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Enforcement of Labor Arbitration Agreements: Is Refusal to Arbitrate an Unfair Labor Practice?

The majority of collective bargaining contracts today contain a series of provisions designed to settle grievances; in most instances the last step is submission of the dispute to arbitration.¹ Once the arbitration procedure has been invoked there are comparatively few instances of refusals to abide by the arbitrator's award.² The problem does arise, however, as to what remedy is available if one party refuses to submit the issue to arbitration as agreed in the contract. The executory agreement to arbitrate is unenforceable at common law.³ Hence it is necessary for parties to the collective bargaining contract to find some other means of enforcing their agreement. Four possible methods of enforcement of the agreement to arbitrate exist at present and will be discussed here.

Since the legislatures of some states have passed statutes authorizing the courts to enforce agreements to arbitrate⁴ the first avenue of attempting enforcement is through the state courts. Generally, however, the results obtained by the use of these statutes have not been satisfactory in labor cases because the acts were not made specifically to be applied to labor arbitration agreements.⁵ In fact, most of the statutes contain clauses

1. In 1950 the United States Department of Labor reported that a comprehensive study of representative collective bargaining agreements showed that 80 percent provided for some type of arbitration. *Arbitration Provisions in Union Agreements in 1949*, 70 MONTHLY LAB. REV. 160 (1950).

2. "In only 51 of 16,819 arbitrations—0.3 per cent—in which the respondents participated in the prior two-year period did either party refuse to accept the award." Warren & Bernstein, *A Profile of Labor Arbitration*, 4 INDUS. & LAB. REL. REV. 200, 217 (1951).

3. The courts today enforce an executed agreement to arbitrate. This means that if the arbitrator has already rendered his award the court will force the parties to abide by it. The only time a court will refuse to do so is when they believe that: (1) the arbitrator has exceeded his jurisdiction, or, (2) there was a lack of due process in the proceedings. *But cf.* *Western Union Tel. Co. v. American Communications Ass'n, CIO*, 299 N.Y. 177, 86 N.E.2d 162 (1949).

4. See notes 6-13 *infra*.

5. Some states have obtained desirable results as in New York. N.Y. CIVIL PRACTICE ACT §§ 1448-1469 provide for specific performance of contracts to arbitrate in labor disputes and the New York courts have so applied it. *Local 474, National Food Chain Store Employees, C.I.O. v. Safeway Stores Inc.*, 79 N.Y.S.2d 493 (Sup. Ct. 1948). See also Nordlinger, *The Law and Practice of Arbitration in New York*, 13 Mo. L. REV. 196 (1948).

excluding "contracts for personal services,"⁶ "contracts pertaining to labor,"⁷ "contracts of employment and labor,"⁸ and the like. Such exclusionary clauses have given the courts a basis on which to refuse to enforce the labor management agreement.⁹ The Louisiana Arbitration Law¹⁰ contains such an exclusionary clause, stating that:

"Nothing contained in this Chapter shall apply to contracts of employment of labor or to contracts for arbitration which are controlled by valid legislation of the United States. . . ."¹¹

Although the Louisiana courts have never passed on the point, it is at least arguable that the exception provision will be interpreted to exclude collective bargaining agreements.¹² Some statutes contain provisions which are even more explicit, such as the Ohio statute reading: "The provisions of this act shall not apply to (a) *collective* or individual contracts between employers and employees in respect to terms or conditions of employment."¹³ (Italics supplied.) In these cases the courts seem justified in refusing to apply the statutes to collective bargaining contracts.¹⁴

A second possible method of enforcement of the agreement to arbitrate is the use of the Federal Arbitration Act.¹⁵ By this act the federal courts are given jurisdiction over certain arbitration disputes. Section 3 of the Federal Arbitration Act gives the courts the power to stay proceedings where arbitration has been agreed upon and Section 4 empowers the courts to compel arbitration. However, a difficulty similar to that found in the application of state statutes is encountered. Thus, Section 1, which defines maritime transactions and commerce, provides: ". . . nothing herein contained shall apply to contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce." If a collective bargaining contract is a "contract of employment" within the mean-

6. Pa. Laws 1927, No. 248, p. 331.

7. CAL. CODE CIV. PROC. § 1280 (Deering, 1949).

8. LA. R.S. § 9:4216 (1950).

9. California has said that the exclusionary clause in its statute did not exclude collective bargaining agreements, but was meant to prohibit involuntary servitude. *Levy v. Superior Court*, 15 Cal.2d 692, 104 P.2d 770 (1940). Pennsylvania courts seem split on the question.

