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Labor Law - Arbitration - Determination of the Question of Arbitrability Under Section 301(a) of Labor-Management Relations Act

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LABOR LAW—ARBITRATION—DETERMINATION OF THE QUESTION OF ARBITRABILITY UNDER SECTION 301 (a) OF LABOR-MANAGEMENT RELATIONS ACT—Plaintiff-union brought an action under section 301 (a) of the Labor-Management Relations Act¹ to compel arbitration of a grievance over the subcontracting of work by defendant-employer. The collective bargaining agreement provided that questions as to the proper interpretation or application of any of the provisions of the agreement would be submitted to arbitration and that all matters involving exclusively managerial functions were excluded from arbitration. The trial court held the grievance not arbitrable. On appeal, *held*, reversed. An implied covenant of good faith and fair dealings and the fact that some private arbitrators have held that the conventional recognition clause by implication prohibits unrestricted employer subcontracting prevent the court from saying with positive assurance that the contract is not susceptible to an interpretation that covers the dispute. *Local 1912, International Association of Machinists v. United States Potash Co.*, (10th Cir. 1959) 270 F. (2d) 496.

There are two questions raised by an assertion that a grievance must be arbitrated. One, termed the "question of arbitrability," is concerned with the jurisdiction of the arbitrator over the grievance and requires a determination of whether defendant has promised to arbitrate the particular

¹ 61 Stat. 156 (1947), 29 U.S.C. (1958) §185 (a). "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

grievance.² Since this determination necessitates interpretation of the contract, leaving the decision to the arbitrator would be in harmony with the conclusion of labor law scholars that the arbitrator is better able to interpret the collective bargaining contract.³ But the general rule is that it is for the court to decide the question of arbitrability unless the parties expressly contract otherwise.⁴ The second question raised in the assertion that a grievance must be arbitrated concerns the merits of the grievance: that is, whether defendant's acts are prohibited by the contract.⁵ The general rule in the federal courts is that the arbitrator should decide this question, since this is the intent of the parties as indicated by their promises to arbitrate grievances. However, two types of cases have arisen in which this rule has been modified by some courts.⁶ The first type of case is represented by

² This is true so long as the duty to arbitrate arises only from contract. Excluding the principal case, the general rule in the federal courts has been that grievances over subcontracting are not arbitrable in the absence of express restrictions upon subcontracting. *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, (5th Cir. 1959) 269 F. (2d) 633, cert. granted 28 U.S. LAW WEEK 3181 (1959); *Dairy, Bakery and Food Workers v. Grand Rapids Milk Division*, (W.D. Mich. 1958) 160 F. Supp. 34. See *Local Division 1509 v. Eastern Mass. Street Railway Co.*, (D.C. Mass. 1958) 162 F. Supp. 942 (dictum that recognition clause does not make grievance arbitrable). But see *Timken Roller Bearing Co. v. NLRB*, (6th Cir. 1947) 161 F. (2d) 949 at 955 (dictum that subcontracting grievance is arbitrable). State law can also be considered by the federal courts in fashioning federal labor law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 at 456-457 (1957). The state courts generally hold the subcontracting grievance not arbitrable where there are no express restrictions on subcontracting. See, e.g., *United Dairy Workers v. Detroit Creamery Co.*, (Mich. Cir. Ct. 1956) 30 CCH Lab. Cas. ¶70115.

³ The peculiarities in the collective bargaining process result in a contract in which the rights and duties of the parties are not adequately reflected by the written words. As a result, interpretation is better done by a private arbitrator familiar with these peculiarities, the particular industry, the parties, and their past relationships. See Cox, "Reflections Upon Labor Arbitration," 72 HARV. L. REV. 1482 (1959); Shulman, "Reason, Contract, and Law in Labor Relations," 68 HARV. L. REV. 999 (1955). See also the comments of Judge Magruder in *Local 149 v. General Electric Co.*, (1st Cir. 1957) 250 F. (2d) 922 at 926-927, cert. den. 356 U.S. 938 (1957), and the articles there cited.

