

The Crisis in Labour Rights Enforcement in the U.S.

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The United States guarantees to each statutory employee a suite of legal rights that, in international comparison, is noteworthy primarily for its (1) paucity and (2) extraordinary difficulty of enforcement. Some aspects of the latter problem have received extensive attention. The growth of the temporary help sector has created complex structures in which many employees are, for legal purposes, employed by a small, undercapitalized entity, rather than the more powerful ultimate purchaser of labour services.¹ Increasingly, however, this problem is being addressed through more liberal findings of "joint employment", under which the worker is jointly employed by more than one beneficiary of his or her work.² In addition, state statutes increasingly impose legal responsibilities on ultimate purchasers of labour even where relations of joint employment cannot be found, and this concept of "responsibility" for labour conditions should, I have argued, be the preferred framework for discussion of the problem.³ Also much-discussed is the practice of having employees who are not represented by unions--that is, the overwhelming majority of employees in the U.S.--sign boilerplate clauses agreeing not to sue their employers but instead submit claims to arbitrators.⁴ U.S. courts normally uphold such clauses,⁵ at least where they refer to the right to sue that they purport to waive⁶ and bind the employer as well as the employee.⁷ Finally, the heavy proportion of immigrant workers, many in the U.S. without authorization, many concentrated in the worst jobs, creates difficulties in effective enforcement of labour rights, despite the fact that such workers are statutory employees covered by labour law and labour standards law.⁸

This Article deals with a different, less-studied aspect of the crisis in labour rights enforcement: the extraordinary multiplicity of legal institutions potentially relevant to the resolution of even the simplest issue; the absence of institutions or doctrines for their coordination; and the frequent jurisdictional chaos that results. This is an issue that the late Professor Bernard Adell addressed, advocating grievance arbitration between unions and employers, where possible, as the preferred institutional solution.⁹ In this Conference in his memory, which largely explores the current Canadian practice of labour arbitration of statutory rights, I would like to explain why this practice is not an established practice in the U.S. and why it is unlikely to become common. While the solution to U.S. jurisdictional conflicts is not obvious, partly because there has been so little attention to this problem, I will argue that it is past time for scholars of labour rights to begin to think about labour courts or similar administrative reform. I doubt, however, that labour arbitration will play more than an interstitial role in U.S. statutory rights enforcement.

¹ David Weil, Hyde in Cambridge volume.

² Browning-Ferris; Cano; Zheng.

³ Calif statutes; NY nondelegable duties. Hyde in Cambridge volume.

⁴ Radin, Stone, Szalai, Outsourcing Justice

⁵ Gilmer, Circuit City

⁶ *Atalese v. US Legal Services Group LP*, 219 NJ 430, 99 A3d 306 (2014), cert denied ___ US ___ (June 8, 2015).

⁷ *Armendariz*

⁸ *Sure-Tan*, *Hoffman Plastics*, *Lucas v Jerusalem Café*.

⁹ Adell

Part I of this Article will describe the current multiplicity of modes of enforcing statutory labour rights and resultant jurisdictional morasses. Part II will describe the historical evolution of this crisis, emphasizing how each of the prominent institutions enforcing labour rights was, in large measure, designed to fail. I shall discuss, in chronological order of their historical appearance: (A) the National Labour Relations Board; (B) the role of private lawsuits in enforcing the Fair Labor Standards Act; (C) grievance arbitration under collective bargaining agreements; (D) the Equal Employment Opportunity Commission and private lawsuits in the enforcement of antidiscrimination statutes; and (E) the collision of these institutions in recent years.¹⁰ Part III will present preliminary speculation on reform of the system. Federal reform is unlikely. There has been no labour legislation of this scope at the federal level in half a century. However, states in the U.S. are free to consolidate claims of wage payment, other labour standards, and discrimination, in state administrative agencies with power to order legal and equitable remedies.¹¹ While this makes reform at least plausible-- --it would come at the price of creating significant differences among the U.S. states.