10. LA. R.S. § 9:4201 *et seq.* (1950).

11. LA. R.S. § 9:4216 (1950). See also the provisions for voluntary arbitration of labor disputes contained in LA. R.S. §§ 23:872-875 (1950).

12. See note 20 *infra*.

13. OHIO GEN. CODE § 12148-1 (Page, 1938).

14. As was done in *Utility Workers' Union v. Ohio Power Co.*, 36 Ohio O. 324 (C.P. 1947).

15. 9 U.S.C. §§ 1-14 (1946).

ing of this section, then of course the Federal Arbitration Act cannot be used to enforce the agreement to arbitrate in labor cases. While the Supreme Court has never passed on this point and the circuit and district courts are in disagreement, the courts have almost unanimously refused to grant specific performance to parties attempting a direct enforcement of the arbitration clause.¹⁶ A few courts have recognized the agreement as an affirmative defense and issued a stay of proceedings under Section 3 of the Federal Arbitration Act without going further.¹⁷

A third available method is the use of Section 301 of the Labor Management Relations Act which gives the federal courts

16. In *J. I. Case v. NLRB*, 321 U.S. 332 (1944), the Supreme Court said that a collective bargaining agreement was not a "contract of employment," but rather a "trade agreement." This case, however, did not concern the Federal Arbitration Act.

The circuit courts line up as follows. The Second, Fourth, Sixth and Tenth Circuits all seem to be of the opinion that the Federal Arbitration Act does not apply to collective bargaining agreements. An example of the confusing situation existing in these courts is given by the Third Circuit's holdings. This court originally held that a collective bargaining agreement was not a "contract of employment." *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943). Later, however, the court reversed itself and held just the opposite. *Amalgamated Ass'n v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3d Cir. 1951). In a very recent case, however, the Third Circuit, while standing by its decision in the *Pennsylvania Greyhound* case that a collective bargaining agreement is a "contract of employment," applied the Federal Arbitration Act to a collective bargaining agreement. This was accomplished by giving the phrase "workers engaged in interstate commerce" a very narrow construction and hence excluding the workers in this case from the exemption of the act. *Tenney (Engineering), Inc. v. United Electrical, Radio & Machinists Workers of America, Local 437*, 207 F.2d 450 (3d Cir. 1953). Note the dissent by McLaughlin, J., *id.* at 455. Mr. Cox, in discussing the *Tenney* case sums up the problem as follows: "The latter point [whether or not a collective bargaining agreement is a contract of employment of a class of workers engaged in interstate commerce] involves three related questions: (1) Does the concluding clause of Section 1 create an exception to the entire Arbitration Act rather than to only those sections, not including Section 3, whose application depends upon a showing that the promise to arbitrate is written in a 'maritime transaction' or a 'contract evidencing a transaction involving interstate commerce'? (2) Is a collective bargaining agreement a 'contract of employment'? (3) Are the employees covered by the agreement 'a class of workers engaged in foreign or interstate commerce'? A negative answer to any one of these three questions would lead to granting the motion for a stay in any action brought under LMRA Section 301 to recover damages upon an issue covered by a contract grievance procedure ending in arbitration. All three questions were raised in the *Tenney* case upon rather confusing precedents." Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 593 (1954). As was seen, the *Tenney* case seems to have applied the Federal Arbitration Act by giving a negative answer to Mr. Cox's third question. The most liberal district court decision is *United Office Workers v. Monumental Life Ins. Co.*, 88 F. Supp. 602 (E.D. Pa. 1950). In this case the court not only issued a stay of proceedings, but also directed the employer to proceed with arbitration. In doing this the court used Section 4 of the Federal Arbitration Act.

17. See also Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 257 *et seq.* (1950); Comment, 12 LOUISIANA LAW REVIEW 462 (1952).

jurisdiction over a breach of a collective bargaining contract. The agreement to arbitrate may come before the court in one of two ways. The defendant in the suit for breach of contract may use the agreement as an affirmative defense against a suit for breach of contract, asking that the court stay proceedings until arbitration has been completed; or the plaintiff may seek specific performance of the agreement to arbitrate. Here again the courts have been reluctant to enforce the agreement to arbitrate.¹⁸ Several recent cases, however, may indicate some change in this attitude.

