

BOWEN v. UNITED STATES POSTAL SERVICE: Preparing the Way for a More Active Labor Role in Contract Administration

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This arbitrator recently felt the hostility of an irate labor relations manager for a ruling upholding the grievance of an employee for overtime pay. As a result of a failure to properly (that is, promptly) record overtime hours paid for purposes of maintaining an overtime balance among employees, the grievant had been passed over in the assignment of overtime, despite the fact that she was the most senior, low-houred employee. Complicating matters was the fact that the grievant was aware for some time prior to the incident prompting the grievance that the recorded hour balance was incorrect and that the employee assigned the overtime had not been charged for overtime paid on an earlier occasion.

Central to the resolution of this grievance dispute was the issue of whether the responsibility for keeping an accurate account of overtime hours was the sole responsibility of the company. What responsibility, if any, did the union and workers have with respect to maintenance of an accurate hour balance for the purpose of overtime apportionment? Since the contract contained a strong management rights clause and since neither the express provisions of the contract nor past practice abridged, limited, or shared with anyone management's rights and responsibilities regarding overtime distribution, the weight of arbitral principle dictated that the arbitrator uphold the grievance. This prompted the industrial relations manager to write:

I can understand your reasoning in the case except for one point. You ruled that the [Grievant] should be paid "regardless of whether the employee was aware beforehand that management would take the incorrect action based on misinformation." You have raised to new heights the principle that it is all right to "hide behind the log" in overtime distribution. [The Grievant] knew for three (3) weeks that an overtime error was bound to happen and she would be paid for not working. You have approved a situation that fosters mistrust among the parties.

After considerable reflection, my original feelings of righteous indignation were transformed to uneasiness

and apprehension: what responsibilities do unions have regarding *active* as opposed to *passive* (that is, relying on the grievance procedure) contract administration and enforcement in mature bargaining relationships?

THE DECISION: THE INITIAL STEP

It was therefore with great interest that I reviewed the Supreme Court's reasoning in *Bowen v. United States Postal Service* (1983).¹ The case involved a wrongfully discharged employee who brought suit in federal district court against his employer, the United States Postal Service, for discharge without cause and his union, the American Postal Workers Union, for arbitrary and capricious handling of the grievance (for breach of its duty to fairly represent employees). Reversing an appellate court decision eliminating the union's responsibility for damages and fees, the Supreme Court upheld the federal district court's apportionment of damages (back pay) between the employer and the union. The employer was deemed liable for back pay from the time of unlawful discharge until the time when an arbitrator would have reinstated him had the union properly represented the employee, with the union liable for any back pay from that point onward.

The Court's decision in *Bowen v. United States Postal Service* is but the latest step of an evolutionary process begun in *Vaca v. Sipes* (1967)² and continued in *Czosek v. O'Mara* (1970)³ and *Hines v. Anchor Motor Freight, Inc.* (1976),⁴ wherein organized labor has been held increasingly accountable for the proper exercise of rights acquired through collective bargaining. Labor has been

¹ US Sup Ct, No. 81-525, January 11, 1983.

² 386 U.S. 171 (1967).

³ 397 U.S. 25 (1970).

⁴ 424 U.S. 554 (1976).

put on notice, so to speak, that it has responsibilities commensurate with its rights and will be held accountable therefor.

In finding the union liable for back pay from the time that reinstatement would have taken place through arbitration, the Court accepted the argument that, having surrendered its unilateral decision-making authority through bargaining and adoption of grievance arbitration, the employer has a legitimate right to expect the union to discharge its bargained-for responsibility of policing the labor agreement. The Court's view of contract administration, therefore, is that of a joint project, the successful and efficient completion of which is dependent upon a partnership dedicated to the execution of the negotiators' will in particular cases. Accordingly, the Court rejected that view of contract administration wherein the parties engage in a form of guerilla warfare, each attempting to win rights not achieved during contract negotiations—an adversarial view of contract administration embodied in arguments presented by the union before the Court in October 1982:

To impose on the union the costs due to the employer's failure to reinstate . . . would enable the employer to delay reinstatement to reduce the financial resources of the union, *his adversary in collective bargaining* (emphasis added).⁵

This is an adversarial view of contract administration wherein the union's role is limited to challenging managerial actions. This view is epitomized by dissenting Justice White in his statement that

neither the collective bargaining agreement nor the union's duty of fair representation provides any support for the Court's conclusion that the union has somehow committed itself to protect the employer, and that the employer has the right to rely on the union to cut off its liability.⁶

A SUBSTITUTE VIEW OF MANAGERIAL RIGHTS: THE NEXT STEP

The Supreme Court's decision in *Bowen v. United States Postal Service* constitutes judicial endorsement of a more active role for labor unions in contract administration. The disgruntled labor relations manager with whom I dealt would apparently support and advocate the adoption of such an activist role for organized labor. Judicial approval of labor's new role is but an important first step toward its eventual implementation. Further progress is contingent upon managerial substitution of the trusteeship or equivalent view of management rights for the currently dominant residualist view.

Under the residualist view, management authority is seen as a set of sovereign rights. Accordingly, management retains all rights and prerogatives not wrested from its grasp and set to language (delineated through specific contract provisions) during the table bargaining process. Strong management rights clauses are a characteristic management response to jointly determined terms and conditions of employment.

