CHAPTER I

# ON FIRST LOOKING INTO THE LINCOLN MILLS DECISION

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## I

Anyone who in his intellectual travels has followed the highways and bypaths (and sometimes even the blind alleys) of the United States Supreme Court's decisions in the field of labor-management relations must have felt, on more than one occasion, that he had reached "the realms of gold" of which the poet speaks. Yet, I confess that I never breathed the Court's "pure serene" quite so fully until the day I heard Mr. Justice Douglas "speak out loud and bold" in the *Lincoln Mills* case.[1] Then, as John Keats professed to feel on first looking into Chapman's Homer, I felt

> like some watcher of the skies
> When a new planet swims into his ken;
> Or like stout Cortez, when with eagle eyes
> He stared at the Pacific —

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[1] *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957).

From the events that have followed hard upon the issuance of that momentous opinion it must be concluded that many of my fellow arbitrators and colleagues in the law have experienced similar emotions. Figuratively speaking, they have read the Court's decision and then "Look'd at each other with a wild surmise." At this point, however, I must abandon my literary figure; for while Keats (who was an indifferent historian) imagined the men of "stout Cortez" standing "Silent, upon a peak in Darien," my associates in the industrial relations field have been extremely articulate in expressing their "wild surmise" concerning the vision conjured up by Mr. Justice Douglas. Dozens of articles and speeches have poured forth, and these, I suspect, are but a trickle compared to the torrent that is to come.

This reaction is quite understandable when we contemplate the awesome spectacle that the Court's majority opinion spreads before us. Guided by only a "few shafts of light" that penetrate the otherwise "cloudy and confusing" legislative history, Mr. Justice Douglas has arrived at the conclusion that Section 301(a) of the Taft-Hartley Act "supplies the basis upon which the federal district courts may take jurisdiction [over suits to enforce arbitration provisions in collective agreements] and apply the procedural rule of §301(b)," and that "the substantive law to apply in suits under §301(a) is federal law which the courts must fashion from the policy of our national labor laws." [2]

In the perilous ascent to the lofty peak of his conception the Justice, an accomplished mountain climber, had to scale the formidable barrier of the Norris-LaGuardia Act and to skirt the treacherous crevasse of the U. S. Arbitration Act. From his ultimate vantage point, however, the view is sublime. This is the way it looks to him:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or

[2] *Id.* at 451-452, 456.

> may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law, if compatible with the purpose of §301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.[3]

Now sublimity, at least in the Kantian sense, combines the elements of both beauty and terror, and to a number of observers the prospect before us is more terrifying than beautiful. These people regard the *Lincoln Mills* decision as a signal for widespread intervention by the federal courts into the hitherto private relationships of employers and unions, an intervention which they feel may well result in the destruction of systems of industrial self-government that have taken decades to build. Others, though somewhat more restrained in their concern, are inclined to agree with Mr. Justice Frankfurter, the sole dissenter in the *Lincoln Mills* case, that the majority decision has created "prickly and extensive problems," presenting "hazardous opportunities for friction" in the regulation of collective agreements, and involving "the division of power between State and Nation, [and] between state courts and federal courts, including the effective functioning of . . . [the Supreme] Court."[4]

Whatever may be the results of the Court's decision in the long run, its immediate effects upon industrial relations are almost certain to be disruptive unless measures are taken to cushion its impact. I say this because, in spite of my respect for the judiciary, I am convinced from my reading of the cases that most judges are poorly informed about industrial relations

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[3] *Id.* at 457.
[4] *Id.* at 464.

at the plant level, and that they apply to arbitration disputes coming before them principles or attitudes that are generally inimical to the arbitration process and to the best interests of the parties.

Most proposals for action following the *Lincoln Mills* decision have looked toward additional statutory enactments, either by the federal or state governments, or by both, as a means of guiding and restricting the discretion of the courts in cases involving the enforcement of collective agreements.[5] Not everyone, however, turns to legislation for a solution. A number of scholars and practitioners, emphasizing another aspect of the problem, have expressed the belief that, in the words of our colleague, Archibald Cox, "the courts will never be made to understand the arbitrator's approach until the arbitration world has developed a coherent explanation of its philosophy of contract arbitration."[6]

Each of these approaches to the problem of judicial intervention has much to recommend it, but both are subject to serious limitations. A federal statute such as the proposed United States Labor Arbitration Act, drafted by our Academy committee, would do much to clarify and limit the powers of courts in arbitration matters; yet only a few amendments could change the whole character of the statute, so that its net effect would be more harmful than helpful. The difficulties of piloting a model bill through the Congress are many, and the danger of its picking up warping or destructive amendments en route is extreme.

Moreover, the judiciary is a force to be reckoned with, statute or no statute. We should not underestimate the range of "judicial inventiveness," of which the majority opinion in *Lincoln Mills* is a good example; nor should we forget Randolph Paul's warning that "grim judicial determination can often work

[5] See, for example, the bill (H.R. 10308) introduced by Representative Teller in the last session of Congress. It is discussed at length by Saul G. Kramer in his article, "In the Wake of Lincoln Mills," 9 *Lab. L.J.* 835 (1958).