I. The Problem

To illustrate that reference to the crisis in enforcement is not hyperbole, consider the following recent sequence of reported decisions. I would not describe this sequence as typical--it is among the worst I have recently encountered--but it arises from a simple factual situation and, as we shall see, could easily arise in many such similar scenarios.

Richard Wawock is an electrician in Los Angeles County, employed by CSI Electrical Contractors and represented by the International Brotherhood of Electrical Workers. His employer required him and others to attend mandatory training courses on topics such as safety, first aid, and preventing harassment. The employer did not pay wages for time spent at such courses. Wawock filed suit in California state court claiming that such time must be compensated under the California Labour Code. He raised no claims under federal minimum wage law or under the applicable collective bargaining agreement.

The applicable law is not in dispute. The federal law (which Wawock chose not to invoke) is found in regulations of the U.S. Department of Labour that require payment of wages to employees attending training courses unless four criteria are met: "(a) Attendance is outside of the employee's regular working hours; (b) Attendance is in fact voluntary; (c) The course, lecture, or meeting is not directly related to the employee's job; and (d) The employee does not perform any productive work during such attendance."¹² Applicable California law

¹⁰ In this Article, "arbitration" refers exclusively to grievance arbitration under collective bargaining agreements. I will not deal at all with the quite different system, also called "arbitration," covering employees without union representation and imposed by boilerplate individual contracts of employment.

¹¹ Federal legislation requiring minimum wage and premium pay for overtime hours (Fair Labour Standards Act, 29 USC), and the various federal statutes prohibiting discrimination in employment (Civil Rights Act of 1964, Age Discrimination Act of 1967, Americans with Disabilities Act, Family and Medical Leave Act), all set national minimum levels of protections. States are permitted to provide more protection to employees, and many have. The classic treatment of the economics of diverging state minima is Card and Krueger. By contrast, for private sector employees, rights to collective action under the National Labour Relations Act, and rights concerning pensions and benefit plans (Employee Retirement Income Security Act or ERISA), may not be supplemented by additional state law rights as the federal statute has been held to preempt any such state law.

¹² 29 CFR §§785.27

is substantially similar.¹³ The employer, despite vigorous litigation on the jurisdictional issue, at no time has suggested any substantive reason why wages are not required. If the course content is as Wawock claims, the employer will be unable to show that the courses lack direct relation to the job. Resolution of this simple factual question, could it be obtained, should result in back wages paid to Wawock and other members of the class.¹⁴

Instead, the employer petitioned the state trial court to send the case instead to arbitration by a joint Labor-Management Committee that hears grievances arising under the collective bargaining agreement. Wawock, of course, raised no claim under his collective bargaining agreement. However, the U.S. Supreme Court, in a 2009 decision under federal law (Pyett), held, in an abrupt change from prior law, that a trial court might dismiss an individual claim under federal age discrimination law if the claimant is covered by a collective bargaining agreement clearly waiving employees' right to sue and providing for resolution of their statutory claims in grievance arbitration.¹⁵

The state trial court sent Wawock's wage claim to arbitration by the Joint Committee. This order ignored at least three potentially significant distinctions with the claim sent to arbitration in Pyett. First, and most importantly, the trial court made no finding that the applicable collective bargaining agreement waived members' right to sue. The U.S. Supreme Court had made such a finding prerequisite to a district court's sending a statutory claim to arbitration. Indeed, an earlier case, undisturbed by Pyett, held that the federal district court must decide for itself statutory claims where the arbitration clause in the applicable collective bargaining agreement did not "clearly and unmistakably" cover them.¹⁶ The California trial court hearing Wawock's statutory claim made no finding that the dispute resolution clause in the collective bargaining agreement waived the right to sue under California wage law for employees covered by it. Instead, it directed the joint committee to determine for itself whether Wawock's claim was within its jurisdiction or arbitrable. Second, the trial court did not consider whether California courts applying California state law should apply the federal dismissal standard in Pyett, or instead provide more protection, as California frequently does. Third, the trial court did not consider whether a joint committee should be treated as the equivalent of the neutral arbitrator in Pyett. Wawock appealed the dismissal and arbitration order but the intermediate appellate court denied review.¹⁷

