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Labor Law

Edwin R. Teple

It would seem that the rulings in these income cases would be equally appropriate in cases providing for a fixed annuity to a fluctuating class, for there is a basic similarity between the trust dispositions in these two classes of cases. Both are paid in regular installments to persons who cannot be specifically determined until the time for each separate payment has arrived, and both are subject to the rule stated above which holds that a gift in favor of a class which may fluctuate for too long a period is invalid. That the corpus of the trust may be invaded by the trustee when the disposition is in annuity form would not appear to be a material distinction in view of the fact that the *entire* corpus is not to be distributed at any given time.

Had this "series of separate gifts" approach been followed in the present case, the court, without offending the rule dealing with fluctuating classes, might have sustained the trusts to the issue of the testator's sons for a considerable period of time. In determining who were to be the measuring lives for the five separate trusts, the court might have used the life of the particular son, together with the lives of those of his children and grandchildren who were living at the testator's death.[42] In this way the trusts could have been sustained on sound legal grounds, without error as to the nature and extent of the interests which were to be taken by those "issue" who were living at the testator's death, or who would necessarily take their interests during the permissible period.

JAMES A. AMDUR
GEORGE DOWNING
JAMES A. YOUNG

LABOR LAW

There have been several highly significant rulings by the Ohio courts reported during the past year under the labor relations heading.

ARBITRATION

Arbitrability Under Labor Contracts

Curiously enough, two decisions with reference to the question of arbitrability under labor contracts were handed down by the same court of appeals within a few weeks of each other. In the earlier opinion, Judge Long ruled that an issue arising under a collective bargaining agreement was in fact arbitrable and arbitration was ordered. In the second case, Judge Matthews, speaking for the majority of the court, ruled

42. See GRAY, THE RULE AGAINST PERPETUITIES § 219.2, n. 2 (4th ed. 1942).

that the employer had been relieved from the obligation to arbitrate. Judge Long dissented.

In *Local 804 IAM v. Stillpass Transit Company*,[1] the collective bargaining agreement between the union and the employer provided for laying off and recalling the employees according to seniority, and for arbitration of any grievances not settled after an earnest effort by the parties themselves. The agreement further provided that any grievance must be made in writing and served on the adverse party within ten days after its happening. On March 4, 1960, two written "complaints," usually referred to as grievance reports, were filed by the union stating that on February 27 and 28 in the one case, and on February 19 to 22, in the other, certain employees had worked in jobs to which the two grievants had recall rights under the terms of the collective bargaining agreement. In each instance a violation of the agreement was alleged.

The employer, as a basis for refusing to submit the matter to arbitration, argued that the two grievants were not in his employ at the time and further that the complaints were not filed within ten days of the event in question. Action was brought by the union to enforce the agreement, and the common pleas court ordered the parties to arbitrate.

Without any reference to the Ohio Arbitration Act,[2] and seemingly on the basis of the enforcement of the agreement to arbitrate incorporated in the collective bargaining agreement between the parties, the court of appeals upheld the contention of the union that arbitration could be ordered, and entered a decree similar to the one entered in the trial court. The case, according to the court, presented a typical collective bargaining agreement, including a provision empowering an arbitration committee to rule on all disputes pertaining to the interpretation or application of the agreement to the facts in dispute.

With respect to the timeliness of the grievance, the court quoted the provision of the agreement that in computing time limits for this purpose, Saturdays, Sundays, and holidays were not to be counted. The court took judicial notice of the fact that two week-ends and one holiday fell within the period elapsing between the earlier occurrence and the filing of the grievance thereon, and ruled that the written grievance was filed within the ten day limit in both instances.

In *Vulcan-Cincinnati, Incorporated v. United Steelworkers of America*[3] an action was instituted by the employer seeking an injunction to restrain the union and certain members thereof from carrying on a strike against the employer in alleged violation of the terms of the collective bargaining agreement between the union and the employer. A temporary restrain-

1. 171 N.E.2d 372 (Ohio Ct. App. 1960).
2. OHIO REV. CODE § 2711.01-.15.
3. 173 N.E.2d 709 (Ohio Ct. App. 1960).

ing order was issued, and thereafter the defendants filed an answer admitting the existence of the collective bargaining agreement but denying that they had in any way supported, encouraged, or taken part in the work stoppage, contrary to the agreement. In addition to their answer, the defendants filed a cross petition alleging that a controversy had arisen between the parties as a result of the discharge of two employees by the plaintiff without proper cause, the plaintiff allegedly acting in bad faith and failing, neglecting, and refusing to discuss or arbitrate this controversy with the defendant union. The defendants alleged that the defendant union had performed all the necessary conditions preliminary and precedent to arbitration, and prayed that the court order the plaintiff to proceed to arbitration. Apparently no answer to the cross petition was ever filed, but the matter proceeded to trial notwithstanding. From a ruling in the common pleas court ordering arbitration, the employer appealed.

