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Mar. 26

NELSON JOHN IMBLEAU, DOUGLAS MILLAR and JAMES DAVID KIMMERLY, on their own behalf and on behalf of all other members of Oil, Chemical and Atomic Workers International Union, Local 16-14 .....APPELLANTS;

AND

BORA LASKIN, Q.C., C. L. DUBIN, Q.C., and MICHAEL O'BRIEN and POLYMER CORPORATION LIMITED .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Labour—Collective agreement—Breach by union of no-strike clause—Power of arbitration board to award and assess damages—Certiorari proceedings.*

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

A collective agreement entered into by a union and a company (the labour relations between the company and its employees being governed by the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152) provided a procedure for the disposition of grievances, and grievances not settled could be referred to a board of arbitration. The latter was not to have power to alter or change any of the provisions of the agreement or to give any decision inconsistent therewith. A board of arbitration considered an alleged breach by the union of a no-strike clause in the agreement; it decided that there had been such a breach, that the union was responsible and liable in damages for it, and directed that the amount of damages be determined after a further hearing.

Subsequently the union challenged the authority of the board to award and assess damages against the union for this breach of the agreement. The board, by a majority award, rejected this challenge to its authority and the union then launched a motion for an order of *certiorari* and prohibition directed to the board's members. The judgment dismissing the motion was affirmed by the Court of Appeal and by leave of that Court the union further appealed. It was submitted that the jurisdiction of the board in dealing with the dispute was limited to making a finding as to whether or not the union had violated "the no-strike clause" and that the board was without power to award any consequential relief.

*Held:* The appeal should be dismissed.

The argument of counsel for the appellant that the agreement gave no express power to the board to award and assess damages and that the Courts below had erred in construing the agreement as giving such a power failed.

Having reached the opinion that the motion was rightly dismissed on the merits, no opinion was expressed as to whether it might have been dismissed *in limine* on the procedural objection had it been taken that a board of arbitration proceeding under the *Industrial Relations and Disputes Investigation Act* is not a public tribunal with respect to whose decisions *certiorari* lies.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. dismissing an application for an order of *certiorari* and prohibition directed to the members of a board of labour arbitration. Appeal dismissed.

*David Lewis, Q.C.*, and *T. E. Armstrong*, for the appellants.

*J. J. Robinette, Q.C.*, and *J. W. Healy*, for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by the Court of Appeal for Ontario, from a judgment of that Court[1] affirming a judgment of McRuer

[1] [1961] O.R. 438, 28 D.L.R. (2d) 81, *sub nom. Re Polymer Corporation & Oil Chemical & Atomic Workers International Union, Local 16-14.*

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C.J.H.C. which dismissed the appellants' motion for an order of *certiorari* and prohibition directed to the respondents Laskin, Dubin and O'Brien, members of a board of arbitration, hereinafter sometimes referred to as "the board".

The respondent Polymer Corporation Limited, hereinafter referred to as "Polymer" entered into a collective agreement with Oil, Chemical and Atomic International Union, Local 16-14, hereinafter referred to as "the union", which was to remain in force from February 27, 1957, to July 7, 1958, and to be automatically renewed from year to year thereafter unless a specified notice was given.

The labour relations between Polymer and its employees are governed by the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152.

Paragraph 8.01 of the collective agreement is as follows:

8.01—

The Union agrees that during the life of the agreement there will be no strike and the Company agrees that there will be no lockout.

On February 7, 1958, there was a stoppage of work at the plant and on February 10, 1958, Polymer filed a written grievance with the union reading as follows:

This grievance is submitted to the Union under Article 6.05 of the Agreement.

The Company alleges violation of Article 8.01 of the Agreement by reason of the strike which occurred on Friday, February 7th, 1958. The Company claims full compensation for its losses suffered as a result of this violation.

The parties failed to settle the grievance and Polymer requested in writing that it be submitted to arbitration in accordance with article 7.01 of the agreement which reads as follows:

7.01—

Both parties to this Agreement agree that any alleged misinterpretation or violation of the provisions of this Agreement, including any grievance which has been carried through the prescribed steps of the Grievance Procedure outlined in Article VI and which has not been settled, will be referred to a Board of Arbitration at the written request of either of the parties hereto, provided that such requests must be received not later than ten (10) regular working days after a decision has been rendered as provided in step 3 of the Grievance Procedure.