⁴ See, e.g., principal case at 497-498; *Local 201 v. General Electric Co.*, (1st Cir. 1959) 262 F. (2d) 265 at 267. See, generally, 24 A.L.R. (2d) 752 at 766-767 (1952). The Court of Appeals for the Eighth Circuit takes the contrary view. *Food Handlers Local 425 v. Pluss Poultry, Inc.*, (8th Cir. 1958) 260 F. (2d) 835. Judge Magruder has suggested two rationales in support of the general rule. The more doubtful is that the United States Arbitration Act, 9 U.S.C. (1958) §§1-14, applies and requires the court to decide this question. The other theory is that since plaintiff establishes federal jurisdiction under §301 (a) by supported allegations that the refusal to arbitrate constitutes a contract violation, the court must find a contract violation before the relief sought can be granted. *Local 149 v. General Electric Co.*, note 3 *supra*, at 927-930. For discussion of the status of the Arbitration Act as applied to collective bargaining agreements, see note, 46 CALIF. L. REV. 462 (1958).

The general rule supports the conclusion that the court can decide whether a party seeking to compel arbitration has complied with the contract's procedural requirements for submitting a grievance to arbitration. *Local 19322 v. American Brass Co.*, (7th Cir. 1959) 28 U.S. LAW WEEK 2322 (1960); *Boston Mutual Life Ins. Co. v. Insurance Agents' Intl. Union*, (1st Cir. 1958) 258 F. (2d) 516.

⁵ The general rule in the federal and state courts is that subcontracting does not constitute a violation of the contract where there are no express restrictions on subcontracting. See 57 A.L.R. (2d) 1399 (1958). See also note 12 *infra*.

⁶ There are also problems involving judicial intervention in the arbitration process after the arbitrator has made an award. In *Enterprise Wheel and Car Corp. v. United Steelworkers of America*, (4th Cir. 1959) 269 F. (2d) 327, cert. granted 28 U.S. LAW WEEK

United Steelworkers of America v. American Mfg. Co., where the court decided that the grievance was arbitrable under the arbitration clause of the contract, but refused to compel arbitration because the grievance was "frivolous."⁷ While the court's emphasis in reaching this conclusion was on evaluating the sufficiency of the facts alleged in support of the merits of plaintiff's grievance, dismissal of the grievance as frivolous indicates that the court had also arrived at some interpretation of the contract provisions which regulated this kind of grievance.⁸ Both the view that the arbitrator is a better interpreter of the collective bargaining agreement and the idea that the parties intended the arbitrator to decide the merits compel the conclusion that this was an unjustified encroachment upon the arbitrator's function of deciding the merits. Opposed to this, the Court of Appeals for the First Circuit has held that a grievance does not cease to be arbitrable even though the result on the merits is clear under the contract.⁹ The second type of case is represented by *United Steelworkers of America v. Warrior and Gulf Navigation Co.*,¹⁰ where the court, in deciding that a grievance over subcontracting was not arbitrable, also became involved in contract interpretations which would determine the merits of the grievance. However, given the rule that the court must decide whether defendant has promised to arbitrate the particular grievance, it appears that the particular arbitration provisions of the contract forced the court to decide the merits question. The contract provided that matters which were strictly a function of management were not subject to arbitration. Whether the grievance was

3207 (1960), the union sought to compel management to comply with an arbitration award ordering reinstatement of wrongfully discharged employees and reimbursement for lost wages. The contract had terminated before the award was made and had not been renewed. The court modified the award by omitting the requirements of reinstatement and reimbursement for wages lost after the contract had terminated, on the theory that these rights of the employees remained in force only for the life of the contract.

⁷ 6th Cir. 1959) 264 F. (2d) 624, cert. granted 28 U.S. LAW WEEK 3148 (1959). This represents an adoption of the Cutler-Hammer doctrine, wherein a court, before compelling arbitration, must find not only that defendant promised to arbitrate the particular dispute but also that there is a bona fide dispute. *Intl. Assn. of Machinists v. Cutler-Hammer*, 271 App. Div. 917, 67 N.Y.S. (2d) 317 (1947), affd. per curiam 297 N.Y. 519, 74 N.E. (2d) 464 (1947). See 24 A.L.R. (2d) 752 at 762-764 (1952); note, 10 SYRACUSE L. REV. 278 (1959).

⁸ A partial justification for this decision on the merits would be that the court was construing the contract most strongly in plaintiff's favor but that plaintiff was still unable to state a good claim.

⁹ *New Bedford Defense Products Div. v. Local No. 1113*, (1st Cir. 1958) 258 F. (2d) 522.

