CHAPTER V

# THE PLACE OF LAW IN LABOR ARBITRATION *

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Analysis of the problem of fitting labor arbitration into the framework of existing institutions with the least breakage and a minimum of rough edges habitually begins with the questions, "What is the attitude of the courts towards arbitration? What is the attitude of the National Labor Relations Board?" We shall have to face those questions, but I suggest that one may come nearer the truth by asking first, "What should be the attitude of the arbitrator towards the law?" One stock answer is to ignore it; but no one means this seriously and no one can follow the advice in practice. Arbitrators encounter the law on three distinct occasions:

1. When the contract provision on which a grievance is founded is alleged to violate a statutory command or other dictate of public policy.

2. When the grievance is founded upon a statutory or common law obligation not embodied in the collective agreement.

3. When legal principles—the law of contracts for example—are invoked as precedents for the arbitrator's rulings.

## 1. Violation of Statute or Public Policy

Should an arbitrator make an award which requires either party to violate a statutory command or defined public policy?

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* Address before the Eighth Annual Meeting, National Academy of Arbitrators (New York City, May 3, 1952).

The problem arose frequently after World War II when a conflict developed between the Selective Service Act and contract seniority. The statute was interpreted to require employers to give veterans preference over non-veterans in the event of layoffs during their first year after discharge from the armed forces.[1] The applicable collective bargaining agreement usually gave veterans only the seniority they would have had if they had not been drafted. If an employee with contract seniority made a grievance of his layoff prior to a junior veteran, how should an arbitrator resolve the conflict between the law and the contract?

Most arbitrators treated the statute as controlling and dismissed the grievance.[2] Yet note that this meant giving effect to law outside the contract and so long as the meaning of the Selective Service Act was unsettled, the principle forced the arbitrator to pass upon a doubtful legal question. A similar problem would arise today if a labor union were to carry to arbitration an employer's refusal to discharge a non-member in accordance with an illegal union security clause.

There is considerable temptation to say of such cases that the arbitrator should not concern himself with the law because he is the creature of the parties given the sole duty to apply their agreement. A rule of this kind would comfort those who worry—and wisely so—about encumbering with knotty legal questions what should be an informal method of adjusting laymen's differences. To support the rule a lawyer might also invoke the analogy of an administrative agency's inability to pass upon the constitutionality of the statute creating it.[3]

On reflection, however, the opposing considerations seem stronger. The parties to collective bargaining cannot avoid

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[1] *Fishgold* v. *Sullivan Drydock & Repair Co.,* 328 U.S. 275 18 LRRM 2075; compare *Aeronautical Lodge* v. *Campbell,* 337 U.S. 521, 24 LRRM 2173.

[2] *E. G. Dow Chemical Co.,* 1 LA 70; Goodyear Tire & Rubber Co., 2 LA 217.

[3] Davis, *Administrative Law* (1951), pp. 631-632.

negotiating and carrying out their agreements within the existing legal framework. It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids—futile because if the employer challenges the award the union cannot enforce it;[4] unjust because if the employer complies he subjects himself to punishment by civil authority.

Furthermore, if arbitrators are unable or unwilling to determine whether a grievant is seeking to bring about an unlawful consequence, the courts and administrative agencies are bound to intervene at least to the point of deciding that question. Having entered the field at this point, would they go no further? Judicial review appears to be increasing,[5] and there are signs that the NLRB is not unready to exercise a considerable degree of supervision over collective bargaining during the term of an agreement.[6] The attitude of both courts and agencies towards the growing jurisprudence of labor arbitration will be deeply influenced by the attitude of arbitrators towards the law. Each can best secure respect for its appropriate jurisdiction by recognizing the proper role of the other.

My conclusion therefore is that an arbitrator should not make an award which requires violation of a statutory command or defined public policy. Nor should he make an award based upon a contract which the courts would call void because against public policy. Thus, just as an arbitrator would not conduct a proceeding between two burglars in order to determine whether they had lived up to their agreement concerning division of the swag, so should he not decide whether the

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[4] Sturges, *Commercial Arbitrations and Awards* (1930), 61.

