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Labor Law—Labor Management Relations Act—Unfair Labor Practices--Board Jurisdiction to Interpret the Contract.—NLRB v. C & C Plywood Corp.

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Labor Law—Labor Management Relations Act—Unfair Labor Practices —Board Jurisdiction to Interpret the Contract.—*NLRB v. C & C Plywood Corp.*[1]—Plywood, Lumber and Saw Mill Workers Local No. 2405, the certified collective-bargaining representative of the production and maintenance employees of the C & C Plywood Corporation, entered into a collective agreement with the company effective May 1, 1963. The agreement contained a detailed classified wage scale and a provision (hereinafter referred to as Article XVII) by which the employer reserved the right to "pay a premium rate over and above the contractual classified wage rate to reward any particular employee for some special fitness, skill, aptitude, or the like."[2] The agreement did not provide for arbitration of contract disputes.

Less than three weeks after the contract was signed, the employer posted a notice that a premium pay plan would be put into effect for the members of the "glue spreader" crews. Each of these crews was composed of four men who received hourly wages of between $2.15 and $2.29 depending upon the function performed within the crew. Under the premium pay plan however, each member of the crew was to receive a uniform hourly wage of $2.50 if the crew met specific bi-weekly production standards.

The union objected to the institution of this plan, contending that it violated the terms of the agreement, which established the wage rates of each crew member. When the company refused to rescind the plan, the union filed unfair-labor-practice charges with the National Labor Relations Board. The Board issued a complaint against the employer, alleging that the institution of the plan was a unilateral pay increase during the term of the agreement, and thus violated the duties imposed by sections 8(a)(1) and (5) of the National Labor Relations Act.[3] In defense to the complaint, the employer argued that since Article XVII expressly allowed it to institute a premium wage rate the specific plan did not violate the act.[4] The Board, however, did not agree with the employer.[5] It found that while the agreement did allow for merit increases to *particular* employees, it did not authorize the company to make the wages a function of the output of the crew as a *whole*.[6] Accordingly, the Board ordered the company to cease and desist from the unfair labor practice found, to rescind any plan unilaterally instituted, and, if requested, to bargain with the union with respect to the institution of a premium pay plan for the "glue spreader" crews.

The Board's petition to the Ninth Circuit for enforcement of the order was denied.[7] The court of appeals, unlike the Board, did not reach the question of the meaning of Article XVII of the collective agreement. Instead, it held that the Board did not have jurisdiction to find that the company had violated section 8(a) of the act, since "the existence or non-existence of an

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1 385 U.S. 421 (1967).

2 Id. at 422-23.

3 Section 8(a)(5) states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(5) (1964).

4 Brief for Respondent, pp. 19-20.

5 148 N.L.R.B. 414 (1964).

6 Id. at 417.

7 351 F.2d 224 (9th Cir. 1965).

unfair practice charge [did] . . . not turn entirely upon the provisions of the Act, but arguably upon a good-faith dispute as to the correct meaning of the provisions of the collective bargaining agreement. . . ."[8] The court pointed out that the meaning to be attributed to Article XVII was a question not for the Board, but for the courts under section 301 of the act.[9]

The Supreme Court granted certiorari to consider the substantial question of federal labor law raised by the Ninth Circuit's opinion.[10] HELD: Reversed. In this case the Board had jurisdiction to construe the labor agreement so far as was necessary to adjudicate the unfair labor practice. The Court, however, made it clear that, since the collective-bargaining agreement in this case did not provide for arbitration, its decision was limited to the situation where only the Board and the courts were available as forums to interpret the disputed contract provision.[11] In reaching this decision, the Supreme Court stated that "the legislative history of the Labor Act, the precedent interpreting it, and the interest of its efficient administration . . . all lead to the conclusion that the Board had jurisdiction to deal with the unfair labor practice charge in this case."[12]

The Court's analysis of the legislative history of the National Labor Relations Act was in response to an argument of respondent based on the legislative history of the 1947 Senate Bill amending the act.[13] The original amendment contained a provision [§ 8(a)(6)][14] which would have given the Board jurisdiction over all breaches of collective-bargaining agreements by making such action an unfair labor practice. The respondent argued that Congress, by deleting this provision from the bill, intended to preclude Board jurisdiction whenever contract interpretation was involved.[15]

In rejecting this proposition, the Court noted that the provision was deleted because it would have been a step toward government regulation of the terms of labor agreements.[16] The Court also pointed out that the legislative history indicated that "Congress was . . . concerned with the possibility of conflicting decisions that would result from placing all questions of contract interpretation before both the Board and the courts."[17] The Court noted, however, that in the instant case, the Board was adjudicating the union's statutory rights under sections 8(a)(1) and (5) of the act, subject matter over which the courts did not have jurisdiction, and, thus, that this conflict could not arise in the *C & C Plywood* type of situation.

