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Labor Law—Unfair Labor Practices—Board Jurisdiction When an Arbitration Clause is Used.—NLRB v. Huttig Sash & Door Co.

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Labor Law—Unfair Labor Practices—Board Jurisdiction When an Arbitration Clause is Used.—*NLRB v. Huttig Sash & Door Co.*[1]—Huttig Sash & Door Company Incorporated (Huttig) and the Carpenters District Council of St. Louis & Vicinity (Union) entered into a collective-bargaining agreement which was to be effective for four years. The contract provided that it was not to be changed or modified except upon compliance with the notice requirements of the National Labor Relations Act.[2] Employees were classified according to the types of jobs they performed, minimum hourly wage rates were established for each job classification, and regular increases for minimum rates and rates above the minimum were specified. The employer was permitted to transfer an employee to a higher or lower classification, but only if the pre-transfer wage rate was continued for a specified period. The grievance procedure, established to settle disputes concerning contract interpretation, required both parties to give an "earnest effort" to settlement and to submit the dispute to arbitration if the procedure failed.[3]

On November 19, 1964, Huttig notified the Union that on November 30, the above-minimum wage rates of eleven employees would be reduced to conform to their present job classifications. In answer to a protest by the Union, the company claimed that such reductions were permitted by the contract, and on November 30, the employees were notified of the wage reduction. Except for these reductions, there were no significant changes in the employees' jobs nor were their classifications changed. Neither party invoked the grievance-arbitration procedure.

The Union filed unfair-labor-practice charges with the National Labor Relations Board. It charged that Huttig had unilaterally reduced wages without giving the Union the opportunity to bargain and had modified the terms of the contract without complying with the notice requirements and thus had committed the unfair labor practice of refusing to bargain collectively, a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act.[4] In answer to these charges, Huttig once again claimed that the wage reductions were permitted by the contract and, therefore, their implementation could not constitute an unfair labor practice. Huttig also argued that even if the reductions were a breach of the contract, the Board had no jurisdiction to hear the Union's charges because the determination of whether such wage reductions constituted a breach and an unfair labor practice required an interpretation of a contract containing a provision for arbitration of grievences. The Board found that it had jurisdiction and that the company had committed the unfair labor practice of refusing to bargain with the Union. It ordered Huttig to cease and desist from the unfair labor practice and to bargain with the Union if the Union so requested.[5]

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[1] 377 F.2d 964 (8th Cir. 1967), aff'g 154 N.L.R.B. 811 (1965).

[2] Under Section 8(d) of the Act, a party to the contract can modify or terminate the contract only if it serves written notice to the other party sixty days prior to the termination or modification, offers to meet and negotiate with the other party, notifies the Federal Mediation and Conciliation Service and any state or territorial agency and continues the contract in full force for the sixty day period. 29 U.S.C. § 158(d) (1964).

[3] 377 F.2d at 966.

[4] 29 U.S.C. § 158(a)(1), (5) (1964).

[5] Huttig Sash & Door Co., Inc., 154 N.L.R.B. 811, 812, 817-18 (1965).

On the Board's petition, the Court of Appeals for the Eighth Circuit enforced the order. HELD: The Board is not deprived of its unfair-labor-practice jurisdiction by reason of the fact that the determination of whether an unfair labor practice has been committed requires the interpretation of a contract which contains an arbitration clause.

In reaching this decision the court was faced with two issues. The first was whether the Board had jurisdiction to find an unfair labor practice where this finding required an interpretation of the contract; the second, whether the Board had jurisdiction to make this interpretation where the contract contained an arbitration clause. To resolve these two issues the court relied upon two recent Supreme Court cases. The court considered *NLRB v. C & C Plywood Corp.*[6] to be conclusive on the first issue and *NLRB v. Acme Indus. Co.*,[7] with its emphasis upon the nature of the relationship that exists between the Board and arbitration and upon Section 10(a) of the National Labor Relations Act,[8] to be determinative of the second issue. The court, in resolving the second issue, also placed emphasis upon the policies behind *Acme* and *C & C*, especially the policy that delay either in the courts or in arbitration should be avoided in the settlement of labor disputes.[9]

