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LABOR ARBITRATION AND THE LAW IN UTAH

By SANFORD H. KADISH *

A. THE PROBLEM.

Eight years ago the Supreme Court of Utah rendered an opinion¹ which attracted wide attention, even finding its way into a popular casebook in labor law.² This occurred not because the decision was particularly good, poor, novel or trail blazing but rather because it epitomized a failure of the law — failure not in the sense of inconsistency with prior judicial formulations or departure from obvious statutory commands, but rather in the larger sense of enunciating a rationale and rendering a holding at cross purposes with contemporary notions of morality and social desirability. The Holsum Bread Company and the Teamsters Union had entered into an agreement designed to govern the terms of their future relationships. Anticipating future differences as to the meaning of their agreement they incorporated a provision requiring that any question as to the interpretation of any provision of the contract would be submitted to a mutually satisfactory arbitrator for binding determination. Notwithstanding this agreement, however, when the company declined to make certain payments which the employees believed the terms of the contract required, the employees, through an assignee (president of the union) ignored their commitment to arbitrate and commenced suit in the district court for breach of contract. A judgment for the plaintiffs was appealed by the company on the ground, among others, that the agreement to arbitrate barred a suit at law. The Supreme Court disagreed. At common law an agreement to arbitrate had no such effect; and the Utah arbitration statute required such a consequence only if the agreement was to arbitrate a dispute existing at the time the agreement was made. In 1609, Sir Edward Coke had said offhand that agreements to arbitrate were by their nature and inherently revocable and unenforceable;³ and courts somewhat later reached the same conclusion, observing that agreements to arbitrate sought to deny to the parties the beneficent dispensation of a judicial remedy and therefore were contrary to public policy.⁴ Hence it must be so with public policy in

¹Member New York and Federal Bars; Associate Professor, University of Utah, College of Law; Public Member, Wage Stabilization Board, Region XI, 1951-1953.


³HANDLER AND HAYES, CASES ON LABOR LAW 347 (2d ed. 1953).

⁴"The doctrine had its origin in the interests of the judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely upon fees, and as they had no fixed salaries, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil. ... And they had a great jealousy of arbitrations whereby Westminster Hall was robbed of those cases which came not into Kings Bench, nor the Common Pleas, nor the Exchequer. Therefore they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law to do so. That really grew up only subsequently to the time of Lord Coke, and a saying of his was the foundation of the doctrine." Lord Campbell in Scott v. Avery, 25 L.J. (N.S. Exch.) 308, 313 (1853).
1945. In Utah therefore a commitment by labor and management to resolve their future differences by the peaceful mechanism of voluntary arbitration rather than through court litigation or the strike and lockout is outside the law. The agreement will not be enforced by the court. It will not bar a legal action. To all intents and purposes it is as if it were never written.

The point of *Latter v. Holsum Bread Co.* is not that the Utah judges nodded. Of the numerous cases involving the same issue a mere handful of courts have had the temerity to reverse the uni-directional flow of common law doctrine without benefit of statute. And indeed Justice Wolfe in an opinion with which Justice McDonough concurred, expressed profound regret at feeling constrained to agree to a holding without color of social or moral justification. The lesson is rather that the burden of years is carried heavily on the shoulders of the common law and in the dynamic times in which we live, when centuries of change are compressed within a decade, human government requires a corresponding dynamism which it is the peculiar province of legislation to furnish.

B. KINDS OF ARBITRATION — SOME DEFINITIONS.

Arbitration as used in labor and commercial relations involves basically the same elements. Disputing parties submit their dispute voluntarily to a mutually satisfactory third party for final and binding determination in accordance with mutually satisfactory procedure and substantive standards for decision. And basically also the salutary uses of labor and commercial arbitration are similar. However, the nature of labor-management relations as they have developed in the United States has made of arbitration in that area a more uniquely appropriate tool, serving perhaps a less replaceable function and having more direct consequences for the public weal. Our prime focus here will be the uses of arbitration in labor relations.

Any discussion of arbitration requires at the outset that distinction be made between true arbitration and what has come to be known as compulsory arbitration. The latter is arbitration in name only. In effect, compulsory arbitration involves the application of the power of the state to enforce conformance to legislatively determined standards of conduct. Generally the enforced standards are formulated by an agency designated by the legislature rather than directly by statute. Its use raises the question whether in certain kinds of disputes, like disputes in certain industries (e.g. public utilities), the public good requires the curtailment of free collective bargaining, with its con-

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*See note 1 supra.*

*See, e.g., Park Construction Co. v. Independent School District, 209 Minn. 182, 296 N.W. 475 (1914) (“For this departure from a doctrine of long standing, we make no apology. To us, the reasons assigned are so compelling as to allow no other course. . . . No rights of property involved, nor rule of practice, the American doctrine of stare decisis is guiding policy, not inflexible rule. . . . It is no shield for plain error.”). cf Ezell v. Rocky Mountain Bean and Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925).

