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SOME LAWYERS' PROBLEMS IN GRIEVANCE ARBITRATION*

ARCHIBALD COX**

A recent search of arbitration law has uncovered an ancient award which some may regard as typical of labor arbitration.

"The undersigned, arbitrators within named, having heard the parties by their several statements under oath, . . . and, there being a wide divergence in their statements aforesaid, we come to the final conclusion that in the amount of damages we do not agree on any sum; but our agreement is, that each party pay his own arbitrators the sum of five dollars each."  

Surely those arbitrators spoke with the wisdom of Solomon, and it will be a matter of regret to all arbitrators, if not to the parties, to learn that so statesmanlike a decision was held invalid by the Supreme Judicial Court of Massachusetts.¹ However, by way of comfort to brother arbitrators another case can be cited which suggests that even if a losing party were so outraged by an arbitration award as to bring an action for damages against the arbitrator alleging that the arbitrator and the opposing party had entered into an unlawful conspiracy,—that even if these facts were proved, the arbitrator would not be liable.²

Not only is grievance arbitration commanding increased attention from labor lawyers but its strictly legal aspects seem to be becoming more and more important. There is a new concern for the legal enforcement of arbitration agreements and arbitration awards which was scarcely felt five years ago. Since the effort to cover all the lawyer's problems in grievance arbitration would take us far afield, it is necessary to confine the discussion to two subjects.

First, the enforceability of agreements to arbitrate disputes arising under collective bargaining agreements. The problem usually arises when a union is seeking to arbitrate a grievance and the employer refuses, but one occasionally encounters a situation where the union is so strong that it prefers to strike.

Second, the vexed subject of "arbitrability." Who decides the issue if the union asserts, and the company denies, that a particular dispute falls into a class of controversies which they have agreed to

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submit to arbitration? When is the issue to be decided? By what criteria?

I. ENFORCEMENT OF AGREEMENTS TO ARBITRATE

Common Law

At common law there was no effective legal sanction for the enforcement of an agreement to arbitrate controversies which might arise in the future under the terms of an existing contract. Ever since the decision of Lord Coke in the *Vynior* case an agreement to arbitrate has been revocable at any time prior to the award. If you ask “Why,” the best available answer is to quote the saying with which my father always silenced a too argumentative son — “If your mother says ‘tis so, ‘tis so, if ‘tain’t so.” Similarly, since Lord Coke said ‘tis revocable, ‘tis revocable if ‘tain’t revocable. In theory, the revocation is a breach of the contract and an action will lie for damages. In practice, this remedy is useless because the damages recoverable are limited to sums expended preparing for arbitration prior to notice of revocation. Under the prevailing common law rule, moreover, breach of a promise to arbitrate disputes arising under a collective agreement is not a bar to an action for damages arising out of the alleged violation of some other provision in the agreement. Although some of the court decisions in States in this region suggest that performance of the agreement to arbitrate may be a condition precedent to an action when a contract so stipulates, it seems likely that the general common law rule would be followed in a labor case either on the ground that the exception is applicable only to appraisals or else because the language of the collective agreement did not explicitly make arbitration a condition precedent to suit. The courts have consistently held that an employer may sue in court to recover damages for breach of a no-

3. 8 Coke 81b-83a, 77 Eng. Rep. 595 (1609)
5. 6 Williston, Contracts § 1927 (rev. ed. 1938), Restatement, Contracts § 550 (1932).
strike clause in disregard of a grievance procedure calling for final
and binding arbitration of all disputes arising under the agreement
either on this theory or else on the ground that the usual form of
arbitration clause does not apply to strikes in breach of contract.8

State Legislation

The familiar statutes regularizing arbitration and providing for
submission of existing controversies have scant application to the
grievance arbitration clauses in labor agreements either because
the clauses cover matters not subject to an action at law or suit in
equity or because they are not limited to existing disputes. Of more
importance in some States—New York and Connecticut, for ex-
ample—are the arbitration laws applicable to clauses to arbitrate
future disputes arising under a written contract.9 These statutes
usually cover four main points.

