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EDITOR'S PREFACE

This volume contains the papers delivered at the twelfth annual meeting of the National Academy of Arbitrators, held in Detroit, Michigan, January 29-31, 1959. It is the sixth such volume published for the Academy by The Bureau of National Affairs, Inc. The earlier volumes are: ARBITRATION TODAY (1955); MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS (1956); CRITICAL ISSUES IN LABOR ARBITRATION (1957); THE PROFESSION OF LABOR ARBITRATION (1957); and THE ARBITRATOR AND THE PARTIES (1958).

The title of the current volume reflects the increasing concern of the Academy with the new problems posed for arbitration by the landmark decision of the United States Supreme Court in the *Lincoln Mills* case, in June 1957, to be found in Appendix F. One entire day of the annual meeting was devoted to a consideration of the impact of this decision on labor arbitration. The divergence of the points of view expressed at the morning session by Benjamin Aaron and Archibald Cox formed the basis for the panel discussion that followed in the afternoon. The evolution of the Academy's official position on the merits and substance of proposed arbitration statutes is traced in the Report of its Committee on Law and Legislation, to be found in Appendix C.

Because of the locale of this year's meeting, the Program Committee under the able leadership of Ronald W. Haughton drew upon its local resources by inviting Leonard Woodcock, vice president of the UAW, and John S. Bugas, vice president, Industrial Relations, Ford Motor Company, to be the two luncheon speakers. The significant achievements of the General Motors-UAW Umpire System were put forth in a notable paper by Gabriel N. Alexander. His monograph is the third in a series of umpire studies to be published in the annual pro-

ceedings. The earlier studies are "The John Deere-UAW Permanent Arbitration System" by Harold W. Davey (CRITICAL ISSUES IN LABOR ARBITRATION, chapter ix); and "The Chrysler-UAW Umpire System" by David A. Wolff, Louis A. Crane and Howard A. Cole (THE ARBITRATOR AND THE PARTIES, chapter v). Each of these monographs is part of a series of reports by members of the Academy who have served as permanent umpires in mass production industries. Ultimately the Academy's Board of Editors, under the chairmanship of William H. Davis, plans to incorporate these studies in a single volume devoted to the growth of permanent arbitration systems in mass production industries. Despite the increasing preoccupation of so many members of the profession with the impact of law on labor arbitration, it is worth noting that each of these umpire systems reflects the creative voluntarism which has been the traditional hallmark of American arbitration.

Jean T. McKelvey

Rochester, New York
March 16, 1959

INTRODUCTION

CURRENT CRITICISMS OF LABOR ARBITRATION*

HARRY H. PLATT**

It will probably come as no surprise to you if I admit that honored as I am at being president of this Academy and much as I applaud your good taste in making that choice, I feel a sense of inadequacy for *this* task. Some time ago, it was decreed that the retiring president should deliver an address at the annual meeting. This, I can assure you, is no favor to him or to you. But ancient wisdom teaches that we must accept the bitter with the sweet. And who am I to flout ancient wisdom? Still, there is one ray of hope for you—because as you see, I am compelled to do my duty standing. Justice Holmes, when he worked at home, used to write his opinions while standing at a desk. Watching him write, with one knee propped against the desk, his wife asked him one day: "Doesn't it tire you?" "Yes," Holmes replied, "but it's salutary. Nothing conduces to brevity like a caving in of the knees."

It was no easy matter to find a suitable subject for this talk. The academicians among us have already contributed to the growing literature of labor arbitration. And while much remains to be said, I am not prepared, by training or instinct, to

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* Presidential address delivered at Twelfth Annual Meeting of National Academy of Arbitrators, Detroit, Michigan, January 30, 1959.

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attempt a scholarly discourse. After years of active arbitration practice, my inclinations are more practical than theoretical.

Labor arbitration is certainly no abstraction for the parties. It involves the resolution of vital disputes which often have a decided impact on the efficiency of the enterprise, the welfare of the employees, and the health of the bargaining relationship. Because these are matters of intense practical concern to employers and unions alike, there has understandably been a good deal of criticism both of the arbitration process and of the way arbitrators go about deciding disputes. Probably some of the criticism can be attributed to the fact that arbitration of industrial disputes is still young. For every new process, as it is developing, receives its share of criticism. It is part of the confusion that accompanies growth. On the other hand, since arbitration belongs to the parties and since they have a far greater stake in the process than we, is it not right that they should tell us what they expect from arbitration and from us as arbitrators? Much of their past criticism *has* been constructive. Much of it, I am sure, has served to reshape the arbitration process to fit their needs. But lately *some* of the criticism has taken on new coloring which, I feel, reflects an increasing discontent with arbitration and skepticism regarding its usefulness. It is *this kind* of criticism that I wish to talk about today. For I think it is a subject of deep practical concern for all of us.

