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Labor Law - Power of the Arbitrator to Award Damages

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federal constitutional questions. While such a decision may be desirable from the standpoint of uniformity of the law, and while it may follow logically from statements of the abstention doctrine found in many of the cases, it is the view of this writer that the dissent's argument that the civil rights legislation takes this case out of the general rule has not been met. The dissenting opinion points out that since the equitable abstention doctrine arose in the *Pullman* case, it has been extended so far as to have become a delaying tactic, both expensive and frustrating. Apart from regional connotations, there is some merit to the views of one writer that applying the abstention doctrine in cases like the instant case "gives utterance to the very legal discord which the [civil rights] statutes were enacted to silence."[23]

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LABOR LAW — POWER OF THE ARBITRATOR TO AWARD DAMAGES

Plaintiff union brought an action for specific enforcement of an agreement to arbitrate, which was treated as an action for a declaratory judgment interpreting a provision in the collective bargaining agreement with defendant employer calling for arbitration of differences in the interpretation or performance of the agreement. Defendant had assigned an employee overtime work which plaintiff contended should have been assigned to another employee. Plaintiff demanded that the aggrieved employee receive premium pay for the work unjustly denied him. Defendant refused to pay him on the ground of a company policy of "no work—no pay," but did offer to let him work four hours at his convenience, for which he would receive premium pay. Plaintiff refused this offer and requested arbitration. Defendant agreed on condition the arbitration be limited to a determination of whether there had been a violation of the agreement, without formulating a remedy. The agreement was silent as to the arbitrator's power to award damages or penalties for misassignment of overtime, although other sections provided for remedies.[1]

23. See Comment, 14 RUTGERS L. REV. 185, 191 (1959).

1. E.g., Section 14 dealing with vacations; Section 15 dealing with pay for those on jury duty; Section 16 dealing with severance pay; Section 17 dealing with annuities; Section 18 dealing with funeral leaves. The district court said: "In these clauses [enumerated above] there is language to be applied for determining an appropriate remedy, e.g., if there is a dispute as to whether or not a certain employee qualifies for a vacation without pay, the arbitrator certainly has the right to order the company to give the employee a two weeks' vacation with pay." Refinery Employees v. Continental Oil Co., 160 F. Supp. 723, n. 4 (W.D. La. 1958).

In the suit for specific enforcement the union requested summary judgment ordering defendant to arbitrate the grievance *without limiting* the power of the arbitrator to provide a remedy for breach of contract. The district court ordered defendant to proceed to arbitration, but limited the arbitrator's power to a determination of whether there had been a violation of the contract.[2] On appeal to the Court of Appeals, Fifth Circuit, *held*, affirmed.[3] A provision in a collective bargaining agreement providing for arbitration only of differences relating to its interpretation and performance and providing remedies in some sections, does not give an arbitrator unlimited power to determine a remedy in a section which is silent on that subject. *Refinery Employees v. Continental Oil Co.*, 268 F.2d 447 (5th Cir. 1959), certiorari denied, 4 L.Ed.2d 152 (U.S. 1959).

The question of the power of an arbitrator to fashion a remedy where there is no express provision in the agreement apparently had not been passed on in any reported federal court decision prior to the instant case. The few decisions in state courts have not been consistent. While some state courts have held that an arbitrator has no power to award damages unless specifically authorized by the parties,[4] others have recognized power to make an award of damages, where there was no express authority given.[5] Although there is a dearth of *judicial* authority on the subject, an examination of the reported labor arbitration decisions will reveal that the power is well recognized and often used by arbitrators. In some decisions involving problems similar to that in the instant case, i.e., misassignment of overtime, the award has consisted of allowing the aggrieved employees to make up the work which they should have been assigned.[6] However, in many cases the arbitrators have awarded the employees money without any make-up requirement.[7] Generally, three rea-

2. Refinery Employees v. Continental Oil Co., 160 F. Supp. 723 (W.D. La. 1958).

3. Brown, J., dissented. Hutcheson, C.J., wrote a rather caustic concurring opinion in which he takes the dissenting judge to task for "taking too seriously his role of leader in our court of an activist movement to deride and destroy the ancient landmarks of the law." 268 F.2d 447, 460 (5th Cir. 1959).

4. Publishers' Ass'n v. Typographical Union, 168 Misc. 267, 5 N.Y.S.2d 847 (1938); Guidry v. Gulf Oil Corp., 320 S.W.2d 691 (Tex. Civ. App. 1959); Lone Star Cotton Mills v. Thomas, 227 S.W.2d 300 (Tex. Civ. App. 1949).

5. See Niles-Bement-Pond Co. v. Local 405, 140 Conn. 32, 97 A.2d 898 (1953); Magliozzi v. Handschumacher & Co., 99 N.E.2d 856 (Mass. 1951); Application of Westinghouse Air Brake Co., 166 Pa. Super. 91, 70 A.2d 681 (1950).