In *Milk and Ice Cream Drivers' Union, Local 98 v. Gillespie Milk Products Corp.*¹⁹ the Circuit Court of Appeals for the Sixth Circuit issued an injunction directing the employer to abide by an arbitration award under Section 301 of the Labor Management Relations Act. While it is true that in this case there was an *executed* arbitration, the fact that the court used Section 301 of the Labor Management Relations Act in reaching the result is significant.

The case of *Textile Workers' Union of America v. American Thread Co.*²⁰ arose from an employer's refusal to arbitrate a grievance as agreed in the contract. The union sought and the district court granted specific performance of the agreement. Section 301 of the Labor Management Relations Act was again employed by the court as the basis for its jurisdiction. Whether the court considered the Labor Management Relations Act, the Federal Arbitration Act or the Norris-LaGuardia Act applicable is not too clear from the opinion.²¹

18. In the past the cases have been brought under Section 301 of the Labor Management Relations Act for breach of contract, but the remedy urged upon the court has usually been the Federal Arbitration Act. See *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948). *Cf.* *Shirley-Herman Co. v. International Hod Carriers, Local 210*, 182 F.2d 806 (2d Cir. 1950), where the court refused to stay proceedings but did grant damages. Only lately has it been urged that Section 301 itself gives the power to compel specific performance or a stay of proceedings. See note 26 *infra*.

19. 203 F.2d 650 (6th Cir. 1953).

20. 113 F. Supp. 137 (D. Mass. 1953), 67 HARV. L. REV. 181.

21. 113 F. Supp. 137, 142 (D. Mass. 1953). Even if it is admitted that Section 301 of the Labor Management Relations Act gives the federal courts jurisdiction over arbitration disputes, there is still the problem of what substantive law is to be applied in order to determine the rights of the parties. There are several possibilities: (1) Apply the common law and federal statutes; (2) Section 301 gives the parties new substantive rights and/or the federal courts are to develop their own common law of the subject; or (3) the federal law is to control with respect to jurisdiction and the local law with respect to the substantive rights of the parties. In the *American Thread* case, the court did not decide this point, saying it was unnecessary as the agreement to arbitrate was enforceable under any one of these theories.

A somewhat contrary result was reached in *International Longshoremen's and Warehousemen's Union, Local 142 v. Libby, McNeill & Libby*.²² Here the union sought a declaratory judgment concerning an alleged breach of contract by the employer. The district court reasoned that it had no jurisdiction to grant the necessary supporting injunctive relief and consequently could not hear the case. In answer to the contention that Section 301 of the Labor Management Relations Act conferred such jurisdiction the court said: "[J]urisdiction is conferred on district courts, irrespective of citizenship of the parties or the amount in controversy, *only in suits for damages* arising from violation of collective bargaining contracts. . . ."²³ (Italics supplied.) In support of this position the court cited the Norris-LaGuardia Act's surviving jurisdictional requirements, which forbid issuing of injunctions by federal courts in labor disputes.²⁴

The fourth and potentially most flexible method is to petition the National Labor Relations Board to enforce the agreement to arbitrate. The board has the power to issue cease and desist orders to a party engaged in an unfair labor practice.²⁵ While refusal to arbitrate is not specifically mentioned among the unfair labor practices,²⁶ there is the possibility of construing a refusal to arbitrate pursuant to a contractual agreement as a refusal to bargain within the meaning of Sections 8(a)5 or 8(b)3 of the Labor Management Relations Act.²⁷

In *Textile Workers v. Aleo Mfg. Co.*, 94 F. Supp. 626 (M.D. N.C. 1950), the court held that Section 301 of the Labor Management Relations Act created a new substantive right enforceable in federal courts. See also Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 600 *et seq.* (1954).

22. 115 F. Supp. 123 (D. Hawaii 1953).

23. *Id.* at 124.

24. 29 U.S.C. § 104 (1946). For a discussion of some of the difficulties that might be encountered in future decisions of this type, see Katz & Jaffe, *Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act*, 8 ARB. J. 80 (1953). See also Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 602 (1954).

