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COMPULSORY ARBITRATION — A SOLUTION FOR INDUSTRIAL CHAOS?

A problem of major importance facing the American people today is that of solving labor disputes with a minimum of discomfort to employees, employers, and the public. Disputes are almost certain to arise under any system of industrial regulation; nevertheless, an attempt to deal with the problem with the hope of arriving at an equitable solution must be made. It is to be expected that any legislative solution of the labor problem will cause inconvenience and hardship to a degree, but perhaps some remedy may be contrived which will be an improvement over the industrial chaos which often ties up vital industries for months at a time while the public is powerless to bring about a settlement. Economic warfare between the wage earner and the employer must be alleviated, for the public has suffered too long and too often.¹

A possible remedy for the unsettled conditions now hampering industry is arbitration of labor disputes. In discussing the question of arbitration one must make, at the outset, a distinction between *voluntary* and *compulsory arbitration*. If the arbitration statute requires both parties to submit the dispute for a decision, the arbitration is compulsory, but if neither party is required by law to submit to arbitration, but do so by agreement, then the arbitration is voluntary.² Where a valid contract is entered into by which the

¹ Higgins, *A New Province for Law and Order*, 29 HARV. L. REV. 13 (1915); Huebner in his article entitled *Compulsory Arbitration of Labor Disputes*, 30 J. AM. JUD. SOC'Y 123 (1946) at page 125 asks: "Must the anarchy of the free market in labor relations be continued, with one of the real parties in interest, the consuming public, incapable of any controls, except to form an opinion and influence the parties with such public opinion?" Simpson in his article entitled *Constitutional Limitations on Compulsory Industrial Arbitration*, 38 HARV. L. REV. 753 (1925) said: "So long as the present industrial system continues to regulate the economic life of the nation, industrial disputes will continue to arise; indeed they are almost certain to arise under any conceivable ordering of an industrial society. Since such disputes are bound to occur, they must be settled."

² UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES* 9 (1946); *In re Bill Relating to Arbitration*, 9 Colo. 629, 21 Pac. 474 (1890).

employer and employees agree to submit to arbitration disputes arising between them, regardless of whether a means of selecting arbitrators is agreed upon, it will be specifically enforced by the courts. This is a voluntary agreement of the parties and the courts, in enforcing the contract, are merely carrying out their express intention.³ Where the parties agree to arbitrate, and by statute are then required to accept the award, this too, is voluntary arbitration and the statute making the agreement irrevocable is constitutional.⁴

Compulsory arbitration on the other hand is involved where the parties have not agreed to arbitrate a dispute but are required by statute to submit their controversy to arbitration.⁵ Compulsory arbitration can be accomplished either by requiring all labor contracts to include a provision submitting any future dispute to arbitration or, in the absence of such contract, by requiring the parties to submit any dispute to arbitration. In either type of case, all labor disputes will be settled by arbitration without the consent of the parties. A statute providing for compulsory submission of the dispute to arbitration but providing for voluntary acceptance of an award would not in a strict sense be compulsory arbitration at all, for neither labor nor industry would ever be forced to settle a dispute, since their consent to the award would be necessary to the final disposition of the dispute. Likewise, a statute providing for voluntary submission to arbitration, but compulsory acceptance of award is not compulsory arbitration.⁶ As used in this article, compulsory arbitration will mean compulsory submission of disputes to arbitration with compulsory acceptance of award.

Voluntary arbitration is certainly a most desirable method of settling industrial differences, for strikes and lockouts are prevented without coercion of either labor or capital. However the question may well be asked whether voluntary agreements will be utilized by the disputing parties. Many states have set up arbitra-

³ Note, 69 A. L. R. 816 (1930).

⁴ *Ibid.*

⁵ DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 967 (5th ed. 1941).

⁶ *Ibid.*

tion boards to which the parties may voluntarily submit their dispute for settlement, and all but two states have passed statutes declaring all arbitration agreements irrevocable and enforceable.⁷ Many of these states have provided that once arbitration has been agreed upon the award will be binding and both parties may be compelled by injunction to abide by the decision of the arbitrators.⁸ Texas adopted this type of statute providing for voluntary submission to arbitration, with compulsory acceptance of the award of the board.⁹ This legislation is a step in the right direction, but the question is whether another step should be taken depriving the parties of their election not to use the processes of arbitration. It may well be argued that the time for the second step has come, particularly in industries essential to the public health and safety.

