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THE RIGHT TO DISCHARGE

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The purpose of this paper is to explore the employer's right to discharge employees as that right exists today. During the past fifty years labor has risen to be a potent economic and social force. The struggle of labor has resulted in encroachments by the unions upon employer prerogatives. Management has felt the impact of labor through legislation and collective agreements curbing the rights of management as they were known under laissez faire. This paper is chiefly concerned with the effect of the collective union contract upon the employer's right to discharge. It is hoped that it will point out the ways in which the union contract has affected this right, how the contract deals with the subject, who may enforce the contract, and what seems to be some of the modern trends. Legislative restraints upon the employer are mentioned only in passing. Arbitration has been given incidental treatment because the author feels that a detailed report on arbitration would be too consuming for the purposes of this paper.

Most union contracts recognize the employer's right to discharge employees; at the same time the contracts attempt to limit the right to "just cause". The importance of the contract is demonstrated by a recent case, *Jenkins v. Thompson,* in which the court said that a contract of employment is a prerequisite to a cause of action for wrongful discharge.[1] This is verified in an early Colorado case in which the court said that the employees of a railroad company have no cause of action based upon discharge where they have no contract for a stipulated time.[2] It is interesting to note that in another Colorado case where the court was considering a discharge for cause under an individual contract, it was held that every contract for hire of services, whether for a definite or indefinite time, is subject to the right of the employer to discharge the employee for sufficient cause.[3]

Where the union contract does limit the employer's right many questions have arisen. Some of these are: Is the employee a third party beneficiary? Is the Union the agent of the employee? Is the contract enforceable by the employee though his term of employment is indefinite? Must the employee be a member of the union that negotiated the contract?

It should be remembered that the most substantial gains of labor did not come until after 1932. The Norris-LaGuardia Act in Section 2 declared the public policy of the Federal Government which recognized the employees' right to bargain collectively through representatives of their own choosing without coercion on

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* Written while a student at the University of Denver College of Law

[1] 251 S. W. (2d) 325 (Mo., 1953).

[2] Frank v. Denver & R. G. R. Co., 23 F. 123 (1885).

[3] Little v. Dougherty, 11 Colo. 103, 17 P. 292 (1887).

the part of the employer.[4] The courts were slow to recognize the rights of employees under collective agreements where the subject of dispute involved provisions included primarily for the benefit of the individual employee. The law is by no means settled, but by this time certain definite patterns are reflected by the cases.

Early history is not of great significance in considering this subject, except that the reader should keep in mind the fact that under laissez faire the employer enjoyed a minimum of restraint. The first collective agreement that tended to limit the employer's control over discharge and discipline was negotiated in 1890 by the International Typographical Union.[5] The law on the subject is still quite new, yet it may be said that the rights of individuals under these contracts now seem to be generally recognized.

LIMITATIONS ON THE RIGHT TO DISCHARGE

There are two basic forces which restrict the right of the employer to discharge employees. Legislation by the federal and state governments reflects the intervention of government as a third party in labor disputes restricting the rights of management. The collective contract reflects not only the effect of this legislation, but also the rise of labor to a bargaining plane with management.

Present legislative and contract restraints running against the employer represent compromises between both employees and management.[6] The employee on the one hand is interested in job security to prevent economic loss through loss of wages. He must also face the stigma attached to a discharge and finally face the possible prospect of securing new employment. The employer must have a strong means by which to maintain discipline. Yet he must consider the consequences of a discharge. A strike or strained labor-management relation may result. He must preserve harmony to continue efficient production and, of course, he must consider the cost of training new employees.

The Norris-LaGuardia Act through its declaration of public policy, as mentioned before, undoubtedly had considerable force in paving the way for the modern collective contract. This then offered an indirect restraint upon the employer. Next the Wagoner Act limited the employer's right to discharge for union activitits.[7] Discharge of an employee for union activities is an unfair labor practice under Sections 7 and 8 of the Act. Under the Wagoner Act the employer can be forced to reinstate an employee where the employer has violated Section 8 (a). The railroad workers have found similar protection in the Railway Labor Act of 1926. These acts have provided the main limitations upon the employer's prerogative of discharge; however, minor limitations appear in

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[4] Federal Anti-Injunction Act, 47 Stat. 70 (1932), 29 U. S. C. 102 (1940).