After stating that in the absence of a statute the courts will not attempt to order litigants to proceed to arbitrate a dispute, the court made reference to section 2711.01 of the Ohio Revised Code, but erroneously stated that collective or individual contracts between employers and employees in respect to the terms or conditions of employment, were excepted therefrom.[4] The opinion then states that the federal law, being the supreme law of the land, would be controlling in any event and the rights of the parties determined in accordance therewith. Finally, the court concludes that whatever right the cross petitioners had to compel arbitration and whatever duty the plaintiff had arose under, and were controlled by, the terms of the contract between them.

The collective bargaining agreement in this case, as outlined in the court's opinion, contains a five-step grievance procedure culminating in arbitration by an impartial umpire mutually selected by the parties. According to the terms of this provision, differences arising between the company and the union as to the meaning or application of the provisions of the agreement, as well as any "local trouble" arising in the plant, "shall be settled immediately" in the succeeding steps of the grievance procedure. The first step is between the aggrieved employee and/or members of the grievance committee, on the one hand, and the foreman of the department on the other. At the second step, the settlement is to occur between the aggrieved employee and/or members of the grievance

4. The exception referred to was contained in the Ohio Arbitration Act prior to its amendment in 1955. This exception was deleted by the amendment, however, and the law has been considered applicable to collective bargaining agreements since that time. CINCINNATI BAR ASSN. COMM. ON ARBITRATION, REPORT pt. III (b) at 4.16. The only exclusions at the present time relate to controversies involving the valuation of property in connection with a lease, rentals due under any lease, the value of improvements at the termination of any lease, the appraisal of property values in connection with making or renewing any lease, or the boundaries of real estate. OHIO REV. CODE § 2711.01.

committee, on the one hand, and the superintendent of the department, on the other hand. Special provision is made, however, for discharge cases. Any employee who believes he has been unjustly dealt with has the right to utilize the grievance procedure by omitting the first step thereof and start "the second step within forty-eight (48) hours of the time of suspension or discharge, Saturdays and Sundays excluded." In no case need the subject matter of the grievance be reduced to writing until the third step, at which point it is to be settled between the aggrieved employee and/or members of the grievance committee, on the one hand, and the personnel manager, on the other.

Various disorders took place at the company's plant early in December and because of their participation therein, the two employees in question were discharged on December 8. They were reinstated the same day, restored to "full rights" on December 11, suspended on December 12, and discharged once more on December 14. It appears that many conferences and discussions between the union and the company took place during this period, at least some of which concerned the status of the two employees. No formal written notice or grievance was filed, however.

The majority of the court concluded that a person claiming to be aggrieved must himself have performed all the conditions precedent upon which his rights are predicated. The parties, the court said, can by express provision confer power upon an arbitrator to determine whether he has jurisdiction to pass upon his own jurisdiction as well as to pass upon the subject matter submitted; but where the arbitration agreement contains no express provision conferring such power and there is nothing from which it can be implied, the decision on arbitrability becomes a matter of law for the court. Before any action can arise in favor of the employees, according to the court, the employer must be in default, and before the employer can be placed in default the entire process of arbitration must be exhausted. It was incumbent upon the employees, the majority said, to start the grievance procedure within forty-eight hours of the discharge or suspension, and failing so to do, the employer was thereby released from any obligation, and the court — not the arbitrator — has jurisdiction so to decide. Final judgment was rendered for the employer.

Judge Long, in his dissenting opinion, expressed the view that the discussions between the company and the union, as well as the discharges and reinstatements, were some evidence that the company considered that the union had performed under the provision requiring the institution of the initial step in discharge cases within forty-eight hours. Judge Long could not agree that the evidence was conclusive of a default on the part of the employees, or that the forty-eight hour provision was a contractual

limitation under the circumstances. He felt that the company had waived its right to this defense in any event by taking part in the negotiations relative to this dispute. The recent decisions of the United States Supreme Court, Judge Long felt, indicate a policy to decide disputes of this kind through the machinery of arbitration whenever possible, resolving doubts in favor of coverage by the arbitration agreement. He would have ordered arbitration.

