

Labor Law: Fair Representation of Employee's Interests in Arbitration Proceedings

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RECENT DECISIONS

Labor Law: Fair Representation of Employees' Interests in Arbitration Proceedings—A grievance arose concerning the seniority of four employees who had been laid off when certain supervisory employees were demoted and transferred back into the bargaining unit. Such supervisory employees had originally held non-supervisory positions in the bargaining unit before they had been promoted.

In the course of the grievance procedure, the employer contended that the former supervisory employees had continuous seniority measured from the date they had entered the service of the company while the union took the position that there should be excluded from such period of continuous service the time spent in supervisory positions.¹ The grievance ended in arbitration before a single arbitrator who received evidence and heard witnesses. However, none of the demoted supervisory employees were notified of the time and place of such hearing and none were present or participated in the arbitration proceedings. The arbitrator's award upheld the union's position.

In an action by seventeen of the demoted supervisory employees to vacate the arbitration award, the circuit court for Waukesha County rendered judgment for the plaintiffs. On appeal, the Wisconsin Supreme Court affirmed, holding that where the union espoused the cause of other employees, the plaintiffs were, as a matter of law, not fairly represented and the award would not be binding on them because of lack of notice of the hearing. *Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264, 99 N.W. 2d 132 (1959).²

The problem presented in the *Clark* case is one that has greatly vexed both legal writers and the courts. It is the problem of when, if ever, judicial protection should be afforded to individual employees whose interests are adversely affected by arbitration proceedings.³ That a suitable answer has not been reached is attested to by the statements of the court in *Donato v. American Locomotive Company*.⁴ There, the court pointed out that while the older cases uniformly held that the union has the sole right to bring arbitration and to seek to vacate an adverse award, "In recent years, . . . there has been a growing recognition that the individual employee has

¹ The contract clause covering seniority read as follows: "Seniority. Is an employee's length of service with the company in years, months and days."

² Motion for rehearing denied 8 Wis. 2d 264, 100 N.W. 2d 317 (1960); *cert denied* by the United States Supreme Court.

³ *Clark v. Hein-Werner Corp.*, 8 Wis. 2d 264 at 269, 99 N.W. 2d 132, at 135 (1959).

⁴ *Donato v. American Locomotive Co.*, 283 App. Div. 410, 127 N.Y.S. 2d 709 (1954).

enforceable rights of his own under a collective bargaining agreement."⁵ The court then concluded that "The law upon this subject is still in a state of flux."⁶

Until the *Clark* case, this new attitude toward rights of individual employees under a collective bargaining agreement, noted in *Donato*, had been followed in only two New York cases.⁷ In the *Iroquois*⁸ case, certain employees sought leave to intervene in an arbitration proceeding over seniority rights because the union had taken a position adverse to their interests. The court granted the right to intervene because the employees were "interested in the controversy which was arbitrated." In *Soto v. Lenscraft*,⁹ which has subsequently been reversed,¹⁰ the arbitrator had denied certain employees the right to appear in the arbitration proceedings by their own counsel. Upon a showing by the employees that the union and employer were in collusion to discriminate against them, the court vacated the arbitration award, stating:

Whether petitioners be viewed in the nature of third party beneficiaries of a contract or in the position of beneficiaries of a trust, in which the union as a trustee owes them a fiduciary obligation of fair representation (the label is not important), they had cognizable standing to seek a vacatur of the award.¹¹

In the *Clark* case, the Wisconsin Supreme Court goes further than either the *Iroquois* or *Soto* cases in protecting the rights of individual employees in arbitration proceedings. The court, however, purports to adopt the test of fair representation employed in the *Soto* case, as its standard for determining when court protection should be granted to the rights of individual employees under a collective bargaining contract.¹²

The test of fair representation had its origin in *Steele v. Louisville & Nashville R.R.*¹³ This case which arose under the Railway Labor Act¹⁴ and involved racial discrimination in negotiating a collective bargaining contract. There, the court stated that the bargaining representative had "the duty to exercise fairly the power conferred upon it in be-

⁵ *Id.* at 715.

⁶ *Id.* at 714.

⁷ See Manson, *Labor Relations Law*, 32 N.Y.U. L. Rev. 1365 at 1374, where the author describes the new trend mentioned in *Donato* as being illusory.

⁸ In the Matter of Iroquois Beverage Corp., 14 Misc. 2d 290, 159 N.Y.S. 2d 256 (1955).

⁹ *Soto v. Lenscraft Optical Corp.*, 7 App. Div. 2d 1, 180 N.Y.S. 2d 388 (1958).

¹⁰ *In re Soto*, 7 N.Y. 2d 397, 198 N.Y.S. 2d 282 (1960).

¹¹ *Supra*, note 9 at 392.

