June 27, 2018

ADR Case Update 2018 - 13

Federal Circuit Courts

- **ARBITRATION AWARD VALID DESPITE ARBITRATOR NO-ADD PROVISION**

  Asarco, LLC v. United Steel, Paper, Forestry…Union
  2018 WL 3028692
  United States Court of Appeals, Ninth Circuit
  June 19, 2018

  Asarco, a mining company, and the United Steel, Paper, Forestry Union (Union) were parties to a Basic Labor Agreement (BLA) that provided a copper price bonus to employees who participated in the company pension plan. In 2011, the agreement was modified to render employees hired after July 2011 ineligible for the pension plan. The Union, unaware of the link between the plan and the bonus, filed a grievance disputing Asarco's refusal to pay the bonus to employees hired after 7/11. The case proceeded to arbitration, with the arbitrator finding a mutual mistake in the failure of both parties to link the pension and the bonus and reforming the BLA to correct the mistake. The court confirmed the award and Asarco appealed.

  The United States Court of Appeals for the Ninth Circuit affirmed. Asarco argued that the arbitrator lacked the authority to reform the award because of BLA Article 5, which provided that the arbitrator can't add to, detract from, or alter the agreement. The Union argued that Asarco waived its right to contest the arbitrator's jurisdiction. The Court agreed, finding that Asarco did not preserve the jurisdictional question for judicial review. Instead, it conceded that the grievance was arbitrable and argued to the arbitrator that he lacked jurisdiction to reform the BLA in crafting a remedy. Asarco's decision to argue the issue of the no-add provision to the arbitrator suggested that it objected not to the arbitrator's jurisdiction but to the arbitrator crafting a remedy that the Union sought. Asarco also argued that the award should be vacated because the award did not draw its essence from the BLA; the arbitrator exceeded his authority in reforming the BLA; and the award was contrary to public policy. The Court disagreed. The arbitrator's decision was grounded in his reading of the BLA and acknowledged the link between the pension, bonus, and no-add provision. Upon concluding that the parties were mutually mistaken as to the impact of the modification to the BLA, the arbitrator reformed the BLA to reflect the terms that the parties agreed upon initially. The public policy exception is very limited; Asarko's argument that the award distorted the BLA was not convincing, given the arbitrator's effort to reform the agreement

so it no longer distorted the agreement the parties made during collective bargaining.

- **NLRB DECISION TRUMPED COUNTERVAILING ARBITRATION DECISION**

  Part-Time Faculty Association at Columbia College Chicago v. Columbia College Chicago
  2018 WL 2994243
  United States Court of Appeals, Seventh Circuit
  June 15, 2018

  PFAC represented part-time faculty at Columbia College Chicago (CCC). USCC represented full and part-time staff members. This case concerned full-time staff members who are also part-time faculty (full-time staff who teach – or FTST). In 2015, USCC petitioned the NLRB to add FTST to its bargaining unit. The petition was originally dismissed on the ground that FTST were already represented by PFAC. The dismissal was later revoked and the NLRB Director issued a decision and order that found FTST were included in the PFAC bargaining unit in their capacity as part-time faculty. PFAC requested review of the decision, but before the Board issued a final decision, CCC began to assign retroactive seniority to FTST employees under the terms of the PFAC CBA. PFAC filed a grievance against the College, which was denied, and then moved to arbitrate. The arbitrator ruled that the full-time staff members (FTST) were not included in the PFAC bargaining unit. PFAC moved to confirm the award and CCC filed a cross motion to vacate. The court vacated, finding that the award contravened the Director's ruling. PFAC appealed.

  The United States Court of Appeals for the Seventh Circuit affirmed, finding that the Director's decision trumped the arbitration award. The Court highlighted the superior authority of the Board: "should the Board disagree with the arbiter…the Board's would…take precedence." (*Carey v. Westinghouse* (372 US 261)). The Director's August 2016 decision concluded that FTST were not included in the PFAC unit or covered by the PFAC contract. The arbiter's award opined on the same issue by characterizing FTST as "non-members of the bargaining unit." Given the primacy of the NLRB's determination, the countervailing arbitration decision could not stand.

Colorado

- **SUBSTANTIAL COMPLIANCE WITH ARBITRATION PROVISION TYPEFACE REQUIREMENTS SUFFICIENT UNDER HEALTH CARE AVAILABILITY ACT**

  Colorow Healthcare v. Fischer
  2018 WL 2771051
  Supreme Court of Colorado
  June 11, 2018

  When Charlotte Fischer was admitted to a Colorow nursing home, her daughter signed an arbitration agreement. Pursuant to the Health Care Availability Act (HCAA), the agreement was to contain a four-paragraph notice in a certain font size and in bold-faced type. Colorow's four-paragraph notice was not in bold. Upon Charlotte's death, her granddaughter (Fischer) filed suit against Colorow and Colorow moved to compel arbitration. The court denied the motion, finding that the arbitration agreement did not comply with the HCAA. The Court of Appeals affirmed and a writ of certiorari was granted.

  The Supreme Court of Colorado reversed and remanded. At issue was whether the HCAA demanded strict or substantial compliance with its requirements for arbitration agreements. The Court looked to the goals of the requirements: to ensure that the agreement was voluntary and to keep insurance costs low for medical providers. Given these goals, the Court found that substantial compliance better effectuated the General Assembly's purpose (especially so since strict compliance would engender more lawsuits, which would raise costs). Colorow substantially complied with the HCAA. Though the language was not bold, Colorow made an effort to comply by separating the agreement from the rest of the text and including capital letters in a larger font. All parties agreed that the Agreement was voluntary.

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