APPENDIX TO REPORT DATED SEPTEMBER 22, 1957 ON THE UNIFORM ARBITRATION ACT

In its report, this Committee has recommended that the Academy should withhold its approval of the Uniform Arbitration Act, as amended; and that legislation governing labor-management dispute arbitration should be separate from legislation governing the arbitration of commercial disputes. These recommendations are based upon the following analysis of the Act:

SECTION 1. (Validity of Arbitration Agreement.) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement.

In its present form, the Act is applicable in its entirety to labor-management dispute arbitration, *unless otherwise provided* in the arbitration agreement. To preserve the voluntary character of labor-management dispute arbitration, it has been suggested that the Act be applicable *only if the parties so provide* in their agreement. On this matter, the Committee was equally divided.

However, quite apart from contracting the application of the Act "in" or "out" of collective bargaining agreements, there should be a legislative enactment making agreements to arbitrate future labor-management disputes specifically enforceable. The *Lincoln Mills* decision * makes such agreements specifically enforceable only where the employer is engaged in interstate commerce, and thereby overrules the common law. There still remains the problem of specifically enforcing agreements to arbitrate future disputes where an employer is engaged in intrastate commerce in those jurisdictions where the common law rule still obtains.

SECTION 2. (Proceedings to Compel or Stay Arbitration)

(a) On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbi-

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* *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* U. S., 40 LRRM 2113 (1957).

trate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 18, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

In connection with Section 2, there is a fundamental question to be resolved. That is, should a court have any pre-arbitral jurisdiction to compel or to stay arbitration proceedings, at all. This problem, we believe, should be resolved by a drafting committee. It involves, among other things, an analysis of arbitration clauses used in collective bargaining agreements, review of methods provided therein for the selection of arbitrators and procedures established by the American Arbitration Association and the Federal Mediation and Conciliation Service for the appointment of arbitrators when an employer refuses to arbitrate.

It is the consensus of this Committee that questions of jurisdiction and arbitrability generally should be determined initially by the arbitration tribunal, rather than by a court. In its report of May 2, 1953, the Committee on Legislation suggested that pre-arbitral jurisdiction by courts be confined to the question of whether there is an agreement to arbitrate, without passing upon the merits of the controversy or upon the question of "jurisdiction" of the arbitrator. Sections 2 (a), (b) and (e) of the Act appear to be intended to limit the pre-arbitral jurisdiction of courts in this manner. However, Section 2 (e) is at least formally inadequate because by its terms it is applicable only to proceedings to an "order for arbitration" and not to proceedings to stay arbitration, as well.

SECTION 4. (Appointment of Arbitrators by Court.) If the arbitration agreement provides a method of appointment or arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

Section 3 does not require the use by courts of standard appointing agencies customarily used by the parties in the selection of arbitrators for labor-management controversies.

SECTION 4. (Majority Action by Arbitrators.) The powers of the arbitrators may be exercised by a major-

ity unless otherwise provided by the agreement or by this act.

The foregoing provision, which changes the common law requirement that the awards by tri-partite boards should be unanimous, is acceptable.

SECTION 5. (Hearing.) Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives any such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request if a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

Section 5 may conform to the practices followed in the arbitration of commercial disputes, but it does not conform to the practices of labor-management dispute arbitration. Sections 5 (a) and (b) dealing with notice and hearing are not adaptable to some actual labor dispute practices widely accepted by the parties.

The following objections raised by the Committee on Law and Legislation in its report of January 26, 1956 regarding the rules of evidence still are valid:

"The draft act (Section 5), which deals with the hearing, does not state that the arbitrators are or are not bound by the legal rules of evidence. In view of the possibility that the act as written will be construed to make the rules of evidence applicable, it would have been preferable to provide otherwise, expressly, in the act, as is customary in legislative drafting where the intention is to relax the requirement. This is especially desirable in view of the fact that, under Section 12 (a) (5), an award may be vacated if the court finds that the arbitrators "so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party." The receipt by arbitrators of "hearsay" evidence, for example, should not be regarded as error per se, or even as an insufficient basis per se for a finding of fact."

Does Section 5 (a) contemplate that only "evidence" admissible under the legal rules of evidence may be considered by an arbitrator? In this connection, reference should be made to Section 4 (e) of the Procedural Standards for Labor-Management Arbitration, prepared by the American Arbitration Association and the Academy, and approved by the Federal Mediation and Conciliation Service:

"The arbitrator should allow a fair hearing, with full opportunity to the parties to offer all evidence which they deem reasonably material. He may, however, exclude evidence which

is clearly immaterial. He may receive and consider affidavits, giving them such weight as the circumstances warrant, but in so doing, he should afford the other side an opportunity to cross-examine the persons making the affidavits or to take their depositions or otherwise interrogate them."

