

The difficulties inherent in applying a test of motive—personal gain rather than policy considerations—is well documented in the context of the expenditure of corporate funds in proxy contests.¹⁸ It would seem that directors should be able “in the exercise of an honest business judgment” to adopt “a valid method of eliminating what appears to them a clear threat to the future of their business.”¹⁹ This does not give the directors an “uncontrollable” weapon against shareholder challenge, yet it achieves what are here suggested to be desirable ends. The corporation will not be forced to engage in costly and most often wasteful proxy fights in the name of furthering corporate democracy; it would not, under the facts of the case at bar, have to wait until the raider obtained a foothold in the company and improved his bargaining position for the ultimate “sell-out”; it could eliminate a dissentient faction for valid business purposes. At the same time, the court would not have foreclosed the possibility of an independent inquiry into the actions of the incumbent management if plaintiff could show fraud, bad faith or misconduct.

NORMAN I. JACOBS

Labor Law—Collective Bargaining Agreements—Procedural Arbitration.—*Livingston v. John Wiley & Sons, Inc.*¹—District 65, Retail, Wholesale, and Department Store Union, AFL-CIO, on the basis of a collective bargaining agreement with Interscience Publishing, Inc., brought an action to compel arbitration on disputes arising over seniority rights, pension plans, job security and severance and vacation pay, against John Wiley & Sons, a successor corporation of a consolidation between Interscience and Wiley. It was undisputed that no notice of any grievance was filed within the four-week period required by the collective bargaining agreement, nor were any of the procedures established in the agreement followed.² The district court, assuming that the consolidation did not terminate the agreement, denied the motion to arbitrate on the grounds that the agreement should be so construed as “to exclude from arbitration matters involving the entire collective bargaining unit, as distinguished from the individuals comprising it;” and that even if not so limited, the Union failed to avail itself of the grievance procedure described in the agreement and thus abandoned any rights it might have had to arbitrate the dispute. The Court of Appeals

¹⁸ See *Steinberg v. Adams*, 90 F. Supp. 604, 608 (S.D.N.Y. 1950) (applying Delaware law); *Hand v. Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649, 651 (D. Del. 1944).

¹⁹ *McPhail v. L. S. Starrett Co.*, 257 F.2d 388 (1st Cir. 1958); *Davis v. Louisville Gas & Elec. Co.*, 16 Del. Ch. 157, 142 Atl. 654 (1928); *In re International Radiator Co.*, 10 Del. Ch. 358, 92 Atl. 255 (1914).

¹ 313 F.2d 52 (2d Cir. 1963), cert. granted, 373 U.S. 908 (1963).

² The collective bargaining agreement set forth “procedures, which shall be resorted to as the sole means of obtaining adjustment of the difference, grievance, or dispute” between Interscience and the Union. In another clause, the agreement stated that “notice of any grievance must be filed with the Employer and with the Union Shop Steward within four (4) weeks after its occurrence or latest existence. The failure by either party to file the grievance within this time limitation shall be construed and be deemed to be an abandonment of the grievance.” *Id.* at 64.

for the Second Circuit reversed. HELD: Certain rights within the collective bargaining agreement survived consolidation, and failure to comply with the requirements of the agreement relative to grievance procedure are matters to be decided by the arbitrator and not the court.³

The court reasoned that substantive arbitrability and procedural arbitrability were separate and distinct matters.⁴ It stated that the only issue for the court to decide is whether the reluctant party has breached his promise to arbitrate. Once a determination is made that the party seeking arbitration is making a claim which on its face is governed by the contract, or that the reluctant party did agree to arbitrate the grievance, or did agree to give the arbitrator power to make the award, the reason for consideration of the matter by the court is exhausted.

Since the *Lincoln Mills*⁵ decision, the courts have been trying to effectuate a "federal common law" which would bind parties to their arbitration agreements. At the same time, the courts have been trying to take into consideration and to make a determination as to what the parties have agreed to arbitrate. In this very determination, the courts have sought to refrain from performing the duties of the arbitrator which would deprive the parties of what they have intended—namely, arbitration.

The judicial system has been leaning toward the thesis expressed by Professor Cox,

that the conventional arbitration clause limiting the arbitrator to disputes concerning "interpretation and application" of the contract reserves the right to judicial determination over the subject matter but that all other questions—procedural, jurisdictional or substantive are solely within the power of the arbitrator to determine.⁶

The Supreme Court has held⁷ in part, that this theory restricts the traditional contract approach⁸ in collective bargaining agreements by holding that "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here,

³ It is this latter point which the author will consider since there have been a number of recent conflicting cases dealing with the subject.

⁴ The court necessarily had to draw this distinction in order to avoid the authority of *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, at 241 (1962) which holds that arbitration is a matter of contract and a party cannot be required to submit to arbitration any disputes which he has not agreed to so submit. See also *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, at 582 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, at 570 (1960) (concurring opinion).

⁵ *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

⁶ Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 at 1511 (1959). See also *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247 (1958).

⁷ *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 4; *United Steelworkers v. American Mfg. Co.*, supra note 4.

⁸ As expressed in *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, at 918, 67 N.Y.S.2d 317 (1947). "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."

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the exclusion clause is vague and the arbitration clause quite broad."⁹ The approach, therefore, is one which recognizes the collective bargaining agreement as a contract, but of a very special type, which requires arbitration unless there is an explicit statement excluding the particular subject matter from arbitration.

