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Arbitration—Questions, Whether Grievance Atually Concerned Rehiring or Discharge, Whether Delay in Seeking Order to Arbitrate Amounted to Abandonment of Claim, Are for Arbitrator

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QUESTIONS, WHETHER GRIEVANCE ACTUALLY CONCERNED REHIRING OR DISCHARGE, WHETHER DELAY IN SEEKING ORDER TO ARBITRATE AMOUNTED TO ABANDONMENT OF CLAIM, ARE FOR ARBITRATOR

Petitioner union sought to compel the defendant corporation to arbitrate grievances involving the discharge of an employee, the revision of time values affecting incentive pay, and the bargaining unit classification of certain workers. The Court of Appeals affirmed the Appellate Division decision which held that where the union desires to arbitrate a discharge of an employee under the collective bargaining agreement and the company refuses on the grounds that the union is really complaining of a failure to re-hire, which is not arbitrable, and in any event is precluded from arbitration by laches, the points of disagreement are to be decided by arbitration. This is so, since this method of solving the dispute was agreed upon when the collective bargaining agreement was drawn. Furthermore, the Court held that where the collective bargaining agreement specifically excludes decisions as to time values from arbitration, the courts will not allow arbitration and then grant a motion to vacate the award, just to provide the union with "therapeutic" arbitration. The Court also held that a dispute as to re-classification of employees previously certified and placed in bargaining units by the National Labor Relations Board is a matter to be determined, upon proper application, by the NLRB, which is peculiarly suited to rule on such issues, and not by arbitration. *Carey v. Westinghouse Electric Corp.*, 11 N.Y.2d 452, 184 N.E.2d 298, 230 N.Y.S.2d 703 (1962).[1]

When confronted with a dispute arising out of a collective bargaining agreement, the courts must first look to the agreement for the intent of the parties. The courts will not decide for the parties what they have agreed to decide in another manner, nor will it decide a matter that has clearly been pre-empted by another body or procedure. That is to say, if a matter is capable of settlement between the parties without resort to the courts, such means will be given preference.

Where the parties voluntarily choose, by means of the collective bargaining agreement, to settle disputes by arbitration, they will be required to fulfill this obligation, and collateral matters, relating to whether a matter alleged by a party to be a subject of arbitration is actually that subject or another, not provided to be arbitrable, or whether the delay involved in seeking court action amounted to an abandonment of the claim, are also properly to be determined by the arbitrator. Thus, where the parties have chosen to arbitrate the discharge of employees, whether the discharge was in fact a rehiring and thus not arbitrable under the agreement, is a matter for the arbitrator, and not the court, to decide. ". . . [T]hat question should be argued in the forum which the parties have voluntarily chosen—arbitration."[2] This principle was

1. 15 A.D.2d 7, 221 N.Y.S.2d 303 (1st Dep't 1961).
2. Carey v. Westinghouse Electric Corp., 11 N.Y.2d 452, 456, 184 N.E.2d 298, 299, 230 N.Y.S.2d 703, 704 (1962).

illustrated in *Matter of Straight Line Foundry & Machine Corp.*,[3] where the Court held that whether the agreed upon methods for instituting grievance procedures were followed and, therefore, whether the matter could be arbitrated, was a question of fact to be determined by arbitration.

The Court in *Carey* utilized the time-honored maxim of construction that the best place to determine the intent of the parties is in the agreement itself, when it held that where the collective bargaining agreement provided that

> Notwithstanding any other provisions of this Agreement, no arbitration shall . . . be authorized to:
> (2) Establish or modify any wage or salary rate . . . or any time value under the incentive system,[4]

the intent of the parties was clearly to remove the problem of revision of time values because of changed conditions of operation, from the arbitration process. It therefore denied the union's demand for arbitration that a delay in changing the time values resulted in invalidity. In doing so it also made it clear that where the parties had not otherwise provided, the Court would not allow such a grievance to be submitted to arbitration as a "therapeutic" procedure, i.e., an arbitration proceeding where any award made would have to be vacated. The Court cited the holding in *United Steelworkers v. American Mfg. Co.*[5] that

> [S]ince arbitration is a creature of contract a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute,[6]

as support for its denial of arbitration.

Finally, the Court asserted the exclusiveness of the National Labor Relations Board's jurisdiction over the composition of collective bargaining units, in denying the union's demands for arbitration that certain workers, because of the type of work they were doing, should be classified as production rather than experimental employees as represented by petitioner union. The Court of Appeals drew heavily upon the United States Supreme Court's opinion in *Marine Engineers v. Interlake Co.*[7] for its identical[8] holding that the required specialized knowledge and ability to consider all ramifications were better possessed by the NLRB than the courts. Also, "when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than theoretical danger of actual conflict between state and federal regulation of the same controversy."[9]

3. 9 N.Y.2d 867, 175 N.E.2d 822, 216 N.Y.S.2d 690 (1961).
4. Carey, supra note 1, at 9, 221 N.Y.S.2d at 305.
5. 363 U.S. 564 (1960).
6. Id. at 570-571.
7. 370 U.S. 173 (1962).
8. Necessarily, for the Court of Appeals holding was in large part a quote from the Interlake case. See Carey, supra note 2, at 457, 184 N.E.2d at 300, 230 N.Y.S.2d at 706.
9. Carey, supra note 2, at 457, 184 N.E.2d at 300, 230 N.Y.S.2d at 706.

