Compulsory Arbitration of Labor Disputes Affecting Public Utilities

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The subject under discussion at this time has so many broad ramifications that unless we keep our eyes straight ahead, we shall find ourselves travelling on some interesting but remote and relatively unimportant by-ways. We are concerned today with the technique of compulsory arbitration as applied to labor disputes affecting public utilities. In order to come to grips with the main problem, we shall eliminate from our consideration the subordinate issue of the use of compulsory arbitration in the settlement of disputes which merely involve the interpretation of an existing labor agreement.

Our real concern is the use of this compulsory process as a means of enforcing settlement of disputes arising out of the negotiation, rather than the interpretation, of labor contracts. The typical situation is the struggle between the company and the union when, following collective bargaining, they are unable to achieve agreement on such important issues as wages or working conditions. Mediation and conciliation have failed to induce an agreement and a strike or lockout appears imminent. When arbitration is required in such cases, the parties are compelled to submit their differences to some agency established by the government. In effect, that agency determines the contractual terms which will be binding on the parties. This is a serious and disturbing mechanism and merits serious attention. Consequently, when we speak of "compulsory arbitration," we shall confine the scope of that term to the enforced settlement of disputes resulting in what might be called "compulsory contracts." As thus limited, the subject is of particular interest to this section since compulsory arbitration laws of this type in the United States are confined almost entirely to the public utility field.

There is a popular song which proclaims that its author was "born in Kansas and was bred in Kansas." This description might well be applied to compulsory arbitration in the United States. If we may by-pass the Adamson Law of 1916, which, by Congressional compulsion, settled a railroad dispute by establishing the eight-hour day (39 Stat. 721; upheld in *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298 (1916) ), we may acknowledge that so far as American experience goes, compulsory arbitration was born and bred in Kansas. Like many other prominent births in recorded history, moreover, this blessed or cursed event—depending on your viewpoint—was preceded by severe labor pains.
It has been estimated that during the period 1915 through 1919, approximately 700 strikes afflicted the Kansas coal mines. A serious shortage of coal resulted and the state, proceeding under its anti-trust laws, appointed a receiver for the mines and proceeded to operate them under National Guard protection. The U. S. Army also stationed troops in the area of disturbance. Against this backdrop of crisis and public furore, the Kansas legislature, in special session in 1920, adopted its compulsory arbitration law (Kansas General Statutes Annotated 1935; 44-60 et seq.) over the vigorous opposition of organized labor. This statute established the Court of Industrial Relations, composed of three, "judges" with jurisdiction over certain industries deemed to affect the public interest. It expressly covered the manufacture and transportation of food and food products and wearing apparel and the mining or production of fuel as well as the services of public utilities and common carriers. The court, which was essentially an administrative agency rather than a judicial body, was empowered to settle all controversies involving such industries and to seize and operate them during emergencies. Strikes, boycotts, picketing and intimidation were made unlawful.

The court promptly proceeded to investigate the coal mining industry. Certain officials of the UMW were summoned as witnesses, ignored the summons, were cited for contempt and were sentenced to jail. A strike was thereupon called despite the anti-strike provisions of the law. An injunction was obtained, was likewise disregarded and a jail sentence of one year imposed for the second contempt. Both contempt sentences were appealed and were sustained by the U. S. Supreme Court in 1922 in Howat v. Kansas, 258 U. S. 181, 42 S. Ct. 277 (1922), without passing upon the constitutionality of the legislation.

The following year, however, the question of constitutionality was presented squarely and decided in Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 262 U. S. 522, 43 S. Ct. 650 (1923); (see also 267 U. S. 552, 45 S. Ct. 441 (1925)), the Court holding that the food industry was not a "business clothed with a public interest" so as to justify wage determinations as a permissible restriction on freedom of contract under the due process clause. It is of particular interest that the Court by way of dictum regarded public utilities and common carriers as examples of businesses which are affected with a public interest. In any event, it is confidently predicted that if the holding in the Wolff Packing case should be urged as a precedent today to invalidate compulsory arbitration of disputes involving businesses other than utilities, it would be relegated to that special chamber in the judicial morgue reserved for such illustrious corpses as Adair v. U. S., 208 U. S. 161, 28 S. Ct. 277 (1908); Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240 (1915); and Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394 (1923).

History records that the Court of Industrial Relations expired for all practical purposes even before the Wolff Packing decision. It atrophied from general indifference and mounting opposition. The court was abolished officially in 1925
even though the statute still remains on the books, bloody and not unbowed. Thus, at this point, the boisterous offspring from Kansas, after a painful birth and a robust and vigorous infancy, became an unwanted and unclaimed waif.