Section 5 (b) disregards arbitration practices under some collective bargaining agreements in which the grievant does not appear at the hearing.

SECTION 6. (Representation by Attorney.) A party has the right to be represented by an attorney at any proceeding or hearing under this act. A waiver thereof prior to the proceeding or hearing is ineffective.

Apparently Section 6 had not been drafted in the light of common experience in labor dispute arbitration. It involves the possible problem that it may be improper for a non-lawyer to represent at party to an arbitration.

SECTION 7. (Witnesses, Subpoenas, Depositions.)

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the.....Court.

This Committee agrees that the power of subpoena should be granted to arbitrators. Accordingly, we have no objection to Section 7 (a). We do, however, object to the provisions of Section 7 (b) for the same reasons set forth in the January 26, 1956 report of the Committee on Law and Legislation:

"On the matter of evidence, it should be noted further that Section 7 (b) authorizes the arbitrators to 'permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.' We feel that this is an unduly restrictive provision, in its implications, since it might very well be construed as prohibiting (a) the receipt of affidavits in evidence, as distinguished from 'depositions', and (b) the use of affidavits or depositions where the affiant could have been produced to testify in person. We believe further that Section 7 (b), which allows fees to witnesses as in court proceedings, is not apt and should be omitted in a statute covering labor dispute arbitration."

Moreover, insofar as Section 7 (b) might mean that the testimony of a person not a witness can be taken in the manner provided, it is inconsistent with standard practice in labor arbitration.

Section 7 (d) providing witness fees is unrealistic. Witnesses are practically always employees or officers of the company called from their jobs to testify and returned when the need for their presence ceases, and without loss of pay. No doubt these provisions may have an appropriate place

in commercial arbitration, but the need for them is not apparent in relation to labor-management arbitration.

SECTION 8. (Award.)

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

Neither Section 8 (a) nor (b) conforms with the standard practices followed in labor-management dispute arbitration.

SECTION 9. (Change of Award by Arbitrators.) On application of a party or, if an application to the court is pending under Sections 11, 12 or 13, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of Section 13, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of Sections 11, 12 and 13.

We have no objection to Section 9. Under accepted practices, a request to modify an award will not be entertained unless the request is made by both parties. This has been codified in Section 5 (f) of the Procedural Standards for Labor - Management Arbitration:

"After the award has been rendered, the arbitrator should not issue any clarification or interpretation thereof, or comments thereon, except at the request of both parties, unless the agreement provides therefor."

SECTION 10. (Fees and Expenses of Arbitration.) Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

To conform with standard practices, fees and expenses should be divided equally between the parties unless they stipulate otherwise.

SECTION 11. (Confirmation of an Award.) Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.

We have no objection to Section 11, in and of itself.

SECTION 12. (Vacating an Award.)

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection;

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or, if the award is vacated on grounds set forth in clauses (3), and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

Fundamentally, we have no objection to Sections 12 (a) (1) and (2). However, Subsections (1) and (2) would have done enough if they had been combined and simply authorized the vacation of an award on the ground of fraud, corruption, absence of a fair hearing, or gross misconduct prejudicing the rights of a party. All of these are sufficiently available on a common law basis so their inclusion in a statute is wholly unnecessary.

Despite the amendments to Section 12, which we think are in the right direction, we feel that Section 12 (a) (3) is still subject to serious objection. There still remains the problem of a court passing on the merits of a controversy in the guise of determining whether an arbitrator exceeded his powers. No attempt is made, as in the case of Section 2 (e), to limit the scope of judicial review. We concur in the recommendation of the Committee on Legislation, made May 2, 1953:

> "A statute should provide that the arbitrator's findings of fact and law (including question of contract interpretation) shall be final and nonreviewable. However, a statute should provide that if it is alleged that the arbitrator has exceeded his powers, the court shall have jurisdiction to determine whether the arbitrator's finding concerning his authority lacked any reasonable basis, unless the parties have expressly agreed that the arbitrator's decision on questions relating to the scope of his authority shall be final."

We have no objection to Section 12 (a) (4). Is there in it an implication that a transcript is not required? We likewise have no quarrel with Sections 12 (b), (c) and (d).

After review of the balance of the provisions of the Act, we conclude that they are not objectionable, as such.