¹⁰ Note 2 supra. The task of the court was complicated by unclear drafting. The contract provided that there were to be no lockouts, that certain matters were exclusively within the jurisdiction of management provided that there was no discrimination against union employees, and that exclusively-management functions were not subject to arbitration. *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, (S.D. Ala. 1958) 168 F. Supp. 702. Since the union alleged that the subcontracting was discriminatory and that it effected a partial lockout, the court, besides deciding that subcontracting was within the clause excluding management functions from arbitration, also had to decide whether such clause was qualified by the discrimination and lockout clauses. The ruling that management functions were exempted absolutely from arbitration would mean that the union might successfully prove to the court a violation of the lockout provision by use of a management function and yet get no arbitration on the matter.

arbitrable depended upon whether subcontracting was strictly a management function, which in turn depended upon whether there were any express or implied restrictions on subcontracting. But whether the union was right on the merits of the grievance also depended on whether there were any express or implied restrictions on subcontracting.¹¹ The arbitration provisions in the principal case were similar to those in *Warrior and Gulf*. To decide whether a grievance over subcontracting was arbitrable, the court would have to decide whether subcontracting was an exclusive managerial function; and to answer this question the court would have to make contract interpretations which would decide the merits of the grievance. The court held that the differences of opinion among the courts and arbitrators as to whether restrictions on subcontracting should be implied from the conventional recognition clause were enough to make the grievance arbitrable, but it was careful not to rule that there were any such restrictions.¹² This result appears to be the desirable one, being in line with scholars' suggestions that the arbitrator is a better interpreter of the collective bargaining contract, and with the idea that the parties intended the arbitrator to decide the merits. However, given the rule that the court must decide the question of arbitrability,¹³ it is difficult to justify this result in legal theory. In not deciding whether subcontracting was restricted, the court did not decide whether it was an exclusive managerial function, and therefore did not really decide that defendant had promised to arbitrate this grievance. The court in effect held that defendant *possibly* promised to arbitrate this grievance.

A proposed statute by the National Academy of Arbitrators would solve this problem by allowing the arbitrator to decide both the question of arbitrability and the merits of the grievance, with judicial review of the arbitrator's determination of the question of arbitrability.¹⁴ A party seeking to

¹¹ The court in *Engineers Assn. v. Sperry Gyroscope Co.*, (2d Cir. 1957) 251 F. (2d) 133, cert. den. 356 U.S. 932 (1957), faced a similar problem.

¹² The private arbitration cases provide a rich source of concepts. The arbitrators are split on whether subcontracting is prohibited by the contract in absence of express restrictions. See *Bethlehem Steel Co.*, 30 Lab. Arb. Rep. 678 at 682 (1958) for a citation of cases. See *National Tube Co.*, 17 Lab. Arb. Rep. 790 at 793 (1951) for a theory restricting subcontracting by implication from the recognition clause.

¹³ The court in the principal case appears to approve of the rule. Principal case at 497-498.

¹⁴ The court is to decide the question of arbitrability when the contract expressly so provides. Draft 3, proposed United States Labor Arbitration Act, National Academy of Arbitrators. The Court of Appeals for the Eighth Circuit has judicially promulgated the same rule. *Food Handlers Local 425 v. Pluss Poultry, Inc.*, note 4 supra. Compare the Uniform Arbitration Act, §2, which also eliminates the use of the Cutler-Hammer doctrine. 9 ULA 79 (1957). Minnesota adopted the Uniform Act in 1957. Minn. Stat. Ann. (1947; Supp. 1959) §§572.08-572.30.

Section 13(3) of the statute proposed by the N.A.A. authorizes the court to vacate an award "to the extent that the award is affected by the arbitrator's determination of an issue which he has no jurisdiction to determine. . . . The award shall not be vacated if there was a reasonable basis for the arbitrator's determination, express or implicit, of his jurisdiction." In a *Warrior and Gulf*-type case, where the determinations of the merits

compel arbitration would have to prove only the existence of a general promise to arbitrate grievances and would not have to prove further that the promise to arbitrate encompasses the particular grievance. In the absence of such a statute, the principal case can be regarded as standing for the proposition that where a court in deciding the question of arbitrability finds itself involved with contract interpretations which would also determine the merits, the court must compel arbitration and allow the arbitrator to decide both questions.¹⁵

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and of jurisdiction overlap, in theory the arbitrator could decide on the merits that subcontracting was a violation of the contract, and the court could decide that the arbitrator had no jurisdiction because subcontracting was not restricted by the contract. Query whether the court should review the arbitrator's determination of his jurisdiction in such a case. This problem would have to be considered under both the proposed statute and the rule promulgated by the Court of Appeals for the Eighth Circuit.

¹⁵ This is similar to the position of the Court of Appeals for the Eighth Circuit, except for that court's provision for judicial review of the arbitrator's determination of the question of arbitrability. *Food Handlers Local 425 v. Pluss Poultry, Inc.*, note 4 *supra*.