First, it is expressly provided that an agreement to arbitrate
any controversy thereafter arising out of a written contract “shall
be valid, enforceable and irrevocable save upon such grounds as
exist at law or in equity for the revocation of any contract.”

Second, in the event either party fails to perform an agreement
to arbitrate, the other party may apply for a summary order direct-
ing that the arbitration proceed. Such an order is to issue if the
court is satisfied “that there is no substantial issue as to the making
of contract or submission or the failure to comply therewith. . .”

Third, a party to such a contract may obtain a stay of any
action brought by the other party on an issue which they have
agreed to arbitrate.

Fourth, a summary procedure is provided for the enforcement
of an arbitration award. The award is final and binding unless (1)
it was procured by corruption, fraud or other undue means or (2)
there was evident partiality or corruption in the arbitrator. Wis-
consin, for instance, has enacted such a statute, but even the Wis-
consin law contains an exception making it plainly inapplicable to
contracts of employment and collective bargaining agreements.10

On the other hand, Wisconsin, unlike some other States, also has

8. E.g., United Electrical R. & M. W of A. v. Miller Metal Products,
215 F. 2d 221 (4th Cir. 1954); Colonial Hardwood Flooring Co. v. United
Furniture Workers, 168 F. 2d 33 (4th Cir. 1948); Harris Hub Bed & Spring
Boston & Maine Transportation Co. v. Amalgamated Ass’n, 106 F. Supp.
Act. §§ 1448-1469.
609, 49 N. W. 2d 720 (1951).
made it an unfair labor practice for either a union or an employer to violate a collective bargaining agreement including a contract to submit future grievances to arbitration. Under this statute the Wisconsin Employment Relations Board may issue an order requiring a recalcitrant party to proceed to arbitration in accordance with the contract.

**Federal Legislation**

The enactment of the Taft-Hartley Act opened another avenue of possible relief for the union or employer seeking to enforce the arbitration clause of a collective bargaining agreement. Section 301(a) provides—

"Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

A majority of the inferior federal courts have held that this provision authorizes a decree of specific enforcement. A few judges have disagreed, and recently an appeal from one such adverse ruling was argued in the Court of Appeals for the First Circuit. Only a Supreme Court ruling will set the question at rest, but the decision of the First Circuit may well exert important influence.

Any suit to enforce an arbitration agreement under Section 301 raises a number of difficult issues warranting discussion but as a preface it is necessary to recall the decision in Ass'n of Westinghouse Salaried Employees v. Westinghouse Electric Co. A union, acting as bargaining representative of a group of salaried employees, sued Westinghouse under Section 301 alleging that the employer had violated a collective bargaining agreement by docking the pay of salaried employees for a day on which they did no
Mr. Justice Frankfurter delivered an opinion on behalf of himself and Justices Burton and Minton in which he developed these propositions. (a) Section 301 creates no substantive federal law, but merely provides a forum for litigation over alleged violations of collective bargaining agreements. (b) There is constitutional doubt whether Congress may confer this jurisdiction upon constitutional courts where there is no diversity of citizenship, for in the absence of substantive federal rights the action may not arise under the laws of the United States. (c) To avoid the constitutional doubt, Section 301 ought to be held not to authorize the district courts to hear actions brought by unions to recover wages allegedly due individual workers. This disposed of the case but in the course of the opinion Mr. Justice Frankfurter said that he and his two colleagues were disposed to think as a matter of substantive law that unions should be allowed to sue for breach of the contracts which they negotiate.\textsuperscript{17}

Mr. Justice Reed's separate opinion challenges the views expressed by Mr. Justice Frankfurter at every point but he concurred in the judgment on the ground "that the claim for wages for the employees arises from separate hiring contracts between the employer and each employee." Therefore, he said, "there is set out no violation of a contract between an employer and a labor organization as is required to confer jurisdiction under § 301."\textsuperscript{18}

The Chief Justice and Mr. Justice Clark straddled the issues dividing Justices Frankfurter and Reed with the Delphic pronouncement that "the language of § 301 is not sufficiently explicit nor its legislative history sufficiently clear to indicate that Congress intended to authorize a union to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer."\textsuperscript{19} Accordingly, they joined in voting to dismiss for want of jurisdiction.