25. Labor Management Relations Act, § 10(a), 61 STAT. 146 (1947), 29 U.S.C. § 160 (1946).

26. It has been suggested that the Labor Management Relations Act be amended so as to expressly give the National Labor Relations Board power in these cases by listing it as an unfair labor practice. "There are two methods of enforcing arbitration agreements through federal statutes which appear the most feasible. . . . The second method would be to add a section to the National Labor Relations Act which would make it an unfair labor practice for an employer . . . to . . . refuse to comply with the terms of an arbitration clause set forth in a collective bargaining agreement." Gregory & Orlikoff, *The Enforcement of Labor Agreements*, 17 U. of CHI. L. REV. 233, 262 (1950).

27. Section 8(a)5 reads: "[It shall be an unfair labor practice for an employer] to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Section 8(b)3 applies the same principle to unions.

Section 10(a) of the Labor Management Relations Act states that the power of the board to prevent unfair labor practices "shall not be affected by any other means of adjustment that has been or may be established by agreement, law, or otherwise." Thus the board's power to compel arbitration in such a case would be unaffected by the presence or absence of other remedies mentioned previously. Section 203(d) of the Labor Management Relations Act encourages settlement by the parties themselves in declaring that:

"Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

This section, together with Section 8(d), which provides that "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract" would seem to indicate that the contractual duty to arbitrate can be enforced. Messrs. Cox and Dunlop, however, have pointed out that:

"During the term of a collective bargaining agreement an offer to follow the contract grievance procedure satisfies any duty to bargain collectively with respect to a matter to which the contract grievance procedure may apply. A refusal either to follow the contract procedure or to discuss the issue at large is a violation of Sections 8(a)(5) and 8(b)(3)."²⁸

Since the employer has the option "either to follow the contract procedure or to discuss the issue at large," it would follow that the employer can escape the arbitration clause by bargaining at large.²⁹

Since the National Labor Relations Board has stated that it will not police contracts,³⁰ it would seem that the party who bar-

28. Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097, 1101 (1950).

29. "When either an employer or a union charges the other with violating Section 8(a)(5) by refusing to bargain about such a question [concerning interpretation or application of an existing contract], the Regional Director should refuse to issue a complaint unless it appears that the respondent has refused either to negotiate the question or to follow the contract procedure. Thus, the NLRB would intervene only when (a) the contract contains no applicable grievance procedure, or (b) the respondent refuses either to follow an applicable procedure or to bargain about the question. Since the Board does not undertake to enforce collective bargaining agreements, any remedial order should also leave open both alternatives." *Id.* at 1108.

30. "We are of the opinion . . . that it will not effectuate the statutory policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between the

gains over an issue will not be forced to arbitrate. This position could be supported by Section 8(d) of the Labor Management Relations Act, providing that "such obligation [to bargain] does not compel either party to agree to a proposal or require the making of a concession." This argument can be met, however, by arguing that the board is not forcing the party to reach an agreement, but merely compelling him to do what he has agreed to do.

Indicative of the general attitude of the National Labor Relations Board in the past is the treatment given to similar cases that have come before it. In *In re Bergen Point Iron Works and Local 445, United Electrical, Radio, and Machine Workers of America (CIO)*,³¹ the employer and the union had a contract containing arbitration as the last step in the grievance procedure.³² The employer refused to check off dues, effected some unilateral reductions in welders' rates, and refused to meet with the union grievance committee as scheduled. The union filed a grievance concerning these matters, but the employer refused to process the grievance, claiming the contract was null and void. The employer was found guilty of an unfair labor practice. The board upheld a section of the trial examiner's report making the following findings:

"Also relevant, as bearing on the question of whether the respondent at the time was genuinely interested in composing through collective bargaining its differences with the Union . . . [is] the respondent's refusal to arbitrate the dispute concerning the continued effectiveness of its old contract. . . . None of these circumstances constitutes a *per se* violation of the Act. . . . They must be evaluated . . . in context with the respondent's entire course of conduct of which they are part. . . . When so viewed, they provided, it is found, persuasive evidence that the respondent . . . was actuated more by a fixed intent to penalize and discredit the Union.

employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." *Consolidated Aircraft Corp. and International Ass'n of Machinists, Aircraft Lodge No. 1125, A.F.L.*, 47 N.L.R.B. 694, 706 (1943). But is it not even more detrimental to collective bargaining to tell parties that although they have agreed to settle their differences in a certain procedure, they will not be required to live up to that procedure?

31. 79 N.L.R.B. 1073 (1948).

