1958

The United States Arbitration Act - A Reevaluation

Herbert Burstein

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Dispute Resolution and Arbitration Commons, and the Labor and Employment Law Commons

Recommended Citation
Available at: http://digitalcommons.law.villanova.edu/vlr/vol3/iss2/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
LABOR ARBITRATION is collective bargaining carried on by quasi-legislative and quasi-judicial means. It is designed, primarily, to preserve the integrity of a labor contract and to assure the peace which it promises. When an arbitrator closes the interstices of an agreement by translating ambiguous clauses into enforceable rules and regulations or declares the rights of the parties, he is engaged in legislation or adjudication and, of course, industrial diplomacy.

This salutary process is frustrated if the contestants are unwilling to be bound by the award or cannot be compelled to accept it. Rejection of the award means, almost inevitably, a transition from a cold war into the heat of a strike or a lock-out. Hence, an effective, even if not an ideal, arbitral system presupposes a comprehensive statutory framework which includes, among other things, efficient procedures for judicial enforcement. This has been achieved under many state statutes which establish agencies or prescribe methods for the settlement of labor disputes through the medium of arbitration.

However, despite the prevalence of arbitration clauses in labor agreements and the development of a federal substantive law of labor relations, and notwithstanding that the federal courts are rapidly becoming the principal forums for the resolution of labor disputes, a specific federal labor arbitration statute has not been adopted. Instead, litigants and the courts have relied upon the United States Arbitration Act as a statutory basis for the enforcement of arbitration agreements involving labor disputes. Unfortunately, there is no unanimous agree-
ment on the part of the courts and the bar that the Arbitration Act applies to labor disputes. On the contrary, the Arbitration Act has been the source of a decisional history which matches, if it does not surpass, the "checkered career" of commercial arbitration. The seemingly hopeless conflict of opinions among the federal courts has not been reconciled by the exiguous contribution of the United States Supreme Court in this field. It is true, of course, that the Supreme Court has sanctioned the enforcement of arbitration clauses in collective bargaining agreements in suits instituted under section 301(a) of the Labor Management Relations Act of 1947. The Supreme Court has held that section 301(a) of the Labor Management Relations Act is more than jurisdictional; that it does, in fact, authorize "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." In short, since section 301(a) of the Labor Management Relations Act "is more than jurisdictional," the procedural route for enforcing arbitration agreements is marked out in section 301(b).

It is evident, therefore, that either an employer or a union may institute suit for violation of a collective bargaining agreement, and elect either to recover damages or to compel specific performance of the promise to arbitrate. Left undecided, however, is this question: whether in a suit, under section 301(a) of the Labor Management Relations Act, to recover damages rather than to compel arbitration, the defendant may stay the action pending arbitration. The issue suggested by this question may be illustrated by a hypothetical problem: a union and an employer, whose employees produce goods for

8. Undecided, too, is the question whether an individual employee may institute suit in a federal court to compel specific performance of a promise to arbitrate grievances. The Supreme Court has held that an individual employee may not institute suit under section 301(a) of the Labor Management Relations Act to recover unpaid wages. Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955).
sale in interstate commerce, are parties to a collective labor agreement. Among other things, the labor agreement provides for arbitration of disputes and grievances concerning the interpretation, application, and enforcement of the agreement. When the employer subcontracts a portion of his work, the union charges the former with a violation of the agreement and calls a strike. The employer then institutes suit under section 301(a) of the Labor Management Relations Act to recover damages for breach of contract and the union moves for a stay of the action pending arbitration.

It may, perhaps, be contended that when the court acquires jurisdiction over the subject matter and the parties, it can entertain a motion under section 301(b) to stay the suit pending arbitration. Alternatively, the union may counterclaim for arbitration. But it is questionable that either procedure would sanction an order staying the suit. Clearly, the Labor Management Relations Act does not, by its terms, contemplate either a motion to stay the suit or a stay accomplished by the counterclaim in the answer. Under typical state arbitration statutes, a stay of the suit is secured by a motion made in accordance with the express provisions of the arbitration law of the state. For example, if an action is instituted in the courts of the State of New York to recover damages for breach of a collective bargaining agreement, the defendant must affirmatively move under section 1451 of the Civil Practice Act for an order staying the action pending arbitration. In other words, the arbitration law of the State of New York prescribes an express procedure for compelling arbitration or for staying an action pending arbitration. If the appropriate procedural steps are not followed by the defendant, the courts will not *sua sponte* stay the action, and the case will proceed to trial and judgment.