In *C & C*, the collective-bargaining contract, which provided for a grievance procedure but not for arbitration, established job classifications, a wage rate for each of these classifications and reserved to the employer the right to pay, as a reward to an employee, a wage higher than the one designated for his classification. The employer, without notice to the union, offered the same increased wage to all the employees of particular work crews even though the wages of the employees varied under the contract. When the union learned of the plan, it protested that the increase was a violation of the contract. Although the employer was willing to discuss the increase with the union, it would not under any circumstances delay enactment of its plan. The union filed charges, and the employer was found to have committed the unfair labor practice of refusing to bargain by unilaterally changing wages in a manner not permitted by the contract.[10] The Court of Appeals for the Ninth Circuit refused to enforce, holding that the Board had no jurisdiction to find an unfair labor practice when such a finding required an interpretation of a contract.[11] In reversing the court of appeals and upholding the Board's order, the Supreme Court held that the Board had jurisdiction to interpret the contract insofar as this was necessary to determine the unfair-labor-practice charge but could not determine the contractual rights of the parties.[12]

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[6] 385 U.S. 421 (1967), rev'g 351 F.2d 224 (9th Cir. 1965), aff'g 148 N.L.R.B. 414 (1964), noted in 8 B.C. Ind. & Com. L. Rev. 997 (1967).

[7] 385 U.S. 432 (1967), rev'g 351 F.2d 258 (7th Cir.), aff'g 150 N.L.R.B. 1463 (1965). See Comment, 1966-67 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 826-29 (1967).

[8] 29 U.S.C. § 160(a) (1964).

[9] 377 F.2d at 969-70.

[10] C & C Plywood Corp., 148 N.L.R.B. 414 (1964).

[11] NLRB v. C & C Plywood Corp., 351 F.2d 224 (9th Cir. 1965).

[12] 385 U.S. at 428.

There are, of course, many similarities between *Huttig* and *C & C*: unilateral wage changes, no bargaining by the parties, and the failure to invoke the contractual grievance procedure. Most important is the fact that in each case the employer defended on the ground that the wage changes were permitted by the contract and thus required the Board to interpret the contract to find the unfair labor practice. The cases are distinguishable, however, because the contract in *C & C* contained no arbitration clause, and this distinction presents the second issue: whether the Board had jurisdiction to make this contract interpretation where the contract contained an arbitration clause.

The court regarded *Acme* as controlling on this issue. In *Acme*, the employer agreed that when equipment was transferred to another location, the employees who worked with the machinery could transfer with it if conditions permitted. After some equipment was moved, the union requested information regarding the transfer. The employer refused to supply the information claiming that there was no contract violation. The contract provided for a grievance procedure culminating in compulsory arbitration. While the grievances which the union had filed were still pending, the union filed unfair-labor-practice charges for the employer's refusal to supply information. The Board found that the information was necessary for the union's determination of whether it should continue to process the grievance, and that, therefore, the employer's failure to supply the information was a refusal to bargain.[13] The Court of Appeals for the Seventh Circuit refused to enforce the Board's order, finding that for the Board to determine whether the information was relevant, it had had to interpret a contract which contained an arbitration clause and had therefore exceeded its jurisdiction.[14] The Supreme Court reversed and ordered enforcement of the Board's order, stating that the Board had not made a binding construction of the contract but had simply determined the relevancy of the requested information and thus had acted within its jurisdiction.[15] The Supreme Court was careful to point out that the interpretation in *Acme*, unlike the one in *C & C*, had no bearing on the merits of the dispute, namely, whether the employer had violated the contract,[16] and that for this reason the decision was not an infringement on the power of the arbitrator later to make a binding interpretation.[17] *Huttig* and *Acme* are distinguishable because the contract interpretation in *Huttig* determined the merits of the dispute, i.e., whether Huttig violated the contract when it reduced the wages, while the interpretation in *Acme* was an aid to the arbitral process and did not affect the power of the arbitrator to make a binding interpretation of the contract.