Kansas was the first state to attempt compulsory arbitration as a solution to disputes in vital industries.¹⁰ The Kansas Act was passed more than twenty-five years ago after a prolonged and violent strike in the coal mining industry had occurred within the state.¹¹ All labor controversies in industries affected with a "public interest," including public utilities, railroads, mining, and the food and clothing industries, were required to be submitted to a court of Industrial Relation. Lockouts, strikes, boycotts, picketing and other methods of labor warfare were forbidden.¹²

The constitutionality of the Kansas Act was tested in a series

⁷ Rhode Island and South Dakota have failed to pass voluntary arbitration statutes. In fact, South Dakota expressly refuses to enforce specifically any arbitration agreement concerning labor disputes; S. D. CODE § 37.4602 (1939).

⁸ MASS. GEN. LAWS, c. 150, § 1 (1932); Mich. Pub. Act No. 318, Mich. Acts 1947; MONT. REV. CODE 3055 (1935); Nebr. Laws 1947, § 20, L. B. 537; NEV. COMP. LAWS § 2763 (1929); N. H. REV. LAWS c. 210, § 15 (1942); N. J. REV. STAT. § 34:13-1 (1937); CONSOL. LAWS OF N. Y. ANN., art. 21, § 750 (1940); ORE. COMP. LAWS ANN., § 102 (1940); PENN. STAT. tit. 5, c. 2, § 21 (Purdons, 1936); TENN. CODE ANN. 9359 (Williams, 1934); W. VA. CODE § 5409 (1943); WIS. STAT. § 111.10 (1943); WY. REV. STAT. § 101-7-124 (1931).

⁹ TEX. REV. CIV. STAT. (Vernon, 1925) art. 239.

¹⁰ Kan. Laws (1920) c. 29, § 3a; the Act is reproduced in full in *State v. Howat*, 109 Kan. 376, 198 Pac. 686, 705 (1921).

¹¹ DAUCHERTY, *op. cit. supra* note 5, at 974.

¹² *Ibid.*

of three Supreme Court decisions. In *Charles Wolff Packing v. Court of Industrial Relations*¹³ the Meat Cutters Union filed a complaint respecting the wages of its members. The employer, a small meat-packing company having three hundred employees, refused to comply with an order of the Industrial Relations Court increasing wages. The Industrial Court instituted a mandamus proceeding in the Kansas Supreme Court to compel compliance. The packing company contended that the Act was unconstitutional, but the Kansas Supreme Court upheld the Act and the action of the Industrial Court.¹⁴ An appeal was taken to the United States Supreme Court, which reversed and held the application of the statute unconstitutional.

In *Dorchy v. State of Kansas*,¹⁵ decided the next year, the United States Supreme Court held the Act invalid as applied to the coal mining industry. A third decision was handed down the following year, again involving the Wolff Packing Company. The Supreme Court held the Kansas arbitration statute invalid in regard to hour regulations in the packing industry.¹⁶

In all of these cases the Act was held to violate the Fourteenth Amendment, which, the court determined, guarantees liberty to contract.¹⁷ In the last *Wolff Packing* case Justice Van Devanter declared:

“Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the Fourteenth Amendment.”¹⁸

The public interest in the businesses subject to the act was not

¹³ *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1922), noted in 37 HARV. L. REV. 1097 (1925); 22 MICH. L. REV. 135 (1924).

¹⁴ *Court of Industrial Relations v. Charles Wolff Packing Co.*, 109 Kan. 629, 201 Pac. 418 (1921).

¹⁵ *Dorchy v. State of Kansas*, 264 U. S. 286 (1923).

¹⁶ *Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552 (1924).

¹⁷ *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1922); *Dorchy v. State of Kansas*, 264 U. S. 286 (1923); *Wolff Packing Co. v. Industrial Court* 267 U. S. 552 (1924).

¹⁸ *Wolff Packing Co. v. Industrial Court*, 267 U. S. 552, 569 (1924).

regarded as sufficient to justify the imposition of compulsory arbitration and infringement of the right to contract as one pleases.