[5] See e.g. Scoles, "Judicial Review of Labor Arbitration Awards," 17 *U. Chi. L. Rev.* 616 (1950); Mayer, "Judicial Bulls in the China Shop of Arbitration," 2 *Lab. L. J.* 502; "Report of Committee on Arbitration," Nat. Acad. of Arbitrators, 16 LA 994.

[6] Compare the views expressed in Cox and Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 *Harv. L. Rev.* 1098, with Findling and Colby, "Regulation of Collective Bargaining by the NLRB," 51 *Col. L. Rev.* 170. See also Summers and Sarnoff, 2 *Lab. L. J.* 329.

painters' union has lived up to an agreement with painting contractors not to allow its members to work for a general contractor except at premium pay.

The suggested principle includes important limitations. It does not suggest that an arbitrator should pass upon all the parties' legal rights and obligations. It does not suggest that an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it. Nor does it imply that an arbitrator should be guided by judge-made rules of evidence or contract interpretation. The principle requires only that the arbitrator look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance.

If this occasionally requires lay arbitrators to rule upon difficult legal questions, they may comfort themselves with the knowledge that to err is human—even in the legal profession.

## 2. Grievances Founded Upon a Legal Obligation

The converse problem is presented by grievances grounded in whole or part upon a statutory or common law obligation not found in the collective bargaining agreement. Such a case might arise if employees claimed payment at overtime rates for clean-up time at the end of an eight hour shift on the ground that the employer's failure to treat the clean-up time as work time violated both the collective agreement and the Fair Labor Standards Act. If there has been no violation of the contract, should the arbitrator rule upon the claim under FLSA? Similar problems arise in connection with the NLRA. A manufacturer of machine tools changed the starting time of a shift in one department without the assent of the union. The applicable contract contained a management clause recognizing that "subject only to the express provisions of this Agreement the supervision, management and control of the Company's business, operations and plant are exclusively the function of the Company." No other provision dealt with

the subject even remotely, unless it be thought that an obligation was created by the recital that—

> The Union's bargaining rights shall extend to rates of pay, hours of employment and other conditions of employment.

Probably most arbitrators would hold that the contract was not violated by rescheduling the shift in order to achieve more efficient production.[7] Should the grievance be dismissed on this ground or should the arbitrator go farther and inquire whether NLRA Section 8(a)(5) was violated by management's unilateral activity?

At the threshold a potentially significant distinction should be noted. Many collective agreements confine the arbitrator to disputes arising under particular clauses of the contract, or to disputes concerning "the interpretation and application of this agreement." Other arbitration clauses are wide open; they embrace "Any dispute, difference, disagreement or controversy of any nature or character." Perhaps these differences of phraseology are purely fortuitous. Douglass Brown of M.I.T. has argued that even under the broadest clause the arbitrator's sole function is to interpret the terms of the agreement.[8] Even though we should reach identical conclusions in nearly all cases, I cannot bring myself wholly to accept Professor Brown's analysis. Surely the thought that goes into the careful drafting of an arbitration clause reflects purposeful distinctions. Ordinary men do not mean the same thing when they say "Any dispute * * * of any nature or character" as they mean when they speak of a "dispute concerning the meaning or application of this agreement."

Suppose that a contract which made no reference to seniority was executed between a union and a company which had customarily made layoffs according to plant-wide seniority.

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[7] See e.g. *Merck & Co.*, 1 LA 430, *Columbia Steel Co.*, 7 LA 881.

[8] Brown, "Management Rights and the Collective Agrement, *Proceedings First Ann. Meeting of I.R.R.A.*, p. 145.

Later the company makes layoffs according to departmental seniority and the union takes the case to arbitration. Under a broad clause the dispute is plainly arbitrable. On the merits perhaps it should be ruled that the agreement implicitly carried forward the old seniority system because "even where the agreement is silent, the parties have by their silence, given assent to a continuation of existing modes of procedure."[9] But acceptance of this view concerning the nature of a collective agreement does not require the conclusion that the seniority dispute would be arbitrable under a clause covering only "disputes concerning the meaning and application of this agreement." A dispute as to what shall happen where an agreement is silent cannot be converted into a dispute as to what the agreement has said. The seniority dispute would not be arbitrable under the narrow arbitration clause. The power of arbitrators differs with the breadth of the provision.