32. "Shortly after the union was certified, the respondent met with it and negotiated terms and conditions of a comprehensive bargaining agreement. . . . Mutual agreement was reached by the parties with respect to . . . the submission to arbitration of all unadjusted disputes, with arbitration costs payable by the respondent. . . ." 79 N.L.R.B. 1073, 1080 (1948).

. . . Such an attitude and approach are not consistent with good faith bargaining."³³

The refusal to arbitrate was thus considered only an indication of a lack of good faith bargaining. The tenor of the opinion seems to indicate that had the employer agreed to bargain, even though refusing to arbitrate, he would not have been guilty of an unfair labor practice.

In re *California Portland Cement Co. and United Cement, Lime & Gypsum Workers International Union, Local No. 89 (AFL)*³⁴ presented a dispute over transfer of work by an employer to another plant. The employer asked to have the grievance submitted in writing; the union did so, but at the same time filed a charge with the National Labor Relations Board alleging that failure to consult the union about the transfer was refusal to bargain. The employer then refused to process the grievance, maintaining that he was relieved of his duty to bargain since the dispute was now before the National Labor Relations Board. In holding the employer guilty of a refusal to bargain the board stated:

"The Respondent contends that the refusal to bargain on this issue should be deemed to be excused by the Union's failure to exhaust its remedies under the contract grievance procedure before filing the amended charge. However, the Union did invoke the grievance procedure, in compliance with Respondent's request, and it was the Respondent, not the Union, that refused to process the grievance further."³⁵

A possible inference from this decision is that the employer must allow the union to exhaust its remedies under the contract in the proper discharge of his duty to bargain. It is at least arguable that the *California Portland Cement* case would apply to the arbitration clause as well as to the bargaining and other phases of the procedure. It is important to note, however, that the employer not only refused to process the grievance, but also refused to bargain over the dispute outside the grievance procedure. Here again, had the respondent agreed to bargain, ignoring the grievance procedure, the result would probably have been different.

Indicative of the attitude of state boards on this point is the case of *Purity Food Co. v. Connecticut State Board of Labor*

33. 79 N.L.R.B. 1073, 1102-3 (1948).

34. 31 L.R.R.M. 1220 (1952).

35. *Ibid.*

Relations,³⁶ where the court upheld a Connecticut Labor Board decision ruling that the employer was guilty of a refusal to bargain. The contract contained a grievance procedure providing for arbitration.³⁷ In its decision the Connecticut Superior Court stated: "Furthermore, the company refused to participate in arbitration and mediation proceedings when the union submitted the controversy to that board."³⁸ Here again, as in the *Bergen* case, the board interpreted the refusal to arbitrate as evidence to show the employer's refusal to bargain.

The Wisconsin Labor Board has recently handed down a decision that seems worthy of extended comment here. In *Upholsterers' International Union of North America, Local No. 352 (AFL) v. Dunphy Boat Corp.*³⁹ the union petitioned the board for a cease and desist order alleging refusal to bargain on the part of the employer on the ground that the employer had refused to abide by his contractual agreement to arbitrate. The board held that: (1) Executory contracts to arbitrate are unenforceable in Wisconsin and conceded that the courts may not enforce such an agreement,⁴⁰ but (2) the board may enforce such an agreement under Section 111.10 of the Wisconsin Act.⁴¹ The particular section which the employer was held to have violated reads:

"(1) It shall be an unfair labor practice for an employer individually, or in concert with others:

"...

"(f) To violate the terms of a collective bargaining agreement. . . ."⁴²

36. 28 L.R.R.M. 2094 (1951).

37. "Thereafter the company failed to negotiate with the union, which submitted the controversies concerning the company's violations of the agreement to the state board of mediation and arbitration in accordance with the contract, which provided for such procedure in the event the parties could not amicably adjust controversies arising under it. The company refused to participate in the arbitration proceedings. . . ." *Id.* at 2095.

38. *Id.* at 2097. Cf. language used in *In re Gray Line Bus Co. and Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America (AFL)*, 19 L.R.R.M. 1067 (1946).

39. 33 L.R.R.M. 1002 (1953).

40. See *Local 1111 United Electrical, Radio and Machine Workers of America v. Allen-Bradley Co.*, 259 Wis. 609, 49 N.W.2d 720 (1951). For a more complete discussion of the Wisconsin position, see Note [1953] Wis. L. Rev. 739.