In view of the obvious confusion concerning the discharges, as well as the apparent efforts to settle the issue within a forty-eight hour period following the initial discharge action, there is a great deal to be said for Judge Long's position.[5]

The majority opinion makes only passing reference to the decision of the United States Supreme Court in *Warrior & Gulf Navigation Company.*[6] The importance and the applicability of the rule established by the United States Supreme Court in this very area warranted much more attention than this.[7] This failure is quite inconsistent with the earlier

5. In addition to the forty-eight hour requirement, the section on discharges provided that it was the intent that all such cases should be taken up and disposed of within five days of the date of discharge. The general grievance section, however, provided that notification of intent to appeal "any grievance" from step three to step four, or from step four to step five, should be given within thirty-one calendar days. Such discrepancies are not uncommon in collective bargaining agreements. It is also noted that no formal complaint or written report is required at the initial step. It is usually felt that matters of this kind can best be settled through arbitration, utilizing men experienced and familiar with the history and special problems of labor-management relations. This case seems to furnish an excellent example of the reason for this rule.

6. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). These cases are generally considered to establish the rule that the courts are limited to finding whether there is a collective bargaining agreement in existence, whether there is an arbitration clause, and whether there is an allegation that a provision of the agreement has been violated. Under the rule of these cases, if the arbitration clause is broad enough to include the alleged "dispute," then arbitration must be ordered. For commentaries on these cases, see Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator,* 36 NOTRE DAME LAW. 138 (1961); Gould, *The Supreme Court and Labor Arbitration,* 12 LAB. L.J. 331 (1961); Hays, *The Supreme Court and Labor Law, October Term, 1959,* 60 COLUM. L. REV. 901 (1960); Kagel, *Recent Supreme Court Decisions and Arbitration Process,* ARBITRATION & PUB. POLICY 1 (1961); Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining,* 28 U. CHI. L. REV. 464 (1961); Petro, *Labor Relations Law,* in 1960 ANNUAL SURVEY OF AMERICAN LAW 131 (1961); Snyder, *What Has the Supreme Court Done to Arbitration?,* 12 LAB. L.J. 93 (1961); Wallen, *Recent Supreme Court Decisions on Arbitration: An Arbitrator's View,* 63 W. VA. L. REV. 295 (1961).

7. In Vulcan-Cincinnati, Inc. v. United Steelworkers, 289 F.2d 103 (6th Cir. 1961), the same employer brought an action under section 301 of the LMRA to recover damages claimed to have been inflicted as a result of a strike by the union. The union moved for a stay of the proceedings pending arbitration of the employer's complaint. The federal court construed the grievance procedure under the contract in this case as applying only to the employees and the union, and not to any complaint which the employer might have. The *American Manufacturing* and the *Warrior & Gulf* and *Enterprise Wheel* decisions were distinguished on the ground that none of these cases involved the issue of a breach of a no-strike clause. The right to strike, the court held, was not an arbitrable issue.

This matter may soon be settled by the United States Supreme Court itself. See Drake

statement in the opinion that the federal law is controlling in the event of any conflict, and it seems safe to predict that this decision will hardly become a reliable precedent.

Designation of the Place of the Award

While on the subject of arbitration, it is also noted that the Ohio Supreme Court denied certiorari in the case of *Ockrant v. Railway Supply and Manufacturing Company.*[8] In this case it was held that in the absence of a designation of the county in which the arbitration award was made either in the agreement to arbitrate, in the award, or in any other place in the proceedings, the common pleas court had no jurisdiction of a proceeding sought to be initiated by an application for an order to confirm the award. Based on dictum in the opinion of the court of appeals, it has been suggested that there may be some question about the application of the Ohio Arbitration Act if the agreement to arbitrate does not specify the county in which the proceeding shall be held,[9] but the syllabus of the opinion contains no such statement, and there should be no real doubt on this point. The designation of the county in which the award is made in the award itself or in some other effective way in the course of the proceeding should be sufficient.[10]

A more interesting, and perhaps more difficult, question is just where the award is actually made. Many arbitrators, at least in labor cases, travel many miles and frequently across state lines to conduct the arbitration hearings. The hearing usually is held at a place convenient to the particular plant in which the issue has arisen, which is also generally the headquarters of the local union. After the hearing, the arbitrator returns to his own office and eventually signs his opinion and award there or some place else where he may happen to be at the time. The award is invariably transmitted to each party, at whatever address the party may give, by mail. The arbitrator almost never returns to the place of the hearing to make his award.

