Journal of Dispute Resolution

Volume 1997 | Issue 2 Article 5

1997

Continuing the Downward Spiral for Unions - Carpenters v. Zcon Builders

Jeffery W. Fields

Continuing the Downward Spiral for Unions

Carpenters v. Zcon Builders[1]

I. INTRODUCTION

Since their inception during the post-war years, collective bargaining agreements have been the primary method used by unions to get employers to deal with issues of importance to their labor force.[2] However, the past few decades have seen a rapid decline in union membership as well as union effectiveness.[3] This casenote will look at whether or not the instant decision, *Zcon*, will be a contributing factor in the continuing downward spiral for unions.

II. FACTS AND HOLDING

Zcon Builders is a licensed contractor and a member of the Associated General Contractors of California, Inc.[4] Due to its membership, Zcon became a signatory to a collective bargaining agreement known as the Carpenters Master Agreement.[5] The agreement provided that it was "binding upon all persons, firms, or corporations under any name or style of doing business in the construction industry, that, at the time of the execution of this Agreement are, or during the term hereof, become members of the Employer, in the area covered by this agreement."[6]

Zcon became incorporated in California in 1982, with Dennis Keating and Charles Zakskorn as its only shareholders and directors.[7] Zcon dealt exclusively with general construction in California.[8] Keating and Zakskorn also owned 50% of the outstanding stock in Sharon Hill, a Nevada based corporation that was started in 1989 and was engaged primarily in property development in Nevada.[9] Sharon Hill was not a signatory to the Carpenters Master Agreement, nor was it a member of a signatory employer association.[10]

On April 6, 1993, the Carpenters 46 Northern California Counties Conference Board ("the Carpenters") filed a grievance which sought full compliance with the Carpenters Master Agreement, payment of wages and fringe benefits, and an audit

---

1. 96 F.3d 410 (9th Cir. 1996).
2. THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 45-46 (1986).
3. Joseph H. Bucci and Brian P. Kirwan, *Double Breasting in the Construction Industry*, THE CONSTRUCTION LAWYER, Vol. 10, No. 1, Jan. 1990, at 1.
4. *Zcon*, 96 F.3d at 412.
5. *Id.*
6. *Id.* at 419.
7. *Id.* at 412.
8. *Id.*
9. *Id.*
10. *Id.*

of both Zcon and Sharon Hill.[11] Notice of the grievance and the arbitration hearing were sent to "Zcon Builders d\b\a Sharon Corp. d\b\a Windwood, Inc." at the address where both Zcon and Sharon Hill were headquartered.[12] Keating, the registered agent for service of process for both Zcon and Sharon Hill, received the notice.[13] Keating attended the hearing, but asserted that he was only appearing on behalf of Zcon.[14] At the conclusion of the arbitration hearing, an award was entered against Zcon and Sharon Hill.[15] The Carpenters then filed a petition to confirm the award in the U.S. District Court, Northern California, as well as a motion for summary judgment, which the court granted.[16] Sharon Hill then appealed the District Court's grant of summary judgment.[17]

Sharon Hill claimed that the district court erred in deferring to the arbitrator's decision that Sharon Hill, as the alter ego of Zcon, was subject to the arbitration provisions of Zcon's Collective Bargaining Agreement with the Carpenters.[18] Specifically, they argued that such issues of arbitrability were for the courts; therefore, the district court should not have given any deference to the arbitrator's decision.[19]

The Carpenters replied by claiming that Sharon Hill, although not a signatory to the Agreement, was nevertheless bound by its terms because it was an alter ego of Zcon, which did sign the agreement.[20] The district court sided with the Carpenters and deferred to the arbitrator's decision that Sharon Hill was bound by the mandatory arbitration provisions of the agreement.[21] The Carpenters also argued that Sharon Hill, by virtue of Keating's conduct at the arbitration hearing, consented to allow the arbitrator to decide the alter ego issue.[22]

The United States Court of Appeals for the Ninth Circuit reversed the lower court's grant of summary judgment to the Carpenters and remanded to the district court for proceedings in accordance with its opinion.[23] The Court held that Sharon Hill received adequate notice of the arbitration proceedings and was not denied a fundamentally fair hearing.[24] However, the Court concluded that the issue of arbitrability is normally reserved for the courts.[25] It also stated that Sharon Hill did

