisville & N.R.R., 83 F. Supp. 391, 396 (W.D. Ky. 1949).

[12] 308 U.S. 165 (1939).

[13] 28 U.S.C. § 1391 (c) (1964).

[14] H.R. REP. No. 308, 80th Cong., 1st Sess. (1947).

[15] *Id.* at A127. *See also Hearings on H.R. 1600, 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary,* 80th Cong., 1st Sess. 29 (1947).

district courts concerning whether the *Sperry* rationale—that unincorporated associations should be treated as corporations for venue purposes—justified extension of the liberalized concept of corporate venue to unincorporated associations.[16] In *Rutland Ry. v. Brotherhood of Locomotive Engineers*,[17] the first appellate consideration of the problem, the Court of Appeals for the Second Circuit found the analogy between corporations and unincorporated associations to be soundly drawn, and concluded that the residence of an association for venue purposes should be expanded to include judicial districts in which an association was "doing business."[18] In the present case, the district court found that venue was proper in that district, applying the *Rutland* test.[19] In reversing, the Tenth Circuit held that unincorporated associations were amenable to suit only at the location of the principal place of business, concluding that *Rutland* had been overruled sub silento by the Supreme Court in *United Steelworkers Union v. R. H. Bouligny, Incorporated*,[20] which held that an unincorporated association, unlike a corporation, could not be treated as a "citizen" of the state of its principal place of business. Any change toward treating the entities as equals, the Supreme Court had remarked in that case, should be made by Congress.[21]

In *Denver & R.G.W.R.R.* the Supreme Court distinguished *Bouligny*, noting that it dealt with an extension of federal *jurisdiction* without an affirmative grant from Congress.[22] Venue, not fraught with the same testy constitutional problems, "is primarily a matter of convenience of litigants and witnesses,"[23] the Court concluded. In rejecting the union's argument that if Congress had intended to expand the venue situs of unincorporated associations, it would have done so explicitly, the Court presumed that Congress had

[16] *Compare* Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635, 637-38 (S.D.N.Y. 1958); McNutt v. United Gas Workers, 108 F. Supp. 871, 875 (W.D. Ark. 1952); Salvant v. Louisville & N.R.R., 83 F. Supp. 391, 396 (W.D. Ky. 1949), *with* Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426, 432 (E.D. Pa. 1956), *and* Portsmouth Baseball Corp. v. Frick, 132 F. Supp. 922 (S.D.N.Y. 1955).

[17] 307 F.2d 21 (2d Cir. 1962).

[18] *Id.* at 29.

[19] *See* Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R., 367 F.2d 137, 138 (10th Cir. 1966).

[20] 382 U.S. 145 (1945) (Mr. Justice Fortas writing for the Court).

[21] *Id.* at 147, 150-51.

[22] 387 U.S. at 556, 563.

[23] *Id.* at 560.

been aware of the principle first enunciated in *Sperry*; *i.e.*, that unincorporated associations should be treated as corporations for venue purposes. The Court further reasoned that even if Congress had not considered *Sperry*, the question of an unincorporated association's residence for venue purposes and the conflict among the lower federal courts remained unsettled. Congressional silence on the residence question was interpreted as an invitation to the judiciary to continue application of the *Sperry* rationale. The majority noted that Congress must have realized the practical need for making large unincorporated associations subject to suit wherever they did business, as well as the inconvenience and unfairness which would result if such organizations continued to be suable only under the restrictive "principal place of business" rule. Justice Black, who was joined in dissent by Justices Douglas and Fortas, questioned whether Congress had been aware of *Sperry* at all, and particularly whether Congress had taken its rationale, rather than its result, into consideration when enacting section 1391 (c).[24] The dissent quoted Professor Moore's statement in his 1949 commentary on the Judicial Code that section 1391 was not intended to change the venue provisions with respect to unincorporated associations,[25] and pointed out that the legislative history gave no indication that Congress had any such change in mind in 1948. The dissent concluded that ultimately the problem was "simply an important question of public policy . . . and should be weighed by Congress and not by this Court."[26]

The dissent's argument, however, presupposes that the residence of an unincorporated association for venue purposes was a settled matter of law prior to 1948, a contention that the majority summarily refuted.[27] The absence of a legislative solution, which precipitated the *Sperry* decision, and later conflict among the lower federal courts, supports the majority's argument that some resolution of the question was demanded. Convenience to parties and witnesses, as well as "fair play and substantial justice,"[28] dictates similar amenability to suit for multi-state unincorporated associations and

[24] *Id.* at 567 (Black, J., dissenting).

[25] *Id.* at 567-68, quoting J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 193 (1949).

[26] 387 U.S. at 569-70.

[27] *Id.* at 561.

[28] *See* UMW v. Coronado Coal Co., 259 U.S. 344, 389 (1922); Comment, *Unions as Juridical Persons*, 66 YALE L.J. 712, 714 (1957).

corporations, which, though they differ in form, are cognate commercial realities. Moreover, in the limited context of the Labor Management Relations Act, Congress has recognized the desirability of a "doing business" test of union availability to suit.[29] *Denver & R.G.W.R.R.* extends this logic to all multi-state associations doing any business which raises federal questions.

[29] Labor-Management Relations Act § 301 (c), 29 U.S.C. § 185 (c) (1964).