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Labor Law--Employee Rights under Collective Bargaining Agreement

Thomas Franklin McCoy
West Virginia University College of Law

The principle became even more inclusive by rulings that a non-union employee, by accepting the benefits of a collective agreement, was bound by the terms of the contract even though he was not represented in the bargaining. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1956); *Sinclair Refining Co. v. Atkinson,* 290 F.2d 312 (7th Cir. 1961); *Jacobsen v. Luckenbach S.S. Inc.,* 201 F. Supp. 883 (D. Ore. 1961).

These cases indicate that not only is the individual employee's will subordinate to that of the union's, but also an employee, regardless of his membership in a union, is bound by the collective agreement and must accept its advantages and disadvantages. Because of the danger of the individual's rights being used by the union for trading purposes with management, or their vindication, depending on the individual's position in the union, there exists the distinct possibility that the individual rights may not receive the consideraton to which they are entitled.

The New York court, despite the possible loss of individual rights, has supported the proposition that the employee cannot enforce his rights in the collective bargaining agreement. *Rotnofsky v. Capital Distrib. Corp.,* 262 App. Div. 521, 30 N.Y.S. 2d 563 (1941). The court has also made it clear that the employee cannot avail himself of the arbitration procedure, since such a right is granted only to the union and employer. *In re Soto,* 7 N.Y.2d 397, 165 N.E.2d 855 (1960); *Parker v. Borock,* 5 N.Y.2d 156, 156 N.E.-2d 297 (1959). If an adverse award has been given, the employee has no right to have it vacated, for that right is given only to the parties to the arbitration—the union and the employer. *In re Soto, supra; Donato v. American Locomotive Co.,* 306 N.Y. 966, 120 N.E.2d 227 (1954).

It has been reasoned, in support of such position, that to allow an employee standing in court to enforce an individual right in a collective agreement would precipitate an avalanche of suits between employees and employers. *Gross v. Kennedy,* 183 F. Supp. 750 (S.D. N.Y. 1960). The New York court has also justified its holdings by maintaining that, not only would the integrity of the arbitration process be destroyed, but also one of the principal purposes, a speedy, conclusive result, would be defeated if persons who were not parties, but whose interests were adversly affected by an award, were allowed to attack it collaterally. *In re Soto, supra; Parker v. Borock, supra; Donato v. American Locomotive Co., supra.*

In contrast to the New York view, other jurisdictions have held that the individual employee does have a right to enforce the collective agreement. *Mackay v. Loew's Inc.*, 182 F.2d 348 (9th Cir. 1950); *Yazoo & M.V.R.R. v. Webb*, 64 F.2d 902 (5th Cir. 1933); *Widuk v. Oster Mfg. Co.*, 117 N.W.2d 245 (Wis. 1962); *Clark v. Hein-Werner Corp.*, 8 Wis.2d 264, 100 N.W.2d 317 (1959).

The Wisconsin court, following this view, has held the individual employee not bound by an arbitration agreement between his employer and union when the union maintained a position adverse to his own. *Clark v. Hein-Werner Corp., supra.* The theory behind this decision was that the employee was entitled to fair representation from his union. In a later case, the court held an arbitration award was a denial of due process, unless the employee was given notice and an opportunity to be heard. *Widuk v. Oster Mfg. Co., supra.*

The courts following the Wisconsin view justify their position by maintaining that relief ought to be given where the elementary requirements of due process have been flouted. *Robertson v. Local 1800, Longshoremen's Int'l Ass'n,* 183 F. Supp. 423 (E.D. La. 1960); *In re Norwalk Tire & Rubber Co.,* 100 F. Supp. 706 (D. Conn. 1951); *Widuk v. Oster Mfg. Co., supra.*

The New York and Wisconsin courts recognize, as a general policy, the right of the union and employer to have a uniform body of rules govern their relationship. Summers, *Employee Rights in Collective Bargaining Agreements,* 9 BUFFALO L. REV. 239 (1959). The purpose of the policy is to insure uniformity in the construction of the contract as well as equal treatment to all the employees. The policy is obviously based on the supposition that the union will represent all the employees fairly. The New York court, as the principal case indicates, does not question this supposition and denies the individual employee benefits beyond those he would obtain if the union vigorously prosecuted his grievances. Wisconsin, on the other hand, does question it and insures the employee that his rights will be protected. *Clark v. Hein-Werner Corp., supra.* One of the purposes of the collective agreement is to prevent harassment of the employer by the employee. New York, as shown by the principal case, prevents this even at the expense of an individual's rights. The Wisconsin court, in contrast, permits no violation of individual rights without an opportunity to be heard. *Widuk v. Oster Mfg. Corp., supra.*

Both courts are seeking to establish smooth, harmonious relationships between management and labor, but the conflict in the law governing the employee-union-employer relationship has shown a distinct need for a new form of fiduciary-agency concept. This conflict has not been reconciled by the growing expanse of federal law applicable to collective bargaining contracts, which binds state court adjudications. *Lucas Flour v. Teamsters Union,* 369 U.S. 95 (1962). It is encouraging to note that elimination of confusion in the field of collective bargaining will not be affected by the concurrent jurisdiction now permitted because of the *Lucas Flour* case. The Supreme Court recently stated that although diversities and conflicts might arise from concurrent jurisdiction, this is not necessarily unhealthy for one of the traditional functions of the Court has been to resolve and accommodate such diversities and conflicts. *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962).

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Municipal Corporations—Insurance and Immunity

P was injured as a result of alleged negligence of the city in the operation of a governmental function. The city was covered by a liability policy whereby the insurer agreed not to raise the defense of governmental immunity. *D*-city demurred to the complaint and the trial court sustained the demurrer. *Held,* order reversed. The city waived its immunity for such of its acts and those of its servants as were covered by the insurance policy to the extent of the policy limits. *Marshall v. City of Green Bay,* 118 N.W.2d 715 (Wis. 1963).

The principal case followed a precedent-breaking Wisconsin decision which abolished governmental immunity for torts from July 15, 1962. *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618 (1962). As a result of the *Holytz* case, the *Marshall* case would seem to have limited effect in Wisconsin. There are, however, other states which may accept the Wisconsin court's interpretation of the effect of like insurance policies. The opinion in the instant case states that a growing minority of jurisdictions are relaxing their views of the waiver of governmental immunity to the extent that an insurance policy protects a municipality against tort liability which previously did not exist. Annot. 68 A.L.R.2d