No one denies that there are weaknesses and perhaps occasional abuses in the methods of administering the arbitration process. Complaints that arbitration is becoming too costly, too time-consuming, too formal or informal are not uncommon. We know that the major responsibility for correcting these and other shortcomings is with the arbitrators; and we must continue our efforts to that end. But the critics we have heard lately in the forum and market place are not primarily concerned with the technical deficiencies of the process or even with the shortcomings of some arbitrators. Their criticism runs much deeper; they believe that arbitrators as a group have,

in certain respects, misconstrued the nature and function of the arbitration process. Although the critics include both employer and union representatives, their complaints are not at all the same. For every employer who protests a liberal construction of the collective agreement, there is a union which protests a strict construction. Where one objects to arbitrators playing a very limited "judicial" role, another objects to our mediating or otherwise creatively encouraging collective bargaining. While some approve of precedents and predictability, others deplore them. The point is that most contenders in arbitration have entirely different conceptions of the function of arbitration. They have simply agreed to arbitrate; they have not fully agreed on what they want or expect from arbitration.

I do not underestimate the prophylaxis of criticism; and my remarks today are not intended to mute or stifle fair and constructive criticism. But I suggest that much of the current criticism of arbitration and of arbitrators is not of that kind. Nor is it particularly aimed at facilitating the processes of adjudication and of voluntary self-government. For there is a vast difference between criticism based on the arbitrator's failure to recognize and understand the *mutual will* of the parties and criticism based on the arbitrator's choice of one theory of arbitration over another *where there is no such mutual will.* What the critics seem to forget is that a choice between conflicting theories must frequently be made and that the parties, by their failure to agree, have left that choice to the arbitrator.

I will try to focalize my subject by specific example. Let us consider, first, the conflicting criticisms of arbitration on the ground that it involves either too much or too little *legalism.* Some complain that arbitration today is too akin to litigation and that, as a consequence, legal rules and contract literalness are overemphasized while the uniqueness of each case is underemphasized. Arbitration's end is to do justice — say these critics — and the end will not be accomplished if decisions are guided by rigid rules and principles instead of by moral aims and flexible standards capable of being individualized to meet

each new problem on its own terms. Others complain that arbitration, due to a failure to apply established norms and standards, is entirely too flexible and hence responsive to individual notions of justice rather than to a "rule of law." To these critics, steadfast adherence to rules and principles represents the ideal of a rule of law above men and furnishes the only check upon arbitrariness of arbitrators.

Of course, no one seriously would contend that there are not significant resemblances, in form and function, between arbitration and court-applied law. Both are adversary systems designed to achieve, through fair and adequate procedures, a sound and informed disposition of controversies. Institutionally considered, both systems in fact have a considerable degree of flexibility. The courts, for many years, have been developing principles for evaluating evidence, interpreting contracts, and determining cases. The principles derive from a method of adjudication which the late Judge Jerome Frank attributed to judges who are imbued with the "scientific spirit." "That spirit," he said, "entails the discipline of suspended judgment; the rigorous weighing of all the evidence; . . . the questioning of the plausible, of the respectably accepted and seemingly self-evident; a serene passion for verification . . . plus an eagerness not to be deceived."[1] Surely those who complain about legalism cannot mean that this decisional process has no place in arbitration!

Yet I do not wish to be misunderstood. I am not suggesting that legal rules or principles are sacred or that they should be blindly transposed to the arbitration process. I merely say that it is not undue legalism if, in an endeavor to arrive at a truly informed and impartial judgment, the arbitrator pays heed to some of the safeguards surrounding decision-making which have evolved from centuries of court experience. More than that. Whether we like it or not, the lesson of *Lincoln*

[1] Frank, *Courts on Trial* (Princeton, New Jersey: Princeton University Press, 1950), p. 219.