Compulsory arbitration, born in the aftermath of World War I and buried several years later, was resurrected with the advent of World War II when the National War Labor Board operated in effect as a compulsory arbitration agency. This experience must not be confused, however, with the type of compulsory arbitration legislation which we are discussing today. The board was founded originally by executive order of President Roosevelt grounded upon the "no strike-no lockout" pledge taken by labor and management in December, 1941. It included representatives of labor, management and the public and was organized as a patriotic contribution to the war effort. Having served the purposes of its creation, it was dissolved by executive order of President Truman on January 3, 1946.

Shortly after the cessation of hostilities, labor unions aggressively asserted the pent-up demands of their members for increased wages and improved working conditions. These demands led to a large number of strikes, some of which involved public utilities. When a utility like an electric, gas, water or sewage company stops operating, the public is hit hard and fast. Not only is there inconvenience to patrons, but such strikes constitute a definite and immediate hazard to health and life. It is not difficult to perceive why a large body of the public firmly believes that work stoppages in such basic utilities should not be tolerated.

In their distress and under the terrific pressure engendered by public indignation, many states in 1947 grasped at compulsory arbitration as a solution to their problem. During that year, Florida, Indiana, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, Virginia, and Wisconsin enacted legislation providing for compulsory arbitration, seizure, or both in public utility labor disputes. These states, together with North Dakota (which had enacted a law in 1941) and Kansas comprised a total of twelve states in which such laws were in effect. The New Jersey Court of Appeals in *State of New Jersey v. Traffic Telephone Workers' Federation* et al., decided May 26, 1949, 2 N. J. 335, 66 A. 2d 616 (1949), invalidated the law of that state on the ground that it did not prescribe adequate standards to guide the arbitrators and consequently unlawfully delegated legislative powers. This defect was later cured by amendment. The Michigan law was likewise invalidated by the Michigan Supreme Court in *Local 170 T. W. U., et al. v. Gadola*, et al., 322 Mich. 332, on September 8, 1948, on the grounds that it required the appointment of a circuit judge as chairman of a board of arbitration in contravention of the division-of-powers provisions of the state constitution and that it failed to prescribe adequate standards for the exercise of the delegated powers. The Michigan legislature later eliminated compulsory arbitration and substituted fact finding in its stead.
For your information and convenience, there is submitted as a supplement to this article, a table summarizing the provisions of the various state statutes and citing the decisions thereunder.* It will be noted that there is much diversity in the provisions of the laws with respect to the types of businesses and services covered, the method of administration, the standards prescribed, the provisions for enforcement, the sanctions and penalties and judicial review.

There is a wealth of literature on the pros and cons of compulsory arbitration. A summary with appropriate topical divisions and bibliography of material is presented as another supplement to this report.** While these are not submitted as a complete review of all the available literature, I believe that they comprise a generous helping of the digestible material on the subject.

It is highly desirable that we survey the beachhead established by the advocates of compulsory arbitration and determine whether, in the national interest, we ought to liquidate it or contain it within its present boundaries, or seek to expand it. It is necessary, in this delicate assignment, to cut under the emotional surface and view the problem objectively.

First, let us inquire: "Who wants this thing called compulsory arbitration and why?" Organized labor definitely does not want it. I believe it is also a fair statement that the overwhelming sentiment of management is opposed to it. The real zeal for such legislation comes from a large and influential segment of the public which contends that the community is so dependent upon essential utility services for its very existence that work stoppages affecting such services simply cannot be tolerated. They assert that where the health and safety of the public are so directly affected, the well-being of the public must be paramount and the economic interests of the warring parties must be subordinated.

They argue that compulsory arbitration is entirely consistent with democratic principles, since the people in the exercise of their rights as citizens voluntarily establish this process through their elected representatives. They answer the averment of the Kansas failure with the counter claim that the Court of Industrial Relations was riddled with politics—as if this condition is the exclusive plague of the Sunflower State!

As lawyers, we must acknowledge that the proponents of compulsory arbitration make out a prima facie case. When we dissect the arguments of the opponents, however, and cut through the tissues of emotionalism, we find a hard core of real sense which calls for pause and serious reflection. The national policy in labor relations has been to encourage collective bargaining. My own experi-

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*A copy of this table which is entitled "Summary of the State Laws Providing for Compulsory Arbitration (with or without seizure) of Labor Disputes Affecting Public Utilities," may be had without charge upon written request to the DICKINSON LAW REVIEW. Ed.