The board of arbitration was established in accordance with the relevant provisions of the agreement. By an award dated September 4, 1958, Messrs. Laskin and O'Brien, decided that there had been a violation of article 8.01 of the agreement, that the union was responsible for such breach and liable in damages for it and directed that the amount of damages be determined after a further hearing.

Subsequently the union challenged the authority of the board to award and assess damages against the union for this breach of the collective agreement. After hearing further argument and receiving written submissions on this point, the board issued a majority award dated November 10, 1959, which rejected the challenge to the board's power to award damages and stated that the board would proceed to assess the damages at a hearing to be convened. The union then launched the motion which was heard by McRuer C.J.H.C.

Other provisions of the collective agreement relevant to the question whether the board has jurisdiction to award damages are as follows:

6.01—(in part)

Parties to this Agreement are agreed that it is of the utmost importance to adjust grievances and disputes as quickly as possible.

* * *

6.05—

Any dispute arising between the Company and the Union regarding the administration, interpretation, alleged violation, or application of this Agreement may be submitted in writing by either party as Step No. 3 of the Grievance Procedure.

* * *

7.03—

The Board of Arbitration shall not have power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions nor to give any decision inconsistent with the terms and provisions of this Agreement.

7.04—

The decision of the majority shall be the decision of the Arbitration Board, and shall be binding upon both parties.

The main argument of counsel for the appellant is that the agreement gives no express power to the board to award and assess damages and that the Courts below have erred in construing the agreement as giving such a power. He submits that the jurisdiction of the board in dealing with the dispute formulated in the written grievance filed by Polymer was limited to making a finding as to whether or

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not the union had violated "the no-strike clause" in the agreement and that the board was without power to award any consequential relief.

On this branch of the matter I find myself, as did the Court of Appeal, in complete agreement with the reasons of McRuer C.J.H.C. and for the reasons given by him I would dismiss the appeal.

Before parting with the matter mention should be made of an alternative ground on which it is submitted in the factum of the respondent that the appeal should be dismissed. It is stated as follows:

> A Board of Arbitration proceeding under the *Industrial Relations and Disputes Investigation Act* is not a public tribunal with respect to whose decisions *certiorari* lies.

While counsel for the respondent did not press this point he did not abandon it; in reply counsel for the appellant relied chiefly on the decision of the Court of Appeal for Ontario in *Re International Nickel Company of Canada Limited and Rivando*[1].

It is not necessary to deal with this point and, in my opinion, we should not do so.

There is nothing in the reasons delivered in the Courts below to indicate that the point was taken there. Early in his reasons the learned Chief Justice of the High Court says:

> The only point at issue in this application is whether the Board of Arbitration has power to award and assess damages for breach of the collective agreement.

Had the point that *certiorari* does not lie been raised before the learned Chief Justice I think it certain that he would have mentioned it and probable that he would have dealt with it before considering on its merits the question whether the board had jurisdiction to award damages; but he would not have been bound to follow that course. If he had seen fit he might have first considered the merits and if on the merits the motion failed it would have become unnecessary to deal with the procedural point. If, on the other hand, he had reached the conclusion on the merits that the board did not have jurisdiction to award damages, it would then have become necessary to determine whether the board was a tribunal to which *certiorari* would lie.

[1] [1956] O.R. 379, 2 D.L.R. (2d) 700.

The merits were fully inquired into in the Courts below and in the argument before us, and having reached the opinion that the motion was rightly dismissed on the merits I express no opinion as to whether it might have been dismissed *in limine* on the procedural objection had it been taken.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the appellants: Jolliffe, Lewis & Osler, Toronto.*

*Solicitors for the respondents: Miller, Thompson, Hicks, Sedgewick, Lewis & Healy, Toronto.*

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PRESENT: Taschereau, Cartwright, Fauteux, Abbott and Ritchie JJ.

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