1991

Must an Employer Arbitrate Grievances Involving Layoffs after the Expiration of the Collective Bargaining Agreement?

Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

Publication Information
Jay E. Grenig, Must an Employer Arbitrate Grievances Involving Layoffs after the Expiration of the Collective Bargaining Agreement?, 1990-91 Term Preview U.S. Sup. Ct. Cas. 283 (1991).

Must an employer arbitrate grievances involving layoffs after the expiration of the collective bargaining agreement?

by Jay E. Grenig

Litton Financial Printing Division
A Division of Litton Business Systems, Inc.
v.
National Labor Relations Board, et al.
(Docket No 90-285)

Argument Date: March 20, 1991

ISSUE

In this case the Supreme Court is asked to determine whether Section 8(a)(5) of the National Labor Relations Act requires an employer to arbitrate grievances involving a seniority-related dispute that occurred nearly one year after the expiration of the collective bargaining agreement between the employer and a union.

FACTS

The employer prints bank checks at six plants, including a plant in Santa Clara, Calif. At the Santa Clara plant, the employer used two types of printing processes—the "cold-type" process and the "hot-type" process. The collective bargaining agreement between the employer and the union representing production employees at the Santa Clara plant expired in October 1979. The agreement contained a grievance arbitration procedure for resolving differences "that may arise between the parties. . . regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement." According to the agreement, "in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal."

In 1980 the employer decided to convert the Santa Clara plant entirely to the "hot-type" process. As a result, the employer laid off 10 employees and gave them severance pay. The employer did not lay off the employees on the basis of seniority, but laid off employees who had worked exclusively or primarily on the "cold-type" equipment. In addition, the employer did not notify the union of the decision to lay off the employees, and it did not give the union an opportunity to bargain.

The union filed separate grievances for each laid off employee. When the union asked the employer for a meeting to discuss the layoff decision, the employer refused, noting that the contract had expired. The employer also refused to bargain over the decision to lay off the employees, but offered to discuss the effects of the layoff on the employees.

The union then filed unfair labor practice charges with the National Labor Relations Board (NLRB). The NLRB found that the employer had violated Sections 8(a)(5) and 8(a)(1) by refusing to bargain about the layoff decision, by refusing to accept and process the layoff grievance, and by unilaterally repudiating the contractual arbitration procedure. *Litton Financial Printing Division*, 286 N.L.R.B. 817 (1987). The Board pointed out that the employer was obligated to bargain over the effects on unit employees of management decisions, even where those decisions are not themselves subject to the obligation to bargain. The Board determined that the employer's decision to lay off the employees was not so inextricably intertwined with the conversion decision as to make it impossible to bargain over the layoff decision.

The Board ordered the employer to bargain about the layoffs and to process the layoff grievances through the contractual grievance procedure. However, the Board refused to order the employer to arbitrate the layoff grievances, rejecting the union's contention that the grievances "arose under" the expired contract. The Board found that the layoffs that triggered the grievances occurred after the expiration of the contract and that there was no evidence that the parties contemplated that the seniority provision would remain enforceable even after the contract expired.

The U.S. Court of Appeals for the Ninth Circuit enforced the Board's order, but reversed and returned the case for further proceedings with respect to the Board's conclusion that the layoff grievances were not arbitrable. *NLRB v. Litton Financial Printing Division*, 893 F.2d 1128 (9th Cir. 1990). The court reasoned that the Board had erroneously focused on "the event" (the layoff) that sparked the dispute, and not on the substantive contract-based rights that were allegedly violated. The court held that a presumption of arbitrability arises with regard to disputes that develop concerning events after the agreement has expired as long as the dispute is over a provision of the

Jay E. Grenig is associate dean for academic affairs and professor of law at Marquette University Law School, 1103 W. Wisconsin Avenue, Milwaukee, WI 53233; telephone (414) 288-5377.

expired agreement and hinges on the interpretation ultimately given the contract clause. The court regarded the NLRB's decisions on the question of whether its "accruing or vesting" standard covers seniority disputes as inconsistent.

The Supreme Court granted the employer's petition for a writ of certiorari in November 1990, limited to the arbitrability question.

BACKGROUND AND SIGNIFICANCE

Sections 8(a)(5) and 8(d) of the National Labor Relations Act require an employer to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." The expiration of a collective bargaining agreement generally freezes the existing terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962).

The NLRB initially took the position that arbitration clauses in collective bargaining agreements did not survive expiration of the contract, on the ground that the duty to arbitrate is wholly contractual and cannot survive by operation of law. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241 (1970). The NLRB concluded that an employer does not violate Section 8(a)(5) by refusing to arbitrate grievances arising between the expiration of one contract and agreement on another.

Seven years later, the Supreme Court noted that arbitration is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. *Nolde Bros. v. Local No. 358, Bakery Workers*, 430 U.S. 243 (1977). However, the Court held that the termination of a collective bargaining agreement did not automatically extinguish a party's duty to arbitrate grievances arising under the agreement. The Court explained that, while the termination of the collective bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind the parties' decision to resolve their contractual differences through arbitration. The Court concluded that a blanket refusal to arbitrate post-expiration grievances violates Sections 8(a)(5) and 8(a)(1), absent strong evidence that the parties intended to exclude such disputes from arbitration.