Analogy would indicate that if an action is instituted under section 301(a) of the Labor Management Relations Act, the defendant must affirmatively move for a stay of the action under the federal Arbitration Act. Section 301(b) does not appear to provide the remedy of a stay pending arbitration. If it does, however, then the federal Arbitration Act, at least in the area of labor arbitration, has become moribund. This may explain the refusal by the Supreme Court to review cases which pose squarely the question of the applicability of the federal Arbitration Act to collective bargaining agreements. Until the

Supreme Court announces its position, it is reasonable to assume that the federal Arbitration Act is not a legislative dodo and that in an appropriate case the Court will act. Consequently, an inquiry into the origin, scope and purpose of the Federal Arbitration Act may adumbrate the important issues which must be resolved.

I.

THE FEDERAL ARBITRATION ACT.

The United States Arbitration Act is a short and relatively simple statute. Its principal provisions are found in sections 1, 2, 3, and 4.12 Briefly stated, the Arbitration Act provides for the enforcement of (a) agreements to arbitrate future controversies arising out of (1) "any maritime transaction or a contract evidencing a transaction involving commerce," or (2) "the refusal to perform the whole or any part" of the transaction or contract, and (b) a written agreement to submit to arbitration an existing controversy arising out of "such a contract, transaction or refusal." Excluded from the ambit of application of the Arbitration Act are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."13 If the issue involved in any suit or proceeding instituted in a federal court is "referable to arbitration under an agreement in writing for such arbitration," the suit or proceeding may be stayed pending arbitration by a motion under section 3 of the Arbitration Act. Further, if one party to the contract or transaction fails, refuses or neglects to proceed to arbitration, the aggrieved party may petition, under section 4 of the Arbitration Act, for an order directing arbitration:

"If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose."

Accordingly, in the hypothetical case, if the union elects to proceed under section 3, the jurisdictional requirement incorporated in section 4, namely, that the federal court have jurisdiction "under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties," is not a bar. In any event, the court would have jurisdiction of the suit since it was instituted under section 301(a) of the Labor Management Relations Act, and the requirement for diversity of citizenship and amount in controversy is expressly waived. However, in order to proceed under section 3 and thereby to stay the action, the union must prove: (a) either that the exclusion in section 1 of the Arbitration Act does not apply because a collective labor agreement is not a contract of employment or if the collective labor agreement is held to be a contract of employment, the exclusion is limited to contracts of employment of workers directly engaged in interstate commerce and not in the production of goods for commerce; and (b) that the dispute is arbitrable.

Whether or not the union will prevail may depend upon its choice of a forum, since the several courts of appeals and the federal district courts are sharply divided. Although a construction of the Arbitration Act based upon its legislative history appears to support those who argue that Congress enacted only a commercial arbitration statute, it has been argued that the scanty history is inconclusive and unreliable.

II.

LEGISLATIVE HISTORY.

The American Bar Association recommended the enactment of the federal Arbitration Act in 1918 and a draft of a proposed law was prepared by its Committee on Commerce, Trade and Commercial Law. In December 1922, a bill was introduced in the Senate and in the House which did not incorporate the exclusionary language now

14. Conflict of opinion is reflected by decisions of federal courts within the same circuit as well as among courts of appeals.

15. Signal-Stat Corp. v. Local 475, United Electrical Workers, 235 F.2d 298 (2d Cir. 1956); Lincoln Mills v. Textile Workers Union, CIO, 230 F.2d 81 (5th Cir. 1956); United Electrical Workers v. Miller Metal Products, Inc., 215 F.2d 221 (4th Cir. 1954); Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n of Street Employees, 193 F.2d 327 (3d Cir. 1952); Amalgamated Ass'n of Street Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310 (3d Cir. 1951); Shirley-Herman Co. v. International Hod Carriers Union, 182 F.2d 806, 809 (2d Cir. 1950); International Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33 (4th Cir. 1948); see, Local 19, Warehouse Workers Union, CIO v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956); Hoover Motor Express Co. v. Teamsters Union, AFL, 217 F.2d 49 (6th Cir. 1954); Mercury Oil Co. v. Oil Workers Int'l. Union, CIO, 187 F.2d 980, 983 (10th Cir. 1951).


