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Labor Arbitration: The Roles of the Arbitrators and the Judiciary

Roger Walsh

RECENT DECISIONS

Labor Arbitration: The Roles of the Arbitrators and the Judiciary—Petitioner union, in the first of three companion cases to be discussed, attempted to compel arbitration of a dispute over the refusal of the company to reinstate an employee. The company would not arbitrate on the grounds that the employee received a 25% permanent partial disability judgment on a workmen's compensation claim and thereby was not entitled to return to work by virtue of the seniority provision of the agreement. This provision stated that the employer would employ or promote employees on the principle of seniority "where ability and efficiency are equal." The District Court held that the acceptance of the workmen's compensation settlement estopped the employee from asserting seniority rights and did not allow arbitration. The Court of Appeals affirmed on the grounds that the grievance was a frivolous one and not arbitrable under the agreement. The Supreme Court, in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), reversed the decision of the Court of Appeals. It held that:

> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. *The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious.* The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.[1] [Emphasis supplied.]

It is settled law that the question of arbitrability is for the courts, not the arbitrators, to decide.[2] When a court determines the arbitrability of a dispute, the question of whether the claim is well founded or not should be assumed immaterial.[3] But New York and New Jersey maintain that a matter is arbitrable only if a "bona fide" dispute is presented.[4] The dispute cannot be manifestly without foundation, or frivolous. The leading case advocating the "bona fide" dispute prerequisite is *International Ass'n of Machinists v. Cutler-Hammer.*[5] It was held there that an agreement in the contract to discuss payment of a bonus by the company was not arbitrable, since "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitra-

[1] United Steelworkers v. Americn Mfg. Co., 363 U.S. 564, 568 (1960).
[2] Annot., 24 A.L.R. 2d 752, 766 (1952).
[3] 31 AM. JUR. LABOR §114 (1958).
[4] Annot., 24 A.L.R. 2d 752, 762-63 (1952). At 756 n. 7, the author criticizes the rule as being illogical. It would be logical if the court could set aside an award for mistakes of law, but no such power exists in New York.
[5] 271 App. Div. 917, 67 N.Y.S. 2d 317 (1947); *aff'd*, 297 N.Y. 519, 74 N.E. 2d 464 (1947).

tion."[6] The Court felt that the union was not seeking a discussion of whether or not the company would pay the bonus, but a discussion of what amount would be paid by the company. In the Court's opinion, the union's position was "plainly" without merit and failed to raise a "bona fide" dispute as to the meaning of a contract provision. In deciding this case the lower court merely stated that a "bona fide" dispute was necessary. No authority was cited, but in a dissenting opinion upon appeal, Justice Fuld made reference to *S. A. Wenger & Co. v. Propper Silk Hosiery Mills.*[7] In the *Wenger* case it was said that:

> Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration; but where a bona fide dispute in fact arises over the performance of *a contract of purchase and sale,* it does not devolve upon the court to say that as a matter of law there is nothing to arbitrate.[8] [Emphasis supplied.]

Although the *Wenger* case dealt with commercial arbitration, it seems to have been the authority for the *Cutler-Hammer* decision. A question then arises as to whether such a rule of commercial arbitration should have properly been transplanted into the field of labor arbitration. In many instances, commercial and labor arbitration may be governed by the same rules, but in some cases it is necessary to realize the distinction between the two before a rule of commercial arbitration can be carried over into labor arbitration. The rule for frivolous claims is one such case. Commercial arbitration is used "to avoid the formalities, the delay, the expense, and vexation of ordinary litigation."[9] Usually only a few persons are involved and rather strict interpretation of the agreement is desired. Arbitration of frivolous claims is unlikely to benefit the few. On the other hand labor arbitration is "primarily designed to prevent strikes and other expressions of unrest by a prompt and equitable settlement of labor disputes"[10] involving a large number of persons. Arbitration of frivolous claims, then, may serve some purpose in preventing industrial unrest.[11] Therefore, it is doubtful whether the *Cutler-Hammer* doctrine, originating in commercial arbitration, should be carried over into labor arbitration, as was done in the lower courts in the *American Mfg. Co.* case.

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[6] *Id.* at 318.

[7] 239 N.Y. 199, 146 N.E. 203 (1924), cited in Cutler-Hammer case, *supra* note 5, 74 N.E. 2d at 464 (Dissent).

[8] *Id.* at 202-03, 146 N.E. at 203-04.

[9] Annot., 24 A.L.R. 2d 752, 756 (1952).

