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Ronald R. Popeo

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EMPLOYEE'S RIGHT TO COMPEL ARBITRATION OR RECOVER DAMAGES FOR WRONGFUL DISCHARGE

Plaintiffs, former employees, at both congressional investigating committee and company hearings refused to answer questions concerning their affiliation with the Communist Party as a result of which they were discharged. Grievances were filed under the provisions of the collective-bargaining agreement but when the plaintiffs refused to make full disclosure to the union regarding Communist Party membership the union refused to press their grievances to arbitration. The employees thereupon brought suit against the union and the company to compel arbitration of their grievances and to recover damages resulting from said discharge. The actions were removed to the federal court. On motions for summary judgment filed by all parties the District Court of Maryland granted those of the defendants. Held: Under a collective bargaining agreement containing provisions for discharge and grievance procedures, employees have no standing either to sue for damages resulting from wrongful discharge, or to compel arbitration unless the union has acted arbitrarily or discriminatorily and thereby violated its duty of fair representation; in this instance the action by the union was justified because it had the right and duty to screen grievances and it was unable to do so since the plaintiffs refused to devulge information essential to the evaluation of their claims. *Ostrofsky v. United Steelworkers of America.*[1]

The decision is in accord with the indecisive weight of authority which holds that the typical grievance procedures provided by collective bargaining agreements preclude the individual from suing the employer or union for damages or to compel arbitration.[2] Courts which have followed this rule are those which have adopted the philosophy that the rights of employees under a collective bargaining agreement are collectivized and no independent individual rights remain so long as the union representative properly performs his duties.[3] However, despite the "decisional trend"[4] treating individual

[1] 171 F. Supp. 782 (D. Md. 1959).

[2] Parker v. Borock, 1 App. Div. 2d 969, 150 N.Y.S.2d 396 (2d Dep't 1956); aff'd, 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959); Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1959); Tirell v. Local 758, Int'l Ass'n of Machinist, 150 Cal. App. 2d 24, 309 P.2d 130 (Ct. App. 2d Dist. 1957); see also, 141 Cal. App. 2d 17, 296 P.2d 100 (Ct. App. 2d Dist. 1956); cf. United States v. Vosges, 124 F. Supp. 543 (E.D.N.Y. 1954).

[3] See Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850 (1957); Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956); Hanslowe, "Individual Rights In Collective Labor Relations" 45 Corn. L.Q. 25 (1959).

[4] Hanslowe, op. cit. supra note 3 at 36.

suits as barred by a union controlled grievance procedure a number of courts have granted individual relief.[5] These courts follow the rationale of *Elgin, Joliet and Eastern Ry. v. Burley*[6] which recognizes the individual as having certain vested rights under a collective bargaining agreement with respect to which the union cannot make a binding settlement without his consent. It is submitted that because of the peculiar provisions of the Railway Labor Act[7] this decision should not be controlling outside the railroad industry.

The focal point of dissension among the courts is the type of remedy which should be afforded an individual under a collective bargaining agreement. An analysis of the theoretical nature of the agreement adds little to the solution of the problem but aids in understanding the source of the individual's rights.[8] One view is that although a collective bargaining agreement gives no rights to an individual employee his employment contract incorporates the union agreement either by local custom or force of law.[9] Under this view the legal relationship between employer, union, and employee is conceived as two bilateral contracts. The first consists of those promises for the benefit of the union as an organization while the second consists of the individual contract of hire incorporating those promises between the union and the company which were made for the employee's benefit. Only the employee can make a binding settlement as to the second. A second theory considers the collective bargaining agreement as a contract in which the individual employee is a third party beneficiary.[10] A third view loosely compares the collective bargaining agreement with a trust.[11] According to this view the union occupies a position comparable to that of trustee and as such holds the employer's promise in trust for the benefit of the employee. Any breach of the fiduciary obligations by the union would give the employee a cause of action against the union.

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5 Kosely v. Goldblatt Bros., Inc. 251 F.2d 588 (7th Cir. 1958) (applying Indiana Law); Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954); In re Norwalk Tire Co., 100 F. Supp. 706 (D. Conn. 1951) (applying Connecticut law); Alabama Power Co. v. Haywood, 266 Ala. 194, 95 So. 2d 98 (1957).

6 325 U.S. 711 (1945).

7 48 Stat. 1185 (1934), 45 U.S.C. §§ 151-188 (1958).

8 For a comprehensive analysis of the theoretical nature of a collective bargaining agreement see Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850 (1957); Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956).

9 Westinghouse Salaried Employees v. Westinghouse Electric Corp., 210 F.2d 623 (3rd Cir. 1954), aff'd 348 U.S. 437 (1954).

10 Leahy v. Smith, 137 Cal. App. 2d 884, 290 P.2d 679 (Sup. Ct. 1955); Hudak v. Hornell Industries, 304 N.Y. 207, 106 N.E.2d 609 (1952).

11 Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850 (1957).

Whether the individual has a cause of action for damages against the union depends, under federal law, on whether the union has breached its duty of fair representation.[12] The problem of individual enforcement of arbitration under a collective bargaining agreement is more complex. There is no authoritative decision as to whether federal or state law should be applied in determining whether and under what circumstances an employee may enforce arbitration under a collective bargaining agreement. The court in the principal case, although noting that the rationale of *Textile Workers v. Lincoln Mills*[13] indicates federal law should be applied, avoided the problem by deciding Federal and Maryland law were identical. Another problem arises as to whether the employee should seek his remedy against the union or the employer. The union is a wrongdoer in that it has breached its duty of fair representation. If the employee has a valid claim against the employer, however, the employer would be the original wrongdoer since it has breached the collective bargaining agreement. It is unlikely that the employee will get adequate representation by compelling an unwilling union to arbitrate his grievance, and so, he should be given a direct right against the employer either to compel the employer to arbitrate with him directly or alternatively to recover damages resulting from wrongful discharge.

The final question is whether an individual can enforce arbitration in the face of a bona fide refusal on the part of the union to represent him in such a proceeding. The answer depends upon one's interpretation of Sec. 9(a) of the National Labor Relations Act[14] and whether one is willing to accept the philosophy of collectivism. The proviso that "any individual employee or group of employees shall have the right at any time to present grievances to their employer, without the intervention of the bargaining representative"[15] has been interpreted by the National Labor Relations Board[16] to mean that the employee must be permitted personally to present his claim through every stage of the grievance procedure up to and including arbitration. The *Hughes* case involved a discriminatory refusal by the union to process grievances. On review the Fifth Circuit[17] affirmed with emphasis upon the discriminatory aspect of the case. Viewed in this light there is no inconsistency with the holding in the principal case.

[12] Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

[13] 353 U.S. 448 (1957).

[14] 41 Stat. 453 (1947), 29 U.S.C. § 159(a) (1958).

[15] 41 Stat. 453 (1947), 29 U.S.C. § 159(a) (1958).

[16] Hughes Tool Co., 56 N.L.R.B. 981 (1944).

[17] Hughes Tool Co. v. N.L.R.B. 147 F.2d 69 (5th Cir. 1945).

The *Ostrofsky* case offers an equitable and expedient solution to an unsettled problem in labor law. While it accepts the basis of collectivism by giving the union alone the power to settle grievances under collective bargaining agreements it protects the individual from arbitrary and discriminatory action by the union. Thus, the danger of "untrammeled individual enforcement of collective bargaining agreements"[18] resulting in a breakdown of sound labor-management relations is eliminated while the individual is afforded adequate protection from unfair dealings on the part of either the union or the company.

RONALD R. POPEO

[18] Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956).