Mr. Justice Black and Mr. Justice Douglas dissented urging that the federal court had jurisdiction and the union should be permitted to sue.

Let us now return to the problems raised by an action under Section 301 to compel an employer or union to arbitrate a grievance.

(1) One issue suggested by the \textit{Westinghouse} case is whether Section 301 is unconstitutional because it seeks to give the federal


\textsuperscript{18} Id. at 464.

\textsuperscript{19} Id. at 461.
courts jurisdiction of cases not covered by Article III, or, in the alternative, is to be construed so narrowly as not to reach such actions in order to avoid constitutional doubts. In my opinion neither argument is very persuasive. The lower courts have unanimously held that Section 301 is constitutional and most commentators approve the ruling. While the Westinghouse case will undoubtedly encourage relitigation of the constitutional question, the outcome is not likely to be changed. With respect to the interpretation of the statute, it should be enough to say that if Section 301 does not give jurisdiction over suits for alleged violations of the arbitration clause of a labor contract, nothing remains except employer's actions for alleged breach of a "no-strike" clause. There is no evidence that the purpose of Congress was so narrow and one sided.

(2) We may also quickly dismiss the second question suggested by the Westinghouse case—has a union standing to sue to enforce an agreement to arbitrate where the underlying grievance is the personal claim of an individual employee, for example, a claim that he was discharged without just cause. In form the promise to arbitrate always runs to the union. In practice it is nearly always the union which decides whether to take a case to arbitration. Consequently, although the union may be acting in a representative capacity, it has the standing to sue. (In the Westinghouse case five justices thought a union could sue—but not under Section 301—to enforce the individual's claim for wages.)

(3) A third issue is somewhat more serious. Since an order compelling arbitration is in the nature of specific performance, we must inquire whether a district court may grant equitable relief under Section 301 or is limited to a judgment for damages. The statutory language gives scant guidance because it speaks of "Suits for violation of contracts" which might imply either meaning, but a plaintiff might gain some comfort from the contrast between these wide-open words and the narrower phrases of Section 303 which provide that "whoever shall be injured in his business

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may sue . and shall recover damages. ." A significant number of cases hold that equitable relief is not available under Section 301, but the weight of opinion permits it where otherwise appropriate.

(4) We come now to a major problem the importance of which goes far beyond arbitration. In an action under Section 301 is the federal court bound to follow State law—in which event one would gain nothing by suing in the federal court to enforce an agreement for arbitration—or may the federal court develop its own law with respect to the enforcement of the agreement to arbitrate?

Shortly after enactment, Section 301 was attacked as unconstitutional because it attempted to confer jurisdiction on the federal courts without regard to the citizenship of the parties in cases not "arising under . . . the laws of the United States." The contention was invariably rejected by holding that actions under Section 301 arise under federal law because the section creates substantive rights to be declared by the federal courts in evolving a body of law of collective bargaining agreements; and a few later cases went on to apply this theory where the only issue was whether State or federal law should govern substantive rights. A few lower courts have held that Section 301 actions are the equivalent of declaratory judgment actions. See, e.g., United Protective Workers v. Ford Motor Co., 194 F. 2d 997 (7th Cir. 1952); AFL v. Western Union Tel. Co., 179 F. 2d 535 (6th Cir. 1950); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267 (W.D. Mich. 1949).


27. E.g., International Union of Operating Engineers v. Dahlem Constr. Co., 193 F. 2d 470, 475 (6th Cir. 1951); Shirley-Herman Co. v. International
courts reached the opposite conclusion holding that in suits under Section 301 State law is controlling on substantive issues just as in cases where federal jurisdiction is based on diversity of citizenship. The Supreme Court justices are also divided. In *Westinghouse*

Mr. Justice Frankfurter and two colleagues described Section 301 as “a grant of jurisdiction to federal courts over a contract governed entirely by state substantive law,” saying—

“If the section is given the meaning its language spontaneously yields, it would seem clear that all it does is to give procedural directions to the federal courts. The aim [disclosed by the legislative history] was to open the federal courts to suits on agreements solely because they were between labor organizations and employers without providing federal law for such suits.”

