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Supplementary Materials

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G. HEILEMAN BREWING CO., INC. v. JOSEPH OAT CORPORATION

871 F.2d 648 (7th Cir. 1989) (en banc)

Before BAUER, Chief Judge, CUMMINGS, WOOD, Jr., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION and KANNE, Circuit Judges.

KANNE, Circuit Judge.

May a federal district court order litigants—even those represented by counsel—to appear before it in person at a pretrial conference for the purpose of discussing the posture and settlement of the litigants’ case? After reviewing the Federal Rules of Civil Procedure and federal district courts’ inherent authority to manage and control the litigation before them, we answer this question in the affirmative and conclude that a district court may sanction a litigant for failing to comply with such an order.

I. BACKGROUND

A federal magistrate ordered Joseph Oat Corporation to send a “corporate representative with authority to settle” to a pretrial conference to discuss disputed factual and legal issues and the possibility of settlement. Although counsel for Oat Corporation appeared, accompanied by another attorney who was authorized to speak on behalf of the principals of the corporation, no principal or corporate representative personally attended the conference. The court determined that the failure of Oat Corporation to send a principal of the corporation to the pretrial conference violated its order. Consequently, the district court imposed a sanction of \$5,860.01 upon Oat Corporation pursuant to Federal Rule of Civil Procedure 16(f). This amount represented the costs and attorneys’ fees of the opposing parties attending the conference.

II. THE APPEAL

Oat Corporation appeals, claiming that the district court did not have the authority to order litigants represented by counsel to appear at the pretrial settlement conference. Specifically, Oat Corporation contends that, by negative implication, the language of Rule 16(a)(5) prohibits a district court from directing represented litigants to attend pretrial conferences.¹ That is, because Rule 16 expressly refers to “attorneys for the parties and any unrepresented parties” in introductory paragraph (a), a district court may not go beyond that language to devise procedures which direct the pretrial appearance of parties represented by counsel. Consequently, Oat Corporation concludes that the court lacked the authority to order the pretrial attendance of its corporate representatives and, even if the court possessed such authority, the court abused its discretion to exercise that power in this case. * * *

¹ Rule 16(a)(5) provides:

(a) *Pretrial Conferences; Objectives.* In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (5) facilitating the settlement of the case.

A. Authority to Order Attendance

First, we must address Oat Corporation's contention that a federal district court lacks the authority to order litigants who are represented by counsel to appear at a pretrial conference. Our analysis requires us to review the Federal Rules of Civil Procedure and district courts' inherent authority to manage the progress of litigation. Rule 16 addresses the use of pretrial conferences to formulate and narrow issues for trial as well as to discuss means for dispensing with the need for costly and unnecessary litigation. As we stated in *Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir.1961), *aff'd*, 370 U.S. 626 (1962):

Pre-trial procedure has become an integrated part of the judicial process on the trial level. Courts must be free to use it and to control and enforce its operation. Otherwise, the orderly administration of justice will be removed from control of the trial court and placed in the hands of counsel. We do not believe such a course is within the contemplation of the law.

The pretrial settlement of litigation has been advocated and used as a means to alleviate overcrowded dockets, and courts have practiced numerous and varied types of pretrial settlement techniques for many years. * * * Since 1983, Rule 16 has expressly provided that settlement of a case is one of several subjects which should be pursued and discussed vigorously during pretrial conferences.

The language of Rule 16 does not give any direction to the district court upon the issue of a court's authority to order litigants who are represented by counsel to appear for pretrial proceedings. Instead, Rule 16 merely refers to the participation of trial advocates—attorneys of record and *pro se* litigants. However, the Federal Rules of Civil Procedure do not completely describe and limit the power of the federal courts. * * *

The concept that district courts exercise procedural authority outside the explicit language of the rules of civil procedure is not frequently documented, but valid nevertheless. * * * The Supreme Court has acknowledged that the provisions of the Federal Rules of Civil Procedure are not intended to be the exclusive authority for actions to be taken by district courts. *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

In *Link*, the Supreme Court noted that a district court's ability to take action in a procedural context may be grounded in " 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." * * * This authority likewise forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets.⁴ * * * [T]he mere absence of language in the federal rules specifically authorizing or describing a particular judicial procedure should not, and does not, give rise to a negative implication of prohibition. *See Link*, 370 U.S. at 629-30; *see also* Fed.R.Civ.P. 83 ("In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of

⁴ * * * The practice of some district judges requiring represented parties to appear in person (or by corporate representative) has been part and parcel of such settlement conferences for many years. * * *

the district in which they act.”).