The Labor-Management Committee found that Wawock's claim was arbitrable and then found for the employer on all counts, denying any compensation for the time spent in class. Wawock then filed suit in federal court, seeking to vacate the award on the grounds that the Committee's finding, that the claim was arbitrable, manifestly disregarded federal labour law. The employer meanwhile sued in state court, seeking to confirm the award in its favor. The federal court vacated the award, finding that Wawock's claim was not within the jurisdiction of the joint committee and that the committee had disregarded federal law in finding that it was. The collective bargaining agreement made no mention of statutory claims, let alone clearly commit them to private dispute resolution, and thus did not represent the clear and unmistakable waiver that under Pyett is prerequisite to a court's refusing to decide a statutory claim.¹⁸ The employer appealed this decision to the U.S. Court of Appeals for the Ninth Circuit, where it languishes as of this writing.

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¹⁴ One federal Court of Appeals has held that a safety course required by the employer as a condition of employment was "voluntary" if employees could schedule it at their convenience. *Chao v Tradesmen Int'l, Inc.*, 310 F3d 904 (6th Cir 2002). This decision is hard to fathom.

¹⁵ *14 Penn Plaza LLC v Pyett*, 556 US 247 (2009).

¹⁶ *Wright v Universal Maritime Service Corp.*, 525 US 70 (1998)

¹⁷ *Wawock v Superior Court*, 197 LRRM 2056, 2013 BL 250005 (Cal.App.)

¹⁸ *Wawock v. CSI Elec. Contractors Inc.*, 2014 BL 297367 (CD Cal, Oct 20, 2014).

The parties then returned to state court for the employer's suit to confirm the award. Wawock now argued that the suit should be dismissed, because the state court was required to give full faith and credit to the federal decision that the suit was not arbitrable. The state court, however, refused to dismiss the suit, retaining it pending the decision of the federal appeals court. Wawock applied to the intermediate state appellate court for a writ of mandamus to the state trial court. The appellate court issued such mandamus, holding that, after the federal decision, the state court should have dismissed, rather than stayed, the employer's suit.¹⁹

Thus, as I write this Article (October 2015), Wawock's simple factual claim has engendered a decision by a joint committee, two decisions by the state intermediate court of appeals, and a federal court decision on appeal to the federal appeals court. This is the sign of a system of enforcing labour standards that has reached almost total breakdown.

How did the U.S arrive at this farcical carnival of litigation? More importantly, what should replace it? A Canadian reader might be tempted to reply that arbitration should become the preferred institution for resolution of statutory claims like Wawock's, a system that has proven largely successful in Canada. I believe that Wawock's case instead demonstrates that, whatever the achievements of Canada's promotion of arbitration here, this would not be a good solution in the U.S. Wawock received a sort of arbitration, but it was by a joint committee, not an arbitrator; the committee was inexperienced in statutory claims; it was flatly wrong in assuming jurisdiction of the controversy and fairly clearly wrong in its understanding of the substantive law of labour standards. Designing an effective system for U.S. labour rights enforcement is a task without an obvious solution. But first, let us understand the origins of the current crisis.

II. Labour rights enforcement in the U.S.: uncoordinated institutions

Part II will introduce the confusing multiplicity of institutions that enforce labour rights such as the right to be paid for work (Wawock's goal), the right to form unions or take collective action, and the right to be free of discrimination on the basis of race, color, national origin, religion, sex, age, or disability. It does not rest on archival research and contains no information that will surprise the reader familiar with U.S. law here. Nevertheless, the story is never told this way. American lawyers take for granted that each of these developments has its own trajectory and does not coordinate with others. There has been little emphasis in the literature on the way each enforcement scheme was deliberately created to fail. And there has been little appreciation of how simple problems like Wawock's can generate quantities of useless litigation, threatening the breakdown of the entire system.

