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Labor Law - Arbitration - Necessity of According Individual Employees Right to Independent Representation in Arbitration Proceeding

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LABOR LAW—ARBITRATION—NECESSITY OF ACCORDING INDIVIDUAL EMPLOYEES RIGHT TO INDEPENDENT REPRESENTATION IN ARBITRATION PROCEEDINGS—Plaintiffs, employees of defendant corporation, were demoted from supervisory positions back into the bargaining unit. The collective bargaining agreement defined seniority as "an employee's length of service with the company in years, months and days." The employer credited

plaintiffs with continuous seniority from the time they had originally begun work with the company in non-supervisory positions. Defendant union contended that time spent in supervisory positions should be excluded from seniority. The dispute was submitted to arbitration without plaintiffs being given notice of the proceedings or opportunity to participate. The arbitration award adopted the position urged by the union. Plaintiffs brought suit in equity and the trial court declared the award null and void and enjoined its enforcement. On appeal, *held,* affirmed, one judge dissenting. Since plaintiffs were not given notice of the hearing and their position was not advocated by the union, they were not fairly represented in the proceedings and should not be bound by the award.[1] *Clark v. Hein-Werner Corp.,* 8 Wis. (2d) 264, 99 N.W. (2d) 132 (1959), rehearing den. *Werner Corp.,* (Wis. 1960) 100 N.W. (2d) 317.

Sometimes in arbitration proceedings under a collective bargaining agreement the interests of an individual or group of employees are opposed to the position adopted by the union. This raises the question whether these employees have a right to have their position independently represented in the proceedings.[2] In the past most courts have held that the union and the employer are the only parties to the labor contract and individual employees cannot claim any rights thereunder in the arbitration process.[3] Under this view the union has the sole right to bring arbitration proceedings, to participate in them, and to move to vacate an adverse award. Recently some courts have taken the view that individual employees do possess rights in arbitration proceedings affecting their interests and should be allowed to participate.[4] The issue may arise during the proceedings when an employee seeks to stay arbitration or to intervene, or after the award is made when he moves to vacate or to enjoin enforcement of the award. In any case the primary question is the employee's right to participate in the arbitration proceedings. In *Matter of Iroquois Beverage Corp.*[5] the court ordered participation of individual

[1] The dissent points out that plaintiffs' position was argued vigorously by the employer, who presented full arguments and briefs in support of its position. The union argued that this constituted adequate representation of plaintiffs' rights, but the court rejected this on the ground that "Employees not fairly represented by the union should never be put in the position of having to solely depend upon the employer championing their rights under the collective-bargaining contract." Principal case at 138.

[2] For discussions of two different approaches to the problem, see Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 (1956); Lenhoff, "The Effect of Labor Arbitration Clauses Upon the Individual," 9 ARB. J. (n.s.) 3 (1954). See, generally, note, 66 YALE L.J. 946 (1957).

[3] Dillon v. American Brass Co., 135 Conn. 10, 60 A. (2d) 661 (1948); In the Matter of I. Miller & Sons, 88 N.Y.S. (2d) 573 (1949). See, generally, Summers, "Union Powers and Workers' Rights," 49 MICH. L. REV. 805 (1951).

[4] Soto v. Lenscraft Optical Corp., 7 App. Div. (2d) 1, 180 N.Y.S. (2d) 388 (1958). See Curtis v. New York World-Telegram Corp., 282 App. Div. 183, 121 N.Y.S. (2d) 825 (1953) (dictum). See also Lenhoff, "The Effect of Labor Arbitration Clauses Upon the Individual," 9 ARB. J. (n.s.) 3 at 4-8 (1954).