Though a single judge dissented[10] in regard to the issue of classification of bargaining units, asserting that the courts should compel arbitration if the agreement so provides,[11] even though the issue may involve a matter that will ultimately give rise to a proceeding before the NLRB, it seems that the Court has merely sidestepped useless and time-consuming negotiations by the parties by "sending" them to the NLRB in an area the Board has undertaken to regulate. Thus, the Court of Appeals, in *Carey*, has done no more than reaffirm the position of the New York courts that labor disputes arising out of collective bargaining agreements, or in areas clearly under NLRB jurisdiction, will not be settled by the courts except as a last resort.

T. C. L.

CIVIL PROCEDURE

REVERSAL BY APPELLATE DIVISION AND GRANTING OF NEW TRIAL HELD NOT TO BE INTERLOCUTORY UNDER SECTION 590 OF THE CIVIL PRACTICE ACT

The appellants (plaintiffs below) were the sister and niece of Daniel Huntting, who at 79 had married 63-year-old Sally Jennings. Appellants, relying on the fact that Huntting had been declared incompetent almost two years after the marriage due to imbecility arising from old age, sought to prove that he was also incompetent at the time of marriage. Following a trial without a jury, the lower court gave an interlocutory judgment granting an annulment. On appeal the intermediate court reversed the interlocutory judgment as being based on inconclusive evidence and ordered a new trial but made no new findings of fact. After the judgment of the trial court, Daniel Huntting died. The wife died after her appeal was filed but before it was heard by the Appellate Division. After the Appellate Division's reversal and order for a new trial, the appellant appealed this decision to the Court of Appeals and stipulated for judgment absolute in the event of affirmance.[1] Meanwhile, at the new trial, the complaints were dismissed under the authority of section 1137 of the Civil Practice Act.[2] Appellants then moved in the Court of Appeals for permission to withdraw their stipulation and substitute an appeal from the dismissal by the trial court. The Court would not accept the new appeal because of a lack of jurisdiction, but it granted the withdrawal of the stipula-

10. Carey, supra note 2, at 458, 184 N.E.2d at 301, 230 N.Y.S.2d at 706.

11. Since the two unions had been organized under the auspices of the NLRB (Carey, supra note 1, at 11, 221 N.Y.S.2d at 308) and the collective bargaining agreement that the petitioning union claimed arbitration rights under was negotiated between the company and the union on this basis, it is hard to see how the union would be competent to arbitrate the matter.

1. N.Y. Civ. Prac. Act § 588(3): Before a party can appeal to the Court of Appeals and where the judgment below has been against the party he must stipulate for judgment absolute. By this, he appeals to the Court to hear his case and allows a final judgment to be rendered against him should the Court affirm the decision below.

2. N.Y. Civ. Prac. Act § 1137. This section does not permit a relative of an insane person to maintain an action for annulment after the other party to the marriage has died.

tion on the condition that appellants pay the cost of the appeal to the respondent, the legal representative of the deceased wife. *Rattray v. Raynor*, 10 N.Y.2d 494, 180 N.E.2d 429, 225 N.Y.S.2d 39 (1962).[3]

Despite the death of the husband and wife, which made a new trial impossible,[4] the Court declared that the action had not abated, and, therefore, the appellate process which had already commenced could be carried to its termination.[5] The appellants could, as they did, file stipulation for judgment absolute in the event of affirmance before the Court of Appeals.[6] However, the Court would have no choice but to affirm the Appellate Division's decision and render judgment absolute against them. The Court reasoned that since the Appellate Division's reversal was based on the law and the facts, in that it held that the evidence presented at the trial was inconclusive, the correctness of that determination was outside the scope of powers of the Court of Appeals.[7]

The Court then declared that the Appellate Division order of reversal and for new trial which resulted in judgment of Special Term dismissing the complaints was not a decision of the Appellate Division as would entitle appellants to appeal to the Court of Appeals as a matter of right. The New York State Constitution provides that an appeal to the Court of Appeals from a court of record of original jurisdiction is possible only where the question on appeal is the validity of a state or federal statute under the state or federal constitution and then only the constitutional question will be considered.[8] Section 590 of the Civil Practice Act provides that "where a final judgment or order is entered in the court of original instance after the appellate division (a) has directed the entry of an interlocutory judgment or rendered an interlocutory order . . ."[9] the aggrieved party may appeal directly to the Court of Appeals from the final judgment. Here, the court concluded that the Appellate Division had merely ordered a new trial. Since the Appellate Division neither made any new findings of fact nor held that the evidence was insufficient as a matter of law, its order for a new trial was not an interlocutory determination under section 590.

The Constitution of New York allows an appeal to the Court of Appeals as a matter of right where the Appellate Division has finally determined an action.[10] However, the Civil Practice Act declares that such appeal is a matter of right where the Appellate Division directs a reversal or modification.[11] The appellants contended that the Appellate Division in essence directed the

3. Edwards v. Huntting, 11 A.D.2d 768, 205 N.Y.S.2d 234 (2d Dep't 1960); Rattray v. Huntting, 11 A.D.2d 785, 205 N.Y.S.2d 232 (2d Dep't 1960).
4. N.Y. Civ. Prac. Act § 1137.
5. See Morgan v. Keyes, 302 N.Y. 439, 99 N.E.2d 230 (1951).
6. N.Y. Civ. Prac. Act § 588(3).
7. See Hirsch v. Jones, 191 N.Y. 195, 83 N.E. 786 (1908).
8. N.Y. Const. art. VI, § 7; N.Y. Civ. Prac. Act § 588.
9. N.Y. Civ. Prac. Act § 590.
10. N.Y. Const. art. VI, § 7(1).
11. N.Y. Civ. Prac. Act § 588(1)b(ii).