[10] *Id.* at 755.

[11] See Cox, *Current Problems in the Law of Grievance Arbitration,* 30 Rocky Mt. L. Rev. 247, 261 (1958). For a more complete discussion of the natures and purposes of commercial and labor arbitration, see Phillips, *The Function of Arbitration in the Settlement of Industrial Disputes,* 33 Colum. L. Rev. 1366 (1933).

The effect of this doctrine, followed in a number of cases,[12] has been twofold. First, if in the court's estimation, there was no basis for the claim, it could refuse to allow arbitration even though the alleged dispute might fall within the literal language of the arbitration agreement.[13] Secondly, in determining that there was no basis, the court has been allowed to inquire into the merits of the particular claim. This amounted to a direct encroachment on the function of the arbitrator, the person chosen by the parties to deal with these matters.[14] Although these effects are the same in both commercial and labor arbitration, the natures of the two institutions, as mentioned above, cause the effects to present a more serious problem in regard to labor arbitration.

In *Engineers Ass'n v. Sperry Gyroscope Co.*,[15] the Court realized that by trying to find a "bona fide" dispute, it was often considering the same facts that an arbitrator deals with when he renders a decision on the merits of a grievance. But it maintained that its duty to determine arbitrability could not be carried out unless it examined the facts. "The alleged breach must be 'put in issue by facts, as distinguished from unsupported charges.' "[16] To explain away the obvious encroachment, it created the "quantum of proof" theory:

> In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the con-

[12] The Cutler-Hammer doctrine seems to be deeply entrenched in New Jersey and New York law. See Textile Workers Union v. Firestone Plastics Division, 6 N.J. Super. 235, 70 A. 2d 880 (1950); Standard Oil Develop. Co. Emp. Union v. Esso R. & E. Co., 38 N.J. Super. 106, 118 A. 2d 70 (1955); George F. Driscoll Co. v. New York City Hous. Auth., 15 Misc. 2d 770, 182 N.Y.S. 2d 778 (1958); Hausner v. Hopewell Products, Inc., 10 A.D. 2d 876, 201 N.Y.S. 2d 252 (1960). But see Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1291 (1959) where the author feels that its influence is decaying and cites Bohlinger v. National Cash Register Co., 305 N.Y. 539, 114 N.E. 2d 31 (1953) and Kharas and Kroetz, *Judicial Determination of the Arbitrable Issue*, 11 ARB. J. (n.s.) 135 (1956) as authority.

This doctrine has spread to other state jurisdictions on occasion. See Greyhound Corp. v. Div. 1384, Amalgamated Ass'n, 44 Wash. 2d 808, 271 P. 2d 689 (1954); Pari-Mutuel Emp. Guild v. Los Angeles Turf Club, 169 Cal. App. 2d 571, 337 P. 2d 575 (1959).

For the Cutler-Hammer doctrine as the basis of federal court decisions, see Barrett v. Miller, 166 F. Supp. 929 (S.D. N.Y. 1958); United Steelworkers v. American Mfg. Co., 264 F. 2d 624 (6th Cir. 1959); International Union, Etc. v. Benton Harbor Mal. Ind., 242 F. 2d 536 (6th Cir. 1957); Goodal-Sanford Inc. v. United Textile Workers, 233 F. 2d 104 (1st Cir. 1956); Local 205, Etc. v. General Electric Co., 233 F. 2d 85 (1st Cir. 1956); Local 379, Etc. v. Jacobs Mfg. Co., 120 F. Supp. 228 (D. Conn. 1953); Davenport v. Proctor and Gamble Mfg. Co., 241 F. 2d 511 (2d Cir. 1957); Engineers Ass'n v. Sperry Gyroscope Co., 251 F. 2d 133 (2d Cir. 1957).

[13] General Electric Co. v. United Electrical R. & M. Workers, 300 N.Y. 262, 90 N.E. 2d 181 (1949).

[14] See Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. CHI. L. REV. 616, 627 (1950) and Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952).

[15] 251 F. 2d 133 (2d Cir. 1957).