[5] John A. Lapp, How to Handle Labor Grievances, National Foremen's Institute, Inc., p. 44 (1946).

[6] C. C. H., Labor Relations, Vol. 5, Union Contracts, Sec. 51,501 (1953).

[7] National Labor Relations Act, 51 Stat. 5 (1937), 29 U. S. C. 158.

other federal statutes. For example, the Selective Service Act prevents discrimination against a veteran upon return to his employment after discharge from the armed services.[8] This is by no means a complete review of the federal law as it pertains to this subject, but to add more would go beyond the scope of this paper. State legislation has been specifically excluded.

The union contract, limiting the right of the employer to discharge, progressed rapidly after federal legislation recognized individual rights of employees. Most contracts affirm the right of the employer to discharge; in fact, the contract may state that "The full power of discharge and discipline lies with the employer".[9] But the contract does not end here. This power of discharge is limited to discharge for "just cause" or "for good cause" or "good and sufficient cause".[10] In the early days of collective contract, the term "just cause" must have been a fruitful area of litigation. Most of the contracts with the larger industries still recognize the employer's prerogative but provide for arbitration as a means of disposing of disputes over discharge. Arbitration awards will be treated more extensively later in this paper. As a matter of illustration, it has been held that the discharge was for just cause where the employee was inefficient, where he had been careless in the use of equipment, where he violated company rules, where he had been drinking on the job or was drunk on the job, or where company equipment had been sabotaged by the employee. The employer has the right to lay off employees under an economy move, however, he should use care that the layoff does not indicate discrimination for union activities.[11]

ENFORCEMENT OF THE CONTRACT PROVISIONS

The real force in the union contract restricting the employer's right to discharge rests in the power to enforce this provision. Historically, it might be safely stated that prior to the Norris-LaGuardian Act (1932), the general rule was that the employee had no right of action against the employer for a wrongful discharge in violation of the contract.[12] This rule has been supported on various grounds. Some of these were: that the employee did not ratify or adopt the contract, and the union was not his agent; that the employee's individual contract with the employer was for an indefinite period, and the contract remained unenforceable for want of reciprocity; that the contract was between the union and the employer and was not intended to operate between the employer and employee; that the employee was not a member of the union at the time the contract was executed; or that the employee was not within the class of employees intended to be benefited by the contract. It should now be pointed out that there is a definite

[8] C. C. H., Labor, Vol. 5, Union Contracts, Sec. 51,502 (1953).
[9] John A. Lapp, How to Handle Labor Grievances, 45 (1946).
[10] *Ibid*, p. 45.
[11] Prentice-Hall Labor Course, Sec. 4296 (1953).
[12] 31 Am. Jur. 880, Labor, Sec. 119.

shift to the view that collective agreements are enforceable by the employee on the theory that the employees are third party beneficiaries, or that an agency relation existed between the union members or employees and the bargaining agent.[13]

There seem to be about twelve states which recognize the collective contracts as third party beneficiary contracts independent of adoption or ratification by the employee.[14] Adding to these the states which will enforce the contracts if ratification or adoption is shown, those requiring employment for a definite term, and, those which follow the agency theory, the general rule could be stated that the courts will permit the employee to sue on the collective contract where the cause of action arises from provisions made for his sole benefit as distinguished from the provisions intended to be effective only between the employer and the union.[15]

With this background, it is clear that the attorney will encounter one or more of the following questions:

1. Could the employee enforce the wrongful discharge provision if it were contained in a contract between himself and the employer?
2. Must the employee adopt or ratify the contract?
3. Is the wrongful discharge clause for his own benefit or the benefit of the union?
4. Must the employee be a member of the union at the time the contract was executed?

A review of some of the cases will demonstrate the various views that the courts have taken on the question of wrongful discharge. In the case of *Swart v. Huston,* the court refused to let the employee recover for wrongful discharge because the employee had no contract for a definite term.[16] He could terminate without a liability running to the employer; and since there was no reciprocal remedy in favor of the other party, the contract would not be enforceable for want of mutuality. The court said that the collective agreement standing alone would give the employee no rights, but hinted that had the contract been adopted or ratified in the individual contract of employment, then it might be enforceable though the court did not indicate the theory of action that should be used.[17]

In the case of *Kessell v. Great Northern R. Co.,* the court refused to permit an employee to sue on a collective contract where the cause of action was based upon the methods and rules of discharge, upon the theory that the contract was intended to operate between the employer and the union.[18] There was no individual

[13] *Ibid,* 1954 supplement, p. 97, Sec. 119.

