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Arbitration—Award of Conditional Penalty by Arbitration Board Held Unenforceable

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in formulating a test based on intent was attempting to equalize what they considered to be the inferior bargaining position of an employer. Such an approach was contrary to the test traditionally employed by the Board.

The decision of the instant case, in repudiating the test formulated by the Court in the *Morand* case illustrates the Board's apparent determination to retain policy formulation on the administrative level.

Marion James Tizzano

ARBITRATION—AWARD OF CONDITIONAL PENALTY BY ARBITRATION BOARD HELD UNENFORCEABLE

An arbitration award against a union for striking in violation of its collective bargaining agreement was affirmed by the supreme court under N. Y. CIVIL PRACTICE ACT §1461. The award provided for $2000 actual damages and a conditional penalty of $5000, payable if the arbitration board finds that the union has again violated its non-strike provision. The contract gave the arbitrators express authority to make this agreement effective, including the power "to impose damages, money or other penalties" upon any party found guilty of a violation. HELD (3-2): Penalty vacated on the grounds that (1) the penalty provision of the agreement is unenforceable at law and (2) the award is not final and definite within CIVIL PRACTICE ACT §1462 (4). *Matter of Publishers' Assn. (Newspaper Union)*, 280 App. Div. 500, 114 N. Y. S. 2d 401 (1st Dep't 1952).

The New York courts have consistently adhered to the general rule that the award of an arbitrator cannot be set aside for errors of judgment either as to the law or the facts if the arbitrator keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct. *Matter of Wilkins*, 169 N. Y. 494, 62 N. E. 575 (1902); *Matter of Delma Engineering Corp.*, 293 N. Y. 653, 56 N. E. 2d 253 (1944). An award becomes enforceable except where grounds exist as specifically provided in CIVIL PRACTICE ACT §1462 for vacating the award. Errors, mistakes, and departures from strict legal rules are included in the arbitration risk. *Pine Street Realty Co. v. Coutrouios*, 233 App. Div. 404, 253 N. Y. S. 2d 309 (1st Dep't 1931). In general the courts are reluctant to reconsider the merits of arbitration awards. *Morris White Fashions, Inc. v. Susquehanna Mills, Inc.*, 295 N. Y. 450, 68 N. E. 2d 437 (1946). Courts would defeat the chief advantages of arbitration by reviewing the merits of an award. See Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. OF

CHI. L. REV. 616 (1950); comment, *Judicial Review of Arbitration Awards on the Merits,* 63 HARV. L. REV. 681 (1950).

However, there are certain exceptions and qualifications to the general rule. The courts have vacated or modified awards for mistakes in calculation of figures, *Kutsukian v. Bossom,* 270 App. Div. 396, 60 N. Y. S. 2d 27 (1st Dep't 1946); for corruption or fraud on the part of the arbitrator, *Brody v. Owens,* 295 App. Div. 720, 182 N. Y. S. 2d 28 (2d Dep't 1940); where arbitrators exceed their authority, *Marchant v. Mead-Morrison Mfg. Co.,* 252 N. Y. 284, 169 N. E. 388 (1929); where an error of law appears on the face of the award, *Fudickar v. Guardian Mutual Life Ins. Co.,* 62 N. Y. 392 (1875); *Drug Store Employees Union v. Reid & Yeomans Inc.,* 265 App. Div. 870, 38 N. Y. S. 2d 372 (2d Dep't 1942); where award violates the PENAL LAW, *Matter of Western Union Tel. Co.,* 299 N. Y. 177, 86 N. E. 2d 162 (1949); 63 HARV. L. REV. 247 (1949), and where award is based on usurious contract, *Matter of Application of Metro Plan, Inc.,* 275 App. Div. 652, 15 N. Y. S. 2d 35 (1st Dep't 1939). See Phillips, *Rules of Law in Arbitration,* 47 HARV. L. REV. 590 (1934).