Three justices disagreed, arguing that the statute permitted the federal courts “to fashion federal rules for the construction and interpretation of those collective bargaining agreements.”

The ultimate outcome will turn, therefore, on the votes of the three uncommitted justices—the Chief Justice and Mr. Justice Clark, who avoided the issue, and Mr. Justice Harlan, who had not taken his seat when the case was argued.

In my judgment Mr. Justice Frankfurter’s view is the more likely to prevail. LMRA Section 301 is phrased in terms of jurisdiction and standing to sue. It adds a good deal to the words of the statute to read in an instruction that the district courts shall develop a body of substantive law. It adds immeasurably more to infer that the federal law should be inclusive, for this conclusion opens the door to removal of actions commenced in a local forum. Nor could one stop there and hope to avoid incongruities. Since Section 301 is probably inapplicable to suits by individuals, the State courts retain


29. Id. at 465.

30. The Judicial Code authorizes removal of “any civil action brought in a State court of which the district courts of the United States have original jurisdiction.” 28 U. S. C. § 1441 (Supp. 1952). If there is no state cause of action, every suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce could be brought in a district court under § 301.

this jurisdiction. It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding in State tribunals. This would have the rather odd consequence of giving the individual a cause of action under the laws of the United States on which he could sue only in a State court. All this may be wise, but is not the edifice too imposing for the courts to construct on so small a statutory foundation? Since Section 301 is constitutional even though given only the jurisdictional significance suggested by its words, there is no need to imbue it with far-reaching substantive connotations.

The conclusion that the substantive law to be applied under Section 301 is State law hardly disposes of the question whether a union may obtain specific enforcement of an agreement to arbitrate. An agreement to arbitrate future disputes is valid and binding upon the parties under the law of nearly every State. Whether it is specifically enforceable goes to the remedy; and one might well take the distinction that although the federal courts are bound to follow State substantive law, they are not subject to the procedural or remedial restrictions resting on State tribunals. In the American Thread case Judge Wyzzanski held that although specific evidence was lacking, the Congress which enacted Section 301 "would have preferred that remedies should be determined without reference to state law and should include specific enforcement of arbitration clauses in labor contracts."

There is one serious difficulty with this analysis. The rule which denied specific enforcement of agreements to arbitrate future disputes is not just a rule of procedure. The underlying theory was that the arbitrator's power like that of an agent is delegated and the delegation—again as in the case of an agent—is revocable even though the revocation is a breach of contract. This is substantive

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32. See note 21 supra.
33. See note 5 supra.
34. See e.g., Guffy v. Smith, 237 U. S. 101 (1915), a case decided prior to Erie R. R. v. Tompkins which may now be of doubtful validity. Hamilton Foundries and Machine Co. v. International Molders Union, 193 F. 2d 209 (6th Cir. 1952), cert. denied, 343 U. S. 966 (1952), held that State laws affecting the remedy must be followed under Section 301.
36. See note 4 supra and text thereto. The point is elaborately discussed in Justice Peterson's dissenting opinion in Park Constr. Co. v. Independent School District No. 32, 209 Minn. 182, 296 N. W. 475, 478 (1941) (dissenting opinion).
law. Or to put the issue in pragmatic terms, a decision to order parties to arbitration instead of leaving them to an action of law (which is really no remedy at all) would be not merely a formal difference in procedure but a basic departure from the policy applied in State tribunals. This makes me a little skeptical about my earlier opinion\textsuperscript{36a} that the federal courts may properly grant enforcement of arbitration clauses when the State courts would deny the same relief.