6. Celanese Corp. of America, 24 Lab. Arb. 168 (1954); Bridgeport Brass Co., 19 Lab. Arb. 690 (1952) (allowed make-up and money damages); Goodyear Tire & Rubber Co., 5 Lab. Arb. 30 (1946); Walworth Co., 5 Lab. Arb. 551 (1946).

7. Mississippi Aluminum Corp., 27 Lab. Arb. 625 (1956); Goodyear Atomic

sons have been advanced in support of awarding money damages. First, it has been said that money awards are necessary to insure compliance with the contract in the future.[8] These awards are apparently regarded as penalties for breach of the collective bargaining agreement.[9] It is argued that to hold the absence of specific provisions for penalties to preclude arbitrators from awarding such penalties would have two detrimental results, (1) some method other than arbitration would be needed for a remedy, making arbitration a relatively unimportant procedure, and (2) agreements would become loaded down with liquidated damage clauses to allow such penalties.[10] Secondly, some arbitrators have stated that the award actually amounts to compensatory damages for breach of the contract. It is said to be misleading to speak of penalties for work not performed because the real issue is a loss sustained by an employee through the employer's breach of the agreement.[11] The third proposed basis for power to make awards is simply the inherent power of the arbitrator.[12] The purpose of arbitration, it is contended,[13] is to settle disputes peacefully in place of strikes and lockouts. The parties contemplate that the arbitrator will fully settle the dispute by granting adequate relief. It would be futile to restrict the

Corp., 27 Lab. Arb. 634 (1956); Phillips Chemical Corp., 17 Lab. Arb. 721 (1951); International Harvester Co., 14 Lab. Arb. 430 (1950); Monsanto Chemical Co., 15 Lab. Arb. 589 (1950); American Machine & Foundry Co., 15 Lab. Arb. 822 (1950); United States Rubber Co., 13 Lab. Arb. 839 (1949); Firestone Tire & Rubber Co., 9 Lab. Arb. 518 (1948); Bethlehem Steel Co., 7 Lab. Arb. 493 (1947); Ingersoll Rand Co., 7 Lab. Arb. 564 (1947); International Harvester Co., 9 Lab. Arb. 894 (1947). *But see* Textron Inc., 12 Lab. Arb. 475 (1949).

8. American Machine & Foundry Co., 15 Lab. Arb. 822 (1950); United States Rubber Co., 13 Lab. Arb. 839 (1949).

9. See, e.g., Bethlehem Steel Co., 7 Lab. Arb. 493 (1947), wherein the arbitrator said that the aggrieved employees were entitled to recover from the employer their fair share of the premium pay, and this was in the nature of a penalty against the employer because he had promised to divide the work equally and had not done so.

10. International Harvester Co., 9 Lab. Arb. 894 (1947). See Mississippi Aluminum Corp., 27 Lab. Arb. 625 (1956).

11. In International Harvester Co., 14 Lab. Arb. 430 (1950), the arbitrator said that the company's contention that a money award was in effect a penalty was without merit because (1) it confused compensatory damages with punitive damages, and (2) it spoke of paying for work not performed, whereas the issue was loss sustained by breach of contract. In United States Rubber Co., 13 Lab. Arb. 839 (1949), the arbitrator said that clearly the employee was entitled to be made whole for his loss, and that make-up work was not an adequate remedy because he was entitled to the work when it arose and not at a later time more convenient to the employer. In Firestone Tire & Rubber Co., 9 Lab. Arb. 518 (1948), the arbitrator said that the employee was ready, willing, and able to work at the proper time, but through management mistake was prevented from doing so, and make-up work would not place him in the "status quo."

12. Standard Lime & Cement Co., 26 Lab. Arb. 468 (1956) (dictum); Phillips Chemical Co., 17 Lab. Arb. 721 (1951).

13. Phillips Chemical Co., 17 Lab. Arb. 721, 722 (1951): "The purpose of

arbitrator to finding that the agreement has been violated without the power to redress the injury. Thus it is inherent in the arbitral process and implied in the arbitration provision that the arbitrator has power to grant adequate relief.