Following *Nolde*, the NLRB reconsidered the rule announced in *Hilton-Davis* that the duty to arbitrate expires with the contract. In *American Sink Top & Cabinet Co.*, 242 N.L.R.B. 408 (1979), the NLRB held that the employer had violated Sections 8(a)(5) and 8(a)(1) by refusing to process and to arbitrate, where appropriate, a grievance over a discharge occurring nearly three months after the contract expired. On the basis of the *Nolde* presumption, the Board explained that the grievance's base was arguably the contract and that there was no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term.

After its *American Sink Top* decision, the NLRB appears to have had some difficulty in adopting a consistent approach to cases involving the post-expiration duty to arbitrate grievances. Compare *Cardinal Operating Co.*, 246 N.L.R.B. 279 (1979) (applying *Hilton-Davis* without citing *American Sink Top* or *Nolde*) with *Digmore Equip. & Eng. Co.*, 261 N.L.R.B. 1175 (1982) (applying *American Sink Top* when employer had refused to arbitrate post-expiration discharge based in part on pre-expiration conduct).

In *Indiana & Michigan Electric Co.*, 284 N.L.R.B. 53 (1987), the NLRB clarified its position regarding the duty to arbitrate grievances after the expiration of the collective bargaining agreement. The NLRB recognized *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes, and that a blanket refusal to arbitrate post-expiration grievances would violate Sections 8(a)(5) and 8(a)(1), absent strong evidence that the parties intended to exclude all such disputes from arbitration. However, the NLRB construed *Nolde* as requiring an employer to arbitrate only those post-expiration grievances "arising under" the expired contract. The NLRB explained that disputes "arising under" the expired contract are disputes concerning contract rights capable of accruing or vesting to some degree during the life of the contract, and ripening or remaining enforceable after the contract expires.

The Board decided two cases following its 1987 decision in *Litton*, holding that post-expiration disputes involving application of contractual seniority clauses are arbitrable. *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

The courts of appeals are divided in their interpretation of the *Nolde* test for determining the arbitrability of post-contract termination grievances. The Eighth and Tenth Circuits, agreeing with the NLRB, have read *Nolde* as calling for arbitration only for those post-contract termination grievances that have vested or accrued before the contract expired. See *Chauffeurs Local Union 238 v. C.R.S.T., Inc.*, 795 F.2d 1400 (8th Cir.); *United Food Workers Union, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990).

Although relying on Section 301 of the Labor-Management Relations Act (which provides that the federal courts have jurisdiction in suits for violation of contracts between an employer and a labor organization) rather than Section 8(a)(5) of the National Labor Relations Act, the Third, Fifth, and Ninth Circuits have not limited *Nolde* to post-contract grievances that have vested or accrued before the contract expired. See *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856 (3d Cir. 1981); *Seafarers Int'l Union v. National Marine Servs., Inc.*, 820 F.2d 148 (5th Cir. 1987); *Local Joint Executive Bd. of Las Vegas, Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986).

The Supreme Court now has the opportunity to clarify

its *Nolde* decision and to bring some consistency to the problem of the arbitrability of post-expiration grievances.

ARGUMENTS

For Litton Financial Printing Division *(Counsel of Record, M.J. Diederich, 360 N. Crescent Dr., Beverly Hills, CA 90210; telephone (213) 859-5161):*

1. Section 8(a)(5)'s requirement that an employer bargain in good faith does not require arbitration of post-contract termination disputes.
2. The grievances in this case did not "arise under" the expired collective bargaining agreement.
3. Express language in the collective bargaining agreement negates the *Nolde* presumption.

For the National Labor Relations Board (as respondent supporting petitioner) *(Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217):*

1. The NLRB's interpretations of the National Labor Relations Act are entitled to substantial deference if they are rational and consistent with the Act.
2. The NLRB reasonably determined that the union's post-contract expiration grievances about the employer's layoff of employees were not arbitrable.
3. The union's post-contract expiration grievances were not arbitrable since they did not "arise under" the contract.

For Printing Specialties District Council No. 2 *(Counsel of Record, David A. Rosenfeld; Van Bourg, Weinberg, Roger & Rosenfeld, 875 Battery St., Third Floor, San Francisco, CA 94111; telephone (415) 864-4000):*

1. The presumption of arbitrability extends to any dispute concerning the interpretation or application of the collective bargaining agreement containing an arbitration clause, regardless of when the dispute or the underlying facts arise.
2. An employer's obligation to abide by existing terms and conditions of employment upon the expiration of the collective bargaining agreement applies to the obligation to arbitrate.

AMICUS BRIEFS

In Support of Litton Financial Printing Division

The Chamber of Commerce of the United States of America *(Counsel of Record, John S. Irving; Kirkland & Ellis, 655 Fifteenth Street, NW, Washington, DC 20005; telephone (202) 879-5000).*