Villanova Law Review, Vol. 3, Iss. 2 [1958], Art. 1

130

VILLANOVA LAW REVIEW

[Vol. 3: p. 125

contained in section 1. Vigorous objection to the bill was voiced by Andrew Furuseth, President of the International Seamen’s Union of America, who charged that it constituted a “compulsory labor” bill. The American Federation of Labor filed protests against the bill and has claimed that its intervention and protest resulted in the adoption of the exclusionary language of section 1 which “exempts labor from the provisions of the law.”

Later, at hearings on the proposed act, a spokesman for the American Bar Association reassured labor representatives by stating that the bill was not designed “to make an industrial arbitration in any sense,” and by suggesting language substantially like that of the exclusionary clause in section 1. Senator Sterling, then Chairman of the Subcommittee, apparently acknowledged that the purpose of the proposed amendment submitted by the American Bar Association was to restrict the law to commercial arbitration.

The bill was not enacted. In December 1923 a new bill was introduced in the House and in the Senate which added the exclusionary language now incorporated in section 1. The testimony at the hearings and floor debate indicates persuasively that the bill was intended to apply to commercial arbitration only. The absence of labor representatives from the hearings appears to support this conclusion. Moreover, the Chairman of the House Committee on the Judiciary emphasized the fact that the House bill was designed to “give an opportunity to enforce an agreement in commercial contracts and admiralty contracts” and this was confirmed by Congressman Mills of New York, who had sponsored the bill in the House. The reports of both the House and the Senate Committees and the support of the Department of Commerce reaffirmed the general understanding that the act was a commercial arbitration law.

20. Id. at 10.
22. 65 CONG. REC. 1931 (1924).
23. 65 CONG. REC. 11,080 (1924).
25. The Department issued a statement in 1925 quoting then Secretary Hoover as follows: ‘Information collected by the Department of Commerce over the past several years’ he said, ‘clearly showed that the substantial element of the American business public is overwhelmingly in favor of arbitration in the settlement of commercial dis-
One further clue to congressional intention is provided by a study of the arbitration statutes in effect at the time when the federal act was adopted. Manifestly, the federal Arbitration Act was modeled, in the main, upon the 1920 New York Arbitration Law and that law was intended to apply to commercial arbitration exclusively.

In 1940, section 1448 of the Civil Practice Act of New York was amended, to read, in part:

"A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

In 1952, the New York law was further amended to provide that the terms of a new collective bargaining agreement could be submitted to arbitration, but no similar change was made in the federal Arbitration Act. Indeed, efforts to expand the Arbitration Act to embrace labor disputes consistently failed. In 1926, the American Bar Association, through its Committee on Commerce, Trade and Commercial Law, proposed the adoption of a bill applicable to labor disputes and a draft of such a bill was submitted by the Association. The proposed bill was opposed by the American Federation of Labor, and the American Bar Association decided not to press for its adoption.

An attempt was made again in 1942 to amend the Arbitration Act, and a bill, drafted by a Committee of the American Arbitration

29. 61 STAT. 669 (1947), as amended, 9 U.S.C. § 1 (1952). The only change effected was the addition to section one of the catchline: "Maritime Transactions' and 'commerce' defined; exceptions to operation of title."
30. 51 A.B.A. REP. 394 (1926).
31. 53 A.B.A. REP. 376 (1928).
32. 55 A.B.A. REP. 328 (1930).
Association, was introduced in the Senate. This bill would have sanctioned the enforcement of arbitration agreements between unions or other representatives of employees and employers but it never reached the Senate floor. When the 1947 Congress codified the act as Title 9, no effort was made to include labor arbitration. Indeed, when the Arbitration Act was codified, one court of appeals had ruled that the exclusionary language in section 1 included a collective bargaining agreement and, hence, that the act was not applicable to a collective bargaining agreement.