[14] 18 A. L. R. (2d) 367.

[15] 18 A. L. R. (2d) 367.

[16] 154 Kans. 182, 117 P. (2d) 576 (1941).

[17] But see Johnson v. Am. R. Express Co., 161 S. E. 473 (1932), *infra* p. 11, where the court construed a union contract to create a definite term by implication based upon the limitation running against the employer.

[18] 51 F. (2d) 304 (W. D., N. D. 1931).

contract with the employee. In a Canadian case, *Young v. Canadian N. R. Co.*, the court refused to allow the employee an action upon the ground that there was no privity between the employer and the employee.[19] In this case the employee was a member of a rival union at the time the contract was executed.

Some of the cases attempt to distinguish between the employer's right to discharge independent of the contract and the right as controlled by the contract. This was pointed out in the case of *Dierchaw v. West Suburban Dairies*, in which the court placed the burden on the employee to show that he went to work pursuant to the agreement before he could claim the benefit of the contract.[20] In this case the employee was not covered by the contract; therefore, the employer merely exercised his unqualified right to discharge.

From these cases it should be noted that some courts will not enforce the contract because it is only between the employer and the union; others require that there be a definite term of employment; others require adoption or ratification; and still others would limit the right to members of the union negotiating the contract. In none of the foregoing cases was the employee allowed a cause of action based upon a provision which would appear to be in the contract for the sole benefit of the individual employees. Should they not have qualified as third party beneficiaries under the contract?

Turning now to the more modern view which holds the collective contract to be enforceable. One of the most interesting opinions on the theory that the employee may enforce the contract as a third party beneficiary appears in the case of *Yazoo & M. V. R. Co. v. Sideboard*.[21] This case seems to represent the modern trend. After the court reviewed the history of labor contracts, it stated:

> . . . these rulings have been left in the rear in the advancement of the law on this subject, and the holdings now are that these agreements are primarily for the individual benefit of the members of the organization, and that the rights secured by these contracts are the individual rights of the individual members of the union, and may be enforced directly by the individual.

It should be pointed out here that the court enforced the contract as a third party beneficiary contract, but that the wording above quoted would seem to indicate that the court would limit the action to members of the union. The opinion also limits the employee's action to provisions that are for his own immediate benefit. It would seem then that the test under these cases should be as here quoted:

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[19] 4 D. L. R. 542.

[20] 276 Ill. App. 355 (1934).

[21] 161 Miss. 4, 133 S. 669 (1931).

> Provisions in a collective labor agreement which limit the employer's right of discharge have been generally held enforceable by an individual employee as inserted for his benefit, where such a provision would have been valid and enforceable had it been part of an individual employment contract.[22]

This test would recognize that the primary obligations of the contract are between the union and the employer, but that the incidental benefits to the employees would be protected by giving them a cause of action. It would seem that the membership in the union would not be a condition of enforcement.

The next inquiry should be directed to the extent of employees' rights as third party beneficiaries. The most important factor seems to be that the employee must first be within the particular class of employees intended to be benefited. This is largely a matter of interpreting the contract. In *Yazoo & M. V. R. Co. v. Webb,* the court had to first consider this question before it could consider the merits.[23] There the court pointed out that where the contract was made for the benefit of a particular class, members of that class could enforce the terms of the contract regardless of union membership. Where the employee was not within the class, he would have no action unless the provisions were specifically extended to include him.

> It has been generally held that a collective labor agreement made between an employer and a labor union for the benefit of all the employees, or a class of employees, may be enforced by an individual employee within the scope of the agreement, even though he is not a member of the contracting union.[24]

This would seem to be in harmony with the philosophy of the National Labor Relations Act which limits bargaining to a single representative body.[25] In considering this matter one court said, "A bargaining agent under the National Labor Relations Act or under the Railway Labor Act is but an agent for a principal". As an agent, the union "is duty bound to represent fairly not only its own membership, but all the employees in whose behalf it has authority to bargain".[26] It should be remembered that the right of discharge as considered in this portion of the paper is the right as affected by the contract with the union independent of legislation creating other restraints, and, therefore, we are concerned with the enforcement arising out of state-created rights and not federally-created rights.