[6] Letter to the writer, Oct. 17, 1958.

magic upon what appears to the uninitiated to be perfectly clear language." [7]

Similarly, while no one could reasonably doubt the advantages in developing a common philosophy of arbitration that can be made comprehensible and acceptable to the judiciary, that praiseworthy objective is more easily commended than accomplished. Fundamental differences of opinion on certain key problems in arbitration exist even among the members of this relatively homogeneous group, and the further we look beyond our own profession, the more numerous those differences will become. Moreover, even if a representative group of arbitrators and industrial relations practitioners were able to develop a coherent philosophy of grievance arbitration, the task of interpreting it to judges and of persuading them to adopt it would be a formidable one. I do not mean to suggest that we should be deterred by these difficulties from essaying the job — "a man's reach should exceed his grasp," and all that — but I do think we would be overoptimistic if we were to rely solely, or even principally, upon this approach as a solution to the problem.

Therefore, without meaning to discourage the attempts either to enact a model statute or to develop and expound a coherent philosophy of arbitration, I should like to consider a few other ways in which the dangers of excessive judicial intervention in arbitration disputes can be avoided or mitigated.

## II

It is appropriate, I think, to begin the discussion by asking this question: If arbitration is so vastly superior to litigation as a means of settling disputes arising out of collective agreements, why do so many employers and unions, including some who endorse the principle of arbitration, turn to the courts to settle these issues?

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[7] "Life Insurance and the Federal Estate Tax," 52 *Harv. L. Rev.* 1037, 1045 n. 17 (1939).

Members of our profession are a little too prone, I think, to attribute such conduct to the poor judgment or the bad faith of the parties; perhaps part of the fault is not in our clients but in ourselves. For example, among the advantages arbitration is said to have over litigation, the informality and the relative brevity and low cost of the proceedings are frequently cited. If one is to judge from the increasing volume of criticism, however, all of these virtues are becoming rather tarnished. Informality in the arbitration procedure, we are told, is more of an historical fact than a living reality. Thus, Emanuel Stein complains of "a frustrating kind of legalism [that] has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation." [8] In this judgment he is enthusiastically supported by the official journal of the American Arbitration Association,[9] which has heretofore shown no special hostility to a reasonable amount of formality in arbitration proceedings. Again, the costs of arbitration, it is claimed, are "low" only in the somewhat dubious sense of that term as used by automobile salesmen. I do not know whether arbitration expenses are keeping pace with, say, the costs of medical care or of hospitalization, but one hears increasingly of cases in which arbitrators are alleged to have charged exorbitant fees.[10] Finally, even the vaunted expressway speed of arbitration procedure has slowed down to the creep of rush-hour traffic. The statistical record reported by Arthur Ross is sobering: "Ten years ago, the decision was issued within thirty days of the hearing in 72 percent of labor arbitration cases. Today, this occurs in only 44 percent of the cases." [11]

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[8] "Arbitration and Industrial Jurisprudence," 81 *Monthly L. Rev.* 866, 867 (1958).

[9] "Creeping Legalism in Labor Arbitration: An Editorial," 13 *Arb. J.* 129 (1958).

[10] These complaints periodically come to the attention of the Federal Mediation and Conciliation Service. See its latest memorandum to arbitrators on its roster, dated Dec. 19, 1958, entitled "Clarification of FMCS Arbitration Fee Policy."

[11] "The Well-Aged Arbitration Case," 11 *Ind. & Lab. Rel. Rev.* 262, 263 (1958).

We should also take note of occasional instances of disenchantment with the arbitration process evidenced by some employees. This may spring in part from their belief that arbitrators are unable or unwilling to prevent collusion between unions and employers or to offer them some protection against bad faith on the part of a union in the presentation of their cases. This feeling, whether well-founded or not, has led employees — in relatively few cases it is true — to seek remedies for alleged wrongs in the courts rather than in arbitration.

Now, as Wirtz's study, "Due Process of Arbitration," [12] showed, arbitrators, as a group, are not indifferent to problems of individual due process. On the other hand, they do have a highly developed appreciation of the central importance of preserving the collective bargaining relationship. Regard for this consideration sometimes results in their showing less concern than the courts have traditionally shown about individual rights.[13]

To be sure, some of the criticisms of arbitration I have mentioned are exaggerated, and some are not directed principally at arbitrators. I call them to your attention only because I think that our special obligation to preserve and improve the institution of arbitration requires us to subject ourselves to more or less continuous and critical self-examination.

## III

Now, having dutifully said my *mea culpa,* I can turn with a clearer conscience to a discussion of the responsibility of unions and employers for the excessive judicial interference in arbitration matters that besets us today. Each week the advance sheets bring us fresh examples of the judicial mind at work on disputes over arbitration. Typically, the issue is one of arbitra-

[12] McKelvey (ed.), *The Arbitrator and the Parties* 1 (Washington, BNA Inc., 1958).