Legislative history is not always a reliable guide to congressional intention. However, the objectives of legislation are frequently revealed by a search into the social climate and the economic dynamics of the time when the law was enacted. Here, too, the evidence points to an exclusively commercial arbitration law. The characteristic sign of the 1920's was the rising tide of American capitalism, the expansion of an industrial economy, and aggressive anti-unionism. The alleged alliance, whether real or illusory, between government and business during this period, did not inspire confidence, on the part of labor, in the impartial processes of government. Organized labor was then vigorously resisting compulsory arbitration statutes which had been adopted or were in the process of adoption by various states. It is understandable, therefore, that the labor movement and each of its segments believed that arbitration was undesirable, if not dangerous. Indeed, the American Federation of Labor consistently opposed the adoption of any labor arbitration statute.

There are, of course, divergent views on the legislative history and the catalogue of abstracts from debates and reports apparently does not impress those who contend that the Arbitration Act applies to industrial disputes under collective labor agreements. They urge, first, that a collective bargaining agreement is not a contract of employment; secondly, that labor's opposition to the inclusion of arbitration of labor disputes must be understood to apply only to individual contracts of hire for personal service, under which seamen were employed in the 1920's, and not to collective bargaining agreements; and, third, that the exclusion in section 1 applies only to employees directly engaged in interstate commerce and not to those who are employed in the production of goods for commerce. One thing is clear: organized labor

35. Gatloff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944).
had encouraged and relied upon collective bargaining agreements and it seems doubtful that the opposition of the American Federation of Labor would have been limited to individual contracts. It is true, of course, that the “yellow dog” contract was the principal target of organized labor’s economic and legislative efforts. The unions’ experience with governmental intervention had not been a happy one but the trade union movement was threatened with even graver consequences by challenges to collective action. This was the day when the Supreme Court disabused those who had hailed the Clayton Act as a magna carta for labor. Business unionists who wanted to keep labor out of politics desired, even more, to keep politics and government out of labor relations. It is fair to suggest, therefore, that any scheme of federal arbitration would be a signal for opposition by organized labor. Certainly, it cannot be effectively argued that the organized trade union movement understood the Arbitration Act to be applicable to collective bargaining agreements while individual contracts of employment were excluded.

Finally, even if a collective bargaining agreement is not treated as a contract of employment, within the meaning of the exclusionary language in section 1, there is one further hurdle which must be overcome. Section 2 makes reference to a “contract evidencing a transaction involving commerce.” How does one square the concept of a collective bargaining agreement with the language “contract evidencing a transaction involving commerce”? If anything, it cannot be reconciled. The legislative history of the act shows that this key phrase was inserted as a substitute for the earlier “transaction involving commerce” in order to preclude any construction that the bill applied to labor contracts as well as to commercial transactions.  

The overriding fact remains that the legislative history has been read differently by different courts, and the United States Supreme Court has provided no definitive guide. Of course, Mr. Justice Frankfurter read the majority opinion in *Textile Workers Union v. Lincoln Mills* as rejecting “the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements,” but this obviously is not a rule of law binding on the federal courts.

---

41. 353 U.S. 448, 466 (1957) (dissenting opinion).
Since neither the text of the statute nor the legislative history has produced a harmony of opinions, courts have resorted to other aids to construction. The consequence has been a miscellany of conflicting decisions.

III. THE ARBITRATION ACT IN THE COURTS.

Unquestionably the primary cause for conflict is the lack of agreement about the status of the collective bargaining agreement. Surely, if the courts agreed that a collective labor agreement is a contract of employment, the conflict would be narrowed. But there is no such unanimity of opinion.

Courts which hold that a collective labor agreement is not a contract of employment rely, principally, upon the decision in J. I. Case Co. v. NLRB, in which the Supreme Court said, in effect, that a collective bargaining agreement is a trade agreement analogous to a tariff of rates and charges published by carriers, rather than a contract of employment. One appellate court, however, has pointed out that the J. I. Case doctrine is not determinative of the question under the United States Arbitration Act. Indeed, in another context, the United States Supreme Court has referred to collective bargaining agreements as "employment contracts." The controversy, however, does not terminate with the conclusion that a collective bargaining agreement is a contract of employment. In Tenney Engineering, Inc. v. United Electrical Workers, the Court of Appeals for the Third Circuit has ruled that while a collective bargaining agreement is a contract of employment, the exclusion in section 1 of the Arbitration Act applies only to employees specifically identified therein, namely, seamen and railroad workers and others directly engaged in interstate commerce. This presupposes, however, that Congress legislated a distinction between employees engaged in commerce and those engaged in the production of goods for commerce. It has