**This summary is to be found at the conclusion of the article. Ed.
ence in an office handling a fair number of such cases indicates that when the disputants know in advance that there will be an arbitration, this knowledge in and of itself usually retards genuine bargaining. Both sides lose the will and incentive to make those final concessions which are so important in achieving agreement. Even where a statute prescribes adequate standards, they generally are not mutually acceptable and the ultimate adjudication appears unreasonable in the eyes of the disappointed party. There is less enthusiasm to abide by an agreement foisted on the parties than by the terms of a contract voluntarily executed after collective bargaining. This reluctance is aggravated by the strong conviction of the parties that their freedom of contract has been impaired. The union sulks at the deprivation of its most effective weapon—the right to strike.

Lowell once wrote that “One thorn of experience is worth a whole wilderness of learning.” We have already noted from the thorny Kansas experience that one does not stop strikes by merely enacting a law prohibiting them. History records other thorns of experience which dampen one’s ardor for compulsory arbitration. The modern renaissance of this process was in New Zealand in 1894. It was applied there with notable irregularity and was abandoned on occasion. In 1904, Australia enacted the Commonwealth Conciliation and Arbitration Act, which has experienced a checkered career. Australia has an area almost as large as that of the United States, but its total population is somewhat less than that of New York City. Obviously, its economy is much less complex than that of this country, and the problems of administering and enforcing compulsory arbitration there should be much less formidable than the difficulties encountered here. Yet statistics indicate that its strike rate exceeds that of the United States! Denmark, too, established an extensive system of compulsory arbitration in its tiny domain in 1936, but repealed it the following year. Norway and Sweden have employed compulsory arbitration to meet specific situations but have shied away from a general law adopting this principle.

Thus, we must conclude that actual experience with compulsory arbitration has not fulfilled the glowing predictions of its most insistent advocates. We have observed, too, that the compulsory technique is fraught with danger and that the public could be the unwitting victim of a process specially designed for its protection but failing in its purpose.

What should we, as lawyers, recommend as a course of action? It is not simple to venture a solution to this delicate and difficult problem without arousing the ire of labor or management or a vocal part of the public or a combination of these elements. Yet, in the best tradition of our profession, we should have the courage to utter our sincere views on this controversial issue.

I believe that compulsory arbitration has gone far enough for the time being. We should observe its operations carefully in those states which have adopted it and compare the results with conditions in those jurisdictions which have not yet
entered the dubious fold. We should resist any effort to expand the coverage of such legislation to industries where a work stoppage would not directly and promptly affect public health and safety even though such industries may also be classified technically as "public utilities." It will be noted from the table submitted with this article that several of the state statutes include transportation within their orbit. There is a vast difference between a water company, for example, and a bus operator. In the one, a work stoppage would cause an immediate and direct threat to health and safety. The water company invariably enjoys a monopoly and the community has no substitute available. On the other hand, a suspension of bus service does not directly imperil public health and safety, and there are several alternatives available to the patrons of the "struck" company. After all, the chief competitor of the bus company is the private car, and if necessary, one can even walk.

A strike of an electric, sewage or gas company has a direct effect on the health of the people affected. On the other hand, a strike of a trucking company would hardly cause a serious impairment to the health of the community, although it could cause much inconvenience. There are several other media of transportation available to the public.

We must realize, moreover, that compulsory arbitration of rates of pay and those expensive "fringes on top" inevitably affect the price of the commodity or service sold by the company. Where a utility enjoys a monopoly, there is less likelihood of serious prejudice than in the case of a motor carrier which competes not only with other carriers performing the same type of service but also with other modes of transportation, including the privately-owned vehicle. These are service industries, and wages and salaries comprise approximately half of their operating expenses. One unrealistic award could eliminate the company from the field of its enterprise to the detriment of the company, its employees, and the public. It would seem much better from the standpoint of all concerned to endure a strike of average duration rather than force a settlement which would result in abandonment of service.