[5] 14 Misc. (2d) 290, 159 N.Y.S. (2d) 256 (1955). See comment, 32 N.Y. UNIV. L. REV. 1365 at 1374 (1956); note, 66 YALE L.J. 946 at 950 (1957).

employees in an arbitration proceeding where it appeared, in view of past misconduct by union officials and the union's conceded favoritism toward another group of employees, that the union would not represent the interests of all the employees. This decision was based on dictum in an earlier New York case indicating that an individual employee might intervene in arbitration or move to vacate an adverse award "if the union is neglectful of his interests."[6] To some extent individual activity in the labor relations field is undesirable because it may disturb the stability of the collective bargaining situation.[7] On the other hand, exclusive control by the union of the arbitration process may not sufficiently protect the rights of individuals because of the opportunity for discrimination by the union among members of the bargaining unit. Although the individual employees may not be parties to the labor agreement, they are greatly affected by it.[8] Therefore, sound labor policy would seem to require that adequate protection be afforded the individual without destroying the stability of the collective bargaining arrangement. The problem must also be viewed in the light of the individual's statutory "right" to present disputes directly to the employer.[9] It may be argued that the statutes create a substantive right in employees to settle directly with the employer, a right which cannot be taken away by agreement between union and employer.[10] However, the better view seems to be that these provisions are intended only to make clear that the employer is not guilty of a refusal to bargain if he deals with the individual, and that the parties may still agree that all disputes be handled exclusively by the union.[11] The best approach to the problem would seem to be to recognize the power of the union to administer and control the arbitration procedure subject to a duty to represent the members of the bargaining unit without arbitrary discrimination.[12] So long as the union exercises reasonably the authority vested in it, its position should be binding on all employees.[13] Only if the union discriminates among members of the bargaining unit on the basis of union membership or activities, politics, or race, or otherwise violates its duty to represent the employees fairly,

6 Donato v. American Locomotive Co., 283 App. Div. 410, 127 N.Y.S. (2d) 709 at 715 (1954).

7 See Cox v. R. H. Macy & Co., 152 N.Y.S. (2d) 858 (1956). See also Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 at 626 (1956); note, 66 YALE L.J. 946 at 952 (1957).

8 See Lenhoff, "The Effect of Labor Arbitration Clauses Upon the Individual," 9 ARB. J. (n.s.) 3 (1954).

9 Labor-Management Relations Act, 1947, 61 Stat. 143, 29 U.S.C. (1958) §159(a); Wisconsin Employment Peace Act, Wis. Stat. (1953) §111.05(1).

10 See Lenhoff, "The Effect of Labor Arbitration Clauses Upon the Individual," 9 ARB. J. (n.s.) 3 at 14-16 (1954). Cf. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711 at 744 (1945) (a similar situation under the Railway Labor Act).

11 See Cox, "Rights Under a Labor Agreement," 69 HARV. L. REV. 601 at 621 (1956).

12 Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 at 198-201 (1944).

13 Cf. New York Times Co. v. Newspaper Guild of New York, 2 App. Div. (2d) 31, 152 N.Y.S. (2d) 884 (1956).

should the court order that the employees adversely affected be independently represented, or enjoin an adverse award.[14] However, the court in the principal case takes a different view, saying "where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows *as a matter of law* that there has been no fair representation of the other group. This is true even though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best of motives."[15] Put simply, in every seniority dispute all employees who would be adversely affected by an award adopting the position urged by the union must be given notice of the proceedings and a chance to participate. This view seems an undesirable deviation from the principle that conflicting interests among members of the bargaining unit should ordinarily be resolved within the union.

The procedural ramifications of the view urged by this note also warrant consideration. It would seem undesirable to impose upon the arbitrator the task of deciding in each dispute whether the employees seeking independent representation have been arbitrarily discriminated against by the union. Moreover, it may well be beyond the jurisdiction of the arbitrator, whose job is to interpret the labor agreement, to consider and decide such an issue. The proper procedure would seem to be to require the dissatisfied employees to prove to a court of equity that the union has taken an arbitrary and unreasonable position, whereupon the court would order that the employees be independently represented, or would enjoin enforcement of the award. This procedure would also eliminate the need for giving notice of the arbitration proceedings to all employees who would be adversely affected by an award adopting the position urged by the union.

Alan E. Price

[14] An alternative would be to allow only a suit for damages by the employee against the union for breach of its fiduciary duty to the members of the bargaining unit. However, in many cases damages will not be an adequate remedy for loss of seniority or other adverse effects of the award.

[15] Principal case at 137.