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SPECIAL TOPICS IN LABOR RELATIONS: THE ROLE OF ARBITRATION IN COLLECTIVE BARGAINING DISPUTE PROCEEDINGS

Foreword

This issue is devoted to an examination of the role that arbitrators play in labor dispute resolution proceedings, and the reasoning that they apply in resolving collective bargaining disputes. Although the formulation and interpretation of labor law[1] is statutorily committed to the public forums of the National Labor Relations Board ("NLRB" or "Board") and federal courts, recent decisions by both the NLRB and the courts have made private arbitration the preferred primary forum for the resolution of many workplace disputes. Consequently, the role and reasoning of arbitrators has assumed a much more critical position in the labor dispute resolution framework of the National Labor Relations Act ("NLRA" or "Act"). This issue examines the reasoning applied by arbitrators in certain discrete topic areas, and then analyzes the public policy implications of the committal of labor dispute resolution to arbitration.

The issue is organized in the following format: a lead Article by Professor Dennis O. Lynch that examines the implications that the

1. The term "labor law," as used here, refers to the body of law that shapes and orders relations between collective bargaining units and management. The primary sources of labor law are statutes and federal common law. For a complete description of the interplay between these sources, see Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237 (1989).

broad waiver and deferral doctrines of the NLRB and federal courts pose for collective bargaining dispute resolution; seven Comments that examine arbitration within certain distinct topic areas; and a concluding Essay by Professor Lynch that examines the implications of the Comments on organized labor/management dispute resolution.

In *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, Professor Lynch traces the application of the waiver of NLRA rights and deferral to arbitration doctrines in several common workplace dispute situations. He concludes that the willingness of the NLRB and courts to commit most labor disputes to arbitration, provided there is adequate foundation within the collective bargaining agreement, is misplaced. In particular, Professor Lynch argues that when core statutory and communal values are involved, arbitrators are ill equipped to adequately balance these values against the central arbitral tenets of preserving peace in the workplace and ensuring productive efficiency and continuity. To address this deficiency, the NLRB and federal courts must formulate narrower deferral and waiver standards, as well as develop more functional and sensitive criteria for determining whether deferral is appropriate or that a waiver has been effected.

The Comments then focus on arbitral reasoning in certain specific contexts, illustrating the difficulties presented by application of broad waiver and deferral standards. The first three Comments focus on the traditional arbitral situation: contract interpretation as it affects wages and work. *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy* examines how deferral has effected the transfer of adjudicatory authority to arbitrators. By abrogating the supervisory role of the NLRB in preventing unfair labor practices, the broad deferral policy now pursued by the NLRB and federal courts constitutes a significant departure from the original intent of the NLRA. *Arbitral Treatment of Subcontracting After* Milwaukee Spring II: *Much Ado About Nothing?* looks at the issue of subcontracting in light of the NLRB decision in *Milwaukee Spring II*[2] that permitted employers to subcontract work without prior bargaining with its unions. The Comment argues that despite the outcry that accompanied the decision, the impact is likely to be slight because of the well entrenched arbitral requirement of good faith bargaining. *Successorship Doctrine, the Courts and Arbitrators: Common Sense or Dollars and Cents?* discusses the obligation of successor employers to

2. Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984) (*Milwaukee Spring II*), *rev'g* 265 N.L.R.B. 206 (1982) (*Milwaukee Spring I*), *aff'd sub nom.* UAW v. NLRB, 765 F.2d 175 (D.C. Cir. 1985).

be bound by a pre-existing collective bargaining agreement. The Comment illustrates that successorship cases are particularly appropriate for deferral to arbitration because the determination that a successor is bound by the pre-existing agreement will be made through interpretation of the transfer or sales agreement. This is a function for which arbitrators are well suited. The Comment helps to demonstrate that issues of successorship should be left to arbitrators to decide on a case-by-case basis.

The next three Comments analyze arbitration in the context of resolving disputes that implicate not only values peculiar to labor law, but external values as well. *Arbitration and Selective Discipline of Union Officials After* Metropolitan Edison, and *The Differing Nature of the* Weingarten *Right to Union Representation in the NLRB and Arbitral Forums*, both examine how arbitrators resolve disputes that involve certain specific rights rooted in core NLRA, societal, and constitutional values. These well established values include rights of association, representation, and due process. *Selective Discipline* examines how arbitrators resolve disputes involving differential sanctioning of union leaders. Although acknowledging that routine deferral to arbitration may corrupt the "clear and unmistakable waiver" requirement of *Metropolitan Edison Co v. NLRB*,[3] the Comment argues that the increased sensitivity of arbitrators to external bodies of law sufficiently guards against the potential sacrifice of selective discipline protection rights in the name of workplace peace. *Weingarten Right* examines the right of union members to have union representatives present during employer investigatory hearings. The Comment argues that there are significant practical differences in the selection of the forum to resolve these disputes because of the different remedies and perspectives each forum brings into play. *Employee Drug Testing: Federal Courts Are Redefining Individual Rights of Privacy, Will Labor Arbitrators Follow Suit?* analyzes how arbitrators resolve questions concerning workplace drug testing. The questions are both important and difficult, and pit employees' rights of privacy and protection from unreasonable searches and seizures against employers' rights to set the terms and conditions of employment. Drug testing presents a further complication because there is no developed body of arbitral law to which arbitrators can refer in resolving these disputes. The Comment examines how arbitrators have attempted to resolve these questions by looking to the only analogous bodies of law that are available, cases interpreting the fourth amendment and cases dealing with public employee drug testing. Further, the Comment ques-

3. 460 U.S. 693, 707-10 (1983).

tions whether the result adequately balances individual and workplace rights.

Merging the RLA and the NLRA for Eastern Air Lines: Can It Fly? shifts gears slightly by looking at a recent trend by federal courts and mediation boards to engraft NLRA principles into Railway Labor Act (RLA)[4] disputes. The Comment explores the problems posed by this engrafting approach by examining recent cases involving Eastern Air Lines and its labor unions. The Comment argues that if the courts intend to pursue the merged approach, they must take the final step and permit both employers and labor unions to pursue the self-help remedies available under the NLRA.

Professor Lynch, in his concluding Essay, *Statutory Rights and Arbitral Values: Some Conclusions*, integrates and interprets the preceding Comments in light of his argument that arbitration is frequently an inappropriate forum for resolving disputes involving core NLRA and communal values. Professor Lynch concludes that the Comments illustrate the difficulties in drawing bright line deferral rules. Further, he renews his argument that the only balanced and principled approach is a retreat from broad deferral and waiver standards, and a move towards a more particularized categorization approach that adequately balances NLRA and societal goals.

We are particularly grateful to Professor Lynch for his efforts in putting together and guiding to completion this Special Topics issue, and for suggesting an expansion of the original concept to include a more developed framework and searching critique. Additionally, we wish to thank Maury R. Olicker, Amanda J. Berlowe, and especially Mark L. Bregar for their vision, effort, and dedication in bringing this unique project to successful fruition.

A procedural note is in order. Although we have attempted to follow *A Uniform System of Citation*,[5] in certain instances, particularly citation to decisions of the NLRB and arbitrators, we have deviated for purposes of simplicity, style, and space. The format that we decided upon uses parallel citations to the NLRA and United States Code, and in the case of arbitral and NLRB decisions, simplifies the case name reporting.

THE EDITORS

4. Ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-188 (1982 & Supp. V 1987).

5. A UNIFORM SYSTEM OF CITATION (14th ed. 1986).