The principal questions seem to me to be:

1. Why, with the model of the National Labour Relations Board already enacted and found to be constitutional, did the 1938 Congress lodge enforcement of minimum wage and hours regulation in private lawsuits rather than an administrative agency?
2. Why, with grievance arbitration largely universal in collective bargaining agreements by the end of World War II, and probably preferred by large employers over administrative process or lawsuits, was there no move to channel statutory labour rights enforcement into arbitration?

¹⁹ Wawock v Superior Court, 2015 LRRM 180683, 2015 BL 99732 (Cal.App, Apr 8, 2015).

3. Why did federal and state civil rights legislation make no formal use of arbitration?
4. How have arbitrators handled the post-2009 practice of federal courts to send statutory claims to them?

It is an easy matter to explain the second and third questions: why arbitration has played a limited role in the enforcement of statutory individual labour rights in the US. Grievance arbitration as we know it barely existed at the origin of federal enforcement of minimum wages and premium pay for overtime work in the Fair Labour Standards Act of 1938. When the Civil Rights Act of 1964 added rights to be free from discrimination, unions were defendants, too.²⁰ Many were discriminators themselves, so turning discrimination claims over to arbitrators responsible to unions and employers would effectively have eliminated those rights. Finally, the legal framework for arbitration, established in a series of Supreme Court cases brought by the unions in the 1950s and 1960s, emphasized, perhaps exaggerated, the gulf between public law claims and institutions, and private law claims and institutions under collective bargaining agreements, identifying arbitration with the latter.²¹ As a result, American grievance arbitrators have little experience with statutory claims and have never contributed anything to the development of statutory labour law.²²

It is much more difficult to explain why statutory labour rights have never been consolidated into a single federal agency with enforcement powers, but instead are parceled out among a variety of agencies and tribunals, none particularly effective. Some themes recur. Passage of any labour legislation is extraordinarily difficult, normally requiring years of Congressional effort, intense opposition from employers, messy compromises, and enforcement schemes deliberately designed to fail. However, there appears to have been little attention to the precise problem of jurisdictional conflict that has become such a prominent feature of statutory labour rights enforcement in recent years.

A. National Labour Relations Board (1935)

--While Article does not deal with collective labour rights, I start here because the Board, while far from perfect, is a model that might well have been, but was not, emulated in subsequent statutes.
--independent administrative agency
--power to issue complaints, try cases, award legal and equitable relief
--minimum judicial review
--no mediators: rights-oriented
--structure changed in 1947 to separate prosecutorial and adjudicatory functions, largely because pre-1947 Board was too effective.

B. Fair Labour Standards Act (1938)

Minimum wage; premium pay for overtime; no child labour. Not even introduced until after NLRA was upheld as constitutional in 1935 though said to have been drafted by Secretary of Labour Frances Perkins before

²⁰ Civil Rights Act of 1964, §703(c), 42 USC §2000e-2(c).

²¹ Steelworkers Trilogy

²² David Feller, The Coming End of Arbitration's Golden Age, 29 Proc.Nat.Acad.Arb. 97 (1976).