These considerations, I submit, make it advisable to observe and appraise the effects of existing laws before we expand their coverage. While we are testing compulsory arbitration in the crucible of experience within its present limits, we should try to perfect better techniques consistent with the policy of free collective bargaining. The method of fact finding has, by no means, been given a fair and adequate trial. When properly and fairly applied, it can bring to bear the very strong pressure of public opinion for a voluntary settlement. We should intensify our efforts to halt work stoppages through the media of better understanding between employer and employee, more scientific and effective conciliation, mediation and fact finding before we gamble too heavily on compulsory arbitration.
If these voluntary methods work, we shall not need the dangerous weapon of compulsory arbitration. There will then be no necessity to enforce by legislative shotgun a wedding which is distasteful to both the bride and groom. If the voluntary techniques do not work after a thorough and fair trial, we shall then face the dilemma of the marriage or the gun. My point simply is that we ought to give the suitors who are sold on the efficacy of free collective bargaining more time and opportunity before we pull the trigger.

SUMMARY OF ARGUMENTS AND BIBLIOGRAPHY*

(In this summary, the arguments pro indicate those supporting compulsory arbitration; those contra signify arguments opposing compulsory arbitration.)

I
PUBLIC INTEREST

Pro

1. The welfare of the country must come first, in a conflict between any group and the nation.


Above all rights is duty to the community. Some industrial disputes cannot continue without danger to the community.


Unions cannot adopt a process which would disintegrate society, no matter how right they are.


Every citizen owes primary allegiance to the welfare of the public; and secondary loyalty to his labor organization.


Freedom and Constitutional rights of the individual must yield to those of society in labor relations as they have in other fields.

*The author gratefully acknowledges the valuable assistance of his office associates and particularly James H. Booser, Esq., and Jefferson C. Barnhart, Esq., in conducting the research and assembling the material for the supplements submitted with this article.

2. The soft coal and railroad strikes of 1946 demonstrated that the public will not permit work stoppages in vital industries.


The post-war state statutes arise from a public decision that public welfare demands no work stoppages in public utilities, and that they simply cannot be tolerated.


3. The public has an interest in labor disputes different from that of the adversaries, due to the interdependence of our industrial society. We cannot endure long on a large scale paralysis of public services or of the necessities of life.


The public has learned that unions are able and willing to paralyze public utility services in flagrant disregard of civil liberties, rights and general welfare of the people.

Richberg, Donald R., "Labor Disputes and Public Utilities," an address before the American Bar Association at Atlantic City, N. J., on October 29, 1946 (reported in 19 LRRM 143 (1947)).

4. A strike against an agent of the public rendering a public service is on a par with a strike by government employees.

Ibid., 144.

5. Since every statute infringes upon liberty, the real question is whether the infringement is justifiable. Strikes interfere more and more unjustly with the liberties of employers, employees, and the public than the proposed substitute.

Parsons, Frank, "Compulsory Arbitration," 17 Arena 663 (1897).


6. In compensation for the growth of power of unions and management, the state must assume greater power than either can wield.

Editorial, Buffalo Commercial, April 20, 1920.
7. The state has the same right to prevent violence and hardship that it has to forfeit the freedom of families infected with smallpox, namely the police power.


Contra

1. The public interest cannot be distinguished from the common interests of labor and management. No policy can succeed that does not serve the interests of democratic trade unionism and private enterprise, and does not respect economic and personal liberties, because most citizens belong to one or the other group.


The public is composed of different groups, some of whose interests are similar to those of the parties. Many are indifferent to the ethical values of any issue that conflicts with their comfort.

Gompers, Samuel, 20 American Federationist, 17, 26 (1913).

2. Balancing the elements of the public interest—self-organization, collective bargaining, right to strike, and to lockout, equality at the bargaining table, free enterprise system, economic stability and maximum production against continued production of essential goods and services,—public interest is opposed to legislation controlling emergency work stoppages.


3. It is impossible to determine in our complicated economy where or when the public interest starts and ends.

Houston, John M., “Case Against ‘Undermining’ Wagner Act,” address to a joint meeting of AFL, CIO, Int’l. Assoc. of Machinists, and Railroad Brotherhoods at Wichita, Kansas (reported in 19 LRRM 136, 141 (1947)).


4. We do not hear enough about the public’s obligations in a labor dispute.

Various public groups judge all disputes on a preconceived prejudice and not after informing themselves on the merits.

5. The Arbitration Acts in Australia and New Zealand result in the public's paying more for products of industries regulated by a board or court where there is no foreign competition.


6. The public cannot afford work stoppage; but neither can it afford degraded manhood.

Gompers, Samuel, loc. cit. supra, Argument 1 Contra.

7. In the light and power industries, almost all contracts of the IBEW include provisions for voluntary arbitration as the final step in dispute settlements. They also contain no-strike clauses, guaranteeing continuity of operation. There have been no interruptions in these plants in 28 years. In the field of local streetcars and buses, the AFL has a requirement of voluntary arbitration in its national constitution.