The first ground for vacating the award in the instant case is that the penalty clause in the agreement is unenforceable at law. For many years courts have declined to enforce a penalty provision for a stipulated sum in any action at law for a breach of contract. *City of New York v. Palladino,* 208 N. Y. 554, 101 N. E. 1097 (1913); *Weinstein & Sons v. City of New York,* 264 App. Div. 398, 35 N. Y. S. 2d 530 (1st Dep't 1942), *aff'd,* 289 N. Y. 741, 46 N. E. 2d 351 (1942). [For history of penalty damages, see 3 WILLISTON, CONTRACTS §§774-776 (rev. ed. 1936).]

But there is authority in New York for upholding an arbitrator's award granting penalty damages for breach of a collective bargaining agreement. The 1st Department has allowed awards of punitive damages where the penalty clause in an agreement provided for $150 penalty for breach. In this same award, $9850 liquidated damages were allowed. *Matter of Mencher (Geller & Sons),* 276 App. Div. 556, 96 N. Y. S. 2d 13 (1st Dep't 1950). An arbitration award, giving the difference between the contract value and the market value at the time of default, plus an allowance of a penalty of from 2% to 10% on the market value, was affirmed by this department. *Matter of East India Trading Co. (Halari),* 280 App. Div. 420, 114 N. Y. S. 2d 93 (1st Dep't 1952).

The other ground for vacating this award is that it is not final under CIVIL PRACTICE ACT §1462 (4), which provides that the court may vacate an award if the arbitrators so imperfectly executed their power, that a mutual, final, and definite award upon the

subject matter submitted was not made. Under this section arbitrators were required to complete the award by naming the amount each reinstated employee should receive, for without this the award is not considered final. In re *E. A. Laboratories Inc.*, 50 N. Y. S. 2d 222 (Sup. Ct. 1944). In *Matter of Pfeiffo*, 222 App. Div. 62, 225 N. Y. Supp. 294 (1st Dep't 1922), the award was vacated and remitted to the arbitrator for a final determination of the quality of the product before the award would be enforced.

As this case exemplifies, the conflict between labor arbitration awards and enforcement by strict judicial review constitutes a bar to successful arbitration of labor disputes. If the advantages of labor arbitration are to be enjoyed to the fullest extent, it is important that the courts ungrudgingly acknowledge the authority of labor arbitration boards within their delineated area.

Myron Siegel

INCOME TAX—EXTORTED FUNDS HELD TAXABLE INCOME

Taxpayer was convicted of willfully attempting to evade federal income tax by failing to report cash obtained by extortion. *Held* (5-4): Extorted funds are taxable income under Int. Rev. Code § 22(a). *Rutkin v. United States*, 343 U. S. 130 (1952).

United States v. Sullivan, 274 U. S. 259 (1927), established the basic principle that the unlawful character of a transaction is no reason to exempt it from a tax which would be imposed if it were lawful. Later cases also establish this conclusion by the use of one or more of the following bases for *generally* holding disputed gains to be taxable income:

(1) Tax liability has been based on the enjoyment of the economic benefits of, or on the actual control over, the property, regardless of where title technically lay. *Corliss v. Bowers*, 281 U. S. 376 at 378 (1930); *Burnet v. Wells*, 289 U. S. 670 at 678 (1933); *Flato v. Commissioner*, 195 F. 2d 580 at 582 (5th Cir. 1952).

(2) Taxability has rested on the receipt of earnings under a claim of right and without restriction as to their disposition. *North American Oil v. Burnet*, 286 U. S. 417 at 424 (1932); *United States v. Lewis*, 340 U. S. 590 at 591 (1951); *National City Bank of New York v. Helvering*, 98 F. 2d 93 at 96 (2d Cir. 1938).

(3) Some gains have been held taxable through the interpretation of the legislative history of Int. Rev. Code § 22(a). The Act of Oct. 3, 1913, c. 16, § II B, 38 STAT. 167 (1913), provided,