Bakeries, Inc. v. Local 50, 287 F.2d 155, 294 F.2d 399 (2d Cir. 1961), *cert. granted,* 30 U.S.L. WEEK 3232 (January 23, 1962).

Cases involving time limits applicable to the steps of the grievance procedure usually are said to involve questions of procedural arbitrability. For recent decisions holding that the broad duty to arbitrate as required under the contract should extend to cases in which questions of procedural arbitrability have been raised. See Radio Corp. v. Ass'n of Professional Eng'r. Personnel, 291 F.2d 105 (3d Cir. 1961); IAM Lodge 2003 v. Hayes Corp., 43 CCH Lab. Cas. 25637 (5th Cir. 1961); Southwestern Elec. Power Co. v. Local 738, IBEW, 43 CCH Lab. Cas. 25195 (5th Cir. 1961); United Steelworkers v. Philip Szeig & Sons, 42 CCH Lab. Cas. 24439 (N.D. Ind. 1961). *Contra,* United Brick & Clay Workers v. Gladding, McBean & Co., 192 F. Supp. 64 (S.D. Cal. 1961).

8. 160 N.E.2d 435; *aff'd,* 111 Ohio App. 276, *cert. denied,* docket no. 36,487 (1961).

9. 22 OHIO ST. L.J. 742 (1961).

10. In the *Ockrant* case, the only reference to the place of the award was contained in a covering letter written by an official of the American Arbitration Association. Without discussing the point, the court in effect ruled that this was not sufficient.

The difficulties here may easily be imagined if the arbitrator hears the case in Ohio but maintains an office and signs the award in a neighboring state, which may frequently occur. Further problems arise if there is a panel or arbitration board composed of three, five, or sometimes more members, with the impartial arbitrator serving as the chairman and the other members representing the parties equally. It is not at all uncommon for these members to reside in different parts of the state and occasionally outside of the state. They seldom meet again, and the award is transmitted by mail for signature.

The most sensible solution would seem to be a designation in the award of the place where the hearing was held as the place of the award. This undoubtedly would be the most convenient place for further judicial proceedings to confirm or vacate the award. If a different designation is made in the award itself, however, for whatever reason, this would appear to satisfy the statute. If the submission agreement, which is sometimes used, designates the county in which the arbitration is to be conducted and the award made, this should clearly settle the problem. A written stipulation signed by representatives of both parties and made a part of the record at the time of the oral hearing, designating the place of the arbitration and award, should also be sufficient to meet the requirement of the Ohio Statute.

JURISDICTION TO ENJOIN PICKETING

In *Sherlock Baking Company v. Bakery Drivers Union, Local 365*[11] the employer brought suit to enjoin "stranger picketing." There were no allegations of violence or anything else which might be construed as a threat to the peace. The common pleas court ruled that it did not have jurisdiction, and this was affirmed by the court of appeals. Notwithstanding the fact that "stranger picketing" is unlawful as against the public policy of Ohio, the court stated that since it appeared that the activity of the defendants sought to be enjoined was arguably subject to the federal Labor Management Relations Act, the court had no jurisdiction to determine the controversy.[12]

In *Foley Construction Company v. Truck Drivers Local 100*,[13] however, the court found that it had jurisdiction where a breach of the collective bargaining agreement between the employer and the union was threatened, notwithstanding the fact that a charge had been filed by the

11. 173 N.E.2d 686 (Ohio Ct. App. 1959).

12. The court relied upon the United State Supreme Court's decision in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The result is also consistent with the Ohio Supreme Court's decision in Richman Brothers Co. v. Amalgamated Clothing Workers, 168 Ohio St. 560, 157 N.E.2d 101 (1959), discussed in Teple, *Survey of Ohio Law — Labor Law*, 11 WEST. RES. L. REV. 396, 401 (1960).

13. 172 N.E.2d 170 (Ohio C.P. 1960).

union with the NLRB and a complaint had been issued against the employer pursuant thereto.