42. See Burstein, Enforcement of Collective Labor Agreements by the Courts, 6th Annual Conference on Labor (N.Y.U.) 31 (1953); Rice, Collective Labor Agreements in American Law, 44 Harv. L. Rev. 572 (1931); Wittmer, Collective Agreements in the Contracts, 48 Yale L.J. 229 (1938).
43. 321 U.S. 332 (1944).
46. 207 F.2d 450 (3d Cir. 1953).
been argued that if the federal Arbitration Act was intended to govern industrial disputes, the impact on interstate commerce of a strike or work stoppage is no less a matter of national concern where it involves employees engaged in producing goods for interstate commerce, than where it is restricted to employees who are engaged directly in interstate commerce. Such a differentiation has not been expressed in other vital labor legislation. On the contrary, Congress and the courts have sedulously avoided an atomization of workers in the National Labor Relations Act both in the original and amended texts. Thus far, the principle of the Tenney case has failed to win widespread acceptance.  

The early labor cases which turned on the Arbitration Act were not within the typical dispute category. Thus, in 1943, the Third Circuit held that section 3 of the Arbitration Act was not limited by section 2 and, accordingly, granted a stay in a suit under the Fair Labor Standards Act. In 1944, the Sixth Circuit held that section 1 did apply to section 3 of the act and denied a stay of arbitration. In other words, the occasion for conflict was primarily a difference of views concerning the interrelationships between section 1, 2, and 3 of the Arbitration Act. Hence, one court which treated section 3 as an independent provision would grant a stay if it was “satisfied that the issue involved in such suit or proceeding [was] referable to arbitration” under an agreement in writing which provided “for such arbitration.” It was, consequently, of no moment whether or not a collective labor agreement was a contract of employment. Another court, on the other hand, treating sections 1 and 3 as integral parts of a single statute would deny a stay if the exclusionary language in section 1 were operative.  

One appellate court dealt squarely with the problem. In Amalgamated Ass'n of Street Employees v. Pennsylvania Greyhound Lines, 47
Judge Hastie construed the catchline added by the 1947 codification of the federal Arbitration Act as a congressional signal to read section 3 and section 1 as integrated parts of a single statute. This controversy was finally settled by the United States Supreme Court in Bernhardt v. Polygraphic Co., which read sections 1, 2, and 3 as interrelated parts of the statute.

Four cases, decided by federal appellate courts, highlight the conflict of construction. In International Union United Furniture Workers v. Colonial Hardwood Flooring Co., suit was instituted under section 301(a) of the Labor Management Relations Act. The Union moved for a stay of arbitration on the ground that the contract required arbitration of the matters in suit. The district court denied the stay on the ground, among others, that the contract did not provide for arbitration of such matters. The court of appeals affirmed, holding that:

"the arbitration clause embedded in Art. IV, as one of the subsections of section 2, has relation to the controversies which are made the subject of grievance procedure of that article, and not to claims for damages on account of strikes and secondary boycotts, which are matters entirely foreign thereto. Damages arising from strikes and lockouts could not reasonably be held subject to arbitration under a procedure which expressly forbids strikes and lockouts and provides for the settlement of grievances in order that they may be avoided. It would have been possible, of course, for the parties to provide for the arbitration of any dispute which might arise between them; but they did not do this, and the rule noscitur a sociis applies to the arbitration clause in the grievance procedure to limit its application to controversies to which the grievance procedure was intended to apply."

The Court of Appeals for the Seventh Circuit reached the same conclusion in Cuneo Press v. Kokomo Paper Handlers' Union. Here, too, the Union sought a stay order under section 3 of the Arbitration Act after they had called a sit-down strike and the employer instituted suit. The court there said:

52. 192 F.2d 310 (3d Cir. 1951).
“If the unions had grievances, it is apparent that they ignored the grievance procedure, as well as the provision for arbitration. Instead they instituted a sit down strike which was disruptive of plaintiff’s business and the work of its employees. The action was in direct conflict with the arbitration procedure called for by the contract. . . . The unions chose to act suddenly and without warning in using the economic force or pressure of a sit down strike. Obviously, a chief purpose of the arbitration agreement was to avoid a strike. When the unions embarked upon the strike, they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff began. Then it was that plaintiff’s right of action for damages and injunctive relief to prevent further damage accrued.