8. The cause of the wave of strikes immediately following V-J Day was inflation and the sharp rise in the cost of living. Further sharp increases in prices and cost of living are unlikely. The important question now is not to prevent work stoppages, but to avert widespread unemployment and breakdown in wage standards.

Ibid., 359.

II
PRACTICABILITY
A. ATTITUDES OF MANAGEMENT AND LABOR

Pro

1. Owners of utilities have no objection since their rates, services and accounting, and abandonment of their public services are already regulated.

Richberg, Donald R., loc. cit. supra, Argument I (3) Pro, 144.

2. Employees who rely on a utility for a living should understand that the public relies on them for continuous service.

Id.

3. Despite the number of strikes and administrative difficulties in Australia, few groups suggest abandonment.

Williams, Jerre S., loc. cit. supra, Argument I (2) Pro, 597 (citing: Foenander, Wartime Labour Developments in Australia, note 47, at XVI, C.V.; Evatt, "Control of Labor Relations in the Commonwealth of
4. One of the outstanding contributions of the 1946 Victoria Convention of Kiwanis International was a resolution calling on the national legislature to "provide for compulsory arbitration of all disputes prior to the calling of a strike which might endanger the national welfare or impinge upon the Constitutional rights of the citizen."


5. Employees and unions should stop merely telling the public what they are against and join in constructive proposals which will insure continuous production in essential industries.


Contra

1. Neither management nor organized labor wants compulsory arbitration.


Representatives of the National Association of Manufacturers, the United States Chamber of Commerce, and the Committee on Economic Development were all opposed to compulsory arbitration.


Enforced settlement of contract negotiation disputes is opposed by both management and labor.


Management, in the transportation field is currently resisting arbitration except on the basis of standards it has at least assisted in formulating.

Hawat, Bruce B., "Will We Toss 'Blank Check' Arbitration Out?", Mass Transportation, June 1949, p. 35 et seq.
B. ENFORCEABILITY

Pro

1. Laws prohibiting strikes will not eliminate strikes; but neither do laws against speeding eliminate speeding.


2. Compulsory arbitration is not fully satisfactory, but is the best available until co-operation arrives.


3. Compulsory arbitration, outside of the imperfections of any plan, has through many years, worked well in Denmark, Sweden, Australia, New Zealand and Great Britain.

Hübner, Carl A., *loc. cit. supra*, Argument I (1) Pro, 129 (citing many general references to treatises and articles on the systems in these countries).

Contra

1. The strike records of countries having compulsory arbitration, with the exception of New Zealand, have been worse than ours.


Accord as to Australia: Williams, Jerre S., *loc. cit. supra*, Argument I (2) Pro, 596.


Despite increasing "teeth" in the Australian law, and the outlawing of strikes and lockouts, the latter have not been successfully eliminated.

Ross, G. W. C., *loc. cit. supra*, Argument II (A) (1) Contra, 22.

2. You cannot stop strikes by law. They are negative acts of nonresistance.


3. In the larger strikes, the number of people involved makes it impossible for the court to collect fines or order imprisonment.


4. Possibly workers could be induced by threats of penalties to work, but not to work effectively.


5. An employer and his employees must live together, as must a married couple, even after a shot-gun wedding. When the terms of the relationship are imposed without the willing submission of the parties, and with opposition by one or both, there will not be a mutual feeling of fair treatment, without which low morale, petty bickering, suspicion, a highly technical interpretation of the order, creation of borderline conditions looking to a challenge of the continuation of the order, multiplied litigation and board proceedings will result, interfering with the joint task of production.

_Id._ (Frey).

Accord that it will be the source of further conflict: _Green_, William, _House Hearings_, Vol. 3, p. 1642.

6. During its short existence the Kansas Act was flouted by many rebellious unions.


Accord: _Witte_, _loc. cit. supra_, Argument II (A) (1) Contra, 257.

7. Writers on labor problems have concurred that compulsory arbitration is a failure in democratic foreign countries.


8. Experience from War Labor Board days shows that the fiat of the board, even though backed by moral suasion of the War, did not stop strikes, and produced many strikes.

_Fitzpatrick_, Bernard H., _loc. cit. supra_, Argument II (B) (4) Contra.

9. Where it has been tried it has not prevented strikes.

_Mosher_, Ira, before Senate Labor Committee, 80th Congress, Part 2, p. 953; _Stassen_, Harold L., _Senate Hearings_, 80th Congress, Part 1, 569.