(5) One question remains even if the plaintiff gets over the hurdles already noted. Section 1 of the Norris-LaGuardia Act provides that no federal court "shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of a labor dispute, except in strict conformity with [its] provisions." It is quite plain that neither of these requirements can be met in a simple case based upon the alleged non-performance of an agreement to arbitrate grievances. Literally, a controversy over the arbitration of a grievance gives rise to a "labor dispute" because that term includes "any controversy concerning terms or conditions of employment." It can be argued, therefore, that a decree ordering a company or union to proceed to arbitration would be an injunction issued in violation of the Norris-LaGuardia Act. This was the view taken by Judge Aldrich in the First Circuit case now pending on appeal.\textsuperscript{37}

Since the philosophy of the Norris-LaGuardia Act was that law served no useful function in the adjustment of labor disputes, it left management and labor to negotiation backed by self-help and economic weapons. Today the law intervenes at numerous points in industrial relations. Unfortunately, the Norris-LaGuardia Act was not amended to take account of the conflict between the new rights and duties and the older policy of legal abstention, but more than one occasion has seen the courts curtail the scope of the anti-injunction law in order to reconcile it with later legislation.\textsuperscript{38} While the cases are distinguishable, they strongly support the conclusion that the Norris-LaGuardia Act does not prohibit specific enforcement of an agreement to arbitrate grievances. It was concerned with strikes and conduct during strikes. Examination of its provisions—

\textsuperscript{36a} Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591 (1954).


those listing the kinds of conduct which can never be enjoined, those prescribing the findings which must precede injunctive relief and also those which regulate judicial procedure—shows that the Act is not applicable to other kinds of conduct or to the enforcement of other rights and duties. Consequently, it seems likely that other courts will accept Judge Wyzanski's statement in the American Thread case that—

"The general structure, detailed provisions, declaratory purposes, and legislative history of that statute show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made."39

Arbitration Awards

An arbitration award, once rendered, enjoys a greater degree of judicial support. The legal situation is much the same as if the losing party had expressly promised to do the things directed by the arbitrator. An action for damages will lie for non-performance.40 Where the award directs the losing party to take steps other than the payment of money and there is no good way of measuring the harm done by failure to comply with the award, the successful party can properly secure a decree for specific performance. In an early Massachusetts case the court said—

"A submission is virtually a contract to do what shall be awarded, and there does not seem to be any reason why it is not as much a subject of equity as if the contract were complete without the interference of an arbitrator."41

These principles provide an adequate remedy for grievance arbitration awards save possibly orders of reinstatement which equity might refuse to enforce as personal service contracts. Even here the old rule may yield to the example of reinstatement orders under the NLRA.

An arbitrator's decision is final on all questions of fact and law even though wrong.42 Indeed, an arbitrator has no obligation to apply the law even as he understands it;43 however, it should be

42. Standard Constr. Co. v. Hoeschler, 245 Wis. 316, 14 N. W. 2d 12 (1944); Park Constr. Co. v. Independent School Dist. No. 32, 216 Minn. 27, 11 N. W. 2d 649 (1943), Larson v. Nygaard, 148 Minn. 104, 180 N. W. 1002 (1921); Goddard v. King, 40 Minn. 164, 41 N. W. 659 (1889), Daniels v. Willis, 7 Minn. 374, 382 (1862) (law).
43. Zelle v. Chicago & N. W. Ry., 65 N. W. 2d 583, 589 (Minn. 1954).
understood that if the arbitrator says he is applying the law and then misconceives it, the award is invalid. The usual formula is that an arbitration award will not be set aside except for fraud, corruption or some mistake so gross that a court treats it as if there were fraud. There are, however, three other grounds of greater importance in labor cases.

First, an arbitration award is invalid unless there was a fair hearing. A fair hearing includes notice of the time and place for hearing, a reasonable time in which to prepare the case and an opportunity to present evidence and argument. Some care must be exercised about consulting outsiders, for awards have sometimes been set aside on the ground that the arbitrators acted on a report by independent experts without giving the parties an opportunity to meet it. On the other hand, it came to be recognized long ago that an arbitrator may seek advice in reaching his conclusion provided he makes his own decision.

Second, an arbitration award is invalid if it does not make a complete disposition of the issues submitted. In a Minnesota case, for example, the parties submitted the question whether a discharge was justified either by the employee's petty thievery or by his generally unsatisfactory record. An award setting aside the discipline was held invalid because the arbitrators failed to resolve the second issue.

