Long Island Chapter

Labor and Employment Relations Association

Newsletter

SHAPING THE WORKPLACE OF THE *FUTURE*

LERA

bug

September 2007

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PRESIDENT'S PERSPECTIVE:

The Emerging Landscape of Employment Arbitration

Thomas J. Lilly, Jr.

In another sign of our changing times, the membership of the National Academy of Arbitrators voted at its annual meeting that the Academy should include as members arbitrators engaged in non-union workplace dispute resolutions. NAA president Dennis Nolan urged his organization to look beyond traditional labor arbitration in light of the continued decline in union density.

Since the United States Supreme Court's 1991 decision in *Gilmer v. Interstate Johnson Lane Corp*, it has been clear that the courts will enforce agreements to arbitrate rather than litigate claims by individual employees against their employers. Employers can, therefore, avoid litigation of claims of illegal discrimination by having all their employees execute agreements to arbitrate any claim or controversy arising out of the employment relationship or its termination.

It is questionable whether an employee who has the choice of signing an arbitration agreement or losing his job has made a voluntary decision to arbitrate. In this regard, the NAA has expressed more concern over the unequal bargaining position of employees and employers than has the Supreme Court. The Supreme Court has stated that this inequality of bargaining position is not a sufficient reason to find an agreement to arbitrate unenforceable. The NAA, on the other hand has taken the position that "employees should be allowed to opt freely, post dispute, for either the courts and administrative tribunals or arbitration."

Those of us used to arbitration as part of the collective bargaining process tend to be suspicious of the

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Upcoming Chapter Meetings

Tuesday, September 25, 2007

Speaker: Arbitrator Dick Adelman

Ambrosia Rest., 25 Smith St., Farmingdale

Thursday, December 6, 2007

Speaker: Nassau Cty DA, Kathleeen Rice

Nassau Couunty Bar Association

March 12, 2008

BLYER SPEAKS AT JUNE MEETING

The guest speaker at our general membership meeting, on June 14, 2007, at the Nassau County Bar Association building, was the Honorable Alvin P. Blyer, Director of Region 29 of the National Labor Relations

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BLYER SPEAKS AT JUNE MEETING

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Board. Mr. Blyer commented on the change in the NLRB administration that came about in 2000 after the election. Along with the changes in the composition of the Board in Washington, came a decrease in the work of the NLRB. In 1996, nationwide, the Board conducted over 3000 elections; in 2006 there were about 1600. There has also been a very significant decrease in the unfair labor practice charges filed at the Board during the same 10 year period. The perception by some observers was that the Board was hostile to labor, and that the delays were unfavorable to unions. According to Mr. Blyer, certain unions are contending that the period between the filing of a petition and the holding of an election is being used by employers to commit unfair labor practices that would cause employees to refrain from voting for unionization, although, he said, the average length of time from petition to election is 40 days. However, for some unions, that was not quick enough.

Currently, there is pending in Congress legislation called the Employee Free Choice Act, which would create a system where a card count could be used as an alternative to a secret ballot election. While the bill is still in the embryonic stage, the presumption is that the cards would be presented to the Board, their authenticity would be checked and if there are 51%, the union would be certified as the bargaining agent. Employers maintain that the potential for coercion (union reps—one or more—going one on one with a potential card signer) and forgeries are a danger. Mr. Blyer said that the various Regions of the NLRB, for years, have had experience checking cards (in connection with the showing of interest unions routinely submit), and there are only rare occasions where coercion or fraud has been uncovered. The legislation also deals with unlawful discharges during organizational campaigns. The pending legislation allows a Regional Director to go to Federal District Court and seek immediate reinstatement of employees fired during an organizing campaign if the Regional Director finds reasonable cause such a violation has occurred. This changes the current law which requires the NLRB in Washington to first approve such action. Thus, the new bill would allow the case to be brought much sooner than the current situation. The new law also calls for greater backpay for employees fired during an organizing campaign, and for the imposition of substantial fines for violations of the Act.

The last aspect of the possible changes that Mr. Blyer discussed was that under current law, if the Employer bargains in bad faith for an initial contract, the Employer will be ordered not to do it again. The new legislation requires that the parties begin negotiations within 10 days of a request after the Union's certification, and allows for the imposition of a two year contract on the parties by a third party if the parties cannot reach a contract after about 4 months of bargaining.