There is language in the instant case that could possibly be interpreted as laying down a broad rule that arbitrators have no power to make an award of damages unless specifically authorized by the parties.[14] However, a close examination of the decision will disclose that it is limited to the narrow issue of whether the arbitrator had "unlimited power" to make any award he thought appropriate. The court held that under the terms of the collective bargaining agreement the arbitrator did not have an unlimited power to make an award of damages. By its terms the collective bargaining agreement provided for arbitration only of disputes as to its interpretation or performance.[15] In holding that this precluded the arbitrator from making an award of damages, the court relied on *Marchant v. Mead-Morrison Mfg. Co.*,[16] a commercial arbitration case. However, an analogy between commercial and industrial arbitration is of doubtful value because of basic differences in the two processes.[17] Further, there is some question as to the validity of the *Marchant* case in the field of commercial arbitration,[18] with the weight of

arbitration is to settle disputes justly and fully, as a substitute for strikes and lockouts. If a grievance has no merit, relief is denied; but if it has merit, adequate relief should be granted. That is what the parties contemplate. Anything less than that would not effect justice and would not satisfy the complaining party. Therefore it is implied in the arbitration section that the Arbitration Board has power to grant adequate relief. The power merely to decide that the Agreement has been violated without power to redress the injury, would be futility in the extreme."

14. 268 F.2d 447, 457 (5th Cir. 1959): "[T]he federal courts have been fully aware of the force of the considerations supporting a broad commitment of labor disputes to arbitration, but have adhered firmly to the principle that remedies (damages) are not arbitrable unless there is clear contractual authority for their arbitrability. See especially Local No. 149 of American Federation of Technical Engineers (A.F.L.) v. General Electric Company, 1 Cir., 1957, 250 F.2d 922, 926, 930." The cited case dealt only with the problem of whether under the contract the question of job grading of a new employee was arbitrable. Nothing in the case dealt with any express or implied power of arbitrators to award damages.

15. The arbitration clause was Section 21-1 of the contract, reading as follows: "Only differences relating to the interpretation or performance of this agreement which cannot be adjusted by mutual agreement, after processing through the grievance procedure may, upon written notice by one party to the other, not later than sixty (60) days after the date of the decision of the regional manager of manufacturing be submitted to arbitration." *Id.* at 453, n. 6.

16. 252 N.Y. 284, 169 N.E. 386 (1929).

17. For a thorough study of the differences between commercial and industrial arbitration, see Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948); Summers, *Judicial Review of Labor Arbitration or Alice Through The Looking Glass*, 2 BUFFALO L. REV. 1 (1952).

18. The case is criticized at length in STURGES, A TREATISE ON COMMERCIAL

authority seemingly against it.[19] However, while the value of the *Marchant* decision as authority in the instant case may be doubtful, a literal reading of the collective bargaining agreement clearly supports the court's view that the agreement was restricted. In many places the agreement provided a remedy expressly or impliedly, but in the provision at issue, relative to misassignment, no remedy was mentioned or implied. Thus the court concluded that the parties did not intend to give the arbitrator power to fashion a remedy in disputes arising under that section.

It appears to this writer that the instant case will have little if any effect on the long line of arbitrators' decisions claiming an inherent or implied power in the arbitrator to make an appropriate compensatory award. In rejecting the union's contention as to the unlimited power of the arbitrator to fashion any remedy he thought appropriate, the court did not hold that an arbitrator does not have an implied power to fashion an appropriate compensatory remedy. The agreement in the instant case is fairly subject to the court's interpretation of restricting the arbitrator's power. This interpretation leaves open the question of the power of an arbitrator to fashion a remedy where the parties have neither expressly granted him such power nor impliedly kept it from him by specifying remedial power in other situations.[20]

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ARBITRATION AND AWARDS 602-07 (1930). The author of that work suggests that the case is not in accord with the weight of authority and is based on reasoning that is not convincing. He suggests the majority of the court may have been primarily concerned with the excessiveness of the award, but concedes that, unfortunately, this reason was not assigned.

19. Colcord v. Fletcher, 50 Maine 398 (1862); Pearce v. McIntyre, 29 Mo. 423 (1860); Garrow v. Nicolai, 24 Ore. 76, 32 Pac. 1036 (1893); Slocum v. Damon, 1 Pin. 520 (Wis. 1845). See Baldwin v. Moses, 66 N.E.2d 24 (Mass. 1946). See also STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS 255 (1930): "Have arbitrators power, as of course, that is, without explicit authority from the parties, to assess money damages upon disputed claims with respect to which, admittedly, they have authority to determine the right and the liability of the respective parties? There are few decisions upon which to base an answer to this question. A majority of the cases and prevailing judicial opinion, however, support an answer in the affirmative." *Cf.* RUSSELL, LAW OF ARBITRATION 39 (15th ed. 1952).

20. The instant case might be interpreted as holding that in all collective bargaining agreements where some sections expressly mention a remedy and other sections do not the arbitrator is always denied the power to make an appropriate compensatory award in disputes arising under the silent sections. If the practice of spelling out remedies in some sections and leaving others silent is widespread, such a holding would be equivalent to denying arbitrators any implied power to make an appropriate compensatory award. However, it is felt no such broad holding was handed down in the case. As indicated elsewhere in the Note, the case turned on the union's insistence on an "unlimited power" of the arbitrator to make any award he thought appropriate and on the restrictive terms of this particular agreement.