The court in *Wiley* would seem to eliminate the contract approach for procedural matters found within the agreement.¹⁰ An allegation that a dispute exists concerning the application of arbitration procedures within the collective agreement does not give the court authority to deny arbitration on a substantive matter found within the agreement.¹¹ The court does not distinguish between a frivolous claim within the scope of the contract and an assertion that a claim is within the scope of the contract. The court precludes any examination of the procedural matters by a determination that the substantive matter is contained within the agreement. This approach would seem to preclude the possibility of the parties contracting procedural steps as conditions precedent to arbitration.

The First and Seventh Circuits, whose cases¹² in this area pre-date the Supreme Court's decisions in the *Steelworkers*¹³ cases, hold that the procedure set down in an agreement is a condition precedent to arbitration, and thus a matter of contract interpretation for the courts and not a matter for the arbitrator. These courts hold that in an action to compel arbitration the question whether the matter is arbitrable is preceded by the question whether there is an obligation to arbitrate. These jurisdictions reason that the industrial knowledge of an arbitrator is irrelevant in the formation of a competent judgment on such procedural issues. Also, the court's expertise in construing agreements seems to qualify them as the appropriate forum for determining procedural compliance.

Wiley completely rejects this theory and maintains "that the parties have bargained for a decision by an arbitrator because they thus have the benefit of his creativity and expertise. . . ."¹⁴ It "would open the door wide to all sorts of technical obstructionism"¹⁵ and also to delay of ". . . national labor legislation [if we promoted] the arbitral process as a substitute for economic warfare."¹⁶

Although the *Steelworkers*¹⁷ decisions did not get into the question of

⁹ *United Steelworkers v. Warrior & Gulf Nav. Co.*, supra note 4, at 584.

¹⁰ Best evidence of this is found in the cases following *Livingston v. John Wiley & Sons, Inc.*, supra note 1; *Carey v. General Elec. Co.*, 315 F.2d 499 (2d Cir. 1963); *Local 748 of the Int'l Union of Elec., Radio and Mach. Workers, AFL-CIO v. Jefferson City Cab Co.*, 314 F.2d 192 (2d Cir. 1963); *Larson v. American Airlines, Inc.*, 313 F.2d 599 (2d Cir. 1963).

¹¹ The court cited *International Ass'n of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir. 1961) as supporting its position. However, the Court in that decision held that the matter was for the arbitrator on an estoppel theory.

¹² *Boston Mut. Life Ins. Co. v. Insurance Agents Union*, 258 F.2d 516 (1st Cir. 1958); *Brass Workers Union v. American Brass Co.*, 272 F.2d 849 (7th Cir. 1959).

¹³ Supra note 4.

¹⁴ *Livingston v. John Wiley & Sons*, supra note 1, at 62.

¹⁵ *Id.* at 63.

¹⁶ *Ibid.*

¹⁷ Supra note 4.

procedural arbitrability, there is language within those decisions to the effect that the question of procedural arbitration should not be handled any differently from questions of substantive arbitrability. A party may not only wish to preclude arbitration of certain matters, but also to preclude it when certain procedures for presenting it are not followed. The test is the same. The court should determine whether the party seeking to bar arbitration because of procedural non-compliance has succeeded in drafting a procedural provision which satisfies the explicitness test.

PHILIP H. GRANDCHAMP

Labor Law—Public Utility Anti-Strike Act—Invalid Under NLRA.—*Street Elec. Ry. and Motor Coach Employees v. Missouri*.¹—On November 15, 1961, the State of Missouri brought suit to enjoin a threatened strike by employees of the Kansas City Transit Co. which had resulted from an impasse in collective bargaining negotiations. Pursuant to the provisions of the King-Thompson Act,² the Governor of Missouri had seized the transit company on November 13,³ the day on which the strike had been called. In so doing, the Governor proclaimed that all rules and regulations governing the internal management and organization of the company and its duties and responsibilities were to remain in force and effect throughout the term of operation by the state.⁴ Upon seizure of the transit company by the state, the strike became enjoined under a provision of the act making it unlawful to use the strike weapon as a means of enforcing demands against a utility after possession has been taken by the state.⁵ From an adverse decision of the Missouri Supreme Court upholding an injunction, the union appealed. In a unanimous decision, the Supreme Court of the United States HELD: that the Missouri statute authorizing seizure and providing for the issuance of injunctions against strikes after seizure is in direct conflict with federal legislation guaranteeing the right to strike against a public utility engaged in interstate commerce and thus invalid under the supremacy clause of the Constitution.⁶

¹ 374 U.S. 74 (1963).

² Mo. Rev. Stat. § 295.10-.210 (1959).

³ Mo. Rev. Stat. § 295.180(1) (1959) sets forth the power of the Governor when a utility strike threatens. The Governor is empowered where a strike "threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare . . . to take immediate possession of the plant, equipment or facility for use and operation by the state of Missouri in the public interest."

⁴ Mo. Rev. Stat. § 295.190 (1959) provides that "the governor is authorized to prescribe the necessary rules and regulations to carry out the provisions of this chapter."

⁵ Mo. Rev. Stat. 295.200(1) (1959) provides that:

It shall be unlawful for any person, employee or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state.

Mo. Rev. Stat. 295.200(6) (1959) provides that "The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

⁶ U.S. Const. art. VI, cl. 2 provides that "This Constitution, and the Laws of the