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particulars. In *State v. Gould*³⁷ the supreme court upheld a trial court's refusal to grant particulars after the prosecutor had informed the court that he was not in a position to furnish the particulars because of the manner in which the books had been kept by the defendant.

CONCLUSIONS

Generalizations are misleading in an area of law so dependent upon the discretion of the trial judge as he views the facts and circumstances of the individual case. However, certain broad propositions emerge from a multitude of cases. First, when the long form indictment or information is employed, the defendant is entitled to such additional particulars as are necessary to apprise him of the charge against him so that he may adequately prepare his defense. Second, in the case of the short form indictment the defendant has a general right to a bill of particulars, but this right is subject to certain very practical limitations. The bill of particulars cannot be used to force the state to disclose specific evidence, or to abandon a responsive verdict. Neither can it be used as a dilatory tactic by requiring an enumeration of useless particulars or of conclusions of law. Finally, the state cannot be expected to perform the impossible, that is, to furnish particulars it does not have.

James A. Hobbs

Labor Law—Applicability of United States Arbitration Act¹ to Collective Bargaining Agreements

Since the recent decision of the United States Court of Appeals for the Third Circuit in *Motor Coach Employees v. Pennsylvania Greyhound Lines*,² quickly followed by *Pennsylvania Greyhound Lines v. Motor Coach Employees*,³ a different

37. 155 La. 639, 99 So. 490 (1924).

1. 43 Stat. 883, 9 U.S.C.A. § 1 et seq. (1925).

2. 192 F. 2d 310 (3rd Cir. 1951).

3. 193 F. 2d 327 (3rd Cir. 1952). Plaintiff employer brought suit against defendant union for breach of no strike agreement. The district court had granted a stay of proceedings pending arbitration according to the collective bargaining agreement. The third circuit reversed the order and remanded the case in order that it might be proceeded with. It merely affirmed its position taken in *Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F. 2d 310 (3rd Cir. 1951).

case, there is no longer any serious dispute as to whether the United States Arbitration Act is applicable to collective bargaining agreements. All the circuits which have decided this question are now in accord that it is not applicable. However, it is the purpose of the writer to question the validity of the position taken, both legally and from the standpoint of sound public policy.

THE ACT IN BRIEF

It is essential to an understanding of the jurisprudence to bear in mind the pertinent provisions of the act. Section 1 defines maritime transactions and commerce; further, it provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . commerce." Section 2 declares that written provisions "in any maritime transaction or a contract evidencing a transaction involving commerce" to arbitrate controversies "arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable." Section 3 provides for a stay of proceedings if "any issue referable to arbitration" has not been arbitrated according to "an agreement in writing for such arbitration." Section 4 provides for judicial enforcement of written agreements to arbitrate. There is very little helpful legislative history except that it is obvious Congress intended to make written agreements to arbitrate enforceable in commerce and maritime transactions but not in contracts of employment.

THE JURISPRUDENCE

With this brief sketch of the pertinent provisions of the act in mind, it is appropriate to examine the jurisprudence interpreting the act as it relates to collective bargaining agreements. The third circuit had consistently held until recently⁴ that Section 3, providing for a stay of proceedings, was applicable to such agreements. The assumption was made without further ado that a collective bargaining agreement was a contract of employment. Yet the third circuit reasoned that Congress, in providing for enforcement of agreements to arbitrate, was dealing with subject matter (maritime and commerce transactions) over which it had the power to enact substantive law, whereas in Section 3, providing for a stay of proceedings, it was legislating under its power to regulate procedure in the federal courts. Consequently Section 3 should be given a broad construction, not limited by other

4. 192 F. 2d 310 (3rd Cir. 1951).

sections of the act, covering any issue referable to arbitration under a written agreement for such arbitration in any suit brought in the federal courts.⁵

However, since its recent decisions in the *Motor Coach Employees* cases,⁶ the third circuit is now well settled to the effect that the act is not applicable in any wise to collective bargaining agreements. The reason for this change of view was that the following catchline inserted by the compilers of the United States Code at the beginning of Section 1, " 'maritime transactions' and 'commerce' defined; *exceptions to operation of title*" (italics supplied) had been enacted into positive law.⁷ The court concluded that "exceptions to operation of title" meant what it said and that therefore the act was not applicable to collective bargaining agreements. The court further adopted the view that the excepting clause dealing with contracts of employment included collective bargaining contracts. Thus the third circuit is now in accord with the second,⁸ fourth⁹ and sixth¹⁰ circuits which have taken this view all along.