These clauses, designed to prevent unions from encroaching on managerial prerogatives that have not been negotiated away, preclude labor's assumption of a more active role during contract administration and enforcement. Consequently, managers holding a residualist view oftentimes find themselves, as did our irate labor relations manager, trapped in a Catch 22 situation. The management rights clause that was made a part of the labor agreement to safeguard managerial flexibility, thereby facilitating the efficient operation of the firm, instead becomes an obstacle to the achievement of that very goal; it prevents the active cooperation and participation of the union, which is a prerequisite for efficient contract administration.

The residualist view also begets a contract administration mechanism that, under an increasing number of circumstances, hinders rather than helps the signatories in implementing the meaning and intent behind specific contract provisions agreed to during the table bargaining process. For example, a standard feature of most contract enforcement mechanisms is that activation occurs with the filing of a grievance, the latter being defined as an employee injury (that is, the denial of benefits or prejudice of rights) resulting from managerial misapplication of the terms of the labor agreement.

Contract administration is accomplished, therefore, in *ad hoc* as opposed to a *priori* fashion through the grievance process. Harm must be sustained by an employee (by the labor-management relationship) before the mechanism can be activated. The entire thrust of contract administration is toward remedying damage after it has been incurred rather than its prevention in the first place. A more balanced approach is warranted by recent problems within the labor relations field—an approach to contract administration that is preventive as well as remedial in nature. The residualist view of management authority makes this more balanced approach difficult, if not impossible, to achieve.

By contrast, the trusteeship view facilitates the adoption of a more balanced, preventive or remedial approach to contract administration, wherein organized labor is afforded an expanded and a more positive role in policing and enforcing the terms of the labor agreement. Here, management authority is viewed as a set of obligations rather than as a set of sovereign rights. The manager's role is that of a steward whose duties include, but are not limited to, insuring that the firm is operated in an efficient fashion with adequate consideration paid to both employee and consumer welfare. Unlike the residualist view, organized labor is not seen as an opponent or as an adversary but rather as a partner whose participation in decision making is valued and whose views are solicited, and who shares the responsibility for active contract enforcement and administration.

MODIFICATION OF DECISIONAL ARBITRATION PRINCIPLES: THE FINAL STEP

The final requirement for the transformation of organized labor from a passive to an active partner in contract

⁵ *Daily Labor Reports*, Nos. 189 and 195.

⁶ US Sup Ct, No. 81-525, January 11, 1983.

administration is the modification of the principles currently utilized by the arbitration profession to resolve disputes involving the interpretation and application of labor agreements. The most important of these decisional arbitration principles are the following.

(1) The *jurisdiction construction principle* assumes that, since arbitrators derive their authority from and must look to the contract to render their awards, they cannot exceed nor contradict the language of the contract and the record of evidence developed through the arbitration. The only exception is where past practice has become a part of the contract.

(2) The *residual rights construction principle* requires that any rights inherent in the labor-management relationship not modified by law or expressly vested with one of the parties by the labor agreement (including past practice) remain the prerogative of management.

(3) The *parol rules of evidence* require that the arbitrator view the contract as a whole, and, if possible, ascertain from the entire document the meaning of disputed contract provisions—provided the language of the disputed provision is not clear.

Judicial and managerial support notwithstanding, arbitral reliance upon the *residual rights construction principle* hinders, if not precludes, labor's assumption of a more active role in contract administration; indeed, it reinforces labor's current passive role. A shift in emphasis from the *residual rights construction principle* to *parol rules of evidence*, on the other hand, is conducive to the role transformation, particularly where contracts contain language similar to the following:

The management of General Motors recognizes that it can not get along without labor any more than labor can get along without management. Both are in the same business and the success of that business is vital to all concerned. This requires that *both* management and the employees *work together* to the end that the quality and cost of the product will prove increasingly satisfactory and attractive so that the business will be continuously successful.

General Motors holds that the basic interests of employers and employees are the same . . . (emphasis added).²

This language commits both parties to positive (that is, active) contract administration and enforcement. With-

² Agreement Between General Motors Corporation and the UAW, March 21, 1982.

out this shift in arbitral focus and emphasis, combined labor-management efforts toward fashioning a more positive role for labor in contract administration, short of a specific but encyclopedic delineation of union responsibilities in all contract areas, are destined for an unnecessary degree of frustration, if not outright failure.

SUMMARY AND CONCLUSION

Do the potential benefits stemming from a more active role for organized labor in contract administration justify the associated costs? Simply answered, labor and management cannot afford not to fashion the more positive labor role described herein. The American labor relations system is at a crossroads. The system, once looked upon as the model system of labor-management decision making, has been subject to increasing criticism. It has been bitterly attacked as a factor responsible for recent economic problems. The blame for everything from low productivity to high prices has been squarely laid at its doorstep. The system is routinely compared in an unfavorable light with the Japanese system of labor-management decision making.

The obvious question is: What has been responsible for this "riches-to-rags" transformation of the American system of labor relations? The answer may lie in its basic conflict orientation. The system is the product of a political, social, economic, and *legal* environment characterized by conflict—from the political system of checks and balances to professional sports. It should not be surprising, therefore, that the American labor relations system is also marked by conflict.

What is disconcerting, however, is that the system's historical conflict orientation is not conducive to the solution of the serious problems confronting labor and management today. Job creation, increased productivity, and improved product quality require a cooperative approach to problem solving rather than confrontation. A more positive role for organized labor in contract administration is critical to the success of this cooperative approach. The more active role for organized labor in contract administration, in turn, requires the cooperation of the courts, management, labor, and the arbitration profession. The Supreme Court's decision in *Bowen v. United States Postal Service* constitutes judicial approval of labor's new role and, as such, is a necessary first step toward the solution of many currently pressing labor relations problems.

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