108 Utah 364, 370, 375, 160 P.2d 421, 423, 426 (1945). Justice Wolfe reasoned that since the statute modified the common law only as respects existing agreements, the legislature must be taken as having indicated a policy that agreements as to future disputes should retain their common law status. But compare Park Construction Co. v. Independent School District, *supra* note 6, where the court interprets a similar statute as supporting its conclusion that future disputes clauses are enforceable on the ground that it expressed a legislative policy which favors arbitration. Justice Wolfe would appear to have the better of the legal argument.
comitant of freedom to apply economic pressures, and the substitution there-
for of state imposed standards upon labor and management, vel non.8 Used
as a stopgap it is an application of government control when the failure of
free collective bargaining forebodes overarching dangers for the public wel-
fare. Used altogether it is an aspect of state socialism. Our present concern
with this problem is only to distinguish it. For the singular characteristic
of the kind of arbitration under consideration is its wholly voluntary character
as an integral part of the process of free collective bargaining. Whether to
agree to arbitrate at all; precisely what issues to subject to arbitration; what
standards are to guide the arbitrator in rendering a decision; what remedy the
arbitrator may direct; who the arbitrator shall be; what procedure shall be
followed — all are within the power of the parties freely to determine. The
parties constitute in effect a legislature creating a private judicial system for
their own purposes. Any obligation to comply with the agreement to arbitrate
imposed by law scarcely renders the process involuntary any more than the
legal requirement to pay an agreed price for a commodity renders involuntary
the process of negotiating a contract of sale.

The uses to which this privately controlled, voluntary mechanism of
dispute resolution has been put in the area of labor-management relations
have been chiefly (1) to settle disputes over interpretation and application
of the collective bargaining agreement voluntarily executed by the parties
to govern their relationships during the term of the contract, and (2) to
determine the substantive terms of such a contract where the parties have
been unable to do so through negotiation. In the sense that the former
involves the rendering of decisions as to rights and duties arising from a
voluntarily executed agreement between the parties, it may be termed
adjudicatory arbitration; and in the sense that the latter involves the creation
of standards to govern the terms of the future relationship of the parties
where agreement has failed, it may be termed legislative arbitration.

While the distinction between voluntary and compulsory arbitration, and
between adjudicatory and legislative arbitration flow from the significantly
different considerations raised by these kinds of arbitration, a further distinc-
tion in terms of the time the arbitration agreement is made is one compelled
only by the idiosyncracies of the common (and much statutory) law. On
the one hand the parties, whether in contractual relation or not, may execute
an agreement to arbitrate a dispute after the dispute has arisen. Thus the
union and the company in Latter v. Holsum Bread Co. after the controversy
over wage payments had arisen might have executed an agreement submitting
that dispute to arbitration. This is generally referred to as ad hoc arbitration.
On the other hand the parties to a contract, in anticipation of possible dis-
agreements over its meaning and application, or as a means of assuring con-
tinuity of the contractual relationship after the term of the contract expires,
may, as in Latter v. Holsum Bread Co., provide that any future disputes
of a described nature should be submitted to arbitration. This so-called
future disputes arbitration is by far the most commonly used kind in labor-
management relations.

8 See Williams, The Compulsory Settlement of Contract Negotiation Labor Disputes,
27 Tex L. Rev. 587 (1949) passim.
C. Labor Arbitration Evaluated.

Definitions and vocabulary out of the way it is now possible to come to grips with central issues. If, as we believe, the proper function of law in democratic society is to give expression and encouragement to pervasively accepted values and institutions, the critical questions at this point become those directed toward ascertaining the extent to which the use of arbitration in resolving industrial disputes tends to lead to a *modus vivendi* between labor and management conducive to the public good. Has it received the approval of those who have tried it? Has it proved itself by general acceptance? What advantages has its use demonstrated that it possesses as compared with traditional mechanisms of dispute resolution?

1. Extent of Its Use.

Perhaps the most noteworthy aspect of labor arbitration has been its increasingly widespread acceptance in the face of a generally hostile attitude on the part of the law. Before organized labor in the United States reached the stage of maturity as a more or less coequal partner in the determination of conditions of employment, there was little need for arbitration. But with the impetus given collective bargaining by the Wagner Act of 1935 and the stimulus toward peaceful resolution of industrial controversies during the days of the World War II War Labor Board, labor arbitration gained rapid acceptance. In 1944 a Bureau of Labor Statistics study showed that 73 per cent of the collective bargaining agreements in fourteen selected manufacturing industries contained provisions for arbitration. In 1945 a National Industrial Conference Board study reported that out of 291 representative companies sampled 74 per cent had collective bargaining agreements which contained arbitration clauses. And in the latest statistical survey conducted by the B.L.S. in 1949, 1237 out of 1482 current collective bargaining agreements sampled (83 per cent) contained provisions for some type of arbitration. Apparently in the United States today where relations between any company and a union have matured to the point that some kind of joint determination of working conditions through the negotiation of a collective bargaining agreement has evolved, the use of adjudicatory arbitration as a means of administering the contract has become virtually standard practice.

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9 The first record of an industrial arbitration was in 1865. From then until 1914 available data indicate only 54 industrial disputes settled by arbitration. 29 MONTHLY LABOR REV. 16 (1929).


