

Contracts: Collective Bargaining Agreements: Rights of Unions and Individuals

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serted his claim. The general creditor in this case, the bank, had not bargained for security. The bank had relied upon the statements of the borrower that the equipment was unencumbered. It did not examine the record. Had it done that, and had it found that there was nothing there, then, obviously, it should have been protected against the other creditor claiming the security interest in the chattels. No instrument was in fact recorded because no mortgage had been executed. The secured creditor had no more than an enforceable contract on the part of the debtor to give him security, an equitable mortgage. There was nothing in the case to suggest that there had been any plan as between the contractor and the surety company to give security but to keep the security instrument off the record. It is suggested here that both the bank and the surety company could have insisted upon some form of security instrument, chattel mortgages for instance, to secure their respective claims. It is true that their claims were unliquidated or were to depend upon future happenings, but that would not have made the giving of chattel mortgages to secure those claims impossible nor impractical. Neither creditor did so insist. The surety company got in first to get the equipment. The bank had not been misled by anything the surety company had failed to do when the former made its loan without insisting upon some form of security. The decision seems to approach the suggestion that any general creditor is to be protected where the mortgage has not been filed even after the mortgagee has stepped in and has seized the goods. It is doubtful whether the filing statute, ambiguous as it is, gives the court any excuse for such a sweeping decision. The decisions cited by the court during the course of its opinion do not sustain the broad proposition.

The legislature in adopting the Uniform Conditional Sales Act has specified particularly that the security interest of the vendor shall not be protected against any subsequent lien creditor without notice, good faith purchaser or encumbrancer through the vendee, where the vendor has failed to file within the time prescribed.¹⁰ The statute in that form is not ambiguous. Although the legislature has spoken that definitely the court still has power to work out an adjustment in favor of the general creditor where circumstances suggest that the secured creditor ought to be estopped to assert his security interest against him. The chattel mortgage statute might well be redrawn. There is no reason why it ought not in this respect read like the statute covering the filing of conditional sales agreements.

VERNON X. MILLER.

CONTRACTS—COLLECTIVE BARGAINING AGREEMENTS—RIGHTS OF UNIONS AND INDIVIDUALS.—“A trade agreement, or a collective labor agreement, is a term used to describe a bargaining agreement entered into by a group of employees, usually organized into a brotherhood or union, on the one side, and a group of employers, or a corporation, such as a railroad company, on the other side. Such an agreement may be a brief statement of hours of labor and wages, or, on the other

¹⁰ Section 122.05, Wis. Stats., 1933.

hand, it may take the form of a book . . . or of an exhaustive pamphlet regulating, in the greatest minuteness, even conditions under which labor is to be performed, and touching upon such subjects as strikes, lockouts, walkouts, seniority, apprentices, shop conditions, safety devices, and group insurance."¹ Originally there was much doubt concerning the enforceability of these collective bargaining agreements. Much of the doubt arose out of the rather unusual character of the agreements. They are made between the union and the employer but are of no practical value to either party unless individual laborers agree to work for the employer. Neither of the contracting parties can force individuals to make these individual agreements, or abide by them once they are made. On the other hand, the individual laborer (or the union) can not force the employer to hire anyone at all if he decides to close down his business,² nor can it force him to keep unsatisfactory workers in his employment.³ But if individual agreements are made and work is given, the collective bargain has a legal effect upon the individual bargain and controls wages, hours of work, conditions and so on. Thus, it is a hybrid device which the courts did not, at first, like to enforce.

Until after the war labor unions or their individual members made few attempts to enforce their collective bargaining agreements in the courts.⁴ The labor leaders mistrusted the courts and preferred to enforce their agreements by means of the strike. There was much to justify their suspicions. The courts had shown a tendency to listen to any of the numerous objections which were raised against the enforcement of such agreements. It was said that they were not contracts at all because the union, an unincorporated association, did not have the power to contract or to enforce a contract in the court; that they were founded upon no consideration because all of the promises were made by the employer and none by the union; that they lacked mutuality because they could not be specifically enforced against the union (being viewed as contracts for personal services). Collective agreements have gained legal status by the slow process of overcoming these objections.

POWER OF A UNION TO CONTRACT AND TO SUE

Chief Justice Taft, in the famous Coronado Coal Company case said that, "Undoubtedly at common law, an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against

¹ *Rentschler v. Missouri Pacific Ry.*, (Neb. 1934) 253 N.W. 696.