It has been shown that *C & C* enabled the *Huttig* court to determine that the Board could make a contract interpretation in the course of deciding an unfair-labor-practice case. *Acme* established that the Board could do this even if there were an arbitration clause in the agreement as long as

[13] Acme Indus. Co., 150 N.L.R.B. 1463 (1965).
[14] Acme Indus. Co. v. NLRB, 351 F.2d 258 (7th Cir. 1965).
[15] 385 U.S. at 437.
[16] Id. at 438 n.7.
[17] Id. at 438.

the contract interpretation did not decide the merits of the dispute. *Huttig*, however, involved both an arbitration clause and an interpretation which decided the merits of the dispute. The court, therefore, was faced with the as yet undecided issue whether such a contract interpretation in the presence of an arbitration clause divested the Board of its jurisdiction. The court held that the language of the National Labor Relations Act, the relationship between the Board and arbitration, and the policies behind *C & C* and *Acme* established that the Board can make such an interpretation in the presence of an arbitration clause.

The language of the National Labor Relations Act resolves this issue. The Board derives its jurisdiction over unfair labor practices from Section 10(a) of the Act: "The Board is empowered . . . to prevent any person 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."[18] Literally interpreted, this section states that the Board's jurisdiction over unfair labor practices is not divested by any other method of settlement no matter how established; this would include a method established by contract, such as arbitration. But Section 203(d) of the Labor Management Relations Act states that it is the method of settlement established by contract which should be used to resolve disputes: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."[19] This policy of section 203(d) was enunciated in a group of three Supreme Court cases, the *Steelworkers' Trilogy*,[20] which involved two suits to compel arbitration and one for enforcement of an arbitral award. These cases stated that this policy could be effectuated only if the disputes arising from the collective-bargaining agreement were settled by the method agreed upon by the parties.[21] Thus, it seems that in a dispute where the contract contains an arbitration clause, the Board is given jurisdiction by section 10(a) but is instructed not to exercise it by the policy of section 203(d) as enforced by the *Steelworkers' Trilogy*. In *Acme*, however, the Supreme Court stated that the *Steelworkers' Trilogy* does not affect the Board's jurisdiction. This is so because those cases dealt with the relationship between the courts and arbitration[22] and thus bear little relevance to the different relationship between the Board and arbitration. The Board's relationship to arbitration differs because a contract, by specifying which subjects are to be submitted to arbitration, limits the arbitrator's power and a court's determination of what constitutes an arbitrable dispute. But the subjects over which the Board has power are determined by statute and never by a contract. Though in some cases the

[18] 29 U.S.C. § 160(a) (1964).

[19] Id. § 173(d).

[20] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[21] 363 U.S. at 566; 363 U.S. at 583; 363 U.S. at 599.

[22] 385 U.S. at 436.

Board has refused to exercise its jurisdiction because the particular circumstances of a case were such that the policies and purposes of the Act would be best served by settlement in the grievance-arbitration procedure,[23] it has never held that the mere presence of an arbitration provision in a contract deprived it of its unfair-labor-practice jurisdiction.[24] This universal practice of the Board coupled with the explicit statements of the Supreme Court in *Acme* would indicate that section 203(d) in no way affects the Board's unfair-labor-practice jurisdiction.

As the Supreme Court did in *Acme*,[25] section 10(a) may be viewed in conjunction with other sections of the National Labor Relations Act to determine whether a particular dispute is within the Board's jurisdiction. Sections 8(a)(1) and (5) make a refusal to bargain collectively with the union an unfair labor practice,[26] and section 8(d) defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times to confer in good faith with respect to . . . the negotiation of an agreement, or any question arising thereunder . . . ."[27] A question arising under a contract would certainly include a question concerning the contract's interpretation. As shown previously, section 10(a) preserves the Board's jurisdiction to decide unfair-labor-practice disputes despite the presence of an arbitration clause in the contract. From all these sections it can be concluded that, regardless of whether there is an arbitration clause, the Board has the power to find a refusal to fulfill the obligation to bargain in good faith with respect to a question arising under the contract, namely, how the contract ought to be interpreted. These sections establish that the Board did have jurisdiction in *Huttig*.