12 NEW YORK MANAGEMENT RECORD, April 1945.


2. **Attitude of Labor and Management.**

The widespread acceptance of labor arbitration clauses through the free processes of collective bargaining would clearly suggest that by and large both labor and management have come to recognize the salutary uses of the arbitration process. This conclusion is supported by other evidence. In 1950 a study was made of the opinions and attitudes of selected representatives of unions and management, as well as arbitrators, through the medium of a questionnaire. Replies received covered a cross section of American management and labor. The management group covered 133 employers and 42 employer counsels, consultants and bargaining associations, located in 29 states including most industrial areas and representing 22 of the 27 major industry classifications used in the 1940 Census. The union group covered 20 AFL, 25 CIO and 8 independent unions distributed over 24 states. The results are striking. While there was a divided opinion within each group as to the desirability of voluntary arbitration of contract terms (legislative arbitration) there was substantial unanimity, not only within each group, but among all the groups, on the desirability of voluntary grievance arbitration (adjudicatory arbitration): 91 per cent of management, 93 per cent of labor and (not surprisingly) 97 per cent of the arbitrators approved. It is significant that these groups were selected on the basis of their experience with arbitration; these are the people who have given it a try and who, presumably, are in the best position to render a judgment.

In 1945 the President of the United States convened a National Labor-Management Conference of leading representatives of labor and management to study the problem of labor disputes. On the desirability of arbitration there was ready agreement. They reported:

"The parties should provide by mutual agreement for the final determination of any unsettled grievance or dispute involving the interpretation or application of the agreement by an impartial chairman, umpire, arbitrator, or board." 17

3. **Attitude of the Public.**

So much for the attitudes of the parties themselves. What now of that elusive notion lawyers refer to as public policy? What has been the judgment of our representative organs of government which have faced the problems of industrial unrest from the public standpoint? Again the evidence indicates a substantially unanimous endorsement. In so far as the voluntary arbitration of grievances represents merely an extension of the process of collective bargaining (a proposition we will want to treat more fully later) the basic philosophy behind virtually all state and federal labor legislation of furthering the process of free collective bargaining can be taken as inevitably endorsing

16 Id. at 202.
the use of arbitration. But there is more particular evidence. A document no less fundamental than the Constitution of the State of Utah provides:

"The Legislature shall provide by law, for a Board of Labor, Conciliation and Arbitration, which shall fairly represent the interests of both capital and labor." 18

The Legislature, pursuant to that mandate has provided:

"It shall be the duty of the [Industrial Commission of Utah], and it shall have full power, jurisdiction and authority: . . . (5) to promote the voluntary arbitration, mediation and conciliation of disputes between employers and employees." 19

The federal recognition of the arbitration process in labor relations is equally clear. Section 201 of the Labor Management Relations Act of 194720 provides:

"That it is the policy of the United States that . . . the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions and to make all reasonable efforts to settle their differences by mutual agreement. . . ."

Subsequent sections of the Act establish the Federal Mediation and Conciliation Service to serve as the instrumentality through which this policy should be implemented21 and pursuant to the Act the Service maintains a National Panel of Arbitrators throughout the country which it puts at the disposal of parties desirous of arbitrating their existing or future disputes.22

The courts have passed similar judgment on the utility of arbitration in labor disputes, even in cases in which they felt constrained to withdraw legal sanction by force of stare decisis. Judge Wolfe, for example, concurring in Latter v. Holsum Bread Co. stated:

"In the field of industrial disputes between labor and management the uniform trend in legislation has been toward the encouragement of collective bargaining. A labor-management agreement encourages labor and management to settle disputes without resort to force. The grievance machinery in these contracts provides for a peaceful means of disposing of future controversies arising under the agreement by arbitration. There is no good reason why such machinery should not be set up in the agreement and used by the parties." 23

4. The Role of Labor Arbitration.

The conclusion is irresistible: arbitration in labor disputes has proved itself, both to labor and management and to the organs of the government.

18 Utah Const. Art. XVI, §2.
22 See Warren and Bernstein, supra note 15, at 205 for data on the use of this service.
The reasons are not hard to find. They lie in vital characteristics of the American labor movement and of labor-management relationships in general. Free and self-determination has characterized the course of labor management relations in the United States, perhaps to a far greater extent than in other democratic countries. While exceptions exist, presently and historically, the setting of the terms and conditions of employment have been typically a private affair characterized by free and voluntary choice of the parties. Unlike other countries, labor in the United States has joined with management in embracing the tenets of a free enterprise system, expressed in labor's terms as the principle of free collective bargaining. While the price paid in costly strikes and lockouts has not been inconsequential, it has proved far less than some would have us believe.

But the facts of industrial life impose themselves. The parties cannot perpetually remain in collective bargaining session to cope with each new issue that arises. Stable relationships are imperative. Neither labor nor management could long survive a situation where a strike or lockout lurked as a potentiality in each of the multifarious issues which might arise. It has become customary in this country, therefore, for the parties to negotiate periodically a collective bargaining agreement—a set of mutually acceptable standards to govern the flux and pace of the future relationships. But contractual terms cannot determine with precision the resolution of the variegated and numerous disputes which generally arise during the term of the contract. What is required is a mechanism, an agency, through the workings of which such disputes may be satisfactorily resolved within the framework of the standards embodied in the agreement. It is at this point that the process of adjudicatory arbitration under a future disputes clause as a regular, institutionalized means of making these adjustments makes its greatest contribution.