Third, and most important, an award is invalid at common law and under most statutes if the arbitrator undertakes to decide an issue which the parties did not agree to submit to arbitration. This is the doctrine which gives rise to the vexed problem of "arbitrability," and it brings us to the second part of this discussion.

II. "Arbitrability"

Stated in abstract terms the doctrine of "arbitrability" is as simple as it is inevitable. Both at common law and also under later arbitration statutes the courts enforce arbitration awards on the

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44. Boston Water Power Co. v. Gray, 6 Metc. 131 (Mass. 1843), see Goddard v. King, 40 Minn. 164, 41 N. W 659 (1889).
45. Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N. W 560 (1923). This includes the right to be present when the other side is presenting its evidence. Lee v. Tysdal, 163 Minn. 335, 203 N. W 988 (1925).
47. See Sturges, Commercial Arbitrations 498-500 (1930), where the authorities are collected.
theory that they are compelling the losing party to carry out his promise to comply with the award. The award is final and binding if made on an issue which the parties promised to submit to the arbitrator for a final and binding decision. Conversely, the award is not binding if the parties did not agree to submit the issue. Disputes in the first category came to be called arbitrable. Disputes in the second category are non-arbitrable. The issue of arbitrability *vel non* is simply a question of contract interpretation. It depends upon (1) a determination as to the exact nature of the controversy and (2) the meaning of the arbitration agreement.

The principles just stated are simple enough. The difficulty lies in their application. Suppose that a manufacturer of heavy steam and water valves is a party to a collective bargaining agreement with the United Automobile Workers which contains the customary provisions including a recognition clause, a seniority clause and a schedule of wage rates. There is also an arbitration clause providing for the designation of an arbitrator by the Federal Mediation and Conciliation Service whenever the parties cannot agree and giving him power to make a final and binding decision in any dispute concerning "the interpretation or application of this agreement." Six months after the contract is executed, the employer, instead of following his previously unbroken practice of doing all his own work, decides to have certain parts machined to specifications by an independent contractor. He subcontracts the work and lays off a number of machinists. The union objects, files a grievance and demands arbitration. The employer replies that the dispute is not arbitrable because it does not concern the "interpretation or application of this agreement," there being no clause in the contract limiting his freedom to subcontract. The union replies that the obligation is implied by the recognition clause, seniority provisions and wage scale, and also by the firm's past practice of doing its own machine work which is necessarily carried forward by the collective bargaining agreement.

In nine out of ten cases this dispute would be voluntarily submitted to an arbitrator who would decide both the question of arbitrability and also the merits, but the one tough case would raise difficult questions for the lawyers on both sides, for the arbitrator and sometimes for a reviewing court.

The union's lawyer, it seems, has the easiest task, for he must make only a relatively simple decision upon whether his chances of ultimate victory are worth the time and effort. Unless he is in a State with an arbitration statute or wishes to seek relief in the
federal court, his only remedy is to press the Federal Mediation and Conciliation Service to appoint an arbitrator despite the employer's objection and then to urge the arbitrator to proceed with the case regardless of the employer's unwillingness to participate in the hearing. Apparently the Federal Mediation and Conciliation Service will make an appointment under these circumstances. The same practice is followed by the American Arbitration Association and other appointing agencies.

If the union chooses to push ahead on this course, the employer's attorney faces some difficult choices. Should he ignore the whole proceeding? Since arbitrators dislike proceeding *ex parte*, this might end the case, or at worst, snarl it up in endless technicalities which would discourage future grievances and even discredit the union and the grievance procedure. Even if the arbitrator heard the case *ex parte* and rendered an adverse decision, the company still might be able to challenge the award in court on the ground that the issue was not arbitrable. But unless one is willing to discredit grievance arbitration or is seeking to break the union, would it not be the preferable course from the standpoint of sound labor relations for the employer to raise the question of arbitrability before the arbitrator, present the case on the merits reserving the challenge to the arbitrator's jurisdiction and then, if necessary, attack the award in the courts? The legal feasibility of this alternative depends upon whether presenting the case on the merits waives the challenge to the jurisdiction of the arbitrator even though the point is properly raised and overruled. Some lawyers apparently feel doubt on the point—a doubt justified by an early Pennsylvania case


51. 76 Iowa 187 40 N. W 713 (1888)
fully to a proceeding before an arbitrator. as to one before a referee or before any board or officer who asserts the right to judge."