* * * Obviously, the district court, in devising means to control cases before it, may not exercise its inherent authority in a manner inconsistent with rule or statute. * * * This means that “where the rules directly mandate a specific procedure *to the exclusion of others*, inherent authority is proscribed.” * * *

In this case, we are required to determine whether a court’s power to order the pretrial appearance of litigants who are represented by counsel is inconsistent with, or in derogation of, Rule 16. We must remember that Rule 1 states, with unmistakable clarity, that the Federal Rules of Civil Procedure “shall be construed to secure the just, speedy, and inexpensive determination of every action.” This language explicitly indicates that the federal rules are to be liberally construed. *Cf. Hickman v. Taylor*, 329 U.S. 495, 507 (1947). * * *

“[The] spirit, intent, and purpose [of Rule 16] is ... broadly remedial, allowing courts to actively manage the preparation of cases for trial.” *In re Baker*, 744 F.2d 1438, 1440 (10th Cir.1984) (en banc), *cert. denied*, 471 U.S. 1014 (1985). Rule 16 is not designed as a device to restrict or limit the authority of the district judge in the conduct of pretrial conferences. As the Tenth Circuit Court of Appeals sitting *en banc* stated in *Baker*, “the spirit and purpose of the amendments to Rule 16 always have been within the inherent power of the courts to manage their affairs as an independent constitutional branch of government.” *Id.* at 1441 (citations omitted).

We agree with this interpretation of Rule 16. The wording of the rule and the accompanying commentary make plain that the entire thrust of the amendment to Rule 16 was to urge judges to make wider use of their powers and to manage actively their dockets from an early stage. We therefore conclude that our interpretation of Rule 16 to allow district courts to order represented parties to appear at pretrial settlement conferences merely represents another application of a district judge’s inherent authority to preserve the efficiency, and more importantly the integrity, of the judicial process. * * *

B. Exercise of Authority to Order Attendance

Having determined that the district court possessed the power and authority to order the represented litigants to appear at the pretrial settlement conference, we now must examine whether the court abused its discretion to issue such an order.

At the outset, it is important to note that a district court cannot coerce settlement. *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir.1985). In this case, considerable concern has been generated because the court ordered “corporate representatives with authority to settle” to attend the conference. In our view, “authority to settle,” when used in the context of this case, means that the “corporate representative” attending the pretrial conference was required to hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation. We do not view “authority to settle” as a requirement that corporate representatives must come to court willing to settle on someone else’s terms, but only that they come to court in order to consider the possibility of settlement.

* * * If this case represented a situation where Oat Corporation had sent a corporate representative and was sanctioned because that person refused to make an offer to pay money—that is, refused to submit to settlement coercion—we would be faced with a decidedly different issue—a situation we would not countenance.

* * * As an alternative position, Oat Corporation argues that the court abused its discretion to order corporate representatives of the litigants to attend the pretrial settlement conference. Oat Corporation determined that because its business was a “going concern”:

It would be unreasonable for the magistrate to require the president of that corporation to leave his business [in Camden, New Jersey] to travel to Madison, Wisconsin, to participate in a settlement conference. The expense and burden on the part of Joseph Oat to comply with this order was clearly unreasonable.

* * * We recognize, as did the district court, that circumstances could arise in which requiring a corporate representative (or any litigant) to appear at a pretrial settlement conference would be so onerous, so clearly unproductive, or so expensive in relation to the size, value, and complexity of the case that it might be an abuse of discretion. Moreover, “[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citation omitted). However, the facts and circumstances of this case clearly support the court’s actions to require the corporate representatives of the litigants to attend the pretrial conference personally.

This litigation involved a claim for \$4 million—a claim which turned upon the resolution of complex factual and legal issues. The litigants expected the trial to last from one to three months and all parties stood to incur substantial legal fees and trial expenses. This trial also would have preempted a large segment of judicial time—not an insignificant factor. Thus, because the stakes were high, we do not believe that the burden of requiring a corporate representative to attend a pretrial settlement conference was out of proportion to the benefits to be gained, not only by the litigants but also by the court.

* * * We thus conclude that the court did not abuse its authority and discretion to order a representative of the Oat Corporation to appear for the pretrial settlement conference. * * *

III. CONCLUSION

* * * The judgment of the district court is hereby AFFIRMED.

POSNER, Circuit Judge, dissenting.

* * * The question of the district court’s power to summon a represented party to a settlement conference is a difficult one. On the one hand, nothing in Rule 16 or in any other rule or statute confers such a power, and there are obvious dangers in too broad an interpretation of the federal courts’ inherent power to regulate their procedure. One danger is that it encourages judicial high-handedness (“power corrupts”); several years ago one of the district judges in this circuit ordered Acting Secretary of Labor Brock to appear before him for settlement discussions on the very day Brock was scheduled to appear before the Senate for his confirmation hearing. The broader concern illustrated by the Brock episode is that in their zeal to settle cases judges may ignore the value of other people’s time. One reason people hire lawyers is to economize on their own investment of time in resolving disputes. It is pertinent to note in this connection that Oat is a defendant in this case; it didn’t *want* its executives’ time occupied with this litigation.