[16] Engineers Ass'n v. Sperry Gyroscope Co., *supra* note 12 at 137 citing Application of Berger, 78 N.Y.S. 2d 528, 532 (1948). In the latter case the union characterized the abandonment of a department as a prohibited layoff. The

> tract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim.[17]

But how much evidence is necessary to determine arbitrability and yet not encroach upon the function of an arbitrator? In *New Bedford Defense Prod. Div. v. Local 1113, Etc.*[18] the Court declined to follow the *Cutler-Hammer* doctrine or adopt the "quantum of proof" theory, and cited the lower court's holding that ". . . issues do not lose their quality of arbitrability because they can be correctly decided only one way."[19] The only requirement was that a possible, rather than a "bona fide" dispute be presented. The Court also compared the jurisdiction of an arbitrator with that of a court and said that since a court would not lose jurisdiction of a case because its solution may be crystal-clear under the law, neither should be an arbitrator. In the following year, in *Local 1912, Int. Ass'n of Mach. v. United States Potash Co.*,[20] the Court felt that a determination of arbitrability involved a "modicum" of contract interpretation. The inquiry into the merits was not to find a "bona fide" dispute, however, but only to determine whether the contract was susceptible to an interpretation to cover the asserted dispute.[21]

In the principal case, *United Steelworkers v. American Mfg. Co.*, the Court stated that §203(d) of the Labor Management Relations Act,[22] sanctioned the use of final adjustment methods agreed upon by the parties. According to the Court, the use of these methods could only be effective if they were given "full play." Expressly referring to the *Cutler-Hammer* decision, the Court said:

> A state decision that held to the contrary announced a principle that could only have a crippling effect on grievance arbitration.[23]

The Court criticized the *Cutler-Hammer* case for being preoccupied with ordinary contract law. It realized that "in the context of the plant or industry the grievance may assume proportions of which judges are ignorant." The agreement states that all disputes are to be arbitrated, not only those the courts consider meritorious.

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company gave the business reasons for the abandonment and the union offered no proof to support its own contention. The Court held that "in the absence of such proof the characterization cannot convert what the facts abundantly establish to be a determination in good faith of a matter of business policy into something else."

[17] Engineers Ass'n v. Sperry Gyroscope Co., *supra* note 15, at 137.

[18] 258 F. 2d 522 (1st Cir. 1958).

[19] *Id.* at 526.

[20] 270 F. 2d 496 (10th Cir. 1959).

[21] *Id* at 499. The Court stated that "it is not for us to resolve the contrariety or to choose between the courts and the arbitrators. It is enough that the contrariety raises a question as to the proper interpretation or application of the contract—a function which belongs to the arbitrator. Without more, it is plain that the grievance dispute does not lie wholly outside the provisions of the contract, and arbitration is therefore enforceable."

[22] 61 Stat. 154 (1947), 29 U.S.C. §173(d) (1958).

[23] United Steelworkers v. American Mfg. Co., *supra* note 1, at 566-67.

The Supreme Court, with the *Cutler-Hammer* doctrine in mind, seems to agree that some rules originating in commercial arbitration have no place in labor arbitration.[24] In accord with the *New Bedford* and the *United States Potash Co.* cases, the Court declared the function of the court to be "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."

In the second of the three companion cases, petitioner union attempted to compel arbitration under an agreement that if differences or local trouble of any kind arose as to meaning and interpretation of the contract, the grievance program, including arbitration, was to be used. The agreement also contained a clause stating that all matters "strictly a function of management" were not to be subjects of arbitration. The company contracted out maintenance work usually performed by the union members. A number of these members filed a grievance that this practice amounted to a partial lockout which was prohibited by the agreement. The grievance was not settled. The company refused to arbitrate on the grounds that the basis for the grievance, contracting out work, was a reserved function of management and not an arbitrable issue. The District Court found that the company had contracted out work in the past and the union had unsuccessfully attempted to prevent the continuation of it by means of a collective bargaining agreement. It sustained the company's contention and the Court of Appeals affirmed. The Supreme Court reversed on the grounds that since there was a dispute as to the meaning and application of the agreement, there was an arbitrable issue. In order that a function of management clause be used to block arbitration, the specific function of management in contention must have been expressly excluded from arbitration in the agreement. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960).

One of the issues involved in this case is the concept of management functions. Many writers refer to "management rights" as the residue of management's pre-existing functions which remains after the negotiation of a collective bargaining agreement.[25] The nature of a collective contract is "to limit management in the exercise of its discretion and its otherwise unfettered authority."[26] A "strictly a function of manage-

[24] The Supreme Court, in United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960) expressly states that "in the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife . . . [and] . . . arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement."

[25] Although "management functions" vary in different industries, basically they include the rights of hiring, firing, organizing and directing the working force, and directing and operating the plant and production. For a more complete list, see BEATLY, LABOR-MANAGEMENT ARBITRATION MANUAL 85-88 (1960).