Mills,[2] about which we are hearing so much today, is that the law, as Archibald Cox points out, "has moved into the sphere of grievance adjustment and contract administration . . . [while] labor relations has spilled over into judicial territory." "Labor, management, and arbitrators," Cox adds, "must recognize that the law often expresses ideals and needs of society which limit their freedom of action. The law of contracts often embodies these ideals. It may also embody lessons of experience entirely applicable to collective bargaining agreements. Conversely the law can satisfy the needs of the industrial world only if there is a strong infusion of many of the ideas and conventions, heretofore unknown to law but appropriate to group action, which have gained acceptance in the world of labor relations." [3]

But the question still remains: Just how large or small a role should rule and principle and experience gained from the law play in arbitration? Some want *more* law and *more* principles; others want *less* of each. Some stress the *contract;* others *fairness and equity.* Some want arbitration to be a closed logical system; others expect it to be a mechanism suitable for social engineering. Ordinarily, the parties do not consider, much less reach agreement on problems such as these. In the absence of any mutual desire, what is there left for an arbitrator to do but to arrive at an accommodation of these conflicting views? The arbitrator knows "there is no one method of judging, supreme over its competitors, but only a choice of methods changing with the changing problem." [4] He tries to apply his best judgment to the solution of the problem at hand. He exercises discretion, where discretion is given to him, with due regard for the consequences of his action upon plant operations and the parties' continuing relationship. He therefore em-

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[2] *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 77 S. Ct. 923 (June 3, 1957).

[3] Cox, "The Legal Nature of Collective Bargaining Agreements," 57 *Mich. L. Rev.* 1.

[4] Cardozo, *Growth of the Law* (New Haven, Connecticut: Yale University Press, 1924), p. 108.

phasizes or deemphasizes rule and principle — as the occasion requires. In those cases, notably discipline, which seem to demand from him the exercise of moral judgment, he exercises moral judgment. In others, he tries to reconcile the contract with what seems to be the fair and just result. Of course, the parties, by agreement, can establish guides for decision and can set bounds upon the arbitrator's authority. But failing in this, it seems to me their complaints about too little or too much legalism in arbitration become hollow and are hardly justified.

Now consider also the conflicting criticisms of arbitration on the ground that it involves either too much or too little *precedent.* Some complain that arbitration, by stressing precedent, is producing so much certainty that the parties are obliged to live by the arbitrator's rules, not by their own rules. More uncertainty, it is argued, would produce more flexibility and encourage the parties to settle their disputes realistically in terms of immediate plant needs. Others complain that arbitration results are still too unpredictable and that the parties are hence unable to settle their disputes because of a lack of meaningful standards. More certainty and more uniformity, it is argued, would mean more workable criteria and would enable the grievance representatives on both sides to resolve problems with a semblance of reason.

The need for some degree of stability, rule and uniformity in plant relations and in contract administration is undeniable. Because most plant problems are recurrent, they must be handled consistently. To treat the same class of employees differently — for example, to choose between applicants for promotion *first* on the basis of seniority and *later* on the basis of ability — is likely to provoke charges of unfair discrimination and impair employee morale. Acceptance of a rule is far more likely by those to whom it applies if it conforms to their reasonable expectations and is alike for all. And expectations are largely a product of plant history — how a particular thing has been done in the past. Thus, the achievement of consistency necessarily involves the acceptance of precedents. The estab-

lished way becomes the right way of doing things. To this extent, precedent plays a vital role in plant relations. And if the parties themselves pay homage to precedent, is it wrong for an arbitrator, so far as freedom of choice is given to him, to do likewise?

But precedents can be easily misused. The experiences of one plant have no real validity in another plant, unless both are part of the same multi-plant bargaining unit. And even in such a unit, rules are bound to develop in one plant which have no pertinency elsewhere. Nevertheless, there seems to be more citing of precedent today than ever before and reliance on decisions in cases which sometimes involve *different* industries, *different* parties, and *different* contract provisions. I must agree that this kind of behavior by arbitrators *and* by the parties themselves is certainly not in the best interest of arbitration.

Furthermore, even within a single plant, it may be difficult to use a precedent correctly. Rules and practices are in a constant state of flux as one side or the other seeks to apply them to new situations. As time passes, precedents tend to broaden because it is often more convenient in a particular case to apply an old rule than to create an exception to it. The arbitrator, however, cannot decide cases merely on the basis of convenience. He must determine the proper dimensions of a rule or practice — whether it can or cannot be applied to a given set of facts. This is no easy matter. For the parties seldom have a common conception of their plant precedents. Some want more rules and fewer exceptions — in short, more predictability; others want fewer rules and more exceptions — in short, more uncertainty. But, to my knowledge, matters of this sort are never really discussed by the parties. Absent a mutual intention, the question again is: What is the arbitrator to do? The dangers in the extreme points of view are obvious. Too much reliance on precedent tends to obscure the unusual in every case; while too much reliance on the uniqueness of each grievance tends to ignore a real need for consistency in the administration of the agreement. Complete predictability

would be as bad as absolute uncertainty. The arbitrator's answer is a simple one — indeed, the only one available to him. He adheres to precedent *or* is guided by the peculiar facts of the case — as the occasion requires. He sometimes follows an existing rule; he sometimes ignores it. He considers both the "common law of the plant" and his own common sense. He places equal value on order and equity. When the facts are the same as in a previous case, he applies his own earlier rule or decision; unless of course he is persuaded that it is wrong — in which case he feels no obligation to consecrate his past mistakes. Until the parties agree on how they want precedent treated in the resolution of their disputes, the arbitrator must continue his present course. And until there is such agreement it seems to me unrealistic for any one to complain of too little or too much precedent in arbitration.

There is further criticism of arbitration on the ground that it encourages either too much or too little *collective bargaining*. Some complain that arbitrators too often conceive of arbitration as an extension of the collective bargaining process and hence tend to mediate disputes rather than decide them. Others complain that arbitrators too often regard their function as strictly "judicial" and that they seldom take steps to further the collective bargaining process or to promote the parties' continuing relationship.

Neither complaint, in my opinion, is wholly valid. While mediation may help the parties resolve particular disputes without need of an arbitrator's award, I question whether it will, in general, encourage effective grievance handling and discourage resort to arbitration. We all know of situations where mediation has had precisely the opposite effect. And while a strict "judicial" approach may create a degree of certainty that would encourage the disposition of grievances short of arbitration, it may just as possibly have an entirely different effect.

It is likely that an imposed decision will not be quite as acceptable as one voluntarily arrived at by the parties. That is why an arbitrator, *when given the opportunity,* will encourage

settlement by the parties. He can do this in several ways — by remanding a case for further discussion in the grievance procedure, by mediating a case and finding some common area of agreement upon which a settlement could be predicated, or conceivably by refusing to take a case at all. Are these actions completely inconsistent with the so-called "judicial" function? I think not. Certainly not if the supporters of the judicial approach are only asking that arbitrators behave more like judges. For indeed in many trial courts today, judges spend a great deal of time trying to compromise and settle law suits. It has been suggested that they do this primarily as a means of relieving congested court calendars. But because an arbitrator encourages settlement more as a matter of principle rather than expediency, he has a far better reason for doing so.

None of this, however, solves the arbitrator's dilemma. Just how active or passive should he be? When should he mediate and when should he refuse to mediate? The answers depend on what the parties desire and on the communication of that desire to the arbitrator. Unfortunately, there is seldom any mutuality on matters of this sort. The arbitrator must use his own judgment in each case to determine what kind of role he should play. He may or may not mediate — as the occasion requires. For an ad hoc arbitrator, attempts at mediation may be undesirable since he has no way of knowing the parties' attitudes — what they want, what they expect, and what they will tolerate. The permanent arbitrator, however, sees the parties fairly regularly and has more of an opportunity to discover their real attitudes. Once these are known, he guides himself accordingly.

Quite apart from the behavior of arbitrators, there are some who complain that *the very existence* of an arbitration clause in an agreement reduces the parties' need to agree and results in less bargaining in the grievance procedure. Why, ask the critics, should the parties bother to settle grievances if an impartial third person is available to shoulder the responsibility for a decision? The answer is that the certainties of a settle-

ment are almost always more desirable than the "uncertainties" of arbitration. No one knows how an arbitrator would decide a particular case or what his rationale would be. And no one can be sure that his decision would not in some way upset the parties' relationship. These are real risks, the kind which intelligent men seek to avoid. The grievance procedure is the mechanism through which the parties maintain *control* over working conditions in the plant. It is difficult to believe that any employer or union is willing to surrender that control to an arbitrator, however wise and omniscient he seems to be. In truth, the overwhelming majority of grievances in most plants *are* resolved by the parties themselves, notwithstanding the availability of arbitration. I believe the presence of an arbitration clause serves to strengthen rather than weaken grievance negotiation. Without the arbitration clause, there would be too much compulsion to agree in order to avoid the consequences of a strike or lockout. With this clause, however, the parties evaluate their grievances not according to economic power but rather according to reason and the terms of their contract.

I do not deny that the parties occasionally fail to bargain on grievances and head straight for arbitration. This is particularly true in the so-called "face-saving" and "buck-passing" type of cases. Where the parties habitually do this sort of thing without making a real effort to settle the dispute themselves, they are not only avoiding their responsibilities but are also weakening the bargaining relationship. But this is an abuse by the parties of the collective bargaining process; *it is not a defect which is inherent in the arbitration process.* Nor is it something that arbitrators encourage or welcome. This brings to mind Harry Shulman's famous quip in a case before him where each side insisted that the dispute was largely a matter of "face-saving" for the other. The inference was tempting, Shulman later commented, that while the parties disagreed as to its identity, they were in accord that some face needed saving and that the umpire's face was expendable for that purpose.

But even so, experience teaches that as parties to a bargaining relationship gain in maturity, excessive resort to arbitration becomes more the exception than the rule.

By confining this discussion to particular criticisms of labor arbitration, I do not mean to imply that there are no others. I do not dwell on the criticisms of arbitrators' conduct, inside and outside the hearing room, not only because it is foreign to my theme but because the Academy, through some of its committees, is already doing everything in its power to improve the standards of professional conduct of arbitrators. So are the American Arbitration Association and the Federal Mediation and Conciliation Service, the two appointing agencies with whom we cooperate. Nor do I dwell on other criticisms which are marked by ambiguity rather than clarity and frankness; nor on the complaints of those who simply have an aversion to the arbitration process. To those critics, arbitration will probably continue to stand with Tom Brown's Dr. Fell:

"I do not love thee, Dr. Fell
The reason why I cannot tell
But this alone I know full well
I do not love thee, Dr. Fell."

The point I wish to make is that the kind of criticism I have discussed is, in my opinion, both jaundiced and short-sighted. For what the critics are really complaining about is the arbitrator's refusal to make arbitration into what one side or the other wants it to be. They cannot complain that their *mutual* desire is thwarted; for, in many respects, they have no mutual understanding of the nature and function of arbitration. Like all advocates and contenders, they are seeking to further their own particular interests. There is nothing wrong in this. The parties who use arbitration are welcome to reshape the process in whatever way they desire — so long as the changes made are the product of mutual agreement. But they must remember that this is *their* responsibility. By criticizing us for failing to do what only *they* have a right to do, they ignore the limits on our authority, confuse areas of responsibility, and blame us for

that which is beyond our control. I think such criticism serves only to weaken arbitration and this, paradoxically, is the very opposite of what the critics set out to do.

There are perplexities, to be sure, in the discharge of any adjudicative function; and they are intensified in arbitration because of the lack of generally accepted standards. Questions arise for the arbitrator even before he comes to consider the merits of a case. How should he treat legal rules and principles and what value should he ascribe to plant rules and precedents? How strictly or liberally should he interpret agreement language? How should he resolve the conflict between contract and equity? How should he encourage collective bargaining — or should he do so at all? Employers and unions tend to give entirely different answers to these questions; yet by taking contradictory positions on such basic issues they have in effect set the bounds within which the arbitrators work, and they not infrequently reverse their positions depending on how strong an impulse they have to win a case.

And what have the arbitrators done? They have respected the bounds set by the parties and have been careful not to overstep their authority. They have sought to render a practical judgment on the issues submitted to them, having due regard for the contract as well as the unique aspects of the situation and for claims of justice. They have attempted to harmonize the conflicting views of the parties and to reconcile their interests. They have worked hard at a difficult job. Of course, we recognize we are far from perfect and we expect criticism. Indeed, so long as the criticism is healthy and constructive, we invite it. But arbitration is not likely to change much through the sort of criticism I have discussed today. The critics and the parties must agree among themselves, through the process of collective bargaining, as to the kind of arbitration they want; and they must make their decision known to their arbitrator.

No doubt some of you will ask: Is this reality or dreamland? Is it reasonable to suppose that the parties, even if they wanted to, would be able to reach a common understanding as

to the arbitration function which both sides would accept as true? My own belief is that on most of the things I discussed mutual agreement can be attained; on some it may be difficult. But if the parties cannot reach agreement at all, what then?

Until the users of arbitration are ready and willing to abandon entirely this method of adjustment or until they can replace it by another more effective method — suggestions which, by the way, I have not heard from even our most impassioned critics — the reasonable path to follow, it seems to me, is for all of us to continue to exert our talents, our experience, our courage, and our determination to bring about necessary improvements in the process of arbitration and give it time to develop and grow into the kind of instrument for industrial peace that we all want and must have. My own conclusion about the future of arbitration is sanguine and optimistic. In actual fact, only a small minority of its users have expressed dissatisfaction with arbitration and I am confident that most managements and unions are today quite satisfied with the way the process is administered and with the steady progress we are making. In my judgment, when the books are balanced they will show that notwithstanding some of the current criticisms, arbitration has increased its usefulness to the parties and is flourishing. Very likely it is because arbitration has become a way of democratic living. Its essential ingredients are not imposed rule, but intelligence and understanding; not authority or force, but reasoned judgment; not cynicism, but faith in men and respect for their dignity. Yes, labor arbitration is a tool whereby management and unions can increase their vigor, their creativeness, and their voluntary collaboration. It by no means deserves the kind of criticism I have discussed today.