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[22] 18 A. L. R. (2d) 367.

[23] C. C. A. Miss., 64 F. (2d) 902 (1933).

[24] 18 A. L. R. (2d) 370.

[25] National Labor Relations Act, 49 Stat. 453 (1935), 29 U. S. C. S. 159(a) (1940).

[26] Brotherhood of Locomotive Firemen & Engineers v. Tunstall, 163 F. (2d) 289 (1948).

A minority of the states let the employee sue on the contract upon the theory of agency. The union is the agent of the employees under this theory. This becomes important from the standpoint of determining who are principals. In at least one case, *Shelley v. Portland Tug & Barge Co.*, it was held that a non-union employee would have no action for wrongful discharge under a collective agreement.[27] The court denied the action because there was no showing the union had authority to act for non-union employees.

It is interesting to note the position taken by one court which was concerned with the enforcement of a collective contract where the question of definiteness in time was raised.[28] In this case the court held that the term of employment could in effect be construed to be for a definite time because the contract bestowed a substantive right upon the employee during the life of the contract and restricted the right of the employer to discharge only for the life of the contract.

ARBITRATION PROVISIONS

The net effect of union contracts has been to restrict management's rights to discharge for "just cause" only. The evolution in this area has been to work out a satisfactory system for determining what is "just cause" without the necessity of resort to the courts in each instance. The author has examined twelve union contracts with various large employers and without arbitration exception has been provided for as an end result.[29] Arbitration has distinct advantages to both the union and management at least where individual grievances are concerned. It provides a much faster method of handling disputes than resort to the courts. The employee can afford to pursue this remedy if he feels the employer violated the contract, and the employer in a relatively short time knows the bounds of "just cause". The arbitration machinery utilized for handling other union grievances may be made available to handle discharge cases if the parties so provide in the contract. Where this is provided for the contract will generally state that the arbitrator is to expedite discharge cases.

Most union contracts set out a system of handling disputes by mediation first and provide for arbitration only as a last resort. These contracts generally provide for notice to the employee and a representative of the union with a specification of the reasons for the discharge. The employee must then seek a hearing within a specified period (two to five days). This first hearing is at the shop or department level with the foreman and a union representative. If this fails, the employee or union may seek a hearing before a company-wide representative official or officials and a similar representative from the local union. If still no settlement is reached, then a further appeal might be taken to a board con-

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[27] 158 Ore. 377, 76 P. (2d) 477 (1938).

[28] Johnson v. American R. Express Co., 163 S. C. 191, 161 S. E. 473 (1931).

[29] C. C. H. Labor Relations, Vol. 5, Union Contracts, Sec. 51,502 (1945).

sisting of company officials and representatives from the parent union. Then if these negotiations fail or either party is not satisfied, the matter may be submitted to an arbitrator as provided in the contract. The decision of the arbirtator is specifically stated in the contract to be final and binding on the parties.

Where the contract provides for arbitration, the employee must pursue his cause as provided in the contract or he has no action at law. In the case of *Swilley v. Galveston, H. & S. A. Ry. Co.*, the court held that an employee could not sue at law on the ground of wrongful discharge where he failed to exhaust the remedy provided in the contract.[30] But there is also an obligation on the part of the employer to follow the terms of the contract in the settlement of a discharge dispute. It was held in the case of *Moore County Carbon Co. v. Whitten* that an employer could not raise the defense that the employee had not complied with the provisions of the contract where the employer had prevented the employee from complying.[31]

A discussion of arbitration would not be complete without considering Rule 109 of the Colorado Rules of Civil Procedure. If the collective contract meets the requirements of this rule then

> The party in whose favor any award shall be made, may file the same with the clerk of the district court of the county wherein the matters were arbitrated, who shall enter a judgment thereon, and if such award requires the payment of money, the clerk may issue execution therefor.[32]

If the agreement does not come within the proscription of this rule, then the employee, where successful, would have to sue in court on the contract to enforce the award. The contract would meet the requirements of the rule if it was in writing and provided for arbitration therein, if the parties are to be bound by the award, and if it provides for the filing with the court and issuance of execution as a means of enforcement of the award.[33]

