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Arbitration—Employee Not "Party" to Collective Bargaining Agreement

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individual cases. The Court of Appeals did not decide, in the *Brennan* case, that the Appellate Division could not declare the punishment excessive, but only that the merits of the case did not demand a modification of the punishment. However in the *Mitthauer* case the Court of Appeals does decide that the merits warrant a modification of the punishment.

The decision of the *Mitthauer* case that the Authority's determination amounted to excessive punishment, is questionable. Dismissing a railroad clerk found guilty of collecting fares without registering them is not such arbitrary or excessive punishment as to warrant judicial intervention. The Authority's determination did not create a situation of gross injustice.

The most important and revolutionary aspect of the *Mitthauer* case is a question not present in the *Brennan* case, once the court has determined the punishment excessive, does the court have the power to impose a new penalty or must the court leave the imposition of a lesser penalty to the administrative agency? The Court of Appeals held that subdivision 5-(a) of Section 1296 of the Civil Practice Act does confer upon the reviewing court the power to also determine the appropriate punishment.

This holding has the valuable effect of saving time and effort by permitting a conclusive decision on all aspects of the case. However, this may mean that expediency is placed above a balance of power between the courts and administrative agencies. By this ruling the power to determine punishment is taken away from the authority and given to the court. It had been the habit for reviewing courts in similar situations to remit the case to the administrative board to determine the new penalty. The dissent argues that the holding is based on a questionable interpretation of subdivision 5-(a), and that the court's power is only to determine whether there has been an abuse of discretion.

The *Mitthauer* case, although it can be reconciled with the *Brennan* case, sets a new direction in the law by conferring on the courts a greater degree of power than has previously been exercised.

ARBITRATION

Employee Not "Party" to Collective Bargaining Agreement

New York Civil Practice Act Section 1462 provides for the vacating of an arbitration award "upon application of any *party* to the controversy which was arbitrated: . . . (3) Where the arbitrators were guilty . . . of any other misbehavior by which the rights of any party have been prejudiced . . ." (emphasis supplied).[1]

1. N.Y. Civ. Prac. Act § 1462:
In either of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated . . . (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced . . . .

The case of *In re Soto*[2] dealt with the question of whether an employee could be deemed a "party" within the meaning of Section 1462.

A contract of arbitration existed between the employees' union, their collective bargaining agent, and their employer. The employees were being threatened with discharge from their jobs because of alleged slow down activities. The union demanded arbitration of the proposed discharge pursuant to the previous mentioned contract.

The employees demanded an independent attorney to represent their interests at the arbitration proceeding, instead of the attorney appointed by the union to be their representative. Their objection stemmed from the fact that the latter attorney had earlier represented the employer in proceedings against these very same employees. The employees' demand was rejected by the arbitrators. Thereafter the cause was arbitrated with the employees absent. During the proceeding the union failed to submit a defense and the employer was given the award allowing it to carry out the discharge. The employees brought the present action under Section 1462 to vacate the award.

The Appellate Division upheld the vacating of the award by Special Term.[3] The rationale set forth by these courts was that the employees had status as a "party" because, their jobs being at stake, they were either third party beneficiaries of the arbitration contract or in the position of trust beneficiaries.

The Court of Appeals reversed the lower courts. It held the employees not to be a party as contemplated by Section 1462. It relied on one of its recent holdings to substantiate its position.[4] In this earlier case a similar bargaining agreement existed, and the question was whether the employer had a right to discharge the employee. The union therein refused to pursue the right to arbitration although requested to do so by the employee. The Court held the employee was bound by the agreement between his union and employer, and having thus entrusted the union to be his representative, he had no right to avail himself of the arbitration proceedings. His only remedy was against the union for breach of its representative duty.

Thus, the Court in the present case said the employees' only remedy was an action against the union for violation of its fiduciary obligation. It made clear this was the employees' only remedy regardless of the equities involved. Any qualification to Section 1462 must be promulgated by the Legislature and not the court.

The dissenting opinion agreed that the standard collective bargaining agreement generally gave the union the right to solely represent the employee in an arbitration proceeding. But it believed the rule not to be inflexible.

It contended that the employees were third party beneficiaries since the

2. 7 N.Y.2d 397, 198 N.Y.S.2d 282 (1960).
3. 7 A.D.2d 1, 180 N.Y.S.2d 388 (1st Dep't 1958).
4. Parker v. Borock, 5 N.Y.2d 156, 182 N.Y.S.2d 577 (1959).

arbitration agreement contained specific rights concerning them. And therefore, under the authority of *Hudak v. Hornell*,[5] it asserted the employees could bring a direct action against the employer. However, that case is distinguishable. It involved a situation where the union-employer agreement almost specifically referred to, and was made for, the benefit of four specific employees. Thus, it therefore correctly could be concluded that these employees were true third party beneficiaries. Here the situation is different. The employees are not specifically designated but are rather mere members of a large and changing group.

The present decision seems sound although the status of an employee's right to attack or intervene in arbitration proceedings has of late become a field of somewhat changing concepts.[6]

ARBITRATION CLAUSE REGARDING BREACH OF CONTRACTS STRICTLY INTERPRETED BY COURT

This action was brought by a subcontractor, against the contractor, to foreclose two mechanic's lien for work allegedly performed under their contract. Performance by the subcontractor stopped when the contractor refused to allow the subcontractor to go on with the job and failed to make certain progress payments. The contractor on appeal was seeking to stay further legal prosecution pending arbitration, pursuant to a clause of the contract which provided that "all questions that may arise under this contract and in the performance of the work thereunder" were to be arbitrated. The subcontractor alleged breach and repudiation asking for damages for such breach, contending the controversy and question were not in "recognition" of the contract and therefore not arbitrable. The two lower courts agreed with plaintiff in his contention and denied the motion to stay.[7]

The general rule is that where there is a broad arbitration clause, any dispute arising thereafter is for the arbitrators and not for the Court.[8] In *DeLillo Construction Co., Inc. v. Lizza & Sons, Inc.*[9] the Court of Appeals felt, however, that the matter of *consequential* damages was for the court and not for the arbitrators. The Court distinguished between damages flowing immediately form the breach and those arising indirectly. The latter would only go to the arbitrators under a clause providing that all disputes arising "out of" (or any such all-inclusive words) the contract be submitted to arbitration. The Court concluded that the plaintiff should not be allowed to conclusively frame the issue in terms of breach and repudiation to thereby escape arbitration, for

5. 304 N.Y. 207, 106 N.E.2d 609 (1952).
6. See cases cited in In re Soto, supra note 3.
7. 2 A.D.2d 828, 182 N.Y.S.2d 297 (1st Dep't 1959).
8. In re Lippman, 289 N.Y. 76, 43 N.E.2d 817 (1942).
9. 7 N.Y.2d 102, 195 N.Y.S.2d 825 (1959).