The law suit could not begin to do the job. The dynamics of industrial relationships could not long tolerate the leisurely pace of a typical law suit. Grievances have to be disposed of quickly before their backlog accumulation festers into dangerous dissatisfaction. The delays of pleadings, motions, jury trials, retrials, appeals, rehearings are unsuited to the rapid fire development of new issues of relatively minor importance typical of industrial relationships. The informality of the arbitration procedure permits a far more rapid disposition; and the parties may, and often do, require that the award be rendered within a designated time limit. Neither are the costs of law suits appropriate to the number and kind of issues which normally arise. Considering court costs, service of process costs, filing fees and the greater time of a law suit and appeals, the cost of arbitration, including hardly much more than the fee of the arbitrator and possibly attorney's fees, are normally only a fraction of the cost of litigation. And since arbitration is voluntary, ultimate resort to the law is the exception rather than the rule. Further, arbitration permits the parties the choice of the person or persons who will decide their griev-

\[It\] may be recalled, for example, that the prophecies of national disaster freely made in reference to the threatened steel strike two years ago were proven wholly unfounded when the strike finally occurred. Mr. David L. Cole, former Director of the Federal Mediation and Conciliation Service, has stated that, "No strike in the last dozen years truly threatened the national welfare." See 4 LABOR LAW J. at 317 (May 1953).
ances; persons whose special competence in labor relations problems and whose objectivity and fairness both sides pass upon before the matter is heard. The consequence of this factor for sounder and more acceptable awards is obvious.

A more general, but no less valid, consideration which reduces the utility of the contract suit as compared with arbitration as a mechanism for administering the contract, lies in the nature of the relationships involved. Law suits are typically hostile, bitterly adversary and hard fought. This serves well enough in some (though assuredly not all) business contexts where the parties are seeking monetary vindication before finally parting to go their separate ways. The crystallization of antagonisms, which is the almost inevitable concomitant of the termination of a law suit, therefore does not matter a great deal. But what distinguishes the labor-management relationship is that it is necessarily continuing. The parties must continue to operate under the unexpired contract, whose provisions are in dispute, and after the expiration of the contract, a new set of terms must be negotiated to govern future relationships. It becomes imperative, therefore, that the dimensions of a dispute be circumscribed rather than enlarged and reinforced in order to preserve the conditions for successful bargaining. The informal, flexible and voluntary nature of the arbitral process combined with the expertise of the arbitrator, with wisdom and authority to keep his eye on the larger issues in rendering his award, make this possible.

The picture becomes distorted, however, if the issues are simply put in terms of the advantages of arbitration over law suits. More realistically the alternative to a mature arbitration process is the use of economic force. Law suits have never gained acceptance by either labor or management as a satisfactory means of adjusting industrial relationships. The relative rarity of such suits in the digests, even with the liberalized breach of contract action provisions of the Taft-Hartley Act, is the clearest evidence. The absence of a satisfactory means of adjusting labor disputes voluntarily through the peaceful and wholesome mechanism of arbitration offers the parties to industrial controversies little alternative but to resort to the use of the strike and the lockout, which, if carried far enough, necessitates the disturbance of the free character of labor-management relationships by governmental interference.

Moreover, viewed from a somewhat different perspective the use of a standing agreement to arbitrate differences arising out of an agreement is not simply a means of resolving disputes; it represents an extension of the process of private and voluntary determination of industrial relationships. Self regulation is insured, even where agreement on a particular issue is impossible, where the parties can at least agree upon the means whereby such disputes will be determined. And the arbitration process set up in a collective bargaining agreement represents a private judicial machinery shaped

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entirely by the parties themselves to meet their own needs as determined by themselves. The parties act as their own legislature to make arbitration invocable in precisely the areas they agree upon; in determining the kind and scope of arbitration; in defining the powers and limitations of the arbitrator; and in determining who shall hear their dispute.

D. The Law and Arbitration.

1. The Common Law.

Unhappily, however, the law has lagged lamentably and the common law still rules supreme from a mouldy grave only lightly disturbed by the intrusions of statutory change. The common law manifested bristling hostility to arbitration, viewing it as an interloper trespassing upon sanctified judicial ground and operating to oust the courts of jurisdiction. An agreement to arbitrate an existing dispute or a future dispute could not be specifically enforced and would not serve to bar a suit at law. There was no way to compel the recalcitrant party to arbitrate as he agreed unless, in some instances, the agreement to arbitrate had been made a rule of court. Such an agreement was therefore said to be revocable unilaterally, although an action for breach would be allowed to the extent of creating a liability to pay purely nominal damages. Once the award was rendered, it could be sued upon; not, however, as a judgment, but as any other contract. The arbitrators had no power to subpoena witnesses or records and the award had to be unanimous.

The inadequacy of these rules for the contemporary commercial world as well as the area of industrial relations has been widely recognized and forcibly argued. Reliance can not be put upon an agreement which is revocable unilaterally. Arbitration as a mechanism for administering disputes under the contract has no sanction, since future disputes clauses are not enforceable. And much of the workability of arbitration is lost where to secure judicial enforcement the merits of the issues must each time be litigated before a court of law.

2. Statutory Changes.

Statutory changes have gone only a small part of the way in establishing a modern and rational arbitration law. In nine states the common law doctrines still prevail either by virtue of lack of statutory change or statutes which incorporate the common law doctrines. The remaining states and the federal government have all statutorily altered the common law to make agreements to arbitrate existing disputes enforceable and irrevocable.

Discussions of the nature and history of common law rules concerning arbitration may be found in Sturges, Commercial Arbitrations and Awards (1930); 6 Williston, Contracts §1918 et seq. (Rev. ed. 1938); Wolaver, The Historical Background of Commercial Arbitration, 83 U. of Pa. L. Rev. 132 (1934); Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595 (1928). See Restatement, Contracts §550 (1933).