[26] BEATLY, LABOR-MANAGEMENT ARBITRATION MANUAL 86 (1960).

ment" clause inserted in the agreement serves to fortify the continuing validity of management functions.[27]

The traditional approach to determine whether a function of management is an arbitrable issue is the search of the agreement for an express provision in the contract that it would be arbitrable.[28] Where there is no such provision, the particular function of management cannot be a subject of arbitration. The Court in *Amalgamated Ass'n, Etc. v. Greyhound Corp.*, held that:

> What is within the terms of the contract is governed by it. What is without the terms of the contract is unaffected by it. Both the employer and employee have complete freedom of action in this unaffected field.[29]

This position is taken because to hold otherwise would result in submitting to arbitration what the parties did not voluntarily wish to submit. In addition, the union might be able to gain from arbitration what they were unable to secure at the bargaining table.

In the *Warrior and Gulf Co.* case, the Supreme Court did not adopt the traditional approach. It felt that management functions were arbitrable unless the company expressly excluded them from arbitration in the agreement,[30] and held that "apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."[31] The reason for this position is that where there is a general arbitration clause, "the management clause cannot be utilized to sever contractual rights vested in other parts of the contract."[32] The Court felt that since contracting out work was not expressly excluded in the agreement, there would be a question as to whether or not it would affect other rights in the agreement. Maintaining that the partial lockout claim presented an arbitrable issue of contract interpretation, the Court held that the arbitrator's function would be usurped if a court was also allowed to determine whether contracting out work amounted to a partial lockout. The court's function should cease when it determined that a particular claim did or did not present a possible issue for arbitration. In determining arbitrability, the court must not weigh the merits, but must see if the arbitration clause

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[27] TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 94 (1947).
[28] See *In re* Celanese Corp. of America, 33 Lab. Arb. 925, 929-31 (1959) for a list of cases which apply this principle. Note that the District Court's decision in the Warrior and Gulf Co. case is one of the chief cases cited in support of the position.
[29] 231 F. 2d 585, 587 (5th Cir. 1956).
[30] For excerpts from cases which advocate this position, see *In re* Celanese Corp. of America, *supra* note 28, at 937.
[31] United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960).
[32] 44 L.R.R.M. 2019, 2021 (1959).

is susceptible to an interpretation that covers the asserted dispute and any doubts should be resolved in favor of coverage.

This holding was criticized in *Md. Tele. Union v. Tele. Co. of Md.*:

> It is hard to believe that the Court means that positions taken and abandoned during collective bargaining can never be considered by the courts in determining whether a party should be required to arbitrate, especially where a demand is withdrawn as the result of an agreement between the parties. Effective bargaining, as well as good faith, requires that parties live up to their agreements, and that neither party attempt to secure by arbitration what it renounced during negotiations.[33]

But it must be remembered that the parties contracted to have the arbitrator decide all disputes. Therefore, would it not be up to the arbitrator to consider the various positions taken at the bargaining table?

The position that the *Warrior and Gulf Co.* case took, as opposed to the traditional approach in considering management functions, presents the greater possibility that management will suffer if this policy is carried through. Contracts that contain a detailed list of "reserved" management functions will be less likely to be accepted by the union. This could force the company to sign an agreement omitting them and thus be subjected to the situation in the principal case. But the arbitrator is not essentially pro-labor and contra-management. It is most probable that an arbitrator would have found that the union had no valid claim in the fact situation of the *Warrior and Gulf Co.* case. What the Supreme Court tried to do was to carry out the intent expressed in the written agreement that "all disputes are to be settled by arbitration."

While the preceding two cases were examples of pre-arbitration problems, the last case of the companion decisions presents a post-arbitration problem. Here the petitioner union attempted to enforce an arbitration award which reinstated unjustly discharged employees and, except for a ten-day suspension period, provided for back pay since their dismissal. The reinstatement and payment of part of the back pay were for a period after the termination date of the collective bargaining agreement. The company objected to that part of the award which dealt with occurrences subsequent to the termination date of the contract and refused to submit to the award. The District Court directed the company to comply, but the Court of Appeals held that that part of the award dealing with reinstatement and payment of back pay after the termination date of the agreement could not be enforced. The Supreme Court reversed the decision of the Court of Appeals because it considered the proper approach in this area to be that courts refuse to review the merits of an arbitration award. It said that the whole arbitra-

[33] 35 Lab. Arb. 82, 87 (1960).