The freedom of employers and employees to contract in an unrestricted manner concerning employment is regarded as both liberty and property, and has been considered as entitled to the same constitutional protection as property rights of a more substantial nature. The right to refrain from entering into contracts is regarded as a part of this liberty of contract. Any legislation restricting or preventing the exercise of this right violates the Fourteenth Amendment, unless such legislation can be justified under the police power of the state.¹⁹ In the *Wolff* case the court refused to apply the doctrine established in *Wilson v. New*.²⁰ In the latter case the court was called upon to decide the constitutionality of the Adamson Act²¹ which established an eight-hour day for the railroad industry. Before this case, it was thought that every industrial worker had the right to demand higher wages or shorter hours and that there existed a corresponding right in the employer to hire workers on any terms he chose, free from government intervention. Nevertheless, the court held that these rights are subject to some qualifications when employment is accepted in an industry vital to the public.²² Chief Justice Taft's opinion in the first *Wolff* case however, declared that the doctrine announced in the *Wilson* case was limited in application to national emergencies or other exceptional circumstances,²³ on the theory that the freedom to contract could not be abridged unless the public interest urgently needed protection. In such a case, private rights must yield to pressing public need.

It has been contended that a system of compulsory arbitration will not violate any individual worker's liberty to contract.²⁴ Vir-

¹⁹ Simpson, *supra* note 1, at 761.

²⁰ *Wilson v. New*, 243 U. S. 332 (1917).

²¹ 39 STAT. 721 (1916), 45 U. S. C. § 65 (1940).

²² *Wilson v. New*, 243, U. S. 332, 353 (1917).

²³ *Wolff Packing Co. v. Industrial Court*, 262 U. S. 533, 544 (1922).

²⁴ Huebner, *supra* note 1, at 126.

tually all labor agreements are made by representatives of labor unions and representatives of industry. Thus the individual worker usually has only a small voice in the matter. This is especially true in the larger industries employing many workers. The worker either accepts the terms of the contract and works the required hours at the agreed wage, or he does not work. Individual bargaining is vanishing along with the horse and buggy. The only substantial change that compulsory arbitration would make in the present situation would be to allow an impartial group to fix the terms of the contract when the representatives of labor and industry cannot, or will not, agree.

Notwithstanding the attitude of the Supreme Court in the *Wolff* case, many exceptions to the liberty to contract doctrine have been found. As early as 1898, an act of the Utah Legislature²⁵ restricting hours of labor in mines and smelters was sustained as a legitimate exercise of the police power, on the ground that if these occupations were too long pursued, they would injure the health of the employees.²⁶ A similar regulation of hours was upheld in *Bunting v. Oregon*,²⁷ and another Oregon statute forbidding the employment of any female in certain industries for more than ten hours a day was upheld.²⁸

In 1919, an Act of Congress²⁹ fixed minimum wages for women and children in the District of Columbia. The Supreme Court pointed out that this was a restraint on the freedom to contract guaranteed by the Fifth Amendment, and the Act was therefore held unconstitutional.³⁰ This decision, the source of much unrest in state legislatures, was expressly overruled in 1938.³¹ It seems

²⁵ Utah Laws 1896, c. 72.

²⁶ *Holden v. Hardy*, 169 U. S. 366 (1898).

²⁷ *Bunting v. Oregon*, 243 U. S. 426 (1916).

²⁸ *Muller v. Oregon*, 208 U. S. 412 (1908).

²⁹ 40 STAT. 960, c. 174 (1918).

³⁰ *Adkins v. Childrens Hospital*, 261 U. S. 525 (1923).

³¹ In *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937) at page 391, Chief Justice Hughes said: "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable lib-

well established that a state may regulate hours, wages, or any other aspect of employment relations where the public interest needs safeguarding. Certain industries are of vital importance to the general health, safety and welfare, and the public interest in them should be sufficient to warrant legislation calculated to prevent prolonged industrial disruption. A system of compulsory arbitration for industries affected with a public interest would seem to be as much within the police power of the state as is a minimum wage act.³² One writer has stated:

"We may safely assume that in the field of regulating and restricting the individual liberty of contract, the Supreme Court will allow any legislative measures which it is made to feel are calculated to promote the public welfare."³³

The opponents of compulsory arbitration urge that such legislation will result in prohibition of strikes and therefore will cause involuntary servitude.³⁴ Of course, any legislation designed to rid the public of economic warfare between unions and employers will have to forbid strikes (and lockouts) in order to be effective. If strikes are permitted, the very purpose of the legislation will be defeated, for any arbitration statute must provide means of enforcing the arbitration award. The acceptance of the award can only be enforced by requiring the parties to refrain from strikes, lockouts and work stoppages. But this does not mean that involuntary servitude will follow as a necessary consequence. The legislation will not prevent a worker from quitting at any time he wishes, nor will it compel him to work, and it is only forced labor

erty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process."