² "The labor contract, therefore, is not a contract, it is a continuing implied *renewal* of contracts at every minute and hour, based on the continuance of what is deemed on the employer's side, to be satisfactory service, and, on the laborer's side, what is deemed to be satisfactory conditions and compensation." John R. Commons, "Legal Foundations of Capitalism," p. 285 (1924).

³ This discussion is concerned with the employment of the more ordinary labor and not with those instances where the services to be rendered are of a special nature, such as singers, artists, etc., who have a unique value.

⁴ 44 Harv. Law Rev. 572 (1930) "Collective Labor Agreements in American Law," William Gorham Rice, Jr.

each member."⁵ Certainly the common law did not recognize an association as an entity which could carry on its own business as such. Many of the cases state that such an association may not be a party plaintiff or defendant in the absence of a statute permitting it.⁶

Because these associations have become an important factor in the social structure and do in fact act as entities, making contracts, holding property and incurring obligations, the growing tendency is one of recognition.⁷ As early as 1896 Thomas Holland pointed out that in England the distinction between the status of the corporation and that of the unincorporated association was being broken down.⁸ Wisconsin has obliterated this distinction and allows the trade union to appear as a party.⁹ This healthy attitude has become settled doctrine in most of the more advanced industrial jurisdictions where the problem is more frequently presented.

Most cases involving trade unions are brought in the equity court. Equity procedure allows one person to bring a suit as a representative of many other persons too numerous to sue or be sued. A very common practice is to have the action brought by the officers for the benefit of the whole membership of the union. This avoids the necessity of de-

⁵ *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 66 L.Ed. 975 (1922).

⁶ *West v. Baltimore and Ohio Ry.*, 103 W.Va. 417, 137 S.E. 654 (1927) represents the traditional view.

Wisconsin has several statutes which may be interpreted to mean that the entity of an unincorporated trade union would be recognized even if the cases did not make this apparent.

Sec. 133.07 (1) (Wis. Stats., 1933) provides that working people may organize into unions for mutual benefit, protection of their rights and regulation of their wages and hours.

Sec. 133.08 (Wis. Stats. 1933) expressly exempts trade unions from the operation of the anti-trust laws.

A reasonable inference could be drawn that since collective bargains made by trade unions are expressly recognized and permitted by the statutes, the courts would recognize the associations which made the agreement as a proper party plaintiff or defendant in any litigation concerning it.

⁷ "It is an undoubted fact that clubs, trade union, churches and other social organizations are frequently created without formality of incorporation. Such groups do exist as facts, and their members customarily think of them as units. It is not apparent that anything substantial will be gained by the community if the courts insist on closing their eyes to these facts, which everyone else clearly recognizes." 43 Harv. Law Rev. 1009 (1930) "The Internal Affairs of Associations not for Profit," Zechariah Chafee.

⁸ "Elements of Jurisprudence" p. 289 (*302) note 16 (1896) Thomas Holland. See also 42 Harv. Law Rev. 977 at 995, "Dogma and Practice in the Law of Associations," E. Merrick Dodd, Jr., for further comment on this tendency.

⁹ *Adler and Sons v. Maglio*, 200 Wis. 153, 228 N.W. 123 (1929). Here Maglio as an officer of the union and the Amalgamated Clothing Workers of America were joined as defendants. Joining the union as a party defendant was not even questioned.

New Jersey allows the union to be sued; service upon the business agent of the union being considered sufficient. *Unkovich et al v. N. Y. Central Ry. Co.*, 114 N.J. Eq. 448, 168 Atl. 867 (1933).

Contra: *West v. Baltimore and Ohio Ry. Co.*, supra, note 6. No action could be maintained against the local lodge of the union (unincorporated) because no valid judgment could be taken against it. Note the comparatively recent date.

cing whether or not the union as such has the ability to sue or be sued.¹⁰ In a code state the same procedure may be followed where the action is at law.¹¹ In almost any jurisdiction, then, the union may be, in fact if not in appearance, a party to an action on a collective agreement.

