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Client Alert

Court Bars Employer's Secondary Boycott Damages Action Because Of Arbitration Clause In Collective Bargaining Agreement

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The Supreme Court's recent decision in *Wright v. Universal Maritime Service Corp*., 119 S. Ct. 391 (1998) provides additional guidance as to when the arbitration clause in a collective bargaining agreement will waive statutory-based employment discrimination claims. Now, in connection with a labor dispute over the delivery of Dolly Madison cakes, the Second Circuit has cooked up an opinion suggesting that *Wright* may have broader significance in traditional labor law. *Interstate Brands Corp v. Bakery Drivers Local 550*, 1999 U.S. App. LEXIS 1162 (2d Cir., January 29, 1999).

The dispute resulted from Interstate's acquisition of Continental Baking and assumption of Continental's collective bargaining agreement (CBA) with the Teamsters. The CBA called for employees represented by the union to deliver, among other things, Wonder Bread and Hostess Cake products (including the incomparable Hostess Twinkies) in the New York metropolitan area. Soon after the acquisition, the union protested Interstate's continued use of its preexisting non-union distribution network to deliver Dolly Madison products (including the scrumptious Zingers). The union alleged that Interstate's distribution policy constituted a change within the meaning of a reopener provision in the CBA. This provision authorized the employer to change its distribution methods during the term of the CBA, subject to reopener negotiations with the union. Disputes regarding this subject were expressly excluded from arbitration by the reopener provision, which explicitly permitted either a strike or a lockout in the event reopener negotiations were unsuccessful.

Interstate refused to agree with the union's demand for reassignment of the Dolly Madison delivery work. The union responded with a zinger of its own, striking the Hostess Cake operation thus disrupting production and distribution of Twinkies. Interstate filed unfair labor practice charges with the NLRB, claiming the strike was an illegal secondary boycott. Several days later, the union extended the strike to the company's Wonder Bread operation. After the union settled with the NLRB, Interstate filed a damages action under Section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. 187.

The Second Circuit upheld the district court's decision granting summary judgment to the union. The court ruled that the employer had waived its right to seek judicial relief because of a broadly-worded arbitration clause in the CBA. That clause called for the arbitration of all disputes or grievances involving questions of contract interpretation, as well as "*any act or conduct or relation between the parties hereto, directly or indirectly*." (emphasis added).

Citing the strong federal policy favoring arbitration of labor disputes, and relying on case law articulating the presumption of arbitrability in labor disputes, the appellate court held that this "unusually broad" arbitration provision was a waiver of the employer's right to file a damages action under Section 303. The court concluded

that the principle announced in *Wright* -- that an effective waiver of employee statutory rights by a union must be "clear and unmistakable" -- did not extend to a statutory right belonging to an employer. The Second Circuit reasoned that the underlying rationale of *Wright* had no bearing on the question of whether a party to a contract has waived its own statutory rights. The court also found that normal principles of contract construction supported the finding of a waiver, as the arbitration clause would be "mere surplusage" if it did not extend beyond questions of contract interpretation.

The court then determined the dispute was not excludable from arbitration under the reopener provision. According to the Second Circuit, the employer had confused the "dispute" that led to the union's strike (the alleged change in delivery methods over the delivery of Zingers and such) with the "dispute" over the damages caused by the work stoppage (presumably lost profits from reduced sales of Twinkies and Wonder Bread). The court held the former was expressly excluded from arbitration by the reopener provision, while the latter nonetheless was covered by the arbitration clause.

The Second Circuit's decision illustrates the continued judicial conflict over the role of arbitration in the adjudication of statutory-based labor and employment law claims. Justice Scalia's opinion in *Wright* notes the tension between two lines of cases represented by the Court's decisions in Gilmer v. Interstate/Johnson Lane Corp. and *Alexander v. Gardner Denver*. The court in *Interstate* appears to have struggled with the proper reconciliation of these cases in the conceptually distinct area of secondary boycott law. For example, it is unclear how the presumption of arbitrability supports the Second Circuit's conclusion; an analysis of damages resulting from a secondary boycott normally does not require an interpretation of a CBA. It is noteworthy that the court cited no authority for its remarkable assertion that there should be a double standard for evaluating whether contractual arbitration provisions will be deemed to waive statutory rights. And the court's conclusion appears at odds with the doctrine of conterminous application of contractual arbitration provisions and no-strike clauses, as well as the commonly-understood notion that the statutory rights and remedies available to employers and unions in a secondary boycott case are fundamentally independent from the parties' respective rights under a collective bargaining agreement.

In adopting the union's circular reasoning concerning the relevant provisions of the CBA, the court may have left the employer without any remedy. The opinion suggests it is highly unlikely that the employer could have obtained a *Boys Markets* injunction against the work stoppage. And it is not certain that the employer could obtain a remedy under the CBA. Like many such provisions, the arbitration clause in the CBA did not explicitly give the employer the right to initiate the grievance procedure and pursue a damages arbitration against the union. And even if that hurdle were jumped, most employers that have sustained substantial damages would be reluctant to submit such a dispute to the vagaries of traditional labor arbitration. The availability of an effective damages remedy for employers victimized by secondary boycotts was, after all, an important part of the compromise that led to passage of the Taft-Hartley Act.

One of the ironies of *Interstate* is that one can imagine that the arbitration clause (which was apparently negotiated long before the reopener provision) may have been drafted in response to the Supreme Court's decision in *Buffalo Forge v. Steelworkers. Buffalo Forge* holds that an employer cannot obtain a *Boys Markets* injunction if the reason for the work stoppage is not arbitrable under the CBA. Presumably the employer

thought it had bargained for additional protection against work stoppages during the term of the CBA. It almost certainly never occurred to the employer that the arbitration provision would end up being interpreted to preclude a damages remedy following a secondary boycott.

Finally, the decision also seems wrong-headed as a matter of public policy. Federal labor policy strongly favors labor peace during the term of collective bargaining agreements. A rule of law that denies employers an effective remedy against unlawful union strike activity of any sort, particularly secondary boycotts, is likely to be counter-productive, as employers consider available responsive strategies.

In any event, the somewhat less than mouth-watering lesson emerging from *Wright* and *Interstate* is that many unionized employers may want to take another look at the arbitration and no-strike provisions in their collective bargaining agreements.

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