Prior judicial determinations were used to reinforce the Court's position. In *Mastro Plastics Corp. v. NLRB*,[18] for example, the employer was charged

8 Id. at 228.

9 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).

10 384 U.S. 903 (1966).

11 385 U.S. at 426.

12 Id. at 430.

13 S. 1126, 80th Cong., 1st Sess. (1947).

14 Proposed § 8(a)(6) stated: "It shall be an unfair labor practice for an employer . . . to violate the terms of a collective bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration . . . ."

15 Brief for Respondent, pp. 42-52.

16 385 U.S. at 427-28.

17 385 U.S. at 428 n.13.

18 350 U.S. 270 (1956).

with section 8(a)(1), (2), and (3) violations for his refusal to reinstate strikers. In defense to the charges, the employer argued that the strikers had violated the no-strike clause in the collective-bargaining agreement, and thus had lost their status as employees under the NLRA. The Board, in evaluating the unfair-labor-practice charges, was forced to construe the no-strike clause. It found that the clause referred only to economic strikers, not unfair-labor-practice strikers and rejected the defense.[19] The Supreme Court upheld this determination, stressing that the unfair-labor-practice question turned on the proper interpretation of the no-strike clause in the contract.[20]

If the Board were not allowed to construe the contract in a case such as *C & C Plywood* where there is no compulsory-arbitration agreement between the parties, "labor organizations would face inordinate delays in obtaining vindication of their statutory rights,"[21] since they could seek Board protection only after a favorable disposition of the contract issue by the courts. As a practical matter, Congress could not have intended to so limit the Board's effectiveness.[22] Finally, the Court summarily rejected the respondent's alternative argument that even if the Board had jurisdiction, it had interpreted the contract erroneously.[23]

The result reached by the Supreme Court is reasonable when one considers the adverse effect that the opposite holding would have had upon the Board's jurisdiction over unfair labor practices. The Court, however, by no means exhausted all the arguments supporting its conclusion. For example, under sections 8(a)(3),[24] "union security," and 8(e),[25] "hot cargo," certain types of clauses are prohibited in collective-bargaining agreements. In these instances, the Board must look at the particular clause involved in order to apply the statute. Where the meaning of the clause has been in dispute, the right of the Board to interpret it has been upheld.[26] Although in these instances the clause is the affirmative basis of, rather than the defense to, an unfair-labor-practice charge, the Board's role is essentially the same —interpreting a contract in order to apply the statute.

Furthermore, *Mastro Plastics* does not stand alone as an example of Supreme Court recognition of the Board's power to construe contract clauses which are raised as a defense to an unfair-labor-practice charge. In *NLRB v. Lion Oil Co.*,[27] the majority of the Court construed a collective-bargaining agreement as not impliedly including a no-strike clause. The opposite construction would have provided the employer with a valid contractual defense to the section 8(d) unfair-labor-practice charge. Two justices, however, dissented in part. Mr. Justice Frankfurter pointed out that it was not proper

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[19] 103 N.L.R.B. 511 (1953).

[20] 350 U.S. at 279, 284.

[21] 385 U.S. at 429.

[22] Id. at 430.

[23] Id. at 430-31.

[24] 61 Stat. 141 (1947), 29 U.S.C. § 158(a)(3) (1964).

[25] 73 Stat. 542 (1959), 29 U.S.C. § 158(e) (1964).

[26] As to § 8(a)(3), see Red Star Express Lines v. NLRB, 196 F.2d 78 (2d Cir. 1952). As to § 8(e), see Truck Drivers Union Local 413 v. NLRB, 334 F.2d 539 (D.C. Cir. 1964).

[27] 352 U.S. 282 (1957).

for the Court to make this determination in the first instance.[28] Mr. Justice Harlan agreed with this contention and added that "the nature of the issue is such that the Court of Appeals might well conclude that the issue should be referred to the Board for its expert views in the first instance."[29] Neither of the Justices who reached this issue even considered whether the proper forum for interpreting the contract was a federal district court exercising section 301 jurisdiction. In fact, Justice Harlan indicated that the Board was the proper forum.