---

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* Windwood had previously been dismissed as a party.
15. *Id.*
16. *Id.*
17. *Id.* Only Sharon Hill was before this Court on appeal. Zcon did not appeal the district court's grant of summary judgment.
18. *Id.* at 414. Sharon Hill first argued that it had not received adequate notice of the arbitration; however, the arbitrator implicitly found that Sharon Hill had received at least constructive notice of the grievance at the hearing.
19. *Id.*
20. *Id.*
21. *Id.* at 415.
22. *Id.* The Carpenters' final claim was that Sharon Hill failed to file a motion to vacate, modify or correct the arbitration award, and thus the defenses it asserted should have been deemed waived, since the statute of limitations had run. *Id.* at 416.
23. *Id.* at 416.
24. *Id.*
25. *Id.*

not, by its conduct, agree to submit the issue of whether, as alter ego of Zcon, it wasbound by mandatory arbitration provisions of the Carpenters Master Agreement.[26] Finally, the Court held that Sharon Hill's failure to move to vacate the arbitrator's decision did not bar it from challenging the decision in subsequent enforcement proceedings.[27]

III. LEGAL BACKGROUND

Nearly four decades ago, the United States Supreme Court decided a series of cases that are now known as the Steelworkers Trilogy.[28] These cases provided four fundamental principles to the field of labor law, the first two of which are directly applicable to this case.[29] First, they established that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[30] Consequently, the arbitrator only gets his or her authority to resolve the dispute between the parties if they have agreed to arbitration in advance.[31] The second principle is that "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[32]

The Court in each of these three decisions showed that it strongly encouraged union, employer, and lower court compliance with the contractual promise to arbitrate unresolved grievances and to accept the resulting awards as final and binding.[33]

Several years later, the Ninth Circuit, following the United States Supreme Court, stated that since an arbitrator's jurisdiction is rooted in the agreement of the parties,[34] the parties may agree to submit even the question of arbitrability to the arbitrator for decision.[35] It also held that an agreement to allow the arbitrator to decide the question of arbitrability may be acted upon by the arbitrator even though it is collateral to the collective bargaining agreement containing the arbitration clause.[36]

---

26. *Id.*

27. *Id.*

28. *Id.* at 414. The three cases were: Steelworkers v. American MFG. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

29. *Zcon*, 96 F.3d at 414.

30. *Id.* (citing *Steelworkers*, 363 U.S. at 582 (1960)).

31. *Id.*

32. *Id. (citing Steelworkers*, 363 U.S. at 582-83 (1960)).

33. Michael H. LeRoy and Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 82 (1991).

34. Ficek v. Southern Pacific Co., 338 F.2d 655, 657 (9th Cir. 1964).

35. International Brotherhood of Teamsters, Local 117 v. Washington Employers, Inc., 557 F.2d 1345, 1349 (9th Cir. 1977).

36. *See* Syufy Enterprises v. Northern California State Ass'n. of IATSE Locals, 631 F.2d 124, 125 (9th Cir. 1980), *cert denied*, 451 U.S. 983 (1981).

Then, in 1984, the Ninth Circuit decided *George Day Construction v. United Brotherhood of Carpenters and Joiners, Local 354*.[37] In that case, the Ninth Circuit held that consent to grant the arbitrator authority on the issue of arbitrability may be implied from the conduct of parties in the arbitration setting.[38] The rationale behind the holding was that a claimant "may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrator to act."[39] The court in *George Day* examined various ways that a party might have preserved the question of arbitrability for independent judicial scrutiny. The court went on to explain:

> Had the employer objected to the arbitrator's authority, refused to argue the arbitrability issue before him, and proceeded to the merits of the grievance, then, clearly the arbitrability question would have been preserved for independent judicial scrutiny. The same result could be achieved by making an objection as to jurisdiction and an express reservation of the question on the record. However, where, as here, the objection is raised, the arbitrability issue is argued along with the merits, and the case is submitted to the arbitrator for decision, it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability.[40]

The Court concluded that "the employer by conduct evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute but also the question of arbitrability."[41]

Whether Sharon Hill was to be bound by the mandatory arbitration provision of the Carpenters Master Agreement as well as the practical enforceability of the Carpenters Master Agreement, depended in large part on how the Ninth Circuit applied the facts of the instant case to the principles it established in *George Day*.