On the other hand, *die Not bricht Eisen* [“necessity breaks iron”]. Attorneys often are

imperfect agents of their clients, and the workload of our district courts is so heavy that we should hesitate to deprive them of a potentially useful tool for effecting settlement, even if there is some difficulty in finding a legal basis for the tool. * * *

* * * [F]ortunately we need not answer the question in *this* case—so clear is it that the magistrate abused his discretion, which is to say, acted unreasonably, in demanding that Oat Corporation send an executive having “full settlement authority” to the pretrial conference. This demand, which is different from a demand that a party who has not closed the door to settlement send an executive to discuss possible terms, would be defensible only if litigants had a duty to bargain in good faith over settlement before resorting to trial, and neither Rule 16 nor any other rule, statute, or doctrine imposes such a duty on federal litigants. * * * There is no federal judicial power to coerce settlement. Oat had made clear that it was not prepared to settle the case on any terms that required it to pay money. That was its prerogative, which once exercised made the magistrate’s continued insistence on Oat’s sending an executive to Madison arbitrary, unreasonable, willful, and indeed petulant. This is apart from the fact that since no one officer of Oat may have had authority to settle the case, compliance with the demand might have required Oat to ship its entire board of directors to Madison. * * *

Sufficient unto the day is the evil thereof: We should reverse the district court without reaching the question whether there are any circumstances in which a district court may compel a party represented by counsel to attend a pretrial conference.

COFFEY, Circuit Judge, with whom EASTERBROOK, RIPPLE and MANION, Circuit Judges, join, dissenting.

* * * Creation of an “inherent authority” to require the presence of a party litigant at a pretrial conference presents a host of problems. Certainly, the court has the power to command the attendance of attorneys at the conference under the provisions of Rule 16 and as “officers of the court.” However, I am convinced that if the attorney does not wish to have the litigant personally appear before the court at the pretrial conference, he is not bound to do so, lest, among other problems, the litigant make an admission of some type which would be damaging to the case and which had not previously been elicited in discovery proceedings. I believe we are all aware of the fact that the appearance of fairness, impartiality and justice is all imperative, and based upon logic I fail to understand how a litigant sitting at a *command appearance before a judge* who injects himself into an adversarial role for either of the parties’ positions during settlement negotiations can feel that he or she (the litigant) will have a fair trial before the judge if he or she fails to agree with the judge’s reasoning or direction regarding a recommended settlement. * * * The appearance of partiality and impropriety must be avoided at all lengths if our nation is to continue to show respect for its judicial judgments. * * *

EASTERBROOK, Circuit Judge, with whom POSNER, COFFEY and MANION, Circuit Judges, join, dissenting.

Our case has three logically separate issues. First, whether a district court may demand the attendance of someone other than the party’s counsel of record. Second, whether the court may insist that this additional person be an employee rather than an agent selected for the occasion. Third, whether the court may insist that the representative have “full settlement authority”—meaning the

authority to agree to pay cash in settlement (maybe authority without cap, although that was not clear). Even if one resolves the first issue as the majority does, it does not follow that district courts have the second or third powers, or that their exercise here was prudent. The proposition that a magistrate may require a firm to send an employee rather than a representative is puzzling. Corporate “employees” are simply agents of the firm. Corporations choose their agents and decide what powers to give them. Which agents have which powers is a matter of internal corporate affairs. Joseph Oat Corp. sent to the conference not only its counsel of record but also John Fitzpatrick, who had authority to speak for Oat. Now Mr. Fitzpatrick is an attorney, which raised the magistrate’s hackles, but why should this count against him? Because Fitzpatrick is a part-time rather than a full-time agent of the corporation? Why can’t the corporation make its own decision about how much of the agent’s time to hire? Is Oat being held in contempt because it is too small to have a cadre of legal employees—because its general counsel practices with a law firm rather than being “in house”? * * *

At all events, the use of outside attorneys as negotiators is common. * * * Firms prefer to send skilled negotiators to negotiating sessions (lawyers are especially useful when the value of a claim depends on the resolution of legal questions) while reserving the time of executives for business. Oat understandably wanted its management team to conduct its construction business.