In addition, the Court's argument in *C & C Plywood*, regarding the efficient administration of the act, could have been expanded. The Court's primary concern was the delay which would be involved in obtaining a court interpretation of the disputed contract clause. Here it could have pointed out that if the courts were the only forum for interpreting collective-bargaining agreements, a premium would be placed upon raising frivolous contractual defenses to unfair-labor-practice charges. Thus, the delay could often arise where there was not even a bona-fide dispute.

As the additional supporting precedent would indicate, the result in *C & C Plywood* comes as no surprise. Yet, the reasoning by which the Court reached its result presents certain problems. The Court first rejected respondent's inference from the legislative history that Congress intended to preclude Board jurisdiction over contract-interpretation disputes. Then, in one step, the Court concluded that since the legislative history did not support the respondent's inference and since the Board has jurisdiction over unfair-labor-practice charges, the Board could also interpret the contract so far as was necessary to adjudicate the unfair labor practice. The problem which this reasoning presents is that the Court has clearly indicated that the *C & C Plywood* opinion concerns only the relation between the Board and the courts. Its reasoning, however, has a broader application. If the Board's jurisdiction extends to all matters which are relevant to unfair-labor-practice adjudications, then it would not matter whether the contract contained an arbitration clause, since the Board's singular jurisdiction over the unfair practice would also give it jurisdiction over the relevant contract dispute. The fact that the Court limited its decision to the situation where the collective-bargaining agreement does not provide for arbitration, however, suggests that the Court did not intend to go so far in this case. Perhaps it is more reasonable to say that the Court could find no congressional intent contrary to the Board's exercise of jurisdiction over the contract dispute, and because of prior judicial precedent and the efficient administration of the act, it felt that, as between the Board and the courts, the Board was the proper forum. On the other hand, the Court had reached its conclusion before it raised the judicial precedent and policy arguments, thus adding support for a broad rather than limited reading of the opinion.

An examination of the factors which would have been involved if the labor contract had provided for arbitration of contract disputes will indicate the importance of how the *C & C Plywood* decision is read. First, there is a real danger of conflicting decisions between the Board and the arbitrator

[28] Id. at 295.
[29] Id. at 305.

which is not present as between the Board and the courts. This conflict arises when the arbitrator makes an award to settle a dispute which subsequently comes before the Board on unfair-labor-practice charges. Second, the delay involved in obtaining a court interpretation is absent if there is an arbitration procedure. Third, the act recognizes the importance of the arbitration procedure as a means of preserving industrial peace.[30] Fourth, the parties have selected the arbitration procedure as the forum for settling their disputes.

Both the Board and the Supreme Court have previously considered the relation between the Board and the arbitration procedure. In *Speilberg Mfg. Co.*,[31] the Board stated that if arbitration has occurred before a case reaches the Board, the Board will not upset an arbitral award if the procedure was fair, if the parties had agreed to be bound, and if the result was not repugnant to the policies of the NLRA. The Court in *Carey v. Westinghouse Corp.*[32] stated its approval of the Board's policy with regard to arbitration, but emphasized that if the Board did have grounds to set aside the arbitral award, its ruling would be superior. It is important to note, however, that in both *Speilberg* and *Carey* the arbitral award, if made, would concern subject matter over which the Board had an explicit congressional grant of jurisdiction. Specifically, *Speilberg* involved an unfair labor practice, and *Carey* involved a jurisdictional dispute.

Against this background, suppose the facts of *C & C Plywood* included an arbitration clause. The dispute between the parties, rather than concerning subject matter over which the Board has jurisdiction, would now require a contract interpretation by the arbitrator (the meaning of Article XVII) which would determine the outcome of the unfair-labor-practice charge. The questions which this fact situation raise are whether the Board, after a complaint has been filed, should defer to arbitration to interpret the contract, and whether the Board must follow the arbitral award which is made. Under the broad reading of *C & C Plywood*, which gives the Board jurisdiction over all issues incident to unfair-labor-practice adjudications, the Board would have jurisdiction to interpret the contract. Then, since the arbitral award would involve subject matter over which the Board had jurisdiction, *Carey* would give the Board the final word over the contract-interpretation issue; but the *Speilberg* doctrine of Board deferral to arbitration would still be viable. The narrow reading of *C & C Plywood*, however, would still leave these questions open to be considered in light of the different factors involved when a forum is sought to interpret a collective-bargaining agreement which contains an arbitration clause.

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[30] Section 203(d) states 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." 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1964).

[31] 112 N.L.R.B. 1080 (1955).

[32] 375 U.S. 261 (1964) (dictum).