The adoption of this practice would greatly improve grievance arbitration by doing away with the *ex parte* hearings which are unlikely to do justice and embarrass everyone concerned.

The hypothetical case of subcontracting raises three problems for the arbitrator: (1) Shall he rule on the issue of arbitrability? (2) Should he hold one hearing on the issue of arbitrability and, as employers sometimes insist, make a separate ruling on that question before hearing the merits? (3) Is the propriety of subcontracting arbitrable in the hypothetical case?

The first issue is relatively simple. For the arbitrator not to go ahead would put it into the hands of either party to block arbitration under existing agreements simply by challenging the arbitrator's jurisdiction. In a State where there is no arbitration statute enforcing future disputes clauses, the moving party is without a remedy when the arbitrator refuses to proceed.

The other two questions are more difficult. Our hypothetical arbitration clause was confined to disputes concerning "the interpretation or application of this agreement." Since there was no express provision dealing with subcontracting, the employer can argue with a good deal of force that the dispute does not concern the interpretation of the contract. Nevertheless, two opposing points must be considered:

(1) The employer and union seldom really expect this form of arbitration clause to be construed literally. Many contracts containing it limit the employer's right to discharge to discharges for just cause and say nothing about lesser discipline, yet no one would seriously challenge an arbitrator's power to rule on the fairness of a six week's disciplinary layoff.

(2) Every contract contains some implied obligations. If A promises to build B a house and B to pay $20,000, A will be held to have promised not to interfere with the building of the house even though the contract contains no explicit mention of this undertaking. Suppose that a collective bargaining agreement contains no express limitation on the employer's freedom to discharge and that the employer fires a man for the sole purpose of circumventing a seniority clause or preventing the prosecution of a grievance. Surely we all would agree that under these circumstances there was a breach of an implied obligation not to deliberately destroy the effect

of the express promises. In the hypothetical case, if the subcontracting took the form of leasing space and machines in the employer's plant to a former foreman who hired machinists at $2.00 an hour instead of the $2.50 rate specified in the collective bargaining agreement, would it not be reasonable to say that such an arrangement is nothing more in substance than a scheme for obtaining a supply of labor without observing the wage scale and other conditions set forth in the contract? Under these circumstances most arbitrators would rule that the issue was arbitrable and the subcontracting a violation. On the other hand, if the decision to subcontract was related to the availability of production facilities, overhead costs, managerial skill and the like, there would be scant basis for criticizing the prevailing view that subcontracting is a management function.

One conclusion to be drawn from these examples is that the question of arbitrability is often indistinguishable from the merits. The real issue is whether the contract fairly sustains the union's contention. If it does, the dispute is arbitrable. If it does not, it makes scant difference whether the union's claim is dismissed on jurisdiction or on the merits. Second, is it not plain in such a case that nothing can be gained by holding separate hearings on the issue of arbitrability and on the merits? To merge the two would be more economical of time and effort and ordinarily would have the further advantage that the employees, even though they lost, would not feel that they had been denied a hearing. Of course this is not always so, but surely it is true in some cases.

From these conclusions several lessons concerning the drafting of collective bargaining agreements may be derived but before considering them a word should be said about the other major context in which arbitration is an important issue—in judicial review.

It is settled law that the parties to an arbitration clause may agree to submit to the arbitrator for final and binding decision all questions concerning his own jurisdiction. His award on the issue of arbitrability would then have the same finality as on any other issue. As an original matter, one might give this effect to the

familiar clause calling for arbitration of "disputes concerning the interpretation or application of this agreement." The arbitration clause is a provision of the agreement. Why, therefore, have not the parties agreed to submit questions concerning its interpretation or application to the arbitrator? But the course of decision is the other way and those who dislike the result should not complain too loudly, for they have only to make their intention more explicit.