³² *Local Union No. 876, Etc. v. State of Michigan Labor Mediation Board*, 294 Mich. 629, 293 N. W. 809 (1940).

³³ Anthony, *Attitude of Supreme Court Towards Liberty of Contract*, 6 TEX. L. REV. 266 (1927).

³⁴ Simpson, *supra* note 1, at 783.

that is prohibited by the Thirteenth Amendment.³⁵ The arbitration statute will prohibit any united or planned walk-outs, and will also forbid the publication of any union mandate ordering such concerted action. In spite of the fact that the individual remains free to quit, the prohibition of planned mass walk-outs is a powerful deterrent to assure compliance with the award of the arbitrators.

The failure of the Kansas arbitration statute discouraged legislation of this type for a dozen or more years, but the idea was by no means dead. During the recent war, the Federal Government settled major labor disputes by imposing virtual compulsory arbitration operating under executive orders of the President and under Congressional authority as expressed in the Stabilization Act and the Smith-Connally Act.³⁶ At the present time nine states have passed compulsory arbitration laws applicable to public utilities.³⁷ With one exception³⁸ all these laws were enacted in 1947.

The Missouri Statute may be taken as typical of this legislation. It provides that compulsory arbitration shall be used in adjusting differences between management and labor in all industries engaged in producing, distributing, selling or otherwise furnishing electric light, heat, gas, steam, water, sewer services, or transportation excepting railroads and communication.³⁹ It provides that compulsory arbitration shall not be effective in disputes where

³⁵ *Ibid.*; The court in *People v. United Mine Workers of America*, 70 Colo. 269, 201 Pac. 54, 56 (1921) said: "There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason."

³⁶ UPDEGRAFF AND MCCOY, *op. cit. supra* note 2, at 10.

³⁷ Mo. Laws 1947, § 1-22, H. B. 180; MINN. STAT., c. 179, § 179.07 (1941); Mich. Laws 1947, pub. acts No. 318, § 13; Gen. Laws of Mass. 1947, c. 150 B, § 1; NEBR. CONST. ART. XV, § 9; Laws of Nebr. 1947, § 20, L. B. 537; N. J. Laws 1947, c. 47, § 34:13; Penn. Laws 1947, act 485; Ind. Laws 1947, c. 334, § 8(D); Fla. Laws 1947, c. 23911, §1.

³⁸ Minn. Stat., c. 179, § 179.07 (1941). In Virginia a statute was passed prohibiting strikes and lockouts in any public utility, providing for seizure by the Governor if a serious threat of strike or lockout is made, and providing for replacement of employees who refused to work, Va. laws 1947, c. 9, § 1.

³⁹ Mo. Laws 1947, § 1, H. B. 180.

voluntary arbitration is a part of the contract, unless such voluntary arbitration agreement fails.⁴⁰

To avoid any possible declaration that the act violates the Thirteenth Amendment, two states have specifically provided that the act does not force labor without the employee's consent.⁴¹ As yet, none of the statutes have been declared unconstitutional, and the Michigan Supreme Court has upheld the Michigan statute.⁴² Since the statutes apply only to public utility industries, whose continuous, uninterrupted operation is indispensable to the public, there is good reason to believe they will be sustained as valid exercises of the states' police power.⁴³

TEXAS

In 1920 the Texas Industrial Commission was organized to investigate labor disputes in Texas.⁴⁴ When the Governor believes a controversy between employers and employees is affected with a public interest, he is to refer the case to the Commission for hearing and report. The Commission, which has power to summon witnesses and to punish for contempt, conducts an investigation and makes public a report on the controversy. Apparently the intent of the Legislature was to use the Commission as an instrument for publicizing the facts of a labor dispute and to bring public opinion to bear to cause a just settlement. It should be observed that the Industrial Commission has no power to compel

⁴⁰ Mo. Laws 1947, § 5, H. B. 180.

⁴¹ Fla. Laws 1947, c. 23911, § 19; Mo. Laws 1947, § 22, H. B. 180.

⁴² Local Union No. 876 v. State of Michigan Labor Med. Bd., 294 Mich. 629, 293 N. W. 809 (1940).

