Marquette Law Review

Volume 43
Issue 2 *Fall 1959*

Article 9

1959

Labor Law: Authority of Arbitrator to Determine Remedy for Violation of Collective Bargaining Agreement

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> compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment.[21]

Therefore, by impyling that the Fourth Amendment which regulates federal action, applied only to criminal proceedings, the Court was then able to decide that the civil health laws were likewise not protected by the due process clause of the Fourteenth Amndment.

Coinciding with this constitutional trend, a new problem will probably present itself—the need for a clearer deliniation between civil and criminal proceedings. The *Boyd* case, cited by the majority opinion in the *Frank* decision, held that the proceedings involved, though civil in name, were criminal in nature and that the Fourth Amendment was still applicable to this "quasi criminal" action.[22] Therefore, it is likely that civil actions which provide for penalties and forfeitures, will be given a "quasi criminal" label in order to secure the traditional protection of the search and seizure clause of the Fourth Amendment as embraced in the Fourteenth Amendment.

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Labor Law: Authority of Arbitrator to Determine Remedy for Violation of Collective Bargaining Agreement—The union sued under Section 301 of the Labor Management Relations Act[1] for specific performance of the arbitration clause of the collective bargaining agreement. The basic grievance resulted from a foreman's denial to an employee of four hours' overtime work to which the employee was allegedly entitled by reason of his job classification. The company offered to give the aggrieved employee four hours' overtime work but refused, in accordance with its established policy, to pay for work not performed. The company proposal was unsatisfactory to the union, which invoked arbitration. The company agreed to arbitrate the issue of whether a contract violation occurred, provided that the remedy for the violation be the subject of negotiation between the company and the union and not fixed by the arbitrator. On appeal to the court of Appeals for the Fifth Circuit, *held:* com-

[21] *Id.* at 808, citing Boyd v. United States, *supra,* note 19, at 633.

[22] "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. . . . The information, though technically a civil proceeding, is in substance and effect a criminal one. . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, . . ." Boyd v. United States, *supra,* note 19, at 633-634.

[1] 61 Stat. 156 (1947), 29 U.S.C.A. §185 (1952).

pany is required to proceed with arbitration of the issue of work assignment, but arbitrator's authority is limited to a determination of that issue alone and not to the formulation of any penalty or the fixing of damages. *Refinery Employees v. Continental Oil co.*, ——— F. 2d ———, 44 LRRM 2388 (5th Cir. 1959).

The union conceded on appeal that the court had the authority to determine the arbitrability of the grievance[2] but contended that the court could not restrict the arbitration to the issue of whether there was a violation of the contract and could not prohibit an award of damages. The court pointed out that arbitration has its basis in the consent of the parties and that specific performance of a contract to arbitrate cannot be ordered unless it is first determined that defendant has broken his promise to arbitrate. The court reasoned that the decision that the defendant has broken his promise to arbitrate requires a definition of the issue sought to be arbitrated and a determination that the defendant promised to submit that issue to arbitration.[3]

Having thus outlined the two tasks confronting it, the court quickly disposed of the first by finding the real dispute which the union desired to arbitrate to be the question of whether the company should pay for time not worked as a penalty to discourage future violations.[4] The underlying controversy as to the correctness of the overtime work assignment was not, the court felt, the real matter in dispute.[5]

In deciding that it was not the intent of the company and the union to submit to arbitration the question of a penalty for misassignment of work, the court considered three features of the collective bargaining agreement: the narrow arbitration clause,[6] the reservation of the

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[2] It appears well settled that the question of arbitrability is to be determined by the court. *Cf.* Engineers Ass'n. v. Sperry Gyroscope Co., 251 F. 2d 133, 41 LRRM 2272 (2d Cir. 1957); Machinists Ass'n. v. Cameron Iron Works, 257 F. 2d 467, 42 LRRM 2431 (5th Cir. 1958) *cert. denied* 358 U.S. 880; United Steelworkers v. American Mfg. Co., 264 F. 2d 624, 43 LRRM 2757 (6th Cir. 1959). The court must determine whether the contract puts the question of arbitrability to the arbitrator and if so order arbitration which will include a decision on arbitrability. United Electrical Workers v. General Electric Co., 233 F. 2d 85 at 101, 38 LRRM 2019 (1st Cir. 1956) *aff'd.* 353 U.S. 547 (1957).

[3] See Engineers, A.F.L. v. General Electric Co., 250 F. 2d 922, 41 LRRM 2247 (1st Cir. 1957), *cert. denied* 356 U.S. 938.

[4] The serious dispute was whether the Company should pay what in effect is a penalty and is contrary to its policy against payment for work not performed, in the absence of a provision in the contract awarding damages or requiring payment for work not performed. Refinery Employees v. Continental Oil Co., —F. 2d—, 44 LRRM 2388 at 2390 (5th Cir. 1959) . . . this Court is not passing on any remedy the aggrieved employee or the Union may have for misassigned overtime work. That issue is not before us. *Id.*, 44 LRRM at 2396.

[5] The company admitted its error at one point in the grievance procedure and consistently offered to provide four hours overtime work for the aggrieved employee. *Id.*, 44 LRRM at 2389 and 2390.