Alabama, South Dakota, Missouri, Nebraska, Mississippi, North Dakota, Oklahoma, Vermont and South Carolina. Compilations of the statutes of the various states may be found in 4 CCH Labor Law Rep. 43,510 (4th ed. 1946); Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. of Chi. L. Rev. 233 (1950). Citation will be given here only to statutes of direct interest.

although nine of these require that the submission agreement be first made a rule of court. However, many of these states have created a new requirement unknown to the common law—namely, that the dispute be such as might be the subject of a legal or equitable action. Thus, agreements to arbitrate the terms of a new contract or to resolve a dispute apart from a contract are in these states rendered no more enforceable than they were at common law. Furthermore, of this group only 18 states and the federal government make future disputes clauses enforceable, and seven of these states plus the federal government exclude future disputes clauses in collective bargaining agreements from the operation of their statutes. In only eleven states, therefore—California, Colorado, Connecticut, Delaware, Louisiana, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, and Washington—do the minimum requirements of a workable labor arbitration law prevail—enforceability of future disputes clauses and submission agreements without regard to the justiciability of the dispute.

3. Development of the Utah Law.

Utah’s recognition of the need for a statutory approach to the problem of arbitration came as early as 1876 but unfortunately the statute enacted amounted to little more than a rephrasing of a 1698 English act. Under this Utah statute, substantially copied from California, the written sub-

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31 Arkansas, Idaho, Indiana, Kansas, Maine, Montana, Tennessee, Virginia, and West Virginia.
35 Colo. Stat. Ann. (1935), Rules of Civ. Pro., Rule 109 (a). Since Ezell v. Rocky Mtn. Bean Co., 76 Colo. 409, 232 Pac. 680 (1925) agreements to arbitrate future disputes are enforceable. Whether a dispute must be justiciable is not clear. The statute so provides, but courts have held the common law (which did not so require) not superseded by the statute. McClelland v. Hammond, 12 Colo. App. 82, 54 Pac. 538 (1898); Lilley v. Tuttle, 52 Colo. 121, 117 Pac. 896 (1911).
45 An Act for Determining Differences by Arbitration, 9 William III, c. 15 (1698), 10 Statutes at Large 139.
46 Compiled Laws of the Territory of Utah, 1876, tit. X, c. IV, §§1588-1597.
mission of an existing dispute which might be the subject of an action (except for certain real property disputes) could be made irrevocable if first entered as an order of the court by stipulation of both parties. An award rendered upon such a submission attained the effect of a judgment upon filing with the court and could not be vacated except for fraud, misconduct, or action in excess of the authority of the arbitrator. This statute remained in effect, with minor amendments, until 1927 when it was repealed and superseded by the statute now in effect, which constituted an enactment of the Uniform Arbitration Act as approved by the National Conference of Commissioners on Uniform State Laws in 1925.

Vigorous controversy marked the prenatal history of this uniform act and its subsequent life fulfilled the prophecy of its unhappy birth. The New York and New Jersey representatives supported a type of arbitration statute similar to the Draft Arbitration Statute proposed by the American Arbitration Association and adopted by New York with the support of the Chamber of Commerce in 1920, which made future dispute agreements as well as submission agreements valid and enforceable. The wisdom of their stand was borne out by subsequent history. The Uniform Act as finally approved, leaving future disputes agreements to the common law, succeeded in being adopted by only four states: Nevada in 1925, North Carolina (where it was since abandoned in 1951), Wyoming, and Utah in 1927. And in 1943 the Uniform Commissioners confessed error by removing it from the list of recommended uniform statutes for reconsideration. The Draft Arbitration Statute, on the other hand, succeeded in serving as a pattern for a substantial number of states and Congress.

Under the present Utah arbitration statute a written agreement to submit an existing dispute to arbitration, whether justiciable or not, is enforceable and irrevocable; arbitrators have power to subpoena witnesses and documents; a judgment may be entered upon the award on motion, which a court is obliged to grant except on grounds of corruption or fraud, partiality or corruption, misconduct of the arbitrators or usurpation or improper exercise of the powers of the arbitrator. However, an agreement to arbitrate controversies arising out of an agreement, such as the typical future disputes arbitration clause in a collective bargaining agreement, is left unaffected by the statute.

50 Uniform Laws Ann. 61 (1942); see Handbook, National Conference of Commissioners on Uniform State Laws 50 (1925).
The Supreme Court of Utah has declined to take over where the legislature left off and has reasserted the common law doctrines in cases involving future disputes clauses. Repeating the traditional common law rationale concerning ouster of jurisdiction, the Court has from an early date refused to give effect to agreements to arbitrate future disputes in commercial contracts.\(^5\) And in Latter v. Holsum Bread Co.\(^6\) the same principles were applied to collective bargaining agreements. The Utah law, therefore, offers no legal remedy for the breach of a future disputes arbitration clause in a collective bargaining agreement; an employer or union which refuses to arbitrate cannot be compelled to, is subject to no realistic liability for damages and may proceed with an action at law without restraint.