CONSIDERATION

The objection that collective bargaining contracts lack consideration was formerly a stronger argument than it is today. Modern courts have found several ways around it.¹² Some have looked at the situation realistically and have recognized that while a person cannot be forced to work against his will, economic compulsion forces most men to work; that there is no need for legal compulsion. Therefore, they have not held that the contract lacked consideration simply because the union could not promise that all of its members would work for any specified length of time. Thus, the Tennessee Supreme Court found sufficient consideration in a laborer's willingness to work.¹³ This willingness was not stated or implied in the agreement but the court implied it from the situation and the acts of the parties. Other courts have looked to the agreement itself and have found something they could call consideration. A promise by the union to call no strikes during the period the agreement was to run was considered good consideration.¹⁴ The manufacturer's privilege to use the union label was considered good consideration.¹⁵ A fixed wage scale which could be counted upon over a period of time was also considered sufficient.¹⁶ In a great many of the cases the question of consideration is neither raised nor discussed; it is presumed. The fact that the agreement may have been brought about by the use of economic force (strikes, etc.) does not usually operate to suspend the presumption that the employer must have had some benefit from the contract if he was willing to enter into it.

¹⁰ "Equity procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or be sued * * * out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdiction * * *" *United Mine Worker v. Coronado Coal Co.*, supra, note 5.

¹¹ Sec. 260.12, Wis. Stats., (1933).

¹² *Hudson v. Cincinnati, N. O. and T. P. Ry. Co.*, 152 Ky. 711, 154 S.W. 47, 45 L.R.A. (N.S.) 184, Ann. Cas. 1915B, 98 (1913). The court here stated that the lack of any agreement on the part of the men to work any specific length of time was sufficiently serious to prevent the agreement from being an enforceable contract because there is no consideration. The court felt that because no individual could be forced to work the agreement could be terminated at the will of either party.

However, in a recent decision the Iowa Supreme Court required a consideration expressed in the contract and refused to imply one from the facts. *Wilson et al v. Airline Co.*, (Iowa 1933) 246 N.W. 753.

¹³ *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 9 S.W. (2nd.) 692 (1928).

¹⁴ *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401 (1922).

¹⁵ *Gulla v. Barton*, 164 App. Div. 293, 149 N. Y. Supp. 925 (1924).

¹⁶ *Meltzer et al. v. Kammer*, 131 Misc. Rep. 813, 227 N.Y. Supp. 459 (1927). In this case the employers had relied upon the wage scale to enter into contracts.

MUTUALITY

Specific performance of collective bargaining agreements was sometimes denied to the union because there was a lack of mutuality; specific performance could not have been given to the employer. Enforcing the agreement against the union was regarded as decreeing performance of personal services, which equity ordinarily will not do. An early New York case pointed out that such a decree against an employer would be given only where the services contracted for were unique, for equity would enforce a contract for unique personal services.¹⁷

Later cases, however, gave relief to the union because the employers are conversely entitled to equitable relief. Certainly there is no dearth of cases in which a union was prevented from breaching its agreement not to strike, or to ask for higher wages and so on.¹⁸ While such a decree is usually in the form of an injunction, practically its effect is that of a decree of specific performance. The courts apply this theory, feeling that there should not be one law for employer and another for employee. The New York court in the well-known case of *Schlesinger v. Quinto* said that to enforce a collective bargaining agreement against a union would not be enforcing a contract for personal services at all; that the contract was made between two large associations, not between two individuals (*Schlesinger* was the president of the International Ladies' Garment Workers union and *Quinto* was an officer of the Cloak, Suit and Skirt Manufacturers' Protective Association); that each of these associations had the power to enter into contracts for its members; and that each association had the power to enforce its laws and compel its members to obey the decree.¹⁹ This would remove from the court the burden of supervision which is the reason for refusing to give decrees which entailed personal services. It is, of course, especially true where the industry is fairly completely organized as in the case of the Garment Workers union and the Musician's union.²⁰ In fully organized industries a union card is usually a prerequisite to employment and the union has the power to take away

¹⁷ *Stone Cleaning & Pointing Union v. Russell*, 38 Misc. Rep. 513, 77 N.Y. Supp. 1049 (1902). The union was trying to enforce a closed shop agreement and the court denied a decree of specific performance because the work done by the union members was not considered unique.

¹⁸ *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N.Y. Supp. 279 (1916). A strike was enjoined as a violation of a collective bargain. See also, *Bhm & Co. v. Landau*, 23 Ohio App. 426, 155 N.E. 154 (1926).

¹⁹ *Schlesinger v. Quinto*, supra, note 14. This action was brought by the union to prevent the employer's association from breaking an agreement. It is one of the earliest cases on record where a union got an injunction against an employer. See also *Ribner v. Racso Co.*, 135 Misc. Rep. 813, 227 N.Y. Supp. 132 (1927). Here the union is given equitable relief because the employer could have had it had the situation been reversed.