“. . . .

“Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength. Having thus violated their contract to plaintiff’s damage, it was too late for them to demand arbitration on that issue.” 65

A similar conclusion was reached by the Court of Appeals for the Sixth Circuit in International Union, United Automobile Workers v. Benton Harbor Malleable Industries. 55 Directly opposed to these opinions is the decision by the Court of Appeals for the Second Circuit in Signal-Stat Corp. v. Local 475, United Electrical Workers. 56 The court there held:

“We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, 'All disputes, grievances or differences' are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from Markel Electric Products, Inc. v. United Electric, Radio & Machine Workers, [202 F.2d 435 (2d Cir. 1953)]. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous. We think their interpretations of similar arbitration clauses are unduly restrictive and achieve, by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements. Cf. Kulukundis Shipping Co. v. Amtorg Trading Corp., 2 Cir., 126 F.2d 978, 983-85. Other cases, with which we agree, support our decision that the instant arbitration

56. 242 F.2d 536 (6th Cir. 1957); see, also, Hoover Motor Express Co. v. Teamsters Union, AFL, 217 F.2d 49 (6th Cir. 1954).
57. 235 F.2d 298 (2d Cir. 1956).

Additionally, the court adopted the reasoning of the Tenney case. The Tenney case illustrates the judicial gyrations which are perhaps inevitable under the Arbitration Act. Originally the Court of Appeals for the Third Circuit, in Donahue v. Susquehanna Collieries Co., and in Watkins v. Hudson Coal Co., read section 3 as distinct from section 1, although the court did not decide whether a collective bargaining agreement was a contract of employment. Then, in Amalgamated Ass'n of Street Employees v. Pennsylvania Greyhound Lines, Inc., the court concluded that a collective bargaining agreement was a contract of employment and that the Arbitration Act did not apply. Then later, in the Tenney case, the court modified its views so as to extend the stay provisions of the Arbitration Act to collective bargaining agreements involving employees not directly employed in interstate commerce.

A possible conflict exists also in the Court of Appeals for the Second Circuit although that court has rejected the claim of conflict and the denial of certiorari by the United States Supreme Court may be read as supporting that conclusion, despite the injunction by the Supreme Court that a denial of certiorari is not to be construed as an expression of opinion by that Court.

In Markel Electric Products, Inc. v. United Electrical Workers, the employer instituted an action under section 301(a) of the Labor Management Relations Act alleging a breach of contract by reason of a strike in violation of the no-strike clause. The Union denied that it had violated the agreement and moved for an order staying proceedings pending arbitration. The arbitration clause referred to differences "between the company and any employee" and to "any trouble of any kind" which might arise in the plant. The court, affirming the order...

58. Id. at 302.
59. 138 F.2d 3 (3d Cir. 1943).
60. 151 F.2d 311 (3d Cir. 1945), cert. denied, 327 U.S. 777 (1946).
61. 192 F.2d 310 (3d Cir. 1951).
62. 207 F.2d 450 (3d Cir. 1953).
63. Signal-Stat Corp. v. Local 475, United Electrical Workers, 235 F.2d 298 (2d Cir. 1956). A petition for rehearing en banc was denied by the court.
64. 354 U.S. 911 (1957).
denying the Union's motion for a stay pending arbitration, held that the dispute was not contemplated by the arbitration clause:

"[W]e do not think that the dispute here involved is within the scope of the arbitration clause. The whole tenor of the contract was to lay a groundwork of agreement as to wages, hours and conditions of employment and to provide a peaceful method for the settlement of grievances and disputes over the meaning and application of the agreement with respect to those matters. If efforts in accordance with the procedure of Article VIII proved to be ineffective, resort might be had to Article IX, which provided that an unsettled dispute or grievance was to be submitted to arbitration . . . upon written notice of the party filing the grievance . . . to be served upon the other party within five (5) days after the meeting referred to in the third step of the grievance procedure outlined above.' The quoted language shows clearly that arbitration was to be but a fourth step in the grievance procedure, and as such the subject matter to which it is applicable is no broader than that to which the first three steps applied. The dispute as to whether the union was justified in calling the strike is one certainly not capable of resolution at a conference between an employee or a department steward, or both, and a department foreman; or between the chief steward and the general superintendent. It is, therefore, not the kind of dispute which was intended to be resolved by submission to arbitration." 65