that time.²³ Nevertheless, does not follow the administrative agency model despite the model of the NLRB, either by adding to its jurisdiction or by creating a parallel agency within Department of Labour or an independent agency. As a result, no agency of federal government may order wage payment. Upholding of NLRA had settled that there is no constitutional objection to Congress's delegating to an administrative agency the power to adjudicate new legal claims and award both legal and equitable relief. Either aggrieved employee (like Wawock), or the DoL, must sue in federal court. No provision for use of grievance arbitration as this was rare in 1938. I have found no evidence that an administrative agency model for FLSA was even discussed at the time and am not sure why this was. This reliance on lawsuits is particularly mystifying since received tradition is that the US labour movement hated and distrusted the courts.²⁴ While FLSA was a New Deal project (specifically Perkins) and not a union project, and was criticized by both AFL and CIO (each fearing it would assist the other), I have not seen any criticism of its reliance on judicial enforcement. With hindsight, this is an enormous opportunity missed. Options in a case like Wawock's claim to payment for training seem today artificially limited to state court, federal court, or grievance arbitration, when most effective for his purpose would be administrative ruling from state or federal department of labour.

C. Rise of grievance arbitration during WW II

Early industrial union contracts after successful CIO drives of 1930s often vague about enforcement. No clear distinction between rights and interests disputes.²⁵ Sit downs and slow downs common. Arbitration clauses often required mutual consent which employer did not give. Only one arbitration held at Ford before WW II. Interesting to speculate what would have developed had war not come. Modern grievance arbitration before professional arbitrator empowered to decide claims under cba, but not new interests, is creature of National War Labour Board.²⁶

By end of war, large employers and unions comfortable with standard war agreement of no strikes during contract but rights disputes referred to arbitration. Arbitration law however was rickety state law often hostile to arbitration, and Federal Arbitration Act excluded contracts of employment. Unions began concerted litigation campaign to establish ready enforcement of executory promise to arbitrate, without judicial preview of the dispute, and minimal judicial review of the dispute either pre- or post-arbitration. This campaign succeeded by perhaps exaggerating supposed incompatibility of private arbitration and public law.²⁷ The very premise of the successful campaign to remove judicial scrutiny from labour arbitration was the assumption that such arbitration deals only with private rights under labour agreements, not statutory claims.

D. Civil rights legislation

There are two chief statutory sources of labour rights held primarily by individuals. The first, as noted, is the FLSA and parallel state legislation. The second is the series of antidiscrimination statutes enacted by Congress

²³ Jonathan Grossman, Fair Labour Standards Act of 1938: Maximum Struggle for a Minimum Wage, 101 Monthly Lab.Rev. 22 (1978).

²⁴ Forbath

²⁵ Histories of arbitration often trace roots to garment or anthracite coal in 1920s, but this were vastly different systems that used arbitrators to create agreement, not merely enforce negotiated agreements.

²⁶ Atleson; Lichtenstein.

²⁷ Trilogy quotes. Shulman.

between 1964 and 1992. Title VII of the Civil Rights Act of 1964 (amended 1972 and 1991): no employment discrimination by race, color, religion, national origin, or sex. Age Discrimination in Employment Act of 1967. Americans With Disabilities Act of 1990 (amended 2008). Family and Medical Leave Act of 1993 (held to have been enacted by Congress under its power to legislate equal protection and thus may bind state governments). All of these statutes share two broad structural similarities to the FLSA. First, they are minimum levels of coverage. States may, and often do, extend additional protections. Second, they are enforced through litigation. For simplicity we examine the first and most important, Civil Rights Act of 1964. Like FLSA, its passage through Congress was protracted and difficult, opposed by southern Democrats, necessitating negotiations with Republicans who focused most intensely on details of enforcement.