tion procedure would be undermined if the courts had the final say on the merits of an award, since the arbitrator's informed judgment is an essential part of the procedure. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

The classic statement of the doctrine of the finality of an arbitrator's award occurs in *Fudickar v. Guardian Mutual Life Ins. Co.*[34] Even before the *Enterprise Co.* case the courts have recognized the doctrine's validity, but oftentimes have not applied it in their decisions. Whether it was "professional jealousy" or, as one author maintains, the arbitrators' assumption of the attitude of judicial demi-gods who disregard established principles of law and substitute their own brand of justice,[35] which prompted judicial review of awards, is not certain. The result of this practice was the demise of the phrase inserted by the parties that "the determinations of the arbitrator are final as to the law and the fact." In regard to a present trend, one author points to an increasing judicial interference,[36] while another maintains that there exists "a growing trend toward a judicial self-limitation which recognizes that there are bounds to the scope of judicial review of arbitration."[37]

The *Enterprise Co.* case was primarily concerned with giving the arbitrator a free reign in order to further the arbitration process. It attempted to aid the development of this branch of industrial self-government.[38] Opponents of this view contend that the preservation and safeguard of basic legal principles, recognized in the community at large, outweigh the merits of allowing the arbitration procedure to go unhampered by the courts. They say that administrative agencies are functioning quite well even though the courts have the power to review their decisions. They conclude that judicial review of awards will not impair arbitration, but will aid it by confirming heretofore hesitant parties that the awards will be legally just.[39]

Preoccupied with the notion that the courts have no business weighing the merits of the claim, the Supreme Court seemed to do its utmost to prevent a court from reviewing an award and vacating it. It would allow vacation, however, if the arbitrator exceeded his authority, since "his award is legitimate only so long as it draws its essence from the collective bargaining agreement."[40] Where the arbitrator's opinion is ambiguous, as the Court thought it was in this case, "a mere ambiguity

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[34] 62 N.Y. 392, 399-400 (1875).
[35] Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14, 25 (1955).
[36] *Id.* at 17.
[37] Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L. Q. 519, 534 (1960).
[38] United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 596 (1960).
[39] Herzog, *supra* note 35, at 29-31.
[40] *Supra* note 38, at 597.

in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce this award."[41] But, primarily, the Supreme Court felt that the Court of Appeals merely differed with the construction of the contract that the arbitrator gave. To allow a vacation on this ground would permit courts to review the merits of every construction of the contract, but this is anathema to the Supreme Court.

The Court's attempt to prevent a review of the merits by a court seems to have resulted in ignoring the view taken by the Court of Appeals and by Justice Whittaker in the dissenting opinion in the *Enterprise Co.* case. They maintained that there existed a question of exceeding given authority rather than one of interpreting the contract differently. The Court of Appeals cited several cases which contained established law that "rights [under a collective bargaining agreement] remain in force only for the life of the contract unless renewed by subsequent contract or preserved by statute."[42] The arbitrator's authority comes from the contract and since there was no contract governing the time that part of the award covered, it seems that the arbitrator could have been adjudged to have acted outside his given authority.

The Supreme Court seemed to feel that the best way to effectuate the labor arbitration process was to prohibit courts from weighing the merits of a grievance. It was this idea that permeated the decisions of the above three cases and gave rise to their results. In the field of labor arbitration, definite roles are now allocated to the courts and to the arbitrators, roles which are to be played in the advancement of industrial self-government.

ROGER E. WALSH

The Trustee's Status as a Hypothetical Lien Creditor Under Section 70 (c) of the Bankruptcy Act: *Constance v. Harvey* Overruled—In *Lewis v. Manufacturers National Bank of Detroit*,[1] the bankrupt borrowed money from the respondent on November 4, 1957, giving a chattel mortgage on his automobile as security. Under Michigan law, such mortgages were void as against creditors of the mortgagor unless recorded immediately.[2] Respondent's mortgage was not recorded until four days later on November 8, 1957, but no creditor had extended credit in the interim between the execution and the recordation of the mortgage. However, after the mortgagor filed a voluntary petition in

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[41] *Id.* at 598.

[42] Enterprise Wheel and Car Corp. v. United Steelworkers, 269 F. 2d 327, 331 (4th Cir. 1959).

[1] 364 U.S. 603 (1961).

[2] MICH. COMP. LAWS s.566.140 (1948) as amended by PUBLIC ACT No. 233 (1957). In 1959, by PUBLIC ACT No. 110, a 10-day grace period is now allowed for the recording of chattel mortgages.