The whole problem appeared to have been brought into focus in a decision by the Court of Appeals for the First Circuit, in Local 205 United Electrical Workers v. General Electric Co. 66 In that case, the Union filed two grievances which the company insisted were not arbitrable. One involved the job classification of an employee alleged to be doing work calling for a rate higher than he was receiving and the other related to the discharge of an employee for refusing to do work claimed to be beyond his regular duties. The question presented was whether a federal district court had authority under section 301 of the Labor Management Relations Act to compel an employer to submit the grievances to arbitration. The District Court dismissed the complaint 67 but the Court of Appeals reversed, holding that jurisdiction to compel arbitration is not withdrawn by the Norris-LaGuardia Act. The court then held that in an action under section 301 (a) of the Labor Management Relations Act federal, not state, law determines whether the remedy of specific performance of an agreement to arbitrate was available. However, said the court, the Labor Manage-

65. 202 F.2d 435, 437 (2d Cir. 1953).
66. 233 F.2d 85 (1st Cir. 1956).
The Employee Relations Act did not provide a statutory basis for enforcing executory agreements to arbitrate. The appropriate vehicle was the federal Arbitration Act, according to the First Circuit.

The decision was reviewed by the United States Supreme Court which affirmed the decision but did not follow the procedural route proposed by the First Circuit. Indeed, the affirmance rested on a ground expressly rejected by the court of appeals and the majority avoided a decision on the Arbitration Act.

The applicability of the United States Arbitration Act to collective bargaining agreements was also raised and similarly treated in Textile Workers Union v. Lincoln Mills,68 Goodall-Sanford, Inc. v. United Textile Workers, AFL-CIO,69 and United States Steel Workers, CIO v. Galland-Henning Mfg. Co.70

A week later, following the decisions in the three landmark cases, certiorari was denied in Buckeye Cotton Oil Co. v. Local 19, Warehouse Workers Union, CIO, and Signal-Stat Corp. v. Local 475, United Electrical Workers.71

Earlier in the Term, the Supreme Court denied certiorari in Cuneo Press, Inc. v. Kokomo Paper Handlers’ Union.72 The consequences of denial of certiorari are these: the Supreme Court has left standing a decision by the Court of Appeals for the Seventh Circuit which holds that a strike does constitute a waiver of the right to demand arbitration;73 a decision by the Court of Appeals for the Sixth Circuit which holds that the United States Arbitration Act specifically authorizes specific performance of an agreement to arbitrate;74 and a decision that a strike does not constitute a waiver of the right to arbitration.75

If the United States Supreme Court ultimately grants certiorari in a case which once again raises the issue of the applicability of the United States Arbitration Act to collective bargaining agreements, the following possibilities are presented:

(a) the Court may decide that a collective bargaining agreement is a contract of employment absolutely excluded under section 1 of the Arbitration Act so that the nature of the employment is immaterial;

68. 353 U.S. 448 (1957).
70. 241 F.2d 323 (7th Cir. 1957).
73. See note 53 supra.
74. 236 F.2d 776 (6th Cir. 1956), cert. denied, 354 U.S. 910 (1957).
75. See note 56 supra.
(b) the Court may hold that the collective bargaining agreement is a contract of employment excluded by section 1 of the Arbitration Act only when it involves workers directly engaged in interstate commerce;

(c) the Court may hold that the collective bargaining agreement is not a contract of employment and so long as it evidences a transaction in commerce it is subject to the provisions of sections 3 and 4 of the Arbitration Act;

(d) the Court may decide that although a collective bargaining agreement is not a contract of employment for the purposes of the Arbitration Act, a stay will not be ordered if the employer institutes an action under the Labor Management Relations Act and elects to recover damages rather than to enforce arbitration;

(e) the Court may decide that a collective bargaining agreement is not a contract of employment and a suit to recover damages for breach of a collective bargaining agreement containing an arbitration clause must be stayed under section 3 of the Arbitration Act, since arbitration is the sole remedy of the plaintiff and section 301(b) authorizes a motion for a stay.

To be sure, it is idle to speculate on the possible outcome of such litigation. Indeed, it is even possible that the Supreme Court will not reach these questions before the act is amended.  