Of course the distinction is a matter of degree. Not every right and obligation created by an agreement is spelled out in explicit terms. Nor is it easy to draw the line in particular cases. For our present purpose, however, it is enough to note the difference in principle.

It is appropriate now to turn back to the question how far an arbitrator should enforce rights and duties resting on legislation or the common law but not found in the collective agreement. If the suggested distinction between broad and narrow types of arbitration clause has merit, the arbitrator whose charter is to resolve "disputes concerning the interpretation and application of this agreement" would not be concerned with legal duties not arising out of the agreement. In the case of a claim to overtime based partly on the contract and partly on FLSA, the arbitrator should decide the meaning of the contract and leave the adjudication of any statutory rights to the courts. Similarly in the case involving a change in shift schedules, the arbitrator would exhaust his function by

[9] Brown, *op. cit.,* at p. 149.

determining whether the employer's unilateral action was consistent with the contract; the question whether the unilateral change in shift schedules during the term of the agreement was an unfair labor practice should be left to the NLRB.[10]

Under a broad form of arbitration clause the answers should be different. The arbitrator who undertakes to decide "Any dispute, difference, disagreement or controversy of any nature or character" fails to discharge his task if he looks only at what is expressed in the contract or implied by its terms. In the absence of legal obligations the very execution of a comprehensive agreement may carry an implied undertaking to preserve existing agreements, both procedural and substantive, unless changed by mutual consent, but it seems both unreal and unwise to derive from the parties' silence an intention to set aside normal legal rights and duties merely because they disregarded them in the past. The arbitrator should therefore decide all aspects of the claim to overtime and, as I shall suggest in a moment, his jurisdiction should be exclusive and his decision should be final.

Similarly, *if* it were clearly established that an employer commits an unfair labor practice by unilaterally rescheduling shifts during the terms of an agreement which provides no solution, it would be wrong for the arbitrator to dismiss the grievance—wrong, not because mutual agreement should be prerequisite to the change[11] but because arbitration under a broad clause should give effect to settled statutory duties.

Although the point is debatable, four considerations support these conclusions:

*First,* the ultimate outcome of the controversy ought not depend on the breadth of the arbitration clause. Under a

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[10] In the case described in the text the arbitrator went ahead, erroneously in my judgment, to apply the NLRA. See *Jones and Lamson Co.*, reprinted in Cox, *Cases on Labor Law* (2d ed. 1951), 720.

[11] Apparently the NLRB would impose such a duty on the employer, but the point is unsettled and the NLRB view seems open to criticism. See Cox and Dunlop, "Regulation of Collective Bargaining by the NLRB," 63 *Harv. L. Rev.* 389.

narrow clause the union could go to court or the NLRB and obtain a favorable ruling.

*Second,* if statutory duties are to be ignored in arbitration proceedings, the courts and Board are unlikely to give effect to the parties' undertaking to submit to the arbitrator "Any dispute * * * of any nature or character."

*Third,* if the dispute were submitted, failure to pass upon the employer's statutory obligation would be an invitation to relitigate the case in a second forum.

*Fourth*—and most important—diversity of approach on such fundamental questions will widen the schism between arbitrators and the National Labor Relations Board. Arbitration cases raise many of the same fundamental questions that are coming before the National Labor Relations Board as it moves into the regulation of collective bargaining. Common thinking in the two spheres would seem imperative unless the way is to be open to forum shopping, second-guessing and uncertainty. Since I shall return to the point later, it is enough to say here that success in fitting arbitration into the legal and administrative framework requires not only definition of the jurisdiction of each and of its attitude towards the others but also the evolution of basic principles which command general acceptance. The present controversy over the nature of the duty to bargain during the term of an existing agreement furnishes a pointed illustration.[12]

## 3. Court Decisions as Precedents

The third occasion on which the labor arbitrator encounters legal doctrines is when they are invoked as precedents either on questions of procedure or in the interpretation or application of a collective agreement. How far should an arbitrator follow common law rules of evidence? Where lies the burden of proof? Are legal rules governing the interpretation of contracts controlling; may evidence of usage, for example,

[12] See articles cited in 6, *supra.*

be considered where the language is plain? May a party be relieved from a clause which it supposed had been left out of the agreement?