T.VII does create an administrative agency, the Equal Employment Opportunity Commission. The later statutes expand its jurisdiction to age and disability cases. By design, the EEOC does not promulgate regulations (it has no such statutory authority) or decide cases (so does not issue rulings as part of deciding cases, a method employed by the NLRB throughout its history).²⁸ Its circumscribed powers were the Republican price for support of the legislation.²⁹ Sovern described it at the time as a poor thing.³⁰ Blumrosen said it would actually be effective.³¹ Time has proven Sovern correct. What does it do if it doesn't enact regulations or decide cases? Precious little. Filing discrimination claim with EEOC or its state analog is jurisdictional prerequisite to suit. EEOC can conciliate or mediate, a little-studied process that has its defenders. It can (since 1972) litigate the case itself, representing simultaneously the interests of the individual or group complainant and the independent interest of the public in ridding workplaces of discrimination.³² The EEOC does not characteristically take the broadest or most cutting-edge cases. Most of the cases it takes are fairly routine and often seem selected to give junior lawyers training and practice in employment litigation before they are hired by private law firms.³³ Not surprisingly, the EEOC is not an effective litigator; most individuals would be better represented by private counsel, who accept compensation on a contingent fee basis.³⁴ In the vast majority of complaints where the EEOC neither conciliates effectively nor keeps the case for litigation, it issues a "right to sue letter" that enables the complainant to sue in federal or state court. This enforcement method was designed to be ineffective and has proven so over time. If the EEOC were abolished tomorrow, no one would miss it except for private firms forced to train their own litigators. As with the FLSA, its creation was an opportunity missed. Congress should have created an administrative agency with administrative law judges to compile factual records, and a board in Washington to set policy.

However, the failure of T.VII to refer to grievance arbitration is not an opportunity missed, but instead a reflection of the sad reality of race discrimination in 1964 America. Of course there were unions that played a crucial role in the civil rights coalition. But there were far too many that were as discriminatory as the employers. Unions in the building trades and maritime industries frequently limited access to their trades to the legitimate sons of their white membership. They did not admit African-Americans to membership (legal until passage of the Civil Rights Act of 1964).³⁵ While most collective agreements by 1964 established grievance systems that ended in arbitration, conspicuous exceptions included unions in the building trades and the Teamsters, whose grievance

²⁸ American Nurses

²⁹ Blumrosen, Modern Law

³⁰ Sovern

³¹ Blumrosen, Modern Law.

³² Waffle House

³³ Selmi

³⁴ Selmi

³⁵ Union control of membership admission was a union demand specifically protected by the Labor-Management Reporting and Disclosure Act of 1959.

systems then (and, as Wawock's case shows, now), typically terminated in joint boards that were (and are) the vehicle for union-employer horse trading, not protection of individual rights.³⁶ There has thus never been any interest in the civil rights community in channeling discrimination claims to private union-management dispute resolution.

E. Interactions among these systems 1964-present

With the pieces on the chessboard, we can start moving them around.

In a series of decisions between 1974 and 1998, the Supreme Court consistently maintained a sharp conceptual and practical distinction between (on the one hand) claims under collective bargaining agreements, appropriate for union-management dispute resolution with minimal judicial review, and (on the other) statutory claims, for which access to public courts and agencies must always be preserved.³⁷ Of course, the cases arose because the very same incident may easily give rise to both kinds of claims. An individual who believes that his or her discharge represented illegal racial discrimination may be said, with no stretch of the imagination, to be simultaneously alleging a discharge without the "just cause" normally required by collective bargaining agreements. Nevertheless, held the Court consistently, the two must be kept conceptually distinct. An arbitrator's decision that the employee was discharged for cause does not preclude his suit under civil rights statutes and is admissible only for whatever weight the court in the civil rights suit chooses to give it.³⁸ This conceptual wall between private claims under collective bargaining agreements, and public claims under statutes, so different from the Canadian conceptualization, rested on (1) the unions' insistence in the Trilogy and other cases from the 1950s and 60s that arbitration reached only claims under collective agreements—as the phrase at the time went, was "the substitute for industrial strife," not "the substitute for litigation"³⁹; (2) Congress's presumed intention of making statutory rights effective;⁴⁰ and (3) practical aspects of the arbitration process which make it unacceptable as a forum for statutory claims.⁴¹

The Court has recently cast doubt on how much of this wall remains intact. In 2009, it held, abruptly reversing course, that a federal trial court should dismiss an individual's discrimination suit where the applicable collective bargaining agreement between his union and employer specifically gave arbitrators jurisdiction to decide claims of discrimination.⁴² The Court failed to note, as the lower courts being reversed had expressly noted, that the union had already decided not to submit his claim to arbitration, so the Court effectively killed it. Nor did the Court attempt to reconcile its decision with the previous thirty years of precedent insisting on a sharp demarcation

³⁶ James and James

³⁷ See generally Hyde, Ohio St

³⁸ Alexander v Gardner-Denver. See also Lingle v Norge.; Hawaiian Airlines v Norris.

