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# Labor Law - The Effect Given to an Arbitration Award by the NLRB in an Unfair Labor Practice Hearing

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which each section will be applicable. It would seem inconsistent first to disregard a group of corporations as "unreal" and then apply a section of the code which authorizes attacks on "real" corporations. To the extent that the *Aldon* decision avoids this inconsistency, it appears to be sound.

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LABOR LAW — THE EFFECT GIVEN TO AN ARBITRATION AWARD BY THE NLRB IN AN UNFAIR LABOR PRACTICE HEARING

Under the National Labor Relations Act as amended a problem exists where an arbitration award deals with the subject matter of conduct which may be an unfair labor practice. It is clear that the Board can entertain jurisdiction when an arbitration award is interposed as a bar to an unfair labor practice proceeding. Section 10(a) provides: "The Board is empowered . . . to prevent any persons from engaging in any unfair labor practice affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."[1] However, it is particularly important to notice that the act does not require, with one exception,[2] that the Board always exercise its jurisdictional power; it merely gives the Board exclusive jurisdiction when the Board does decide to exercise it.

Prior to the case of *Spielberg Mfg. Co. & Harold Gruenberg*,[3] the Board apparently had not formulated any comprehensive criteria by which it would determine whether to accept an arbitration award as a binding settlement of the dispute presented as an unfair labor practice. In that case four strikers, discharged for their conduct during the strike, were refused reinstatment by an arbitration award which the union, company, and discharged strikers had agreed was to be binding. The discharged strikers were represented by counsel, and three of the four were present during the arbitration. Subsequently these discharged strikers filed unfair labor practice charges. The Board dismissed the complaint and accepted the arbitration award as binding. In doing this the Board enumerated the criteria to be met before the Board would defer the exercise of its jurisdiction to an arbitration award. The three criteria are:

1. Labor Management Relations Act, 29 U.S.C. § 160(a) (1947).
2. Labor Management Relations Disclosure Act § 701 (1959).
3. 112 N.L.R.B. 1080 (1955).

(1) the proceedings must appear to have been fair and regular; (2) all of the parties must have acquiesced in the proceedings; and (3) the arbitrtation award clearly must not be repugnant to the purposes and policies of the act. The Board strengthened its policy decision of abstention in cases where the criteria are met by declaring that "this does not mean that the Board would necessarily decide the issue of the alleged strike misconduct as the arbitration panel did. We do not pass on that issue."[4] This seems to make apparent the Board's policy of giving full effect to an arbitration award which avoids the necessity of facing an unfair labor practice charge when the three criteria are met.

The first criterion — the proceedings appear to have been fair and regular — was applied in *IAM & New Britain Machine Co.*,[5] wherein the Board found that he agreed-upon grievance machinery had been utilized fairly, and in the same manner as the parties had always utilized it in handling other grievances. The Board stated that the arbitration proceeding was "a fair and valid voluntary settlement of the factual issues presented."[6] The exact meaning of "fair and regular" has not been clearly defined by the Board, but some help as to its meaning may possibly be obtained by considering a few instances where the courts have passed on motions to affirm or vacate arbitration awards. Thus, when a company withdrew from the proceedings before formal notice of the award, but after learning that the award would be unfavorable, the court enforced the award, finding that the proceedings were in order and that the company's withdrawal was in bad faith.[7] It has also been held that a proceeding will be nullified when the arbitrator is at fault, such as forgetting to mention to the union that he had been a partner of the employer,[8] or when the arbitrator allowed the union to amend its petition without informing the employer and rendered an award on the amended petition.[9] Generally, an award will be sustained unless the complaining party claims and produces evidence of fraud, corruption, or other misconduct on the part of the arbitrator.[10] Where a party does not have the benefit of counsel, the award is enforceable as being fair if the lack of

4. *Id.* at 1082.
5. 116 N.L.R.B. 645 (1956), rev. on other grounds, 247 F.2d 414 (2d Cir. 1957).
6. *Id.* at 646.
7. Shoeworkers Ass'n v. Federal Shoes, Inc., 150 Maine 432 (1955).
8. *In re* Siegal, 153 N.Y.S.2d 673 (Sup. Ct. 1956).
9. *In re* Goldman, 166 N.Y.S.2d 19 (Sup. Ct. 1957).
10. See Grant v. Atlas Powder Co., 241 F.2d 715 (6th Cir. 1957); *In re* B & M Cleaners & Dyers, 26 Lab. Arb. 93 (N.Y. Sup. Ct. 1956).

counsel is due to the complainant's failure to procure counsel.[11] Apparently, proceedings are "fair and regular" in the eyes of the court where the arbitrator is honest, all parties are heard who desire to be heard and who have the right to be heard,[12] and the award is within the power of the arbitrator.[13]