The policy of avoiding delay in the settlement of labor disputes also points toward Board jurisdiction in this case. Because one of the basic purposes of the labor laws is the orderly and speedy settlement of labor disputes, any delay in obtaining solutions for these disputes is in some measure adverse to the policies underlying these laws. In *C & C*, the Supreme Court expressed concern about the fact that if the Board did not have jurisdiction of the case the union would be faced with the long delay of securing judicial relief.[28] The avoidance of delay was also a major factor in *Acme*. The Court there noted that if the Board did not have jurisdiction the union would have to proceed to arbitration to obtain the information needed to determine whether its claims were sufficiently meritorious to be processed further in the grievance procedure.[29] *Huttig* is similar, for if the Board had been held not to have jurisdiction, the dispute procedure would have begun again. The parties would then have suffered a loss of time and money like the parties in *C & C* and *Acme*.

Despite section 203(d), Section 10(a) of the Act establishes the Board's

[23] E.g., Hercules Motor Corp., 136 N.L.R.B. 1648, 1651 (1962); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

[24] Electric Motors & Specialties, Inc., 149 N.L.R.B. 131, 136 (1964).

[25] 385 U.S. at 436-37.

[26] 29 U.S.C. §§ 158(a)(1), (5) (1964).

[27] Id. § 158(d).

[28] 385 U.S. at 429-30.

[29] Id. at 438.

jurisdiction even though there is an arbitration clause in the contract, and section 10(a) in conjunction with other sections shows that the Board may find an unfair labor practice which requires an interpretation of the contract. Moreover, a decision that the Board did not have jurisdiction in this case would be adverse to the policy of avoiding delay. These were sufficient reasons for the court to hold that the Board had jurisdiction to find an unfair labor practice in *Huttig*.

THOMAS HOWARD BROWN

Principal and Surety—Miller Act—Duty to Apply Payments to a Secured Debt.—***United States ex rel. Hyland Elec. Supply Co. v. Franchi Bros. Constr. Corp.***[1]—Franchi Brothers Construction Corporation (Franchi) contracted with the United States to build an ammunition-storage facility at the Ethan Allen Air Force Base in Vermont. As required by the Miller Act,[2] Franchi furnished a payment bond under which Franchi would be liable for any nonpayment to persons supplying labor and materials for use on the government job. Maryland Casualty Company (Maryland) was surety on this bond. Fairway Electrical Contractors Incorporated (Fairway) subcontracted with Franchi to do the electrical work on the storage facility. Hyland Electrical Supply Company (Hyland) supplied Fairway with all the necessary electrical material which had a total value of $18,647.38. Hyland had previously supplied materials to Fairway for use on other jobs and still had accounts receivable for their payment.

Both Fairway and Hyland requested Franchi to make any progress payments from the government job in the form of checks payable to Fairway and Hyland as joint payees. Franchi complied with this request and sent several checks, which had a total value of $19,597, to Fairway, who forwarded them to Hyland for endorsement. Hyland endorsed the checks and returned them to Fairway. Fairway thereafter sent several payments to Hyland—in total $16,597—and instructed Hyland to credit only $9,000 to the account for materials supplied on the government job, directing that the remaining amount ($7,597) be applied to its other unsecured debts owed to Hyland. After each application of the payments, Hyland notified Franchi of the amount with which the Franchi-Fairway account was credited; Franchi made no reply. There was still a balance of $9,647.38 on the secured Franchi-Fairway account when Fairway became insolvent and filed a petition in bankruptcy. Hyland instituted suit in the United States District Court, seeking to recover the $9,647.38 against Franchi and the surety, Maryland. The district court entered judgment for Hyland against both Franchi and Maryland in the amount sought by Hyland.[3] The court reasoned that Franchi, because of its knowledge of Hyland's allocation of the funds, was estopped from asserting that Hyland had an equitable obligation to

[1] 378 F.2d 134 (2d Cir. 1967).

[2] 40 U.S.C. §§ 270a-270d (1964).

[3] United States ex rel. Hyland Elec. Supply Co. v. Franchi Bros. Constr. Corp., Civil No. 4061 (D. Vt., filed May 5, 1966).