In conclusion, Mr. Blyer quoted a court decision where the judge said that "the quest for due process must not be allowed to result in process so elaborate and time consuming as to be undue. We must not permit the doctrine of exhaustion of remedies to exhaust the suitor."

Photos on pages 2 and 3 taken at our June meeting

Emerging Landscape of Employment Arbitration

(*Continued from Page 1, col. 1*)

fairness of an arbitration process in which the employee had no practical input into the drafting of the arbitration agreement. There are, however, some aspects of employment arbitration that are more favorable to the employee than what is typically available in traditional labor arbitration. This point is illustrated by two recent court decisions here in New York, one from a state court and one from a federal court.

In *Tong v. SAC Capital Management*, Mr. Tong objected that his employer tricked him into signing an arbitration agreement by telling him that it was "standard language," and that he could not be fired in any event. The State Supreme Court for New York County found that objection by Mr. Tong unpersuasive, because Mr. Tong "had the option to walk away from the job offer."

Mr. Tong further objected that he should not be required to arbitrate because he was seeking punitive damages from his former employer,

and arbitrators do not have authority to award punitive damages under New York law. The court agreed that the usual New York rule is that arbitrators do not have authority to award punitive damages. That rule was, however, pre-empted in Mr. Tong's case by the Federal Arbitration Act, which does allow arbitrators to award punitive damages. Mr. Tong was, therefore, ordered to arbitrate his claims, and the arbitrator was empowered to award punitive damages against the employer.

In *Porzig v. Dresdner, Kleinwort, Benson North America*, the United States Court of Appeals addressed a case in which the employee, Mr. Porzig, signed a "standard" agreement to arbitrate any disputes concerning his employment. Mr. Porzig later claimed that he was fired in violation of the Age Discrimination in Employment Act, and a panel of arbitrators awarded Mr. Porzig over $200,000 in damages and interest. The panel, however, declined to award Mr. Porzig his attorney's fees, and ordered Mr. Porzig to pay his portion of the arbitration costs.

The concept that each side must bear its own attorneys' fees and share the costs of the arbitration is ingrained in the collectively bargained arbitration process. In the *Porzig* case, however, the court held that the arbitration panel acted in "manifest disregard for the law" when it failed to award Mr. Porzig his attorney's fees and costs. The court remanded the case with instructions to make an additional award to Mr. Porzig based on his attorney's hourly fees.

A new arbitration paradigm is emerging as a result of both the decline in union density and court decisions favoring arbitration of employment related disputes. Like the NAA, LERA needs to recognize the fact that this new paradigm is emerging. Furthermore, we should use our collective expertise to influence its development.

Nota Bene: New Suffolk Meeting Location

A number of members raised concerns over rising stress levels associated with fighting eastbound rush hour traffic to attend LERA meetings in Hauppauge. To address these concerns, the September 25, 2007 meeting will held at Ambrosia Restaurant, 25 Smith Street, Farmingdale 11735 (Suffolk). We hope this proves to be a more convenient location.

We will continue to alternate our quarterly meetings between Nassau and Suffolk Counties.

REPORT ON OUR NEW WEBSITE
www.lilera.org

Our new website is up and running. With the technical assistance provided by Executive Board member Tom Wassel (and some help from his firm, Cullen and Dykman) the following things are available for your perusal:

- Benefits of joining our chapter
- Executive Officer Roster
- National LERA constitution
- Dates and locations of upcoming meetings
- A membership application
- The last three newsletters
- Links to LERA national and other websites

Please take a look and let us know if there are any suggestions that will make the site more useful to those that consult it.

NYC Chapter Meetings

September 24, 2007
December 11, 2007
January 28, 2008
March13, 2008
May 20, 2008

ANNOUNCEMENTS, NOTICES

If you have a job vacancy you are trying to fill or an announcement you would like published in the LI LERA Newsletter, please forward the relevant information to:
jerrryarb@optonline.net

You can write, I can edit and publish.
Let's get together.
Have you had a case or incident in your practice that would .provide insight to other practicioners? Have you read a book or article in a professional journal that you believe, others might learn from and enjoy reading?
Let's get together. Send me your manuscript via email to:
jerryarb@optonline.net

The Long Island LERA Newsletter is a quarterly publication of the Long Island Chapter of the Labor and Employment Relations Association.

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