An inquiry into the legal status of arbitration in Utah would not be complete without an examination of the applicable federal laws. The Federal Arbitration Act,\(^7\) modeled after the American Arbitration Association Draft Arbitration Statute, makes agreements to submit future controversies to arbitration enforceable and irrevocable and provides for a stay of an action at law brought in breach of such an agreement to arbitrate. At one time this statute held out some hope of legal sanction, if only in cases where the contract evidenced “a transaction involving commerce,”\(^8\) since some courts were prepared to hold that certain provisions of this statute applied to collective bargaining agreements.\(^9\) Now, however, virtually all circuit courts which have passed upon the problem agree that collective bargaining agreements are entirely excluded from all sections of the Act.\(^6\) Section 301 of the Labor Management Relations Act of 1947,\(^6\) however, has possibilities as yet only partly explored, at least where the contract involves an employer and employees “in an industry affecting commerce” as defined in the Act.\(^6\) Since the definition of commerce is notoriously broad

\(^5\) Daniher v. A.O.U.W., 10 Utah 110, 37 Pac. 245 (1894); Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132 (1936).

\(^6\) See note 1 supra.


\(^8\) Id. §2.


But the Third Circuit has recently introduced a novel twist, taking the position that while collective bargaining agreements of workers “engaged in foreign or interstate commerce” are excluded from the Act, the stay provisions of §3 of the Act are applicable to all other collective bargaining agreements containing arbitration clauses which may be involved in suits properly brought in the federal courts. Tenney Engineering, Inc. v. U.E., 21 L.A. 260 (3d Cir. Oct. 16, 1953).


\(^5\) §501; 29 U.S.C. 142 (1) (Supp. 1952); “The term 'industry affecting commerce' means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.”
the potentialities of the Act in this regard are not insignificant. Section 301(a) grants jurisdiction to the United States district courts of suits for violation of contracts between unions and employers in an industry affecting commerce without regard to any jurisdictional amount or diversity of citizenship of the parties. May a federal district court under this section enforce an agreement to arbitrate contained in a collective bargaining agreement by granting a mandatory injunction directing the defaulting party to arbitrate? The answer turns on a variety of perplexing legal issues regarding the interpretation of this section, on some of which no court has passed, on others of which various lower courts have passed upon differently and on none of which has the Supreme Court as yet spoken. Essentially the question revolves about what law, federal or state, the federal court is to apply in actions under this section and, if federal law, what is the federal law on this issue of specifically enforcing future disputes arbitration clauses in collective bargaining agreements.

On the one hand, Section 301 may be interpreted as creating no federal substantive right but only serving to avoid the various state procedural rules making difficult suits by or against unincorporated associations (unions) through substitution of the more liberal federal procedural rules. There is considerable legislative history in favor of this interpretation, and some judicial support; moreover, its constitutionality is fairly supportable. If it were accepted the further question would be presented whether specific enforcement of an arbitration agreement is a matter of state substantive law, calling for the application of state law, or a matter of remedy, calling for the application of federal law. The weight of authority would support treating this issue as a matter of remedy to be governed by the law of the forum — the federal law. On the other hand, Section 301 may be interpreted as establishing a new substantive liability, actionable in the federal courts, for the breach of a collective bargaining agreement in an industry affecting interstate commerce, the interstices of the law, involving remedies, defenses, etc., to be filled in by a federal common law formulated by the federal courts.


See Mercury Oil Refining Co. v. Oil Workers Int'l Union, C.I.O., 187 F.2d 980, 983 (10th Cir. 1951).

Against the contention that this would amount to an unconstitutional grant of jurisdiction over causes not specified in Art. III, §2 of the Constitution as within the judicial power of the United States (see Note, 57 Yale L.J. 630 (1948); Schatte v. International Alliance, etc., 182 F.2d 158, 164 (9th Cir. 1950) it could be argued that the cause in fact arises out of a law of the United States, but that Congress has exercised its power over commerce to direct that such controversies affecting commerce shall be governed by state law. See Textile Workers v. American Thread Co., 113 F. Supp. 137, 140 (D.C. Mass., 1953).

See Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 119 (1923); Murray Oil Products Co. v. Mitsui & Co., 146 F.2d 381, 383 (1944); Gatiloff Coal Co. v. Cox, 142 F.2d 876, 881 (6th Cir. 1944); Boston & Maine Transportation Co. v. Amalgamated Assn., 106 F. Supp. 334, 335-336 (D.C. Mass. 1952). This conclusion is strengthened by the consideration that future disputes arbitration agreements are not made invalid, but only unenforceable under the common law. See Red Cross Line v. Atlantic Fruit Co., supra, at 122-123. But see Hamilton Foundry & Machine Co. v. Int'l Molders and Foundry Workers Union, 193 F.2d 209, 215 (6th Cir. 1952) ("... the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought.").
judiciary. A majority of courts have held or indicated in favor of this view. Its acceptance would clearly lead directly to the application of federal law in determining the enforceability of arbitration clauses — the same law to which the former alternative interpretation would probably lead, although not so clearly and not so directly.

But what is the federal law on this issue? Since the U.S. Arbitration Act has been held inapplicable, as indicated above, there is no explicit statutory authority providing for enforcement of such agreements. Moreover, the old federal common law rule has been held to be that future disputes arbitration agreements are not specifically enforceable. Therefore, a federal court in order to enforce a future disputes clause in an arbitration agreement would have to justify a change in this rule, primarily either on the basis of the intent of the legislature in enacting Section 301(a) or on the ground “that the rule rests on merely weak historical arguments, and should be abandoned whenever, as is the case in the Taft-Hartley Act, there is sufficient indication that the legislation in a particular field intended the maximum degree of enforcement of arbitration contracts.”