IV. INSTANT DECISION

The primary issue in the instant decision that the Ninth Circuit Court of Appeals dealt with was arbitrability.[42] Sharon Hill argued that the district court erred in deferring to the arbitrator's decision that Sharon Hill, as the alter ego of Zcon, was subject to the arbitration provisions of Zcon's Collective Bargaining Agreement with Carpenters.[43] Sharon Hill claimed that such issues of arbitrability are for the courts, so that no deference should have been given to the arbitrator's

37. 722 F.2d 1471 (9th Cir.1984).
38. *George Day*, 722 F.2d at 1475.
39. *Id.* (*citing Ficek*, 338 F.2d at 657).
40. *Id.*
41. *Id.*
42. *Zcon*, 96 F.3d at 414. The first issue that the court dealt with was notice. The Court held that the notice given Sharon Hill was more than sufficient to satisfy any requirement of fairness or due process. *Id.*
43. *Id.*

decision.[44] The Ninth Circuit found that Sharon Hill could only be required to submit to arbitration if it was bound by the terms of the Carpenters Master Agreement which contained the arbitration procedure.[45] The court then stated that arbitrability is an issue clearly reserved for the courts, and is not, itself, a proper subject for arbitration.[46] Thus, the court held that the district court erred in deferring to the arbitrator's decision that Sharon Hill was bound by the mandatory arbitration provisions of the Agreement.[47]

The Carpenters countered that Sharon Hill, by virtue of Keating's conduct at the arbitration hearing, consented to allow the arbitrator to decide the alter ego issue.[48] The Carpenters contended that the court's ruling in *George Day* compelled a finding that Keating, who was both Sharon Hill's agent for service of process and part owner, by his conduct, agreed to submit the alter ego issue to the arbitrator.[49] The majority disagreed and stated that although Keating appeared at the arbitration, he stressed repeatedly that he was appearing on behalf of Zcon only, and that Sharon Hill was not appearing because it had not been given proper notice.[50]

The Ninth Circuit Court of Appeals thus concluded that the issue of arbitrability decided by the arbitrator is normally reserved for the courts, and that Sharon Hill did not, by its conduct, agree to submit the alter ego issue to the arbitrator.[51] Judge Pregerson dissented from the opinion of the majority.[52]

V. COMMENT

According to the traditional model of collective bargaining in the construction industry, negotiations take place between a union organizing a single craft and employers represented by a specialist association.[53] An agreement is made when an employer belonging to an association works within the area of that agreement's jurisdiction, be it local, regional or national.[54] The agreement typically regulates wages, conditions, training, and hiring practices.[55]

---

44. *Id.*
45. *Id.*
46. *Id.* at 414-15.
47. *Id.* at 415
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 416. The final argument made by the Carpenters was that Sharon Hill had failed to preserve its defenses and that the statute of limitations had run. The court concluded that Sharon Hill's failure to move to vacate the arbitrator's decision did not bar it from challenging the decision in subsequent enforcement proceedings. *Id.*
52. *Id.* Judge Pregerson disagreed with the majority. He felt that the district court properly deferred to the arbitrator's award in this case because Sharon Hill, through Keating, appeared at the arbitration hearing and voluntarily submitted the alter ego question to the arbitrator. As a result, Sharon Hill could not then challenge the authority of the arbitrator because it disagreed with his decision. *Id.*
53. Stephen Evans and Roy Lewis, *Union Organization, Collective Bargaining and the Law: An Anglo-American Comparison of the Construction Industry*, 10 COMP. LAB. L.J. 473, 476 (1989).
54. *Id.*
55. *Id.*

Collective bargaining developed in the post-war years, at a time when an expanding economy and United States dominance in the world led to a rising standard of living for most Americans and a general feeling of optimism about the future.[56] Part of this optimism included the view that employers would come to accept unions, that the scope of bargaining between management and labor would continually expand, and that unions would come to play greater roles in corporate decisionmaking.[57] In an environment of economic expansion, stable markets and thriving companies, job security was not a particularly pressing concern.[58] Collective bargaining about such items as wages, seniority, pensions, and so forth was sufficient to protect workers' interests.[59] In the first decades after World War II, unions successfully negotiated regular wage increases, established health and pension benefit programs, and protected employees against arbitrary treatment.[60] For a workforce that recently had experienced the Great Depression and the wage freezes of World War II, these were enormous accomplishments.[61] Thus, collective bargaining agreements were helpful to unions, because they forced employers to deal with unions on issues of importance to union members.[62]

However, it appears that the era of collective bargaining that was born in the New Deal and that blossomed in the post-war decades is now coming to an end.[63] Labor's demise in the public mind has paralleled the decline of union strength.[64] Throughout the 1950s and 1960s, well-publicized stories of labor corruption and scandal turned public opinion away from labor.[65] While union employment as a percentage of total employment in the construction industry was approximately 40 percent in 1973, by 1983 there was a decline to approximately 30 percent, with further declines through 1988 to a figure of 21.1 percent.[66]

Many factors, including cultural and economic factors originating outside of the labor relations system, have shaped public perception of union effectiveness.[67] Undoubtedly, one of these factors is a decline in actual union effectiveness.[68] The decline in actual union effectiveness cannot summarily be dismissed as simply the natural result of the inherent weakness of unions.[69] Actual union effectiveness is, to a large extent, a product of the legal rules that determine what unions can and cannot do.[70]