The purpose of the second criterion — all of the parties must have acquiesced in the proceeidngs — appears to be to insure that all parties concerned have consented to a voluntary settlement by arbitration. What this consent consists of is nowhere clearly spelled out. Where arbitration is not provided for in the contract, the problem of determining if all of the parties have acquiesced does not appear too difficult. In *Wertheimer Stores Corp. & Samuel Weiss*[14] the Board found that the employee had not acquiesced in the arbitration proceeding instituted by the employer and the union, relying on the fact that immediately upon discharge the employee had filed unfair labor practice charges with the Board and had continued to press the charges after the arbitration proceeding. Apparently there was no arbitration provision in the collective bargaining agreement. Until the Board becomes more specific in its definitions there will be doubt as to what constitutes "acquiescence." However, the court decisions offer some possible indications. An example of acquiescence was presented where an individual employee had instigated the arbitration proceeding and had been ruled against in a fair hearing. There a court held that because the employee had instituted the arbitration proceedings he had consented, and the award barred an action of law on the same issues. Where the contract does contain provisions for grievance machinery terminating in arbitration, the essential question seems to be the extent to which its existence restricts the right of the employee to assert his individual claim in some other forum after an adverse arbitration award has been made. Under the Board's requirement of acquiescence, this would appear to depend upon whether the employee consented to a settlement of his claim by arbitration. If the employee invoked the grievance machinery by lodging a claim with the union and stood by while the claim

11. *In re* Rosengart, 169 N.Y.S.2d 837 (Sup. Ct. 1957).
12. *In re* Iroquois Beverage Corp., 159 N.Y.S.2d 256 (Sup. Ct. 1955).
13. *In re* Minkoff, 29 Lab. Arb. 737 (N.Y. Sup. Ct. 1957). See, for suggestions as to other situations which might be grounds for refusal to accept an award as binding, Uniform Arbitration Act, in PROCEEDINGS OF THE NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS, Appendix D (BNA 1956).
14. 107 N.L.R.B. 1434 (1954).

was processed and finally disposed of by arbitration, there would seem to be little difficulty in finding that he had acquiesced. This is ample evidence from which an inference of consent may be drawn.[15] Suppose, however, an employee has manifested lack of confidence in the fair disposition of his claim by arbitration by filing charges with the Board contending that the conduct underlying his claim constitutes an unfair labor practice, or by unsuccessfully seeking to intervene in the arbitration proceeding. Some of the recent court cases involving the assertion of contract claims by individual employees suggest that the foregoing would be acquiescence sufficient to permit the adverse award to bar the Board's jurisdiction. Thus, in *Parker v. Borock*[16] the New York Court of Appeals held that the plaintiff's right of action on the contract was precluded by the contractual grievance and arbitration machinery. However, the decision is not too pertinent, for the Board is not concerned solely with the question of whether arbitration is the exclusive method for disposing of claims arising under the contract. The question before the Board is whether, as a matter of policy, it should accept the award as a definitive disposition of a dispute in which unfair labor practices issues lurk. In the case of a union member, the Board might fashion a policy that acquiescence is to be inferred from the fact of membership, but that acquiescence is only for the disposition of his claim by "fair and regular" proceedings. For example, the employee could impeach the award as a bar upon a showing that there was collusion between the employer and the union in the arbitration proceedings.[17] While the case of the non-union employee is more troublesome, it seems that if he invoked the grievance machinery, or was content with the disposition of his claim by arbitration until an adverse award was entered, an inference of acquiescence should be drawn from such evidence. Under these circumstances the suggested policy should be applied to both union and non-union employees. However, suppose that the non-union employee was one of several grievants similarly situated and that he objected at every stage of the proceedings to the disposition of his claim under the grievance and arbitration machinery. He could hardly be said to have acquiesced except, perhaps, on the theory that an employee acquiesces in the settlement of his claims by arbitration by accepting employment under an agreement which calls for

15. *Cf.* Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945).
16. 182 N.Y.S.2d 577, 156 N.E.2d 297, 5 N.Y.2d 156 (Ct. App. 1959).
17. *Cf.* Soto v. Lenscraft Optical Corp., 180 N.Y.S.2d 388 (Ct. App. 1958).

the disposition of grievances through the arbitration machinery. Perhaps the best method to balance the public rights of the group as given to the bargaining representative of the unit, and the private rights of the individual, is to accord full effect to the collective bargaining agreement insofar as it specifies the power of the union to arbitrate and to rely on the "fair and regular" test to insure that the individual gets just treatment in the arbitration. Where the individual's rights are sought to be arbitrated without reliance on a provision in the contract, the most equitable solution would seem to be reached by requiring consent either by express word or action on the part of the individual, as by consenting in so many words, or by participating in the arbitration.