Glancing through arbitration opinions one finds great diversity of expression. The tendency is to assert a sweeping general rule without much discrimination. In *Bond Clothes Inc.*[13] the arbitrator held an employer bound by a clause which it had not realized was in the contract, saying—

> It is an established rule of law that a persons's failure to inform himself as to the contents of a contract which he signs is negligence which stops him from voiding the instrument on the ground that he was ignorant of its contents * * *. This arbitrator is bound by the law as much as any court * * *.

In *Andrew Williams Meat Co.*[14] the arbitrator dismissed a grievance protesting the reduction of bonuses in excess of the contract scale:

> If the arbitration process is to serve a just and useful purpose, it cannot exist outside of the framework of the law. Indeed, industrial arbitration would be operating under a false and illegal banner, calculated to provoke, rather than to allay industrial strife, if, under the pretext of good industrial relations, it seeks to evade the law and establish itself as an extra-legal administrative process. Consequently, previous arbitration decisions attempting to impose obligations on either contracting party not raised and recognized by the law, or not appearing in their contract, are neither persuasive nor controlling authorities which should guide other Arbiters in subsequent arbitration proceedings involving similar facts. Having demonstrated that arbitration, like all other democratic institutions, must operate within the frame-work of the law, it will be instructive next to examine the law of contracts.

[13] 7 LA 708.
[14] 8 LA 518.

The arbitrator then examined decisions of the California courts and concluded:

> The foregoing citations clearly demonstrate the law of contracts governing over-the-scale wage payments, bonuses, and overtime compensation. The Arbiter considers these controlling rather than the arbitration decisions relied upon by the union. Accordingly, his award will be in conformity to the former rather than the latter, and the contention of the union rejected.

Contrast this amazingly legalistic approach with the tendency of other arbitrators to ignore judge-made rules on the ground that they are legal technicalities irrelevant to human relations.

Some of the apparent irreconcilability of these points of view can be dispelled by giving up the search for an embracing principle which makes all legal rules applicable or inapplicable, at all times and under all conditions. There are some rules of law which no responsible arbitrator would follow. The practice of reinstating an employee who has been discharged without cause is followed uniformly in the face of the century-old rule that the courts will not compel men to enter into or maintain an employer-employee relation. The reason is that the common law rule which grew up in the days when the relationship was personal has scant application to factory employment.

On the other hand it would be extraordinary to find an arbitration award inconsistent with the rule that a party to a contract is bound by an unambiguous provision, in the absence of mutual mistake, even though he did not realize that the contract contained the undertaking. The reason is not that arbitrators must follow the law of contracts. The reason is that in this instance the rule of contract law embodies a judgment upon the best way to conduct human relations, which is supported by sound reasons whether one is dealing with a commercial transaction, a lease of real estate or a collective bargaining agreement.

This is the key to the problem. Some rules of law survive in the courts because the courts cannot easily slough off established precedents. Others represent wise rules of conduct in one context but become arbitrary concepts when transferred to another. Still other legal principles are based upon experience and judgments which apply to labor relations with the same force as to the problems with reference to which they were developed. When legal principles are invoked in arbitration proceedings it is well not to brush them aside impatiently but to recall that behind them lies the weight of thought tested by experience. If the policy behind the legal rule holds true, the case should turn upon it. If the policy is unimportant, the legal rule may safely be disregarded.