10. It is clear that compulsory arbitration has not eliminated labor disputes in those countries where it has been used.

_Roberts_, Harold S., _Compulsory Arbitration of Labor Disputes_ (University of Hawaii: Legislative Reference Bureau 1949) 27.

III

ARBITRATION PERSONNEL

_Pro_

1. Partisan representation does not result in conspiracy detrimental to the public.

_Col. Univ. Studies, etc., cit. supra_, Argument II (B) (3) Contra, 213.
2. Public representatives will not oppose wage increases in utilities.

President Wilson, Letter to Railroad Brotherhoods, in reply to their request that he veto the Esch-Cummings Act of 1920.

Contra

1. Arbitrators are often poorly informed respecting practices and technical aspects of the industry involved.


2. In wage disputes, arbitrators have almost never awarded the offer of demand of either side. This means that arbitrators either "split the difference" or the parties do not bargain for agreement.


In the absence of standards, the tendency to compromise and be guided by expediency is inevitable.


3. Arbitrators appointed by the powers that be from the dominant social group, will maintain conditions and ethical standards as they are and therefore will rule against labor which has always been challenging current ethical standards.


Arbitrators are biased because belonging to the professional classes, and therefore having a class consciousness or dependence on management.


4. The Kansas Court of Industrial Relations became enmeshed in politics.

Columbia Univ. Studies, etc., *loc. cit. supra*, Argument II (B) (3) Contra, 51.

Accord: Gagliardo, Domenico, The Kansas Industrial Court, (University of Kansas Social Science Studies 1941) 227-228; Millis and Montgomery, Organized Labor, 824-826.
IV

STANDARDS

Pro

1. Equalization of wage rates with those in comparable situations has the appeal of precedent and satisfies the normal expectations of the parties and the public, stabilizes wages, sets a standard wage for a given skill, and prevents competitive advantage by paying low wages.


2. Setting wages and conditions by compulsory settlement is not difficult in utilities. Prices and profits are already controlled, and the prevailing wage technique is well developed and easy to apply.

Williams, Jerre S., loc. cit. supra, Argument I (2) Pro, 653.

Contra

1. Arbitration results in levelling-down. Skilled workers cannot get above the minimum, which become the maximum, when fixed by the court.

Ahearn, W. F., 2 Reconstruction 24 (1920).

2. The prevailing wage as a criterion is static, only transmits wage increases achieved by dynamic methods, and will not impose leadership in wages on an employer. A labor group should receive its demands, if otherwise justified, regardless of other groups, since its leadership will redound to the advantage of the others.

"Factors Relied on by Arbitrators," etc., cit. supra, Argument IV, (1) Pro, 1031.

3. The comparative wage system perpetuates differentials between jobs and between industries where in some cases re-evaluation would be in order.

Id.

4. American experience shows that best results follow when the parties make their own rules and arbitrators merely apply them.

Witte, Edwin E., op. cit. supra, Argument II (A) (1) Contra.

In contract negotiation disputes, the arbitrator is faced with an apparently insurmountable obstacle, that is, to say what the agreement of the parties is when they cannot reach an agreement.

Sanders, Paul H., "Types of Labor Disputes and Approaches to Their Settlement," 12 Law and Contemp. Prob. 211, 217 (1947).

5. By what principles other than political expediency will the legislature establish standards?

The result will be government by men and not by law.

6. "But the Board of Arbitration is nowhere directed to consider the rights of the public, which will ultimately be called upon to foot the bill."

Chief Justice Vanderbilt, loc. cit. supra, Argument III (2) Contra.

7. Standards are undesirable because they tend to create strife by making inflexible what should remain flexible—the ability of management and labor to adjust to changing conditions.

Fitzpatrick, Bernard H., loc. cit. supra, Argument II (B) (4) Contra.

V

RIGHT TO STRIKE

Pro

1. John L. Lewis has said that compulsory arbitration would enslave labor. But if a miner must belong to the UMW to work and he must work under a contract negotiated by Lewis, is that less involuntary servitude than working under one fixed by a government tribunal after full hearing?

Huebner, Carl A., loc. cit. supra, Argument I (1) Pro, 127.

2. When you give labor the better weapon and the protection of law, you can take away the old weapon of the strike.

Huggins, William L., op. cit. supra, Argument I (1) Pro.

3. The Kansas Act curbed capital just as much as it curbed radical labor.

Id.

4. "To insure domestic tranquillity" law must be substituted for force in labor disputes.