5. *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (3rd Cir. 1943). Plaintiff employees sued for back wages under the Fair Labor Standards Act. A stay of proceedings was granted, since arbitration was provided for in the collective agreement but had not taken place. Accord: *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (3rd Cir. 1945), cert. denied 327 U.S. 777 (1946), a suit for overtime wages and damages.

See also the third circuit district court case of *Metal Polishers, Buffers, Platers & Helpers International Union Local No. 90, A.F. of L. v. Rubin*, 85 F. Supp. 363 (E.D. Pa. 1949). A stay of proceedings was not granted; however, the court found the issue was not referable to arbitration.

6. 192 F. 2d 310 (3rd Cir. 1951), 193 F. 2d 327 (3rd Cir. 1952).

7. Act of July 30, 1947, c. 392, § 1, 61 Stat. 669 (1947), 9 U.S.C.A. § 1 et seq. (1947).

8. See *Shirley-Herman Co. v. International Hod Carriers, Building & Common Laborers Union of America, Local Union No. 210*, 182 F. 2d 806 (2d Cir. 1950). Plaintiff company brought suit against defendant union under Section 301 of the Labor Management Relations Act for damages resulting from a work stoppage; the collective bargaining agreement provided for arbitration before any cessation of work. The court refused to grant a stay of proceedings because the arbitration act was not applicable to collective bargaining agreements. However, it is noteworthy that the arbitration agreement was given some effect in that the court gave damages for violation of the collective bargaining agreement.

9. See *International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., Inc. (United States Intervenor)*, 168 F. 2d 33 (4th Cir. 1948). Plaintiff employer sued defendant union under Section 301 of the Labor Management Relations Act for damages resulting from a strike allegedly in violation of the collective bargaining agreement which contained an arbitration provision. A stay of proceedings was not granted; the court said that the arbitration agreement did not cover strikes and further that the arbitration act was not applicable to collective bargaining agreements because the excepting clause in Section 1 applied to the entire act.

10. See *Gatliff Coal Co. v. Cox*, 142 F. 2d 876 (6th Cir. 1944). Plaintiff

It is interesting to note that the second circuit has, however, given some effect to the agreement to arbitrate by giving damages under Section 301 of the Labor Management Relations Act¹¹ for violation of the arbitration provisions of a collective bargaining agreement. However, damages would have to be proved as in any suit with the result that only nominal damages might be awarded.¹²

The tenth circuit, in *Mercury Oil Refining Company v. Oil Workers*¹³ also held in accord with the other circuits. The court said, in refusing to enforce arbitration, that Section 301 of the Labor Management Relations Act merely gave federal courts jurisdiction over labor contracts and that it did not grant any additional power to enforce agreements to arbitrate.

Three district court cases are noteworthy because of their inconsistency with the circuit court decisions. *United Office Workers v. Monumental Life Insurance Company*¹⁴ involved a dispute between the union and the company over the checkoff provision in the collective bargaining agreement which also contained an arbitration provision. There the court not only granted a stay order but it directed the company to proceed with arbitration. The granting of the stay order was in line with the third circuit's view; however, the enforcement of the arbitration agreement under Section 4 was the most liberal interpretation ever given the act. The court sidestepped the question of whether or not Section 4 was limited by the excepting clause in Section 1, dealing with contracts of employment, and based its decision on the grounds that that question was of no consequence because a collective bargaining agreement is not a contract of employment.