⁴³ In an address to the Ohio State Bar Association printed in 19 OHIO STATE BAR ASSOCIATION REPORT 146, 149 (1946), Donald Richberg said: "In the case of public utility services at least, it seems clear that, since the properties are devoted to public use and subject to public regulation as to rates and service, the law might well impose on workers accepting such employment three obligations: first, to attempt peaceful settlement of disputes; second, if unable to reach agreement, to submit the issues to an impartial arbitration; and, third, to avoid any concerted withdrawal from employment." Simpson, *supra* note 1 at 784 said: "Compulsory arbitration is due process of law when applied to public utility industries or to essential industries. . . ."

⁴⁴ TEX. REV. CIV. STAT. (Vernon, 1925) art. 5186.

settlement of disputes, nor does it have the power to prevent strikes during its investigations. Undoubtedly publicity is and has been a strong force in causing settlement of labor controversies. In many instances, however, it is suspected that neither labor unions nor employers yield merely because the general public believes a particular settlement should be reached.

A few changes in the Texas Industrial Commission would make it effective to prevent strikes and lockouts in vital industries. At the present time the Commission is composed of five members, one representing labor, one representing employers and three representing the public. This is an appropriate organization to accomplish the purpose for which it was created, for its essential function is to inform the public of the facts. Since the Commission cannot compel any action by the disputing parties, no harm is done in making the public members a majority. However, if arbitration powers were given the Commission, an increase in number of labor and employer representatives would be desirable. Management and unions would have greater confidence in the Commission if they knew that their representatives, who presumably are better acquainted with industrial conditions, could out vote the public members. An enlargement of the Commission to seven members, with three representatives from the public, and two members each from labor and industry, might be wise. This arrangement would prevent any settlement adverse to both labor and industry and at the same time would give the public adequate representation. New Jersey, in its public utility compulsory arbitration act, has adopted a mediation board having this composition.⁴⁵

At the present time the Governor is given power to declare what industries are affected with a public interest. The statute empowers the Governor to determine whether an emergency exists in any industry and allows him to decide what industries are of such a public nature as to demand investigation. If the Industrial Commission were given power to arbitrate disputes by compulsion,

⁴⁵ N. J. Laws 1947, c. 47, § 34:13—B, § 20.

it would certainly be preferable that the Legislature declare what industries vitally affect the public interest. Public utilities should be first on this list of industries, for as has been pointed out a precedent has already been established in this field. If the statute operated satisfactorily, other industries might be added to the list, whose uninterrupted operation is essential to the welfare of the public.

The remaining alteration needed is to give the Commission power to enforce its award. Criminal sanctions might be imposed, and violations punished by fine, imprisonment, or both. Injunctive relief might also be provided to prevent violation of the arbitration award. As a last resort the legislation could provide for seizure of the business plant in the event of strike or lockout, as has been done in four states.⁴⁶

CONCLUSION

Under a system of compulsory arbitration, labor unions and employers could still come to agreement on any terms found acceptable to them. In the event of such peaceful settlement, the voluntary agreement would replace any previous award by the arbitration tribunal. No doubt the mere formation of a compulsory arbitration commission would bring about many peaceful settlements in disputes which otherwise would result in prolonged strikes. In the event no settlement were reached, impartial arbitrators could determine the reasonable and equitable solution. In either case the public would benefit, for the economic waste caused by idle industry would be avoided. No longer would obstinate representatives of labor or of management be able to cause industrial standstills, for every dispute would be determined promptly by a fair and equitable arbitration award.

Labor unions would still play an important role since the skill of union representatives in presenting their cause of complaint to

⁴⁶ Gen. Laws of Mass. 1947, c. 150 B, § 1; Mo. Laws 1947, § 1, H. B. 180; N. J. Laws 1947, c. 47, § 34:13; Va. Laws 1947, c. 9, § 18.

the arbitrators would play an important part in determining the terms of the contract. Compulsory arbitration has already been instituted in nine states, and the report is that it is operating smoothly abroad.⁴⁷ There is no reason that the people of Texas cannot put aside lockouts, strikes and boycotts in public utilities and other vital industries and attempt peaceful settlement of labor differences by arbitration.

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⁴⁷ Jones, *Industrial Arbitration in Australia*, 8 *Mod. L. Rev.* 63 (1945).