Where an arbitrator undertakes to decide a question which plainly has not been submitted, judicial power to set the award aside is salutary. No one could quarrel with a court decision invalidating an award which granted a general wage increase or inserted a union security clause because the arbitrator thought it was good industrial relations. The difficulty is that many courts have used the doctrine in one of two ways to impose their own views of the merits.

(1) A good many awards have been set aside on the ground that the arbitrator did not interpret the contract but added a new obligation. The difficulty is that if you put one meaning on a contract or statute and I am convinced that it has another, it is easy for me to say that you have distorted, and therefore altered or added to, the provision. Suppose the arbitrator ruled in our hypothetical case that the subcontracting broke an implied promise not to undercut the wage scale and seniority clause by dealings with a labor contractor. Even if I thought the decision were wrong, I would say that the arbitrator had done no more than interpret the agreement but I suspect that a good many courts which disagreed would set the award aside on the ground that the arbitration was not given an interpretation.66

(2) A second parallel doctrine has also developed for enlarging the judicial function in contract administration. The New York courts hold—

"[T]he mere insertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration."67

Under this doctrine the courts decide whether a dispute is too one-sided. If the judge thinks the grievance is frivolous, he stays the arbitration, thus making the only effective decision of the dispute.

Perhaps judicial review through the doctrine of arbitrability is necessary to prevent occasional boners by well-meaning arbitrators. Unions are sometimes tempted to press frivolous grievances to harass the employer or serve some internal political objective. But now that the roll of experienced arbitrators has grown and their decisions have been canalized by the development of an industrial jurisprudence, the cause of justice and sound industrial relations might well be better served by a higher degree of judicial restraint. While many of the supporters of grievance arbitration believe there is need for legislation providing effective sanctions for agreements to arbitrate future disputes, they hesitate because the example of States like California, Connecticut and New York strongly suggests that the advantages are more than offset by the costs of a high degree of judicial interference. The proposed Uniform Arbitration Act prepared under the guidance of Professor Pirsig makes a step in the right direction by barring application of the one-sided dispute doctrine, at least until the case has been heard by the arbitrator on its merits. However, neither this statute nor any other is likely to be made applicable to grievance arbitration on a wide scale until some better accommodation is worked out between judicial interpretation and the views of experienced arbitrators.

In conclusion permit me a few diffident observations with respect to the handling of questions of arbitrability at the time a collective bargaining agreement is negotiated. Too little thought is given to the difficulties we have been discussing before they arise. Certainly the parties could do much more to specify the way in which the question of arbitrability is to be handled and some foresighted attorneys take advantage of the opportunity. As an outsider, I would be inclined to favor an express stipulation that the arbitrator shall have both initial and final authority to determine any question of arbitrability but it would seem that the least that should be done would be to provide him with the express power to make a preliminary ruling subject to the condition that participation in arbitration after an adverse ruling should not prejudice a party's right to raise the question in court.

It is also questionable whether anything is gained by adhering to the form of arbitration clause which limits the arbitrator to questions of contract interpretation. Not many years ago the limitation
was undoubtedly important because there were few experienced arbitrators and still fewer standards to guide them, but that is scarcely true today. Regardless of the form of arbitration clause, arbitrators make their awards on the theory stated by Saul Wallen in denying a claim for severance pay:

"The parties in this case bargained over a contract, reached an agreement on its salient features, and determined that it was to govern their relationship for a fixed period. All of the important elements involved in their relationship were discussed, considered, and negotiated. On certain ones the parties reached common understandings and reduced them to writing. With respect to others, demands were made by one side and rejected by the other. Provisions covering such subjects were omitted from the contract. The agreement as finally written was an embodiment of all of the major elements in the parties' commitments."\textsuperscript{58}

Would it not be better therefore to use the form of arbitration clause which permits the submission of all disputes that arise during the term of the collective agreement, leaving the arbitrator free and concentrating the attention of the parties on the merits instead of confusing the proceeding with questions of arbitrability?