In *Lewittes v. Furniture Workers*¹⁵ the district court granted a stay of proceedings where plaintiff employer sued defendant union under Section 301 of the Labor Management Relations Act for breach of the collective bargaining agreement which contained an arbitration provision. This is of course inconsistent

employee brought suit against his employer for overtime compensation under the Fair Labor Standards Act. A stay of proceedings was not granted because the excepting clause in Section 1 was held to apply to the entire act including Section 3, providing for a stay of proceedings.

11. Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. § 141 et seq., § 185 (1947).

12. *Shirley-Herman Co. v. International Hod Carriers, Building & Common Laborers Union of America, Local Union No. 210*, 182 F. 2d 806 (2d Cir. 1950).

13. 187 F. 2d 980 (10th Cir. 1951).

14. 88 F. Supp. 602 (E.D. Pa. 1950).

15. 95 F. Supp. 851 (S.D. N.Y. 1951).

with what the second circuit specifically said in *Shirley-Herman Company v. Hod Carriers*,¹⁶ that is, that the act was not applicable to collective agreements.

In the other of the three, *Textile Workers v. Aleo Manufacturing Company*,¹⁷ the court granted a preliminary injunction to compel defendant employer to comply with the arbitration clause of the collective bargaining agreement. This was specific enforcement of an agreement to arbitrate; the court based its jurisdiction on Section 301 of the Labor Management Relations Act and the Federal Declaratory Judgment Act.¹⁸ This decision does not seem to be in line with the fourth circuit's decision in the *Colonial Hardwood Flooring Company* case,¹⁹ wherein the court said the arbitration act was not applicable to collective bargaining agreements, implying that there could be no stay of proceedings or enforcement of the agreement to arbitrate; in that case the action was also brought under Section 301 of the Labor Management Relations Act. However, it was distinguished on the grounds that the arbitration agreement in the *Colonial Hardwood Flooring Company* case did not cover the matter in dispute whereas the one before it did. The writer submits that, from a full reading of both cases, the distinction is not too forceful.

Of course the *United Office Workers* case²⁰ can now be deemed overruled by the third circuit's decisions in the *Motor Coach Employees* cases.²¹ However, the other two district court cases, the *Lewittes* case²² and the *Textile Workers* case,²³ decided in the second and fourth circuits respectively, were apparently intended to be in accord with the position taken by those respective circuits. The *Textile Workers* case presents an interesting new angle—that of specific enforcement under Section 301 of the Labor Management Relations Act. An appeal from either of these three decisions would certainly put to test the stand now taken by all the circuits.

CONCLUSION

Uniformity and certainty in themselves are desirable; however, the writer submits that this question, though settled, has

16. 182 F. 2d 806 (2d Cir. 1950).

17. 94 F. Supp. 626 (1950).

18. 62 Stat. 964, 28 U.S.C.A. §§ 2201, 2202 (1949).

19. 168 F. 2d 33 (4th Cir. 1948).

20. 88 F. Supp. 602 (E.D. Pa. 1950).

21. 192 F. 2d 310 (3rd Cir. 1951), 193 F. 2d 327 (3rd Cir. 1952).

22. 95 F. Supp. 851 (S.D. N.Y. 1951).

23. 94 F. Supp. 626 (1950).

not been settled in accordance with the meaning of the act or with sound public policy. The position taken by all the circuits that the excepting clause in Section 1 is applicable to and limits the entire act is not difficult to agree with. The view, however, that the excepting clause covering contracts of employment includes collective bargaining agreements is most difficult to accept. A collective bargaining agreement is simply not a contract of employment. As was ably put by the Supreme Court in *Case Company v. National Labor Relations Board*,²⁴ "Contracts in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what has often been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships."²⁵ A collective bargaining agreement may be analogized to a constitution; it is a broad agreement between an employer and a union, not an employee, in which the rights, duties, and liabilities of the employer and employees are outlined. It does not provide that a particular person will be hired for a certain period of time for a specified rate of pay. It provides for such things as a grievance procedure in the event of a dispute between the employer and employee or the union representing that employee. It provides that the rate of pay for particular jobs will be within certain limits set forth. It provides that employees will receive a certain period of paid vacation depending on their seniority. It provides that working conditions will be up to a certain standard. In many respects, the lives of millions of laborers and their families are affected just as much by collective bargaining agreements as they are affected by the Constitution of the United States.