³⁹ Steelworkers v Warrior & Gulf

⁴⁰ See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 US 557, 567 (1987)("It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FEHA [Federal Employer Liability Statute] simply because he might also be able to process a narrow labor grievance under the RLA [Railway Labour Act] to a successful conclusion.")

⁴¹ Alexander mentioned the legal incompetence of many arbitrators; the limited fact-finding in arbitration; the usual practice of arbitrators, approved by the Court, of failing to give reasons for awards; the general informality of procedures; the union's exclusive control over whether and how to present a claim to arbitrator; lack of harmony between the interests of an individual claimant and the majority of the bargaining unit.

⁴² 14 Penn Plaza v Pyett

between any individual's statutory claim to be free of discrimination, and the same individual's parallel (but distinct) claims under his collective bargaining agreement.

The lower federal courts have since understandably been quite confused on their role in similar disputes in which an individual employee (or group of employees) wants to litigate a statutory claim while their employer wants it dismissed from court and sent to actual or hypothetical arbitration. Some courts carefully parse the arbitration clause in the applicable collective bargaining agreement to see whether it refers to statutory claims.⁴³ Some send anything dubious to arbitration, expecting that the arbitrator will determine his or her own jurisdiction.⁴⁴ Some courts will stay any action on any statutory claim by an employee working under a union agreement.⁴⁵ Some make distinctions among statutes.⁴⁶ Some seem never to have heard of *Pyett*.⁴⁷ The dimensions of this confusion are doubtless of little interest to a Canadian audience. The one point that is clear is that arbitrators, now hearing statutory claims that, pre-*Pyett*, they would never have seen, have not yet risen to the challenge. There are simply no interesting opinions by U.S. labour arbitrators, post-*Pyett*, on important questions of statutory or other public labour law.

It is idle to wonder whether, had the US gone down the Weber path at an earlier time, it might have evolved a Canadian-style cadre of arbitrators, adept at statutory analysis. Path dependence can suck sometimes. On my side of the border, we have the arbitrators whom the Steelworkers described to the Court in 1960: "a

⁴³ *Gjoni v Orsid Realty Corp.*, 2015 BL 239642 (SDNY, July 22, 2015)(FLSA and NY state and city wage legislation, employer motion to dismiss denied, collective bargaining agreement provided for arbitration of "all differences between the parties" but did not make that arbitration exclusive); *Nichols v Androscoggin County*, 2015 BL 136499, 2015 LRRM 182897 (D Me., May 11, 2015)(unpaid wages, "The collective bargaining agreement attached to the Plaintiff's Supplemental Brief does not waive the right to a judicial forum for statutory violations as the collective bargaining agreement did in *Pyett*."); *Bradley v Compass Airlines, LLC*, 195 LRRM 3031, 2013 BL 146303 (D Minn 2013)(close reading of arbitration clause in collective bargaining agreement, distinguishing *Pyett*). *Gilbert v Donahoe*, 751 F3d 303 (5th Cir 2014) found that the collective bargaining agreement in the US Postal Service required the employer to comply with disability statutes although the grievance clause made no specific reference to those statutes. Held, the agreement waived employees' right to sue under the disability statutes, dismissing those claims. However the agreement did not waive claims under the Family and Medical Leave Act, so those might be litigated.