Parsons, Frank, loc. cit. supra, Argument I (5) Pro, 664.

5. For the sake of fairer and more reasonable settlements and the infusion of equity into all relations between capital and labor, compulsory arbitration is called for "to establish justice."

Id.

6. Every time reason is substituted for passion and force, a gain for character development is scored.

Id.

7. Advancing civilization and government requires the substitution of court compulsion for private compulsion.

Ibid., 668.


See also to same effect: Huebner, Carl A., loc. cit. supra, Argument I (1) Pro, 129; Richberg, Donald K., loc. cit. supra, Argument I (3) Pro, 143.
8. In a modern prolonged work stoppage, the employer with huge financial reserves, can compel servitude under his terms by starving employees and their families.


9. Industrial plants are communities; arbitration is simply bringing in the judge, without whom a community cannot get along.


10. The individual results of arbitration are unpredictable; but so are the results of unfettered trial by battle.


11. Compulsory arbitration puts the parties on an equal footing, regardless of the disparity of their economic strength.

Columbia Univ. Studies, etc., *cit. supra*, Argument II (B) (3) 203.

12. It is useless to speculate whether the disappearance of the right to strike from some areas is good or bad. It is the inevitableness of its disappearance, as the price of a complex industrialized society, which is significant.


13. It substitutes reason and logic for a trial of strength by strike.

Bogen, Jules, Modern Industry, Aug. 15, 1946.

*Contra*

1. Taking away their one potent weapon will destroy labor unions.

Columbia Univ. Studies, etc., *cit. supra*, Argument II (B) (3) 38.

2. The strike is justifiable as a natural expression of unrest.


3. If free men have the right to withhold their labor, they have the right to do all lawful things in pursuit of that purpose. No court may deny free men these natural rights.

*Id.*

4. The right to quit individually is of little avail if the quitting cannot be done in such a way as to make it a matter of concern in determining conditions for himself and his fellows.


5. A sounder social structure will eventuate if we do not arbitrarily check social trends. The labor-management struggle has gone on since Colonial days, and the social assets equal the liabilities.

VI

FREEDOM OF CONTRACT

Pro

1. Employers would suffer no actual loss of freedom of contract, since today his employees are likely to be so many that no labor pool can replace them, and his only alternative is to risk government seizure or give in to demands, however unreasonable.

Huebner, Carl A., loc. cit. supra, Argument I (1) Pro, 124.

2. How much actual freedom of contract is left today to the single employer of the single employee when contracts are made by a few representatives of each side in a distant metropolitan hotel or office?

Ibid., 126.

3. Absolute freedom of contract would mean that railroads could refuse to contract with their employees, and could cease operating, except on their own terms, however oppressive.

Ibid., 128.

4. It would only affect the labor cost side of the business which is already largely controlled through control of other factors.

Ibid., 129.

Contra

1. While the utility remains responsible to the public and stockholders, it is called on to cede its vital prerogative, of deciding what it can afford to pay employees, to a transient committee of three arbitrators.


2. Those who urge compulsion overlook the fact that a labor dispute is not over the meaning of a contract or law, but is over what the law (wages, hours and conditions) shall be.

Houston, John M., loc. cit. supra, Argument I (3) Contra 140.

VII

EFFECT ON COLLECTIVE BARGAINING

Pro

1. Cases settled by arbitration serve as a foundation and as precedents for future settlements.

Columbia Univ. Studies, etc., op. cit. supra, Argument II (B) (3) Contra, 203.

2. Bringing the parties together will give them a better understanding of each other's position.

Ibid., 214.
3. Compulsory arbitration will not destroy the effectiveness of the unions, and therefore the unions themselves, since the workers would have greater need to act collectively in presenting their cases and to have union leadership trained to do so.


4. If compulsory arbitration followed the breakdown of collective bargaining, the bargaining would be based on a prediction as to what the public agency might decide, and therefore would take the public interest into account, as it does not at present.


Contra

1. When parties are hostile, belligerency may be increased by having them confront each other with opposing arguments.

Columbia Univ. Studies, etc., *cit. supra*, Argument II (b) (3) Contra, 214.

2. The party who is in a weaker position makes the collective bargaining a pro forma process, doing just enough to get before the compulsory arbitration agency. Experience in Australia and here during war time bears this out.


3. So long as either party can expect governmental intervention, it will hope that more can be gained by such intervention than by voluntary agreement, and collective bargaining will be destroyed.


4. So long as the government is in "the decision-making business," one of the causes of strikes will be the desire to compel government intervention.