¹² The court stated: "We deem such test of fair representation, in determining when to grant court protection to the rights of an individual employee under the collective bargaining contract, to be sound in principle and we adopt the same." *Supra*, note 3 at 272, 99 N.W. 2d at 136-137.

¹³ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

¹⁴ 45 U.S.C.A. §151 *et seq.* (1952).

them.”¹⁵ This test of fair representation which has been held to apply with equal vigor to the settlement of grievances,¹⁶ has been advocated by Professor Cox:

The relationship between law and industrial relations will be improved, and collective bargaining will work better, in my opinion, without any sacrifice of the interests of individual employees, if contracts which contemplate active administration through a grievance and arbitration procedure controlled by the union are held to vest the power to settle grievances in the collective bargaining representative, subject to its fiduciary duty of fair representation.¹⁷

It would appear, however, that in its anxiety to protect the rights of individual employees, the Wisconsin court has misapplied the test of fair representation by holding:

. . . 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.¹⁸ (emphasis added)

This conclusion of the court appears unwarranted in light of the cases which have applied the test of fair representation.

According to the recent case of *Ostrowsky v. United Steelworkers*:¹⁹

When an employee alleged a breach of a union's duty of fair representation, the test to be applied by the court is whether the action of the union was within 'a wide range of reasonableness' and was taken in 'good faith and with honesty of purpose.'²⁰

Numerous other cases, including the *Soto* case, also indicate that an individual has no recourse under the doctrine of fair representation unless he can demonstrate that the grievance settlement was arbitrary, capricious, or in bad faith.²¹ As stated in *Cortez v. Ford Motor Co.*:²²

Our court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representa-

¹⁵ *Supra*, note 13 at 202-203.

¹⁶ *Hughes Tool Co. v. N.L.R.B.*, 147 F. 2d 69 (5th Cir. 1945); *Conley v. Gibson*, 355 U.S. 41 (1957).

¹⁷ Cox, *Rights under a Labor Agreement*, 69 Harv. L. Rev. 601, 638 (1956).

¹⁸ *Supra*, note 3 at 272, 99 N.W. 2d at 137.

¹⁹ *Ostrowsky v. United Steelworkers*, 171 F. Supp. 782 (D.C. Md. 1959).

²⁰ *Id.* at 793 citing *Ford v. Huffman*, 345 U.S. 330 (1953).

²¹ *Renzi v. Oertel Brewing Co.*, 31 Lab. Arb. 565 (Ky. Cir. Ct. 1958); *Jenkins v. Schludberg-Kundle*, 217 Md. 556, 144 A. 2d 88 (1958); *Cortez v. Ford Motor Co.*, 349 Mich. 108, 84 N.W. 2d 523 (1957); *Parker v. Borock*, 182 N.Y.S. 2d 577, 156 N.E. 2d 297 (1959); *Di Santi v. United Glass & Ceramic Workers*, 40 L.R.R.M. 2548 (Pa. Com. Pl. 1959). Also see *Soto* case, *supra*, note 9 and *Pattenge v. Wagner Iron Works*, 275 Wis. 495, 82 N.W. 2d 172 (1957), which are cited by the court in the *Clark* case.

²² *Cortez v. Ford Motor Co.*, *Ibid.*

tives of the union, subject to challenge after exhaustion of the grievance procedure *only on grounds of bad faith, arbitrary action or fraud.*²³

The rule laid down in the *Clark* case that a showing of bad faith or active discrimination by the union is not necessary to find a breach of the union's fiduciary duty, seems regrettable. The court imposes on the collective bargaining representative the impossible burden of satisfying every member of the unit or being held to have violated its duty of fair representation. In so doing, it also provides an opportunity for every employee who is dissatisfied with an arbitration award to seek relief in the courts. It is believed that allowing individuals such free access to the courts may well prove disruptive of the entire arbitration procedure since employers and unions alike will be reluctant to settle grievances by arbitration if their decisions are subject to attack by individuals.

The danger of allowing individual employees to intervene in the arbitration process and attack adverse awards was recognized by the New York court in reversing the *Soto* case.²⁴ *In re Soto*²⁵ made it abundantly clear, that under New York law, even where there was a breach of the union's duty of fair representation, only the *parties*²⁶ to a collective bargaining contract have a right to seek a vacatur of an arbitration award. The court also stressed that an exception to this rule could not be created by a judicial application of equitable principles but could only be accomplished by appropriate legislative action. However, the court took great pains to point out that "an employee is not foreclosed, in an appropriate case, from pursuing any remedy at law that might be available for breach of a fiduciary duty owing by the union."²⁷ Thus, it appears that in New York an employee who is unfairly represented by his union has recourse against the union for damages. This seems to be a sensible way of enforcing the union's duty to fairly represent the members of the bargaining unit while preserving the arbitration process from undue harassment.