---

56. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 631 (1992).
57. KOCHAN et al., *supra* note 2, at 45-46.
58. Stone, *supra* note 57, at 631.
59. *Id.*
60. Neil W. Chamberlain, THE UNION CHALLENGE TO MANAGEMENT CONTROL 74-88 (Harper, 1948).
61. Stone, *supra* note 57, at 631.
62. KOCHAN et al., *supra* note 2, at 45-46.
63. Stone, *supra* note 57, at 576.
64. *Id.* at 632.
65. *Id.*
66. Bucci and Kirwan, *supra* note 3, at 1.
67. Stone, *supra* note 57, at 583.
68. *Id.*
69. *Id.*
70. *Id.*

The way the courts have reacted to the act of "double-breasting," has affected the strength of unions. Double-breasting refers to the creation of two distinct operating entities, one governed by a collective bargaining agreement and one totally unencumbered by such an agreement.[71] The single most universal characteristic of any double-breasted operation is common ownership of both the unionized and nonunionized companies by a central business entity.[72]

There are several legal remedies that a union may pursue in reaction to an employer who is operating in a double-breasted fashion.[73] One reaction may be to argue that the nonunion shop is simply the alter ego of its former union shop parent.[74] This is the route that the Carpenters in the instant decision took against Sharon Hill. The alter ego doctrine is most frequently raised when one company succeeds to the work of another, it being argued that an employer may not evade its obligations under a labor agreement by merely changing the form of its business and then abandoning its original business.[75] The successor company ends up with a different name, but retains the same management, operation, equipment, customers, and ownership, as the former company.[76]

When an alter ego situation occurs, the nonunion company will claim that it is not bound by any labor agreement entered into by the union shop.[77] In the true alter ego situation, the union contract will be applied to the nonunion employees because the business arrangement is viewed primarily as a disguised continuance of the former company or as an attempt to avoid the obligations of the collective bargaining agreement through a sham transaction.[78] The successor is deemed to be the alter ego of the former company and is therefore bound by the labor obligations of the parent company.[79]

Courts and arbitrators allow a contractor to operate in a double-breasted fashion as long as the contractor conclusively establishes that the two operations (the union operation and the nonunion operation) are distinct and separate business concerns and not merely convenient distortions, or alter egos, of the parent company.[80] However, when courts allow alter ego situations to occur, the nonunion operations are then able to operate without the restrictions of the collective bargaining agreement which applies to the other union operations. This, in effect, allows the nonunion operations to undercut everyone else.

Court decisions allowing double-breasted operations to continue where the nonunion operation is but the alter ego of the parent company partially help to explain the decline of union effectiveness. This is what the dissent in the instant case finds troubling about the majority's decision.[81]

---

71. Bucci and Kirwan, *supra* note 3, at 1.
72. *Id.*
73. *Id.* at 24.
74. *Id.* at 30.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 26.
81. *Zcon*, 96 F.3d at 419.

Judge Pregerson in his dissent comments that by refusing to confirm the arbitration award in this case the majority sends a troubling message to employers.[82] He states that the majority is telling employers they can avoid their responsibilities under a collective bargaining agreement by engaging in "double-breasting" operations.[83] Judge Pregerson also thinks the majority is telling employers engaged in "double-breasting" operations that if they voluntarily submit a dispute to arbitration without reserving the arbitrability question for the courts they can still challenge the arbitrator's award simply by arguing they never intended to submit the arbitrability question to the arbitrator.[84]

The majority's decision not only weakens the power of arbitrators in resolving labor disputes, but helps to perpetuate the ongoing demise of unions. The court in effect is telling employers that they can get away with "double-breasting," which has been one of the contributing factors in the erosion of the effectiveness of the once-powerful unions.

The costly fringe benefits and substantial wage increases won by union labor over the years have given nonunion operations a built-in competitive advantage.[85] This advantage includes not being restricted by long-standing union work rules and being more likely to complete projects within their allotted budget and on schedule.[86] These are the motivational factors that make it desirable for a union contractor to operate in a double-breasting fashion.[87]

VI. CONCLUSION

Zcon can be viewed as a good or bad decision depending on one's view of unions. Regardless of how one perceives unions, decisions like *Zcon* are an example of the legal rules that have resulted in the decline in union effectiveness. As long as courts allow tactics such as double-breasting to continue, employers will be able to avoid their responsibilities under collective bargaining agreements and, in effect, render them useless.

JEFFERY W. FIELDS

82. *Id.*
83. *Id.*
84. *Id.*
85. Bucci and Kirwan, *supra* note 3, at 24.
86. *Id.*
87. *Id.*