But at this point a further problem arises over whether a district court in this kind of case is authorized to issue an injunction, directing compliance with the agreement. Does the Norris-LaGuardia Act in depriving federal courts of jurisdiction to issue injunctions “in any case involving . . . a labor dispute” have the effect of precluding such relief, or can it successfully be argued that since the Act was designed to prevent judicial interference with labor's concerted activity it can have no application where a mandatory injunction is sought to compel compliance with a contract? Further, apart from the Norris-LaGuardia Act, does the absence of any provision in Section 301 authorizing injunctive relief negate the power, or does the grant of jurisdiction to hear suits for violation of a contract necessarily carry with it a grant of the procedural remedies a court normally possesses, including the injunction? The cases have gone both ways on whether Section 301 permits an injunction to secure contract compliance.

See Shirley Herman Co. Inc. v. Int'l Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Schatte v. Int'l Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950). Contra: Mercury Oil Refining Co. v. Oil Workers Int'l Union, C.I.O., 187 F.2d 983 (10th Cir. 1951).


Injunction granted: Milk Drivers Union v. Gillespie, 31 Lab. Rel. Ref. Mass. 2486 (6th Cir. 1953) (specific enforcement against employer of arbitration award pursuant to arbitration agreement); American Federation of Labor v. Western Union Telegraph Co., 179 F.2d 535 (6th Cir. 1950) (restraining employers' breach of contract pension plan); cases cited infra notes 74, 75 and 76.

Injunction denied: Alcoa Steamship Co. v. McMahon, 81 F. Supp. 541 (S.D. N.Y. 1948), aff'd 173 F.2d 567 (2d Cir. 1948), cert. denied 338 U.S. 831 (1948) (Injunction against union and employees to compel compliance with contractual provisions regarding crew distribution, denied: "... it is not the policy of the United States judicially to compel obedience to collective bargaining agreements on pain of imprisonment."); United Packing
Only a few courts have squarely faced the ultimate question under discussion. One district court in Colorado⁴ and one in North Carolina⁷ have granted specific enforcement of future disputes arbitration clauses contained in collective bargaining agreements in suits under Section 301(a), although without illuminating discussion of some of the more difficult issues. And more recently Judge Wyzanski of the Massachusetts District Court did likewise in a much fuller opinion.⁶ Plainly the last word on these issues is yet to be spoken. And in any event, it can not be said that the federal right, if any, is either so clear or so plenary as to eliminate the need for a state remedy.

E. THE NEED FOR A NEW ARBITRATION LAW IN UTAH.

1. The Importance of Legal Enforcement Machinery.

The failure of the law in Utah to lend judicial sanction to the institution of arbitration as a means of administering and enforcing the contractual relations of employers and unions, in the face of its demonstrated social utility, is a glaring defect in the structure of Utah law. It may appropriately be asked whether it makes any substantial difference whether the law affords a legal remedy or not, since in the main the arbitration process works independently of legal sanction⁸ (indeed, that is its chief virtue) and has shown such power to establish itself in hostile legal environments. No answer to this query can fail to concede that industrial arbitration has in fact thrived without the aid of legal sanction—witness its almost universal use in the majority of the states (among them some of the industrial giants of the nation)⁷ which have not effectively altered the common law rules. But the hard fact which constitutes the short answer to this question is that in Utah arbitration has not yet caught on to any substantial degree. It is fairly common for Utah collective bargaining agreements to contain arbitration provisions; but it is almost as common for the parties to by-pass the arbitration agreement and go straight to the courts, feeling acutely the futility of invoking a procedure in which, especially on a hard fought issue, the other party can, and may well, decline to cooperate with impunity. It may safely be predicted that in the long run Utah labor and management will come to see the virtue of arbitration, not only philosophically, as they now generally do, but when concrete, bitterly contested issues arise. But that long run...
period of industrial strife and instability can be substantially shortened by
the enactment of legal enforcement machinery, thereby making possible now,
rather than in the distant future, the mechanism for successful industrial
relationships.79

2. The Industrialization of the Utah Economy.

Nor can the problem be dismissed as a matter of no great moment in
the predominately agricultural community of Utah. For increasingly Utah,
along with much of the west, is becoming industrialized;80 and statistics bear
testimony to a relatively high degree of industrialization already attained
with its consequence of typically industrial problems. Whereas shortly before
the war the percentage of Utah employees engaged in nonagricultural em-
ployment averaged about 68 per cent, since the end of the war the figure has
hovered around 78 per cent.81 With the exception of Colorado, Utah has
more people employed in nonagricultural jobs than any of the states in the
Rocky Mountain region.82 And in one basic industry, the manufacture of
steel, Utah has forged ahead of all the states west of the Mississippi, with
the exception of California.83 Between 1939 and 1947 total expenditure for new
plant and equipment in Utah expanded by almost 900 per cent, as com-
pared with a national expansion of roughly 300 per cent.84 Between 1948
and 1952 total income paid to individuals in Utah in the form of wages and
salaries increased by approximately 50 per cent as compared to an increase
of proprietor's income of 17 per cent and an increase of property income of
28 per cent.85 Such figures as are available show that the inevitable ac-
companiment of industrial growth, industrial relations problems on a larger
scale, is occurring in Utah. During and immediately following the war work
stoppages in Utah accounted for roughly .1 per cent yearly of the total
number of workers involved in work stoppages in the United States.86 In
1950 this figure jumped to .9 per cent—about equal to Colorado,87 sub-
stantially higher than any other state in the mountain division and higher
than or equal to the figure for five other of the eleven states which enforce