[6] "Only differences relating to the interpretation or the performance" of the agreement were to be submitted to arbitration. The court contrasted this language with the wide-open clauses providing for the arbitration of any

union's right to strike during the term of the agreement,[7] and the absence of a clause empowering the arbiters to provide a remedy or impose a penalty. This led the court to the conclusion that the contract did not expressly require the company to arbitrate the matter of damages. The three features of the collective bargaining agreement outlined above, the provisions establishing remedies for company violations of various sections of the contract but not for misassignment of overtime[8] and the fact that no fixed standard was established for such assignment,[9] induced the court to conclude that the authority to make an award was not implied. Although the court made only passing reference to the fact that the contract did not contain an absolute prohibition against strikes, the usual *quid pro quo* for a broad arbitration clause,[10] that fact seems particularly persuasive that the company did not intend to arbitrate its monetary liability or punishment and that such a submission should not be implied.[11]

In further support of its conclusion that the power of the arbitrator to fix a penalty was not implied in the collective bargaining agreement, the court relied on a New York case[12] precluding arbitrators from making a damage award under an arbitration clause similar to the one used by the company and the union in the case at the bar.[13] Several state and federal cases were cited in support of the proposition that damages are not arbitrable in the absence of clear contractual language so providing.[14]

The importance of the *Continental Oil* case seems to lie in its holding that the arbitrator's authority is dependent upon the intent of the

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dispute arising under the collective bargaining agreement. *Id.*, 44 LRRM at 2392.

[7] The union promised, however, to refrain from causing work stoppages until the grievance procedure had been exhausted and thereafter until sixty days after a majority of the employees had approved the strike by secret vote. *Id.*, 44 LRRM at 2392, n. 8.

[8] "Nowhere in Section 8 is there any provision for a penalty or for damages for a misassignment. But a remedy is expressly provided or probably implied in other sections of the contract, such as those dealing with vacations, jury duty, severance pay, annuities, and funeral leaves." *Id.*, 44 LRRM at 2395.

[9] The section dealing with overtime stated the intent of the company "to equalize overtime . . . insofar as it may be practical" but imposed no absolute obligation and made no reference to damages or other remedy. *Id.*, 44 LRRM at 2396.

[10] "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

[11] The principle contended for by the union would require the company to arbitrate the proper penalty yet leave the union free to attempt to force a greater penalty through a strike.

[12] Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929).

[13] The arbitrators sought to resolve a commercial dispute by awarding close to $1,000,000 as consequential damages.

[14] There is eminent authority to the contrary. See Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 at 1494 (1959); Goodall-Sanford, Inc. v. United Textile Workers, 233 F. 2d 104 at 107, 38 LRRM 2033 (1st Cir. 1956), *aff'd.* 353 U.S. 550 (1957).

parties and not upon a court's idea of the public policy with respect to arbitration of labor disputes.[15] Inherent in the decision is the notion that the intent of the parties must be gleaned from an examination of the collective bargaining agreement. Unfortunately, there are few, if any, well established rules of construction which would aid a court in this task since the body of substantive law spoken in *Lincoln Mills*[16] is not yet fashioned. To apply the rule of construction contended for by the union that the arbitrator's authority to impose a remedy is implied where not expressly denied would be a denial of the consensual basis of arbitration since the agreement was not drafted in contemplation of such a rule. The Fifth Circuit opinion considers the dilemma presented by collective bargaining agreements which fail to completely define the arbitrator's authority but suggests no rule of law providing a solution.[17] Consequently, the decision alerts parties to collective bargaining agreements of the practical necessity of contract provisions clearly spelling out their intent with respect to arbitration.

Although the failure of the union and the company involved in the *Continental Oil* case to set forth the arbitrator's authority with sufficient definiteness and clarity may have resulted from inadvertence, it appears more likely that the company and the union never in fact reached a definite agreement on the issue. If such were the case the decision appears correct since a court is unable to add to the parties' agreement in this respect and still recognize that arbitration is based upon the consent of the parties. It has been suggested that failure to reach a definite agreement on the question of the arbitrator's authority often results from the reluctance of the negotiating parties to risk an impasse and that both sides prefer to execute incomplete agreements in the hope that they will be interpreted favorably.[18] The *Continental Oil* case serves notice to employers and employee representatives of the need to face the problem at the bargaining sessions and resolve it in the collective bargaining agreement. CHARLES Q. KAMPS

[15] The dissenting opinion contains the following language: The idea of a person deciding a controversy so that his decision may then become the subject of a new and further one — i.e., controversy in bargaining — is repugnant to the scheme of an orderly disposition of disputes before they ripen into the seeds of industrial conflict. Refinery Employees v. Continental Oil Co., *supra* note 4, 44 LRRM at 2398. This would appear to be justified criticism of an agreement precluding the arbitrator from providing a remedy but not of a decision enforcing such an agreement.

[16] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

[17] Where reasonable minds could not differ as to the appropriate remedy for a contract violation, the arbitrator's authority to determine the remedy might still be in doubt but not questioned since nothing could be gained by litigation.

[18] Sooner or later an employer and his employees must strike some kind of a bargain. The costs of disagreement are heavy. The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required. Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 at 1491 (1959).