Was there any congressional intent or public policy against

24. 321 U.S. 332 (1944).

25. *Id.* at 334, 335.

enforcing agreements to arbitrate in collective bargaining agreements? To the contrary, it would seem that sound policy would sanction the enforcement of such agreements, that is, if sound public policy is in favor of stable labor-management relationships. This view was taken in the *United Office Workers* case and in the *Lewittes* case which, as has been pointed out, are not in line with the jurisprudence. It would be most interesting to see how the Supreme Court would decide the question in the event that it granted certiorari.

The result reached in the *Textile Workers* case is novel. It seems to be settled that damages may be given under Section 301 of the Labor Management Relations Act. The writer submits that performance as well may be granted under Section 301, as was done in the *Textile Workers* case. This act deals solely with labor-management relations and it should not be limited in the scope of its application by an act passed twenty-two years prior and not dealing with such relationships. Section 301(a) provides that suits for violations of contracts between an employer and a union may be brought in the United States district courts. Section 301(b) makes certain provisions in the event of a money judgment against a union; this would seem to imply that Section 301 is not limited solely to suits for damages; the *Textile Workers* case represents to the writer the correct and intended application of the Labor Management Relations Act, leaving out any consideration of the arbitration act. Specific enforcement of agreements to arbitrate under Section 301 might be a way around a decision on the question of the arbitration act's applicability to collective bargaining agreements in the event that the Supreme Court ever grants certiorari on that question.

It is necessary to note at this point that the granting of specific enforcement of agreements to arbitrate might be contrary to the Norris LaGuardia Act,²⁶ since that act prohibits the issuance of injunctions in labor disputes. While there is some authority to this effect, the point was urged and rejected in the *Textile Workers* case. This possibility involves many complex issues dealing with statutory interpretation and policy. These have been ably discussed by Professor William G. Rice, Jr., in a recent issue of the *Marquette Law Review*.²⁷

26. 47 Stat. 90, 29 U.S.C.A. § 101 et seq. (1932).

27. A Paradox of our National Labor Law, 34 *Marquette L. Rev.* 233 (1951).

It should be noted that the significance of the present position taken by the circuit courts in denying applicability of the United States Arbitration Act to collective bargaining agreements is lessened because of the fact that there are comparatively few breaches between labor and management of agreements to arbitrate and the fact that the courts will award damages for such breaches.

William A. L. Crowe

Torts—Recovery by Aggressor for Personal Injuries Received in Encounter

Article 2315¹ of the Louisiana Civil Code of 1870 is the general tort article, and as such is the ultimate foundation of the action wherein a party seeks recovery for personal injuries received in an encounter with a fellow. Because of this article recovery is predicated upon the finding of "fault." Thus, for example, in *LaFleur v. Dupre*² plaintiff, when held "not at fault,"³ was allowed damages, and in *Fontenelle v. Waguespack*⁴ it was concluded that "Either plaintiff or defendant, in order to recover, would have to prove that he was without fault in provoking the difficulty."⁵ In the dissenting opinion in *Ogden v. Thomas*⁶ the plaintiff was held not entitled to recovery because he was not "without fault."⁷ Nevertheless the number of cases wherein "fault" is mentioned is quite restricted, the probable reason for this being the formulation by the courts of what might appropriately be called the "aggressor rule."⁸

The "aggressor rule" is: One who provokes a difficulty with another cannot recover damages for injuries inflicted upon him as a result thereof, even though the conduct of the one who

1. "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ."

2. 41 So. 2d 717 (La. App. 1949).

3. Id. at 720.

4. 1 La. App. 230 (1924).

5. Id. at 232.

6. 150 La. 316, 90 So. 662 (1922).

7. 150 La. 316, 320, 90 So. 662, 663.

8. The "aggressor rule" itself received a "fault" transfusion in *Randall v. Ridgley*, 185 So. 632 (La. App. 1939), wherein the court stated: ". . . one who is himself in fault cannot recover damages for a wrong resulting from such fault, although the party inflicting the injury was not justified under the law."