GOVERNMENTAL REGULATION

Pro

1. Managers and owners of utilities should not object since their rates, services and accounting are already regulated and they do not have the freedom to abandon public service.

Richberg, Donald R., loc. cit. supra, Argument I (3) Pro, 144.

Contra

1. It opens the way for further intervention by government into prerogatives of management.


2. As we learned during the war, we cannot fix some terms of economic life and leave hands off others. Australia and New Zealand started 40 years ago with compulsory arbitration alone. Features had to be added such as compulsory unionism, control of unions and employers' organizations and governmental determination of wage movements.

Houston, John M., loc. cit. supra, Argument I (3) Contra, 140.

IX

RELATIVE FAIRNESS

Pro

1. It (the Kansas Act) curbs the tyranny of capital just as stringently as it curbs that of radical labor.

Allen-Gompers Debate, loc. cit. supra, Argument I (7) Pro.

2. It involves investigation into the cost of living, wage rates and conditions of employment, which benefit labor.

Id.

3. It puts the parties on an equal footing regardless of the disparity of their economic strength.

Columbia Univ. Studies, etc., cit. supra, Argument II (B) (3) Contra, 36, 203.

Contra

1. Delay in proceedings is unfair to labor. The worker is hurt immediately and irretrievably by substandard wages and conditions; whereas, the business can recoup a temporary loss in the long run. It is therefore unfair to take away the right to strike, and impose on labor equal responsibilities.

Ibid., 43.
2. Employers have an advantage over employees because they have available all the documents, books and records from which to draw arguments.  

_Ibid._, 206.

3. Control of all the great means of communications by employing interests will increase the disparity of influence between the parties.  

Gompers, Samuel, _loc. cit. supra_, Argument I (7) Pro.

4. In those areas where the strike is inappropriate, an alternative should be provided to redress the inequality in bargaining power resulting from elimination of the right to strike.


X

TENDENCY TOWARD STATE SOCIALISM

_Pro_

1. Rates, services, accounting and cessation of operation of utilities are already regulated by law.  

Richberg, Donald R., _loc. cit. supra_, Argument I (3), Pro 144;  
Williams, Jerre S., _loc. cit. supra_, Argument I (2) Pro, 653.

2. Utilities are agents of the public, authorized to render public services, and strikes against them are on a par with strikes against the government.  

Richberg, Donald R., _Id._

3. The post-war state statutes arise from neither side, but from a general public decision; therefore, for the first time, development of, and limitations upon compulsory settlement are conditioned upon "the optimum manifestations of democracy."

Williams, Jerre S., _Ibid._, 657.

4. The objective evidence does not show that it will inevitably lead to undesirable alterations of our political and economic system.  

_Id._

5. The Commonwealth Court has sprung from the people, and, as administered by it, compulsory arbitration is as consistent with democratic ideals as any other reasonable and necessary limitation of freedom based upon social consent.  


6. It is neither impossible in a democratic society nor does it violate fundamental rights as the New Zealand and Australian experiences show.  

Contra

1. It will introduce state socialism by allowing the state to fix wages and conditions and regulate operation.

Columbia Univ. Studies, etc., cit. supra, Argument II (B) (3) Contra, 38; Stassen, Harold E., loc. cit. supra, Argument VII (2) Contra.

2. It opens the door to further government intervention into management prerogatives.


3. Our American system is based on freedom of enterprise, freedom of contract, and freedom to withhold one's labor. Those who urge compulsion slight these freedoms.

Houston, John M., loc. cit. supra, Argument I (3) Contra, 140.

Accord: Fitzpatrick, Bernard H., loc. cit. supra, Argument II (B) (4).

4. Once it is adopted for a few key industries, the wages fixed there will blanket the country, as our post-war experience indicates. Demand for state control of basic elements of our economy will be irresistible, and endanger the preservation of the free enterprise system.

Sigal, Benjamin C., loc. cit. supra, Argument I (2) Contra, 217.

5. If the government forces employees to stay on the job, it must compel employers to maintain the job. In extreme cases, it will have to give subsidies, or some other means insuring his ability to stay in business.

Ross, G. C., loc. cit. supra, Argument II (A) (1) Contra, 20.

6. If its use is not restricted to situations of critical need, then it will be an inciting force toward a managed economy.

Williams, Jerre S., loc. cit. supra, Argument I (2) Pro, 657.

7. In Fascist Italy, Nazi Germany, and Communist Russia there were and are no strikes. If we want their type of labor peace, we must accept their type of government.

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