⁴⁴ *Trustees of the U.A. Local 38 Defined Benefit Pension Plan v Trustees of the Plumbers and Pipefitters National Pension Fund*, 2014 BL 226382 (ND Cal, July 30, 2014). Two pension plans agreed to arbitrate a dispute about reciprocity. After the arbitration began, the plans differed on whether the applicable rules were under federal pension law, or the common law of contracts. On action for declaratory judgment, held, the district court has no jurisdiction to answer this question. The arbitrator must.

⁴⁵ *Portis v Ruon Transp.Mgt.Sys.*, 2015 BL 205580 (WD Va, June 26, 2015)(state whistleblower statute, suit stayed pending arbitration under Teamster agreement, which provided for grievances "arising under the agreement" and made no reference to statutory claims, held, violation of whistleblower statute would "necessarily" violate contractual requirement of just cause); *Hodges v All Transit LLC*, 198 LRRM 2513, 2014 BL 37580 (EDNY, Feb. 7, 2014)(FLSA; dismissed because employees covered by a collective agreement with grievance procedures; no reference to statutory rights in the agreement; no mention of the standard of "clear and unmistakable" waiver).

⁴⁶ *Manning v Boston Medical Ctr. Corp.*, 725 F3d 34 (1st Cir 2013)(unsettled whether FLSA claims may ever be waived by a collective bargaining agreement, since that statute contains no language encouraging arbitration, but holding that defendants had failed to show "clear and unmistakable" waiver here).

⁴⁷ *US v Brennan*, 650 F3d 65, 123 n.56 (2d Cir 2011)("[N]othing in *Pyett* suggests any wavering in the Court's commitment to the traditional separation between contractual CBA rights and statutory Title VII rights."); *Wynn v New York City Housing Authority*, 2015 BL 245772 (SDNY, July 29, 2015)(pay discrimination on the basis of race, employer motion to dismiss denied, existence of collective bargaining agreement might be relevant to motion to compel arbitration or an affirmative defense on the merits of the claim).

system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties” (meaning unions and employers).⁴⁸ For determining whether a given employee was discharged or disciplined for cause, it works fine. But US labour arbitration has yet to contribute anything to the development of statutory labour law. Indeed, there is practically no literature in the US on arbitration of statutory claims.⁴⁹

CONCLUSION

I hope it is clear that I am as unhappy as can be about this situation. I regard current jurisdictional confusion in the enforcement of statutory labour rights as every bit as big a threat as the equally-threatening, and more-commented, problems of diversion of unrepresented employees’ claims to individual arbitration; employer off-loading of statutory responsibilities to less-capitalized staffing agencies and subcontractors; and securing effective labour rights enforcement for the large population working in the US without legal authorization. With all respect to the Canadian experience, I do not believe that the solution to this problem lies in channeling statutory claims to US labour arbitrators who have failed this task historically. One need only note that only 6.6% of private sector workers in the U.S. are represented by a labour union.⁵⁰

Rather, I believe that experts in statutory labour rights need to have “sitting in the drawer,” as Frances Perkins had the draft Fair Labour Standards Act, legislating creating a unified labour court or agency that could, without cost to employees, investigate and remedy violations of such labour statutes as labour standards and antidiscrimination legislation.

Should the occasion occur for enactment of such a statute at the federal level, it could then be pulled from the drawer. Vastly more likely, however, is the creation of such agencies in states such as California, New York, New Jersey, or Massachusetts, which already provide substantive labour standards and protection against discrimination far superior to the federal minima. Effective enforcement will then become just one more dimension of the dissolution of federal labour law in the US and the rise, familiar to a Canadian audience, of primary state (provincial) responsibility for standards in the labour market.

⁴⁸ Warrior & Gulf

⁴⁹ Pauline Kim; David Weil.

⁵⁰ U.S. Department of Labour, Bureau of Labour Statistics, Union Members—2014, USDL-15-0072 (January 23, 2015), available at <http://www.bls.gov/news.release/union2.nr0.htm>.