²⁰ *Weber et al v. Nasser et al.*, (Cal. 1930) 286 Pac. 1074. The owners of certain theaters had entered into a contract with the Musicians' Union to hire a certain number of musicians during the period. The defendant owners then installed talking devices and refused to hire the musicians. The action was brought to force the defendants to continue to hire them. The defendants contended that they could not have forced the musicians to play and therefore there was no mutuality. The California court stated the same theory as that expressed in the *Schlesinger* case (note 19) that the contract was between associations, not individuals.

this card for disobedience of the rules. The coercive power of a union over its members may, then, be very great.

Though it is never expressly stated by the court, underlying this reasoning must be a realization that there is no need of legal compulsion to make the members work; that the court will not be called on to make a decree forcing men to work. (This has been especially true since the war when even during the years of prosperity the demand for employment has been increasingly greater than the supply of it, because of technological improvements and other economic factors.) Any other order which the court might have to make against the union, such as an order not to call a strike or to stop picketing a certain factory, could not be considered a decree for personal services and would be enforceable.

In giving legal effect to these agreements the courts have been moved by considerations of public policy. It has been recognized that if these agreements are not enforced by the court the unions will attempt to enforce them themselves by strikes which are injurious to the persons immediately concerned and to the public as well. In the words of the Supreme Court of California, "Courts should, in the interest of public welfare, give recognition to the laudable efforts of groups to improve industrial conditions and prevent waste and violence, and where the parties have contracted with that end in view, their contracts should be enforced in a manner to give them effect, if possible."²¹

EQUITABLE RELIEF AND DAMAGES AT LAW

An action upon a collective bargaining agreement may be brought by the union for the benefit of all of its members, or it may be brought by an individual for his own benefit. It may be brought at law for damages caused by the breach of the agreement or it may be brought in equity to present a further breach. When the action is brought by the union it is almost without exception in equity; damages at law would be inadequate and difficult to assess.²² Furthermore, the union is necessarily not so interested in being repaid for the injury already done as it is in preventing violations in the future. This is usually recognized by the courts. If equitable relief is denied it is seldom because the remedy at law is adequate.²³ Occasionally liquidated damages are provided for in the contract. Where such provision has been made and the covenant breached, the union will, of course, bring the action at law.²⁴

Where the action is brought by an individual member of the union

²¹ *Weber et al. v. Nasser et al.*, at p. 1077, *supra*, note 20.

²² *Ribner v. Racso Co.*, 135 Misc. Rep. 813, 227 N.Y. Supp. 132 (1927) explains that the remedy at law is inadequate because there is an irreparable and continuous injury to the moral and prestige of the union which could not be aided by money damages. See also *Schlesinger v. Quinto*, *supra*, note 14.

²³ But see *Stone Cleaning and Pointing Union v. Russell*, *supra*, note 17 at page 1050 where it is stated, "Plaintiff, if it has any cause of action, will have an adequate remedy at law, just as would any other employee wrongfully discharged. It will be possible for it to show the amount of services of the kind specified in the contract rendered to the defendant by others than its (the union's) members, which its members might have rendered, and the consequent damage if any." It would be difficult to assess damages according to this formula.

²⁴ *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5 (1905).

it is ordinarily an action at law for damages or loss of wages caused by the breach. This is not because the individual cannot bring an action for specific performance of the contract but because he is more interested in getting damages for the injury done to him. Because the member has had no part in the making of the agreement there has been some difficulty in deciding exactly how individual rights have been acquired under it. The cases may be divided roughly into four classes: where the individual is regarded as a third party beneficiary of the contract made by the employer and the union; where the union is regarded as an agent for the individual in making the contract so that the contract is in fact the individual contract of the union member; and where the agreement is considered a set of rules and usages which are the basis for the individual employment contract, in other words, the individual contracts with reference to them. Then there are some cases which just assume that the rights of the individual are in some unspecified way fixed by the collective agreement.²⁵

Few cases follow the theory that the contract is made by the union and the employer for the benefit of the member of the union as a third party beneficiary. One reason for this may be that the doctrine of third party beneficiary contracts is not favored in some jurisdictions. Where the theory is relied on it is held that the validity of the collective agreement is not affected by any subsequent agreement made between the employer and the individual employee. The two agreements may be in conflict. In *Gulla v. Barton*²⁶ the collective agreement provided for a wage of \$18 a week. The plaintiff workman, although a member of the union, did not know of this and contracted to work for defendant for \$9 a week. He sued to recover the difference for the period during which he had worked, and recovered. (This was a union shop.) The court stated that the two agreements were concurrent and did not destroy each other.²⁷