The employer in this case had entered into a collective bargaining agreement with the Ohio Conference of Teamsters, a division of the International Brotherhood of Teamsters, which had geographical jurisdiction over Local 100. The petition joined the International, the Ohio Conference, and Local 100 as defendants and charged them with attempting through picketing to force it to breach its contract, further alleging instances of violence, intimidation, and threats of bodily harm. A temporary restraining order was issued by the court and thereafter Local 100 filed a charge with the NLRB, as a result of which a complaint against the plaintiff was issued. Two days later, Local 100 filed a motion to dissolve the restraining order and to dismiss the petition on the basis that the court did not have jurisdiction. The local argued that it was the designated representative of the plaintiff's truck drivers, that the plaintiff's refusal to bargain with it was an unfair labor practice under the federal LMRA, and that since these matters came within the purview of the federal act, the NLRB had exclusive jurisdiction and the state court could not assume jurisdiction thereof. In reply, the plaintiff argued that the United States Supreme Court had recognized two exceptions to the federal preemption doctrine, namely, (1) cases of violence, and (2) breach of contract. The contract in question contained a no-strike provision.

After a careful review of the federal court decisions as well as decisions in several other states, the court concluded that it was not the intent of Congress to give the National Labor Relations Board jurisdiction over matters of law such as the enforcement of contracts; nor, the court concluded, was exclusive jurisdiction vested in the federal courts in this respect. Considerable reliance was placed on the decision of the Cuyahoga County Common Pleas Court in *Standard Oil Company v. Oil Workers International Union,*[14] wherein Judge William K. Thomas ruled that there was nothing in the Taft-Hartley Act which could be regarded as protecting concerted activities which had as their purpose possible and probable inducement of breach of contract.

CRIMINAL CONTEMPT

In *State v. Local 5760, United Steelworkers of America*[15] the Ohio Supreme Court ruled that where union officials during a strike failed to

14. 144 N.E.2d 517 (Ohio C.P. 1957), discussed in Teple, *Survey of Ohio Law — Labor Law,* 9 WEST. RES. L. REV. 338 (1958). As in the *Standard Oil* case, the court in the *Foley Construction Company* case did not consider the matter of the alleged violence, although specifically recognizing its jurisdiction to restrain such violence.

15. 172 Ohio St. 75, 173 N.E.2d 331 (1961). See also discussion in *Constitutional Law* section, p. 446 *supra.*

make reasonable efforts to prevent interference by members with the processes of a court, particularly where there was evidence of actual approval or participation in such conduct, the officials and the union itself were subject to a charge of contempt of court.

The clerk of the common pleas court had issued four writs of replevin to the sheriff ordering him to take possession of ten truck-trailers loaded with aluminum products which were then located on company property where a strike was in progress. The sheriff proceeded to the gate of the struck plant in his official automobile, accompanied by ten truck-tractors and their drivers to be used to remove the trailers from within the plant. The vice president of the striking union was present at the gate with several others when the sheriff approached and presented him with the writs. The gate was blocked by automobiles, however, and they were not removed despite the sheriff's explanation that it was his duty to go into the plant to execute the order of the court. The sheriff left with the union official and called his office from a nearby phone booth for further instructions. When he returned to the plant gate, the automobiles had been removed but in their place was a line of men standing closely together and blocking the gate. At this point, the president of the union was also present. Although the sheriff testified that he had discussed this matter with the local president the day before, it was admitted that the seventy-five men engaged in picketing on the day in question had received no prior instruction concerning the possibility of the writs being served. The union officials finally offered to allow the sheriff to enter the plant for the purpose of placing court seals upon the trailers, but when the sheriff started to drive into the plant without saying what he would do, his vehicle was jostled by the men surrounding it.

A contempt charge was thereafter filed against the defendants, a hearing was had pursuant to the terms of section 2705.03 of the Ohio Revised Code, and the two officials, together with the union itself, were found guilty and fined $500.00 each.[16] The court of appeals determined that the sheriff's duty in executing the writ of replevin did not require him to take actual physical possession of the property involved, and on this basis reversed the judgment of the common pleas court and discharged the defendants. In a lengthy opinion, the supreme court reversed the court of appeals and affirmed the judgment of the common pleas court.

The court ruled that the defendants' interference with the sheriff in his attempt to execute the court's order clearly constituted an offense against the dignity and process of the court. The purpose of the penalty imposed upon the defendants, it was said, was to punish rather than to

16. The defendants were also charged with violation of section 2917.07 of the Ohio Revised Code, which makes it a felony to interfere with an officer of the court in the discharge of his duty, but the grand jury returned a "no bill" to this charge.