79 See Gregory and Orlikoff, 17 U. of Chi. L. Rev. 233, 235 (1950). "It cannot be
reasonably expected that contractual commitments which may be broken with impunity
will very long continue to be rigorously observed.... Such breaches of good faith are
likely to imperil the whole arbitral process. As more and more awards and agreements
to arbitrate are ignored with impunity, the more arbitration will become just another way
station to, rather than a rescue-station from, industrial conflict. In an area where the peace-
ful resolution of disputes is so important, this trend could have tragic results."
80 Garnsey, Westward the Course of American Capital, New York Times, Nov. 18, 1951,
p. 16, Mag. Sect.
83 Editorial, Second in the West, Salt Lake Tribune, April 27, 1953, discussing latest
report of the American Iron and Steel Institute.
85 Computed from 13 Utah Econ. and Bus. Rev. 4 (January 1953).
86 Handbook of Labor Statistics 151 (1950 ed.).
87 Ibid.
88 Id. at 148.
future disputes clauses in collective bargaining agreements — Connecticut, Delaware, Louisiana, North Carolina, and Washington. In 1949 the Federal Mediation and Conciliation Service reported Utah among nine states constituting a group of states to which it made the fewest number of assignments of mediators. In 1950 an increase in the number of assignments moved Utah out of this group of states along with only two other states formerly a part thereof. None of the above figures is by itself conclusive of anything. Taken together, however, they demonstrate a rapidly increasing industrialization of Utah, an increase in the industrial wage earner group and an increase in industrial relations problems.

3. The Lawyer and Arbitration

The position of the lawyer in this process requires passing mention. The cry that arbitration ousts the courts of jurisdiction has, in limited circles of the legal profession, been replaced by the plea that it at least ousts the lawyers of professional fees. That the placing of the monetary interests of a single class ahead of the national welfare fails to comport with the ideal stature of law and lawyers, scarcely needs to be belabored. But this position is not only unworthy. A study recently conducted by a committee of the Bar Association of the City of New York based upon the files of the American Arbitration Association indicates that it is also based upon a false premise. In commercial arbitration cases lawyers participated in 80 per cent of the cases in 1942 and 82 per cent in 1946. In labor arbitrations the proportion of lawyer representation was higher. In 1942 it was 84 per cent of the cases; in 1943, 91.7 per cent and in 1947, 91.6 per cent. In addition, roughly 61 per cent of the arbitrators proved to be lawyers. The place of the lawyer in the arbitration process is secure.

F. Conclusion and Recommendation.

It is not to be expected that if the Utah legislature does not amend its arbitration law at the very next session, industrial relations here will degenerate into an anarchy of strikes and lockouts. Neither can it be said with assurance that the failure of the law in this regard will forever foreclose the widespread use of industrial arbitration by labor and management through their own enlightened acquiescence. It may safely be prophesied, however, that the enactment of such a law will hasten the acceptance of the arbitration process and thereby accelerate the attainment of one of the necessary condi-

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89 Ibid.
90 Ibid.
91 Id. at 149.
92 Id. at 150.
93 Id. at 151.
96 34 A.B.A. J. 305 (1948).
97 See Mosk, Arbitration Versus Litigation, 7 ARB. J. 1218, 224 (1952); Ooms, On the Lawyer's Place in Arbitration, 7 ARB. J. 71 (1952); Roth, Arbitration and the Lawyer, 2 ARB. J. 204 (1947).
tions for healthy industrial relationships. When a substantial quantum of industrial unrest and strife can be eliminated by the passage of a law, the failure to act becomes a breach of trust by the representatives of the people — especially where the existing law is a medieval anachronism whose basic premise has been thoroughly discredited. States with less, or at least no more acute, industrial relations problems than Utah, have in recent years done what needs to be done here. Washington in 1943, Delaware in 1947, and North Carolina in 1951 (which, like Utah, had originally adopted the Uniform Arbitration Act) have amended their arbitration statutes to make future disputes clauses in collective bargaining agreements enforceable and irrevocable.

There are many respects in which the Utah arbitration statute can be substantially improved — for example, by providing procedure by which an order of stay of trial of any action brought upon a cause embraced in an arbitration agreement may be obtained, by providing anticipatory procedures whereby issues of the validity and scope of the arbitration agreement may be resolved before the arbitral proceedings are had; by expressly making provisional remedies available against the defaulting party and in other ways. Careful studies and a draft statute are available for reference should a revision of the Utah arbitration statute get underway. But the most pressing defect of the Utah law is its failure to make enforceable and irrevocable agreements to arbitrate disputes which may subsequently arise. This may very simply be accomplished by one addition to the first sentence of Section 78-31-1 to make it read as follows:

"Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy existing between them at the time of the agreement to submit or they may agree in writing to settle by arbitration any controversy thereafter arising between them."

Much may depend upon these few words in the long run and it would be consistent with the best in the tradition of the legal profession for the lawmen of this state to take the initiative in making of the law a more perfect expression of the needs of the community.

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