Where the agency theory is applied the court are much concerned with the problem of whether or not the individual member has ratified the agreement made by the union as his agent. No rights can accrue to him which can be enforced against the employer unless there has been a ratification. Just what ratification consists of is hard to determine. It has been said that a mere entering into employment with knowledge of the collective agreement and assent to the rules laid down is not an agreement by the individual to make it his own contract.²⁸ It is difficult to see what more could be done. In *Burnetta v. Marceline Coal Co.* it was stated that a mere statement that the member understood the rules laid down in the collective agreement was not sufficient.²⁹ Apparently there must be some express intent to work under the rules. This is a weakness in the theory for as a practical matter there will seldom be any expressed intent to work under the rules. It is usually assumed by members of a union, working in a unionized shop that they will work under union rules and would make no remark con-

²⁵ *Gary v. Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S.E. 819 (1928).

²⁶ *Gulla v. Barton*, 164 App. Div. 293, 149 N.Y. Supp. 925 (1924). There is some hint that the court has looked at the agreement in the Schlesinger case, *supra*, note 14, in this way but no very definite statement is made. See also *Hall v. St. Louis-San Francisco Ry. Co.*, 224 Mo. App. 431, 28 S.W. (2d.) 687 (1930).

²⁷ *West v. B. and O. R. Co.*, *supra*, note 6.

²⁸ *Hudson v. Cincinnati, etc., Ry. Co.*, *supra*, note 12.

cerning it whatever. It is a formalistic requirement which could well be dispensed with. The ratification could be implied from the acts of the parties. A separate agreement by the individual to work for other hours or wages than those provided in the collective agreement would, of course, be evidence of no ratification and under this theory such an individual could not share in the benefits of the collective agreement too, as he could under the third party beneficiary theory.

The third theory is the usage theory. It holds that the collective agreement is no agreement at all; it merely sets up rules and regulations which are the usage or custom of the trade. All individual contracts are made with reference to this, and the rules and provisions are incorporated into the individual employment contract.³⁰ Nothing need be said about the collective agreement at all if it is known to both parties. It will be assumed that the employment contract is governed by these rules, and the parties' rights are fixed by them.³¹ However, this usage must be known to the parties making the employment agreement in order to make it with reference to this usage.³² The usage may be stretched to affect the contracts made even by non-members of the union who do the same type of work done by union members.³³ This theory is applied more often than any of the others in dealing with individual rights, probably because of the greater possibilities of a liberal treatment of collective bargaining agreements under it. It does not have the formalistic drawback of the agency theory and it may be used in those jurisdictions where the contract for the benefit of a third party would not be enforced in favor of the third party.

The same court then, may look at the agreement as a contract which is binding between the union and the employer but as a mere memorandum of a usage between an individual member of the union and the employer, in respect to which a binding agreement may be made. It is then, a contract and not a contract, depending upon the parties. The collective bargaining agreement is a comparatively new problem to the law and has not yet been fully defined. It does not fit well into any of the fixed legal categories in all of its aspects and may well require special treatment which is not bounded by the limitations of the law of contracts.

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²⁹ *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S.W. 136 (1904); *Piercy v. Louisville and N. Ry. Co.*, 198 Ky. 477, 248 S.W. 1042 (1923), points out that the agency of the union is limited to the purpose of securing fair and just wages and good working conditions and it may not waive the rights of individuals.

Ahquist v. Alaska-Portland Packers' Ass'n., 39 F. (2d) 348 (C.C.A. 9th. 1930) holds that if the union agent is actually authorized to do what has been done, no ratification is necessary. This is unusual.

³⁰ " * * * the legal effect of the agreement between the operators and miners is that it became a part of and formed the basis of employment between each operator accepting it and each of his employees, who entered or continued in the services and employment of such employer with knowledge of its execution, and in the absence of any express contract between the individual employee and his employer inconsistent with the terms of the agreement." *Cross Mountain Coal Co. v. Ault*, 157 Tenn. 461, 9 S.W. (2d.) 692 (1928) at 694.

³¹ *United States Daily Publishing Co. v. Nichols*, 32 F. (2nd) 834 (App. D.C. 1929).

³² *Rentschler v. Missouri Pacific Ry.*, supra, note 1.

³³ *Yazoo and M. V. Ry. Co. v. Sideboard*, 161 Miss. 4, 133 So. 669 (1931); *Gregg v. Starks*, 188 Ky. 834, 224 S.W. 459 (1920).