The third criterion — the award clearly must not be repugnant to the purposes and policies of the act — was applied in *Monsanto Chemical Co. & George W. Draper.*[18] There the arbitration award upheld a discharge based upon a union security provision of the agreement, which allowed the discharge of employees for certain non-compliance with the union's rules. The Board found that the contract provision was not in effect at the time it was invoked, and therefore reliance on such a non-contractual provision was a statutory violation. The Board stated "there can be no justification for deeming ourselves bound, as a matter of policy, by an arbitration award which is at odds with the Statute."[19] Like the other criteria announced in the *Spielberg* case, the term "clearly repugnant" suffers from nebulousness. Again, due to the dearth of Board cases on the subject, it is helpful to look to the courts when seeking the meaning of "clearly repugnant." In the case of *Western Union Tel. Co. v. American Communications Ass'n, CIO,*[20] the union employees refused to handle messages sent by non-union employees of international telegraph companies which were struck by their union employees. The contract provided that there should be no work stoppage, and specifically stated that the arbitrator did not have authority to modify the contract. The arbitrator sustained the right of the employees to refuse to handle the "hot" work, on the basis of custom in the industry, and ordered the reinstatement of the suspended workers. The lower court confirmed the award, but on appeal it was vacated, since the court found that the award modified the contract and

18. 97 N.L.R.B. 517 (1951), enforced, 205 F.2d 763 (8th Cir. 1953).
19. *Id.* at 520.
20. 299 N.Y. 177, 86 N.E.2d 162 (Ct. App. 1949).

therefore the arbitrator had exceeded his power. The court stated that where the language in the contract was clear and unambiguous there was no justification for the arbitrator to go outside its provisions to interpret it. Thus, by merely looking to the award and the contract on which it was based, the court found a conflict. It is suggested that a comparable interpretation could well be given the NLRA as amended, and the arbitration award, when the Board applies its "clearly repugnant" criterion. Such an interpretation, without looking behind the award, will best serve the purpose of effectuating arbitration as a means of settling disputes, and yet guarantees adherence to the provisions of the act.

The purposes and policies of the act appear to substantiate the Board's position as postulated in the *Spielberg* case, albeit the criteria are somewhat indefinite. These policies are clearly expressed in Title I, Section 1, of the Act which provides that "experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences."[21] This policy exposition is buttressed by Title II, Section 203(d), which provides that "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[22] In addition to this statutory support several other reasons favor the Board's interpretation of the purposes and policies. The Board's policy respects the integrity of the collective bargaining process, wherein the parties bargain and voluntarily concur in the terms of the agreement. Recognition of the arbitration fosters voluntary agreement as to the terms by permitting the parties to have the disputed provisions settled by a person of their choice, without government interference or intervention. As a practical matter, the policy expedites the settlement of disputes, and facilitates quicker action by the Board on other matters. This is quite important since at present the average time between filing a charge and a Board decision on the charge is 465 days, while an additional average delay of 378 days is required to secure judicial enforcement of that award.[23] Minimum delays in settlement should result in less

21. Labor Management Relations Act, 29 U.S.C. § 151 (1947).
22. *Id.* at § 173.
23. Report of the Advisory Panel on Labor-Management Relations Law to the

hardship to the parties, and consequently less bitterness should build up that would possibly impair labor-management relations. The present policy is also in accord with the Board's related policy which requires that parties having binding agreements to arbitrate must arbitrate before seeking Board relief, as to matters submissible to arbitration.[24] A failure to give effect to the subsequent award would nullify this related policy.

It is concluded that the policy of the Board gives full effect to the purposes and policies of the act, while respecting the intentions of the parties as much as the act permits. This enables the parties to rely on the collective bargaining process to reach terms mutually satisfactory, with full knowledge that so long as the three criteria are met, labor disputes may be settled authoritatively by arbitration even though they involve issues of potential interest to the NLRB.

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## MINERAL RIGHTS — RIGHTS OF THE NAKED OWNER AND THE USUFRUCTUARY

The naked owners executed a mineral lease on property which they owned subject to a usufruct, and about a year later the usufructuary executed a mineral lease on the same land. Subsequently, plaintiffs, the naked owners and their lessee, sought a declaratory judgment asking that the usufructuary be declared to be without any right to the minerals under the land and that he therefore had no authority to grant a mineral lease on it. Each party prayed that their lease be recognized as valid and that the lease of the other party be cancelled. The trial judge held for the plaintiffs, but declared that the rights of the lessee were subordinate to the rights of the usufructuary and the lessee could not enter and use the land subject to the usufruct without the consent of the usufructuary.[1] On appeal to the Supreme Court, *held*, affirmed as amended. The rights of the usufructuary to the oil and gas under the land are governed by Article 552 of the Civil Code and he is not entitled to the proceeds of

Senate Committee on Labor and Public Welfare on the Organization and Procedure of the National Labor Relations Board, S. Doc. No. 81, 86th Cong., 2d Sess., CCH Lab. L. Rep. No. 602, p. 12 (Feb. 11, 1960).

24. See United Tel. Co. of the West, Inc., & International Brotherhood of Electrical Workers, Local No. 843, AFL, 112 N.L.R.B. 779 (1955).

1. The lessee of the naked owner was, however, according to the view of the trial court entitled to extract the minerals under the land subject to the usufruct by directional drilling.