As for the third subject, whether the representative must have “settlement authority”: the magistrate’s only reason for ordering a corporate representative to come was to facilitate settlement then and there. As I understand Magistrate Groh’s opinion, and Judge Crabb’s, the directive was to send a person with “full settlement authority”. Fitzpatrick was deemed inadequate only because he was under instructions not to pay money. * * *

Both magistrate and judge demanded the presence not of a “corporate representative” in the sense of a full-time employee but of a representative with “full authority to settle”. Most corporations reserve power to *agree* (as opposed to power to discuss) to senior managers or to their boards of directors—the difference depending on the amounts involved. Heileman wanted \$4 million, a sum within the province of the board rather than a single executive even for firms much larger than Oat. Fitzpatrick came with power to *discuss* and *recommend*; he could settle the case on terms other than cash; he lacked only power to sign a check. The magistrate’s order therefore must have required either (a) changing the allocation of responsibility within the corporation, or (b) sending a quorum of Oat’s Board.

Magistrate Groh exercised a power unknown even in labor law, where there is a duty to bargain in good faith. 29 U.S.C. § 158(d). Labor and management commonly negotiate through persons with the authority to discuss but not agree. The negotiators report back to management and the union, each of which reserves power to reject or approve the position of its agent. We know from Fed.R.Civ.P. 16—and especially from the Advisory Committee’s comment to Rule 16(c) that the Rule’s “reference to ‘authority’ is not intended to insist upon the ability to settle the litigation”—that the parties cannot be compelled to negotiate “in good faith”. A defendant convinced it did no wrong may insist on total vindication. See * * * *Kothe v. Smith*, 771 F.2d 667 (2d Cir.1985), holding that a judge may not compel a party to make a settlement offer, let alone to accept one. * * * Yet if parties are not obliged to negotiate in good faith, on what ground can they be obliged to come with authority to settle on the spot—an authority agents need not carry even when the law requires negotiation? The order we affirm today compels persons who have committed no wrong, * * * who

want only the opportunity to receive a decision on the merits, to come to court with open checkbooks on pain of being held in contempt.

Settling litigation is valuable, and courts should promote it. Is settlement of litigation more valuable than settlement of labor disputes, so that courts may do what the NLRB may not? The statutory framework—bona fide negotiations required in labor law but not in litigation—suggests the opposite. * * *

The majority does not discuss these problems. Its approach implies, however, that trial courts may insist that representatives have greater authority than labor negotiators bring to the table. And to create this greater authority, Oat Corp. might have to rearrange its internal structure—perhaps delegating to an agent a power state law reserves to the board of directors. Problems concerning the reallocation of authority are ubiquitous. For example, only the Assistant Attorney General for the Civil Division has authority to approve settlements of civil cases, and his authority reaches only to \$750,000; above that the Deputy Attorney General must approve. 28 C.F.R. §§ 0.160(a)(2), 0.161. An attorney for the government, like Fitzpatrick, lacks the authority to commit his client but may negotiate and recommend. Does it follow that, in every federal civil case, a magistrate may require the presence of the Assistant or Deputy Attorney General or insist that they redelegate their authority? If such a demand would be improper for the Department of Justice, is it more proper when made of Joseph Oat Corporation?

These issues will not go away. The magistrate's order was to send a representative *with the authority to bind Oat to pay money*. What is the point of insisting on such authority if not to require the making of offers and the acceptance of "reasonable" counteroffers—that is, to require good faith negotiations and agreements on the spot? Fitzpatrick had the authority to report back to Oat on any suggestions; he had the authority to participate in negotiations. The only thing he lacked—the *only* reason Oat was held in contempt of court—was the ability to sign Oat Corp.'s check in the magistrate's presence. What the magistrate found unacceptable was that Fitzpatrick might say something like "I'll relay that suggestion to the Board of Directors", which might say no. Oat's CEO could have done no more. We close our eyes to reality in pretending that Oat was required only to be present while others "voluntarily" discussed settlement.

MANION, Circuit Judge, joined by COFFEY, EASTERBROOK and RIPPLE, Circuit Judges, dissenting.

* * * Inherent power is not a license for federal courts to do whatever seems necessary to move a case along. Inherent power is simply "another name for the power of courts to make common law when statutes and rules do not address a particular area." *Soo Line R. Co. v. Escanaba & Lake Superior R. Co.*, 840 F.2d 546, 551 (7th Cir.1988). Since inherent power's purpose is to fill gaps left by statute or rule, it necessarily follows that where a statute or rule specifically addresses a particular area, it is inappropriate to invoke inherent power to exceed the bounds the statute or rule sets. * * *

[The dissenting opinion of Judge Ripple is omitted.]

Notes and Questions

1. In 1993 (i.e., after this case was decided), Rule 16 was amended to provide expressly that a court “may require that a party or its representative be present or reasonably available by other means to consider possible settlement.” Fed. R. Civ. P. 16(c)(1).

2. Was the 1993 rules change wise? Does requiring parties to attend settlement discussions personally amount to coercing the parties to settle? On the other hand, what would happen to settlement negotiations if parties had an absolute right not to attend and not to send a representative with full settlement authority?