Another disturbing aspect of the *Clark* decision is the requirement set forth by the court;

. . . of the giving of notice, and an opportunity to intervene, to those employees not being fairly represented in the arbitration

²³ *Id.* at 529.

²⁴ *Supra*, note 9.

²⁵ *Supra*, note 10.

²⁶ The Civil Practice Act of New York, specifically provides that only parties to an arbitration proceeding can seek to set aside the award, and lists various grounds for which such an award can be vacated. In the first *Soto* case, the court had held the individual employees whose jobs were at stake had status as parties but this view was condemned in *In re Soto*. *Supra*, note 10.

²⁷ *Supra*, note 10 at 283.

by the union, as a condition to the award being binding on such employees. . . .²⁸

As authority for imposing this requirement of notice, the court on rehearing cited the *Estes*²⁹ and *Primakow*³⁰ cases which arose under the Railway Labor Act. According to the court:

Those cases hold that employees have vested seniority rights under their collective bargaining contract, which entitle them to notice of, and the right to participate in, an arbitration proceeding instituted to pass on such rights. We do not deem that seniority rights negotiated under the Labor Management Relations Act, and embodied in a collective bargaining contract, should be accorded any lesser protection.³¹

In reaching this conclusion, it would seem the court ignored one vital distinction. In the National Railway Labor Act, Congress specifically provided "due and timely notice shall be given to the employee or employees *involved* in such dispute."³² No such provision for notice is made in the National Labor Relations Act. As pointed out in a recent Connecticut case,³³ section 9(a)³⁴ does no more than secure to an employee the right to submit grievances directly to his employer and does not give employees the right to compel arbitration.

Another objection which can be made against the requirement of notice is, that although simple on its face, it will not prove readily adaptable to the arbitration process which has as its purpose to reach a speedy and inexpensive determination of questions arising under the collective bargaining contract. Instead it would seem that the requirement of notice will create some new and difficult problems which will tend to cause delay and added expense to the arbitrating parties. In each case the union must determine who must receive notice, that is, what employees have interests in conflict with those advanced by the union. This determination will not be easy because in seniority or promotion cases, it is conceivable that every member of the unit could have an interest adverse to that of the grievant. There is also the problem of what type of notice will be sufficient. Must each interested employee receive separate written notice of the hearing, or would a

²⁸ *Supra*, note 3 at 273, 99 N.W. 2d at 138.

²⁹ *Estes v. Union Terminal Co.*, 89 F. 2d 768 (5th Cir. 1937).

³⁰ *Primakow v. Railway Express Agency*, 56 F. Supp. 413 (D.C. Wis. 1943).

³¹ *Supra*, note 2 at 318.

³² *Supra*, note 14.

³³ *Arsenault v. General Electric Co.*, 147 Conn. 130, 157 A. 2d 918 (1960).

³⁴ Section 9(a) of the National Labor Relations Act as amended, 29 U.S.C. §159 (a) (1952) provides: "Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

public notice on the union bulletin board suffice? A special set of problems is encountered when employees, upon receiving notice of hearing, decide to intervene in the arbitration proceedings. Will this not cause a substantial delay in the arbitration procedure? Will it not increase expenses?

GEORGE F. GRAF

United States v. Parke Davis—In a prosecution by the Justice Department under Sections One and Three of the Sherman Act,¹ a conspiracy and combination in restraint of trade by resale price maintenance was alleged. During a period of time when there was no Fair Trade Law coverage in the District of Columbia or Virginia, Parke Davis Drug Company distributed a catalogue containing a schedule of minimum wholesale and retail prices to wholesalers and retailers in the affected area. Since Parke Davis made it clear that it would refuse to deal with those who did not adhere to the minimum price schedules, most of the wholesalers and retailers indicated their willingness to follow the price policy.

In spite of large profits obtainable under the schedule of minimum prices, some retailers refused to follow the price policy. One of these retailers, Dart Drugs, explained that it was forced to cut the prices of Parke Davis products since a nearby drug store, a member of the People's Drug chain, was advertising Parke Davis products at reduced prices. At once Parke Davis took steps to curtail this price-cutting by People's, which had agreed to observe the stated price lists. The result of these efforts was an assurance by the vice-president of People's Drugs that it would abide by the price policy in the future.

Although Parke Davis' efforts were successful with the People's drug chain, Dart Drugs continued to retail its stock of Parke Davis products at a discount. Dart and others finally agreed to stop the advertising of cut-rate prices in exchange for the resumption of Parke Davis shipments. There was evidence that Parke Davis had decreased its efforts in the ensuing months under greater and greater threat of prosecution by the Justice Department.

It was held by the United States Supreme Court that there were facts in the record which were sufficient as a matter of law to show

¹ 15 U.S.C. §1, 3: Sec. 1—Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy, hereby declared to be illegal shall be deemed guilty of a misdemeanor. . . ; Sec. 3—Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in . . . the District of Columbia and any State or States or foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor.