Note, Appearance of Bias as Grounds for Vacating an Arbitrator’s Award – Implications of Commonwealth Coatings Corp. v. Continental Casualty Co. for Labor Arbitration

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APPEARANCE OF BIAS AS GROUNDS FOR VACATING AN ARBITRATOR'S AWARD—IMPLICATIONS OF COMMONWEALTH COATINGS CORP. V. CONTINENTAL CASUALTY CO. FOR LABOR ARBITRATION

INTRODUCTION

Commonwealth Coatings Corp. v. Continental Casualty Co. involved the arbitration of a dispute between two contractors. The reasoning of the opinion of the court contains possible implications for the review of labor arbitration awards challenged on the ground of alleged partiality of the arbitrator. The federal district courts find jurisdiction to vacate labor arbitration awards under Section 301 of the Labor Management Relations Act (LMRA), but nowhere in the LMRA is there an express test of partiality the courts can apply. Section 10 of the United States Arbitration Act provides a statutory test of "evident partiality,"—but it has been held that the United States Arbitration Act does not apply to collective bargaining contracts in interstate commerce. A key issue, therefore, is whether the Section 10 test of "evident partiality" developed in the opinion of Commonwealth Coatings Corp. v. Continental Casualty Co. should be applied to a question of partiality in a labor arbitration proceeding where there is no statutory test.

BACKGROUND

Plaintiff, Commonwealth Coatings Corporation, a subcontractor, sued the sureties on the prime contractor's bond to recover money alleged to be due on a painting contract. Pursuant to an arbitration clause in the painting contract, Commonwealth Coatings Corporation appointed one arbitrator and the prime contractor appointed a second. The two arbitrators appointed a neutral third arbitrator. The tripartite arbitration board unanimously rendered an award. Plaintiff, the losing party, challenged the award under Section 10 of the United States Arbitration Act, 9 U.S.C. § 10 (1964), states certain conditions upon which awards can be vacated. The arbitration award may be vacated (a) where the award was procured by corruption, fraud or undue means, (b) where there was evident partiality or corruption in the arbitrators or either of them, (c) where the arbitrators were guilty of certain misconduct and (d) where the arbitrators exceeded their powers.

States Arbitration Act. The sole ground for his challenge was the failure of the neutral arbitrator and the successful party to disclose a past business relationship between them. Plaintiff conceded that the arbitrator was innocent of actual partiality, bias, or improper motive. The Federal District Court for the district of Puerto Rico refused to set aside the award. On appeal, the First Circuit affirmed on the ground that there was no "disturbingly close" relationship between the "impartial" arbitrator and the successful party. The court held:

where there is a disturbingly close relationship the very failure to make disclosure could be evidence of partiality. . . . However, we cannot say that the relationship was sufficiently close to establish "evident partiality" within the statute as a matter of law.

The United States Supreme Court granted certiorari and reversed the court of appeals. The Court split three ways. Mr. Justice Black, writing for himself and three others, delivered the opinion of the Court. Mr. Justices White and Marshall joined in a concurring opinion. Mr. Justices Fortas, Harlan and Stewart dissented.

Mr. Justice Black's opinion reasoned as follows: Section 10 provides not merely for arbitration but for impartial arbitration. The requirements of impartiality taken for granted in every judicial proceeding are not suspended when the parties agree to arbitrate. If one party in a judicial proceeding can show that unknown to him, a judge has had a prior business relationship with the opposing party, there is no doubt that the judgment can be successfully challenged. The fact that the prior business relationship constituted a small part of the judge's income would not be material. A judge's decision should be set aside by the court where there is "the slightest pecuniary

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5. The neutral arbitrator conducted a large engineering consultant business in Puerto Rico. One of his regular customers in this business was the prime contractor that petitioner sued in this case. The relationship was sporadic and there had been no dealings between them for about a year immediately preceding the arbitration. The relationship was nevertheless repeated and involved fees of about $12,000 over a period of four or five years.


interest" on the part of the judge. Mr. Justice Black argued that Congress intended to guarantee the constitutional principle of judicial impartiality in arbitration proceedings, as illustrated by the broad statutory language providing that an award can be set aside on the basis of "evident partiality" or the use of "undue means." Therefore, evidence of prior undisclosed business dealings constitutes "evident partiality" within the meaning of Section 10 of the United States Arbitration Act.

Mr. Justice White, with whom Mr. Justice Marshall joined concurring, stated that it is because arbitrators are men of affairs and "of the marketplace" that they are effective in their adjudicatory function. Therefore, arbitrators should not be held to a standard of judicial decorum. Arbitrators should not be disqualified automatically by undisclosed relationships that are trivial. Nevertheless, the relationship in this case was substantial enough to warrant vacating the award.

Mr. Justice Fortas, writing for the dissent, argued that "evident partiality" means conduct by the arbitrator favoring one party rather than another. Though the

failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias. . . . But where there is no suggestion that nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct, the presumption clearly is overcome.

Mr. Justice Black's "opinion of the court" held that to avoid the Section 10 prohibition of "evident partiality," arbitration under the United States Arbitration Act must be conducted in such a way as to avoid even the appearance of partiality. Therefore, commercial arbitrators have a duty to disclose to the parties any dealings that might create an impression of possible bias, including the slightest pecuniary interest in the case. It is suggested that the Section 10 test

9. Tumey v. Ohio, 273 U.S. 510 (1927). In this case, a magistrate's compensation was determined by the number of guilty verdicts rendered by him in cases that came before his court. The Supreme Court held that this procedure violated due process. In dictum, the Court said that "even the slightest pecuniary interest" on the part of the judge would be grounds for setting aside a decision, but this was not the holding of the case.

of "evident partiality" developed by the Black opinion should not be applied to the question of partiality in a labor arbitration proceeding.

**Development of a Suitable Test**

*Appearance of Partiality*

The first determination in the development of a suitable test of partiality is whether to premise it on an appearance of partiality or partiality in fact. The majority in Commonwealth Coatings Corp. v. Continental Casualty Co. chose the former, the dissenters chose the latter. The dissenters argued that arbitration is essentially consensual and practical. It is "a system characterized by dealing-on-faith and reputation for reliability." Therefore, only "conduct—or at least an attitude or disposition—by the arbitrator favoring one party rather than the other" will constitute sufficient partiality to vacate an arbitrator's award.

The dissent is correct when it characterizes the arbitration process as consensual and practical, but these characteristics do not, *a fortiori*, demand a conclusion that the arbitration process must rely on "dealing-on-faith" or the "reputation" of the arbitrator for its efficacy. To the contrary, because the process is consensual, its efficacy depends upon its acceptance, by the parties involved, as an alternative to litigation or a strike. Its acceptance as an alternative, furthermore, depends upon faith that the system produces just results. It follows, therefore, that the efficacy of the arbitration process depends upon the continued confidence that arbitration will produce a just and impartial result. The appearance of partiality, therefore, in an arbitration proceeding, will undermine the foundation of the system by undermining confidence in the system.

*De minimis non curat lex*

Having ascertained that courts must look to the appearance of partiality, one must establish the standard of appearance of partiality to be applied in a labor arbitration proceeding. In particular, may some conduct that would disqualify a judge be considered *de minimis* when engaged in by a labor arbitrator? The answer must be affirmative. The difference in the nature of the judicial system and the labor arbitration process demands that the application of the test of

12. *Id.*
appearance of partiality be different. "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts." The Supreme Court has stated that labor arbitration calls into being a new common law of the industry or shop and "proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by a superior authority which the parties are obliged to accept. . . . He is rather part of a system of self-government created by and confined to the parties. . . ."

The distinctions between the roles of judges and arbitrators are basic, for the question of appearance of partiality is really a question of the expectations of the parties. If the parties expect the labor arbitrator to bring to the arbitration proceeding the expertise necessary to make determinations foreign to a court, then prior dealings and contacts with one or more of the parties may well be within their set of expectations. Indeed the labor arbitrator sometimes is chosen because of the knowledge gained through his prior dealings and contacts in the industry and not disqualified due to them. The system of self-government under which the labor arbitrator functions recognizes that the labor arbitrator will not remain aloof but will have been involved and continue to be involved with the events which forge the common law of the industry.

Any test of an appearance of partiality in labor arbitration, being a test of the expectations of the parties, must be framed from the perspective of one who has an understanding of the common law of the industry, and of the mores and practices of labor arbitration. The Code of Ethics for Labor Management Arbitration outlines the qualifications for office in Section 3.

It is, however, incumbent upon the arbitrator at the time of his selection to disclose to the parties any circumstances, associations or relationships that might reasonably raise any doubt as to his impartiality or his technical qualification for the particular case.

14. Id. at 582.
16. Many of these prior contacts may have been in the form of service while on the payroll of a party, while other contacts may have come about through service as a neutral.
18. Id. at 382.
Necessarily implicit in the language "reasonably raise any doubt as to his impartiality" is the qualification, "by one who understands the mores and practices of the labor arbitration profession." This is not the same as the standard of judicial decorum used by the majority in Commonwealth Coatings Corp. v. Continental Casualty Co. Unlike the standard of judicial decorum, the standard of an arbitrator’s decorum should consider the exigencies of the arbitration process.

SUMMARY AND CONCLUSIONS

The opinion of the Court in Commonwealth Coatings Corp. v. Continental Casualty Co. held the commercial arbitrator to a standard of judicial decorum. It held that the test of "evident partiality" includes a requirement to disclose to the parties any dealing that might create an impression of possible bias, including the slightest pecuniary interest in the case. To say this and nothing more puts the arbitrator in a difficult position in determining what he must disclose.

What test of partiality will be used as grounds for vacating a labor arbitrator's award is still an open question. When the federal courts do address themselves to the issue of the standard of partiality to be applied in labor arbitration proceedings, the doctrine of Commonwealth Coatings Corp. v. Continental Casualty Co. may, unfortunately, be viewed as an acceptable test for labor arbitration. Such a result would be a serious mistake. Rather than commit this mistake, the courts must recognize the dynamics of the labor arbitration process. Few would disagree that the labor arbitrator must disclose to the parties any circumstances, associations, or relationships that might reasonably create an appearance of partiality. The critical qualification not recognized by the Commonwealth Coatings rule is that the appearance of partiality in labor arbitration must always be decided from the perspective of one who understands the mores and practices of the labor arbitration profession. This means that the strict standard of judicial decorum will be unworkable. The exigencies of the labor arbitration process demand this conclusion.

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