CONCLUSION

There now remains little doubt that a majority of the states will recognize the rights of individual employees to enforce a contract which limits the employer's right to discharge to "just cause" only. It would seem that the cases would line up in the following manner:

1. Where a state recognizes third party beneficiary contracts and the court will construe the contract to be one, the employee may sue for wrongful discharge though his term of employment is indefinite providing he is within the class of

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[30] C. C. A. Texas, 96 S. W. (2d) 105 (1936).
[31] C. C. A. Texas, 140 S. W. (2d) 880 (1940).
[32] Colo. R. C. P. 109(e).
[33] *Ibid*, 109(b).

employees intended to be benefited by the contract. Union membership would not be necessary.

2. Where the state recognizes third party beneficiary contracts and the court will construe the contract to be one, but requires the third party to acknowledge the contract, then the employee must ratify or adopt the contract before he has a cause of action. Union membership would be immaterial.
3. One test that would assist in determining if the provision should be enforced as a third party beneficiary provision is to determine whether the provision would be enforceable between the employee and the employer if it were in an individual contract. Most wrongful discharge cases meet this test.
4. Where the state refuses to construe the contract as a third party beneficiary contract, the employee may still have his cause of action based upon the theory of agency, but in these cases it would seem that the burden of showing that the agency existed at the time the contract was executed is upon the employee. This could preclude a non-union employee or a member of a rival union from an action based on the collective contract. Under this doctrine union membership must have existed at the time the contract was executed. No cases have been found by the author demonstrating the effect of the agency doctrine as set out in the National Labor Relations Act where the employee relied upon the act to establish the agency.
5. In jurisdictions that refuse the employee recovery because the contract was intended to operate only between the union and the employer, there is no action that accrues to the benefit of the employee; however, there are strong indications in some cases that the employee could claim the benefit of the contract if he adopted it as a part of his individual contract. It is not clear whether he would sue here as a third party beneficiary or on the theory that it is his own contract.
6. Some jurisdictions might still refuse to extend the benefit of the wrongful discharge clause to employees on the theory that though the collective agreement may be for a definite term the employee's individual contract is not for a definite term, and if he is free to terminate at any time and for any cause, there is no reciprocal provision running in favor of the employer, thus making the contract ineffective for want of reciprocity. As has been pointed out, this has been overcome in at least one case reported by construing the substantive right of the employee with the restriction limiting the employer as creating a definite term. The theory of the indefinite term does not seem to have the general approval of the courts.

If the employee does have a cause of action which was created by the union contract, his rights are then limited according to the terms of the contract. Where the contract provides for arbitration, he must follow the arbitration procedure or forfeit his cause of action unless the employer's acts have prevented him from complying with the contract. If the state has an arbitration statute which gives summary effect to an arbitration award where the contract meets the provisions of the statute, then he need not sue to enforce the award; however, where he cannot qualify under the statute, he must sue in the proper court to enforce the award. Arbitration seems to meet with general approval, at least, where the dispute concerns the rights of the individual employee for discharge.

Modern legislation coupled with the restrictions of the collective contract have greatly altered the position of the employer from that of his predecessor under laissez faire. It may be that the employer today is suffering for the delinquencies of the past; however, taking all matters into consideration, he has not suffered too badly in this one instance because he can still discharge for "just cause". Except in limited circumstances, it would seem that the burden should not be unbearable when weighed in the light of public and individual gains.

SOCIETY FOR CRIPPLED CHILDREN

To better serve handicapped children and adults in Colorado, and particularly in Metropolitan Denver, the Denver County Society for Crippled Children is attempting to assume full financial responsibility for the operation of Sewall House, Denver's Therapy Center. The State Society is an administrative organization that assists outlying counties. Previously, the State Society had contributed some $20,000.00 annually toward the support of Sewall House.

Any bequests or gifts intended to benefit and/or provide treatments for crippled children and adults at Sewall House should be made out to the Denver County Society for Crippled Children and Adults, Inc.

This organization, without assistance from Community Chest or United Funds, has been serving the crippled of all races and creeds, regardless of their ability to assist in any payment, since 1939.