41. Wis. STAT. § 111.10 (1949). The Wisconsin board in a previous case ordered the arbitration of future contract terms as agreed upon in the contract. *Madison Bus Co. v. Wisconsin Employment Relations Board and Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees of America, Local Div. No. 456*, 25 L.R.R.M. 2398 (1949).

42. Wis. STAT. § 111.06(1)(f) (1949).

The similarity between this provision and Section 8(d) of the Labor Management Relations Act is striking. Section 8(d) provides that "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract. . . ." It would seem, therefore, that the National Labor Relations Board could come to the same conclusion as was reached by the Wisconsin Board and find that a refusal to arbitrate, as agreed upon, is a refusal to bargain and consequently an unfair labor practice.

Against this background of available precedent and possible argument, the National Labor Relations Board recently considered the question of whether or not a refusal to arbitrate constitutes a refusal to bargain. In the case of *In re Textron Puerto Rico (Tricot Division) and Textile Workers Union Local 24,877 (ILA-AFL)*⁴³ the employer and the union had signed a collective bargaining agreement containing a grievance procedure with arbitration as the final step. A union member was discharged for alleged forging of work records and the union sought to process the discharge as a grievance. The employer refused to process the grievance. The trial examiner came to the conclusion that the employer had violated Section 8(a)5 of the Labor Management Relations Act. It would seem that the trial examiner based his decision on the fact that the employer refused to consider the grievance on its merits at all and not on the mere refusal to arbitrate the question. The trial examiner found:

"Accordingly, the Respondent was required by the Act to bargain with the Union by discussing with it the merits of the grievance concerning Carrasquillo's discharge. This the Respondent has refused, and continues to refuse to do in violation of Section 8(a) (5) and 8(a) (1) of the Act. . . . As noted, the violation in this case resulted from the Respondent's denial of the Union's statutory, not contract, rights. . . . [I]t is not here found that the Respondent violated the Act by refusing to arbitrate Carrasquillo's grievance, but that its misinterpretation of the contract has impelled it to refuse to consider the grievance on its merits at all, thereby violating Section 8(a) (5) of the Act."⁴⁴

The National Labor Relations Board reversed the trial examiner and came to the following conclusions: (1) The record did not show a violation of the statutory duty to bargain, and (2) the

43. 107 N.L.R.B. No. 142 (1953).

44. *Id.* at 6.

most that could be said was that the employer refused to arbitrate the issue and that this fact alone did not constitute a violation of Section 8(a)5 of the Labor Management Relations Act.⁴⁵

In the great majority of cases in which the grievance procedure reaches the arbitration stage both parties fulfill their agreement to arbitrate. It is possible, however, that the very absence of an adequate sanction to enforce arbitration will cause harm to the arbitration process. In states which have passed or will pass specific statutes allowing the enforcement of arbitration agreements in labor cases no real problem will arise. Assuming the National Labor Relations Board follows the precedent set in the *Textron* case, enforcement as an unfair labor practice under Sections 8(a)5 or 8(b)3 of the Labor Management Relations Act seems not to be available as a method of enforcement. Although a simple amendment of either the Labor Management Relations Act or the Federal Arbitration Act could provide the necessary remedy to enforce arbitration it is not likely that Congress will pass such a statute in the near future. As was noted above, Section 301 of the Labor Management Relations Act has been used successfully in some jurisdictions to enforce the agreement to arbitrate. Thus, in the absence of a state statute, Section 301 provides the method which is most likely to meet with success in the immediate future.

Maynard E. Cush

Visitation Rights of the Parent Without Custody

The Louisiana Civil Code provides that upon separation or divorce the custody of a minor child of the marriage is given to one of the parents.¹ No provision in the legislation recognizes a

45. "Thus, the record establishes, at the most, that the Respondent refused to comply with the Union's request that the Respondent submit to arbitration the dispute arising out of that discharge. Whether or not such refusal constituted a breach of the collective bargaining agreement, it did not in itself, constitute a violation of Section 8 (a) (5) and (1) of the Act. Accordingly we shall dismiss the complaint." *Id.* at 2.

1. Art. 157, LA. CIVIL CODE of 1870, as amended, La. Acts 1924, No. 74, p. 114: "In all cases of separation and of divorce the children shall be placed under the care of the party who shall have obtained the separation or divorce unless the judge shall, for the greater advantage of the children, order that