Time prevents pursuing an inquiry into the applicability of some of the legal principles most often invoked in labor arbitration. If I have not already provoked controversy, I am sure that on these questions there would be sharp differences of opinion. Possibly it is only lawyers who feel misgivings on observing the tendency of some labor arbitrators to receive testimony from the parties as to what they thought and said during the negotiation of the contract which the arbitrator is seeking to interpret. It is easy to brush aside a principle called the parol evidence rule with the explanation that you are getting to the bottom of the problem. Yet behind the technical label lies the policy of enabling men who sign written undertakings to rely on the pretty plain meaning of an agreement which purports to speak for itself, without speculating as to what a judge or arbitrator will conclude after hearing conflicting testimony on the claims, demands or understanding of this and that party prior to the contract's execution. The policy was developed for commercial dealings, but might not adherence to the same approach in labor arbitration prove salutary for both management and labor, and at the same time relieve witnesses of undue pressure on their "recollection" concerning past contract negotiations?

Whatever the proper answer it should be one for the arbitrator to make without review by a court or administrative agency. Until recently the courts seemed content to leave the matter there but recent decisions show a tendency towards judicial intervention. One of the striking cases is *Western Union Telegraph Co.* v. *American Communications Assn.*[15] The case is worth examining because it emphasizes the danger of confusing awards calling for a violation of law, statute or defined public policy with mere failure to treat a legal precedent as controlling.

The collective agreement applicable to the domestic business of Western Union provided—

> The Company agrees that there shall be no lockouts and the Union agrees that there shall be no strikes or other stoppages during the life of this contract.

Later, when another ACA local called a strike against the cable companies, including Western Union's separate cable division, the local with jurisdiction over the domestic business voted not to handle struck international traffic. Western Union warned employees against refusing to handle the traffic and then suspended for four months those who disregarded the warning. ACA referred the issue to arbitration under the following stipulation:

> In the event that an agreement cannot be reached between the Union and the Company with respect to the application or interpretation of this contract * * * it is agreed that such matters shall be submitted on the request of either party to (a permanent impartial arbitrator). The arbitrator shall not have the authority to alter or modify any of the express provisions of the contract.

The arbitrator ruled that neither ACA nor the employees had violated the "no strike" clause because the literal words of the clause must be read in the light of an industry tradition

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[15] 299 N.Y. 177, 86 N.E.2d 162, 12 LA 516.

sanctioning refusals to handle traffic from other struck carriers. In the lower court Justice Pecora ruled that the arbitrator had not exceeded his power. "Especially in a collective agreement affecting an industry, it is expected that the impartial chairman named in the contract will render decisions in conformity with the practices of the industry and not act in total disregard of them by making literal interpretations of the text."

On appeal the decision was reversed and the award was vacated on two grounds: (1) because the award sanctioned violations of the criminal laws of New York which make it a crime to "willfully refuse or neglect duly to transmit or deliver messages," and (2) because the arbitrator's reliance on custom in the industry was an erroneous assumption of power to alter the express provisions of the contract.

The court's reasoning concerning the penal code confuses arbitration awards based upon precepts as controlling in interpreting a lawful agreement. An arbitrator cannot properly make an award requiring the performance of an unlawful act or enforcing an agreement against public policy, hence there would have been ample authority for withholding enforcement of an award directing Western Union to join in violation of the penal code or based upon a contract provision purporting to set aside a public obligation.

Properly understood, however, the Western Union award involved no violation of this principle. One underlying issue was whether the union and employees had promised to handle struck messages. The ruling that the contract contained no such undertaking left unaffected whatever public obligation the penal code imposed upon the employees. A second question may have been whether violation of the duties imposed upon employees by the penal code was just cause for a four-week suspension. That conduct in the shop is criminal may be relevant to the issue of "just cause" but an arbitrator should not be bound to treat it as controlling. In the *Western Union* case it was so doubtful whether there had been a violation of

the statute that the Court of Appeals split four to three. The statute had not been applied in previous instances. Surely, it was not unreasonable for the arbitrator to hold that under these circumstances both he and the employer should continue to leave the enforcement of the ambiguous public law to public prosecution. This was all the arbitrator did. In my judgment the court erred badly in setting aside the award.