[13] For a recent and interesting case in point, see *Soto* v. *Lenscraft Optical Corp.,* 7 App. Div. 2d 1, 180 N.Y. Supp. 2d 388 (1st Dep't 1958). [*Editor's Note:* Leave to appeal to the Court of Appeals granted on January 29, 1959. 7 App. Div. 2d 845].

bility, and the suit is usually initiated either by a union seeking to compel arbitration or by an employer attempting to prevent it. There is also a certain amount of litigation to confirm or to set aside arbitration awards; but these cases do not seem to me to present a serious problem. Some of the decisions involving arbitrability, however, are based on reasoning not dreamt of in any arbitrator's philosophy, and the list of Horrible Examples grows longer and longer. From *Cutler-Hammer*[14] to *Warrior & Gulf Navigation Company*[15] the story is the same: under the guise of determining arbitrability, the court disposes of the merits of the case, usually by finding the relevant language of the collective agreement so clear in meaning and so ineluctable in effect that, it would seem, only idiots and arbitrators could profess to see in it a lurking ambiguity giving rise to an arbitrable issue.

However strongly we may disagree with these decisions, we are scarcely in a position to criticize the courts for making them. The complete answer to such criticism was given by Chief Judge Magruder in *Technical Engineers, Local 149* v. *General Electric Company.*[16] "We are aware," he said, "of a viewpoint urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator in the first instance the question of arbitrability . . ." Then, after reviewing the various arguments in support of that proposition, he continued:

> While not ignoring the force of these considerations, it seems to us that they would be persuasive not so much in a case like the present, but rather in inducing the parties to make a voluntary submission to arbitration, and . . . to include terms in a collective bargaining agreement giving wide scope to the questions to be submitted to arbitration.

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[14] *International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317 (1947), aff'd 297 N.Y. 519, 74 N.E. 2d 464 (1947).

[15] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 43 LRRM 2328 (D.C.S.D. Ala. 1958).

[16] 250 F.2d 922 (1st Cir. 1957). See also his discussion in *Local 205, U.E.* v. *General Electric Co.*, 233 F.2d 85, 101 (1st Cir. 1956).

> But when one of the parties . . . asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise.[17]

To me, Judge Magruder's position is unassailable; moreover, I do not think it is weakened by the fact that not all of his brethren have his appreciation of the nice distinction between determining whether an arbitrable issue exists and determining the merits of an arbitrable issue. By now the parties should have a pretty good idea of the risks involved in submitting the question of arbitrability to a court for decision, and if they are dissatisfied with the results, they must hold themselves principally to blame.

In short, I do not think that we can contribute to the solution of the problem under discussion simply by adopting the slogan, "Arbitrability for the arbitrators; judges, go home!" Rather, we should urge employers and unions to include in the arbitration provisions of their agreements specific procedures for dealing with issues of arbitrability. Before offering what I hope will be some constructive suggestions in this regard, however, I wish to take note of a provision in the national agreement between General Electric and the International Union of Electrical Workers (IUE), specifically dealing with questions of arbitrability, that seems to me to invite more trouble than it could possibly avoid. After stating that either party wishing to arbitrate a grievance may request the American Arbitration Association to submit a panel of names from which an arbitrator may be chosen, the provision continues in relevant part as follows:

> It is further expressly understood and agreed that the . . . Association shall have no authority to process a request for arbitration or appoint an arbitrator if either party shall advise

[17] *Technical Engineers, Local 149* v. *General Electric Co.*, 250 F.2d 922, 927 (1st Cir. 1957).

> the Association that . . . the grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue. In such event, the Association shall have authority to process a request for arbitration and appoint an arbitrator . . . only after a final judgment of a court has determined that the grievance . . . raises arbitrable issues and has directed arbitration of such issues . . .

Presumably, the parties to this agreement knew what they wanted; in any event there is no ambiguity in the language they employed. Yet in none of the reported court decisions resulting from the invocation of that provision has the issue been one that would not have been resolved as well or better by a competent arbitrator. The risk of getting a bad decision, I suppose, is always present; but the chances that a judicial error will be perpetuated as a binding precedent are infinitely greater than the chances that an unsound arbitration award will be repeated — except possibly by the man who originally made it.

Over the years, whenever I have met a representative of labor or management who was reluctant to submit issues of arbitrability to an arbitrator, I have inquired as to the reason. The most frequent reply is that arbitrators are reluctant to divest themselves of jurisdiction over any given dispute. Further inquiry as to why this should be so has produced two explanations, both of them embarrassing: the first is that all arbitrators have an indecent itch to dispose of other people's problems; the second, that no arbitrator ever passes up a chance to make a few extra dollars. I report these findings more in sorrow than in anger, although I think that, as generalizations, they are harsh and unwarranted.

Indeed, convincing refutation of these accusations can be found upon the most casual examination of the reported cases. A very quick review of the first thirty volumes of *Labor Arbitration Reports* (The Bureau of National Affairs, Inc.) turned up fifty-seven decisions in which arbitrators found that the issues presented were not arbitrable. Anyone who reads those opinions, some of which were written by the most eminent men in our profession, will be struck, I think, by one salient fact:

that in almost every instance the arbitrator was careful to relate his findings to the specific facts and circumstances of the case and to avoid broad generalizations. By way of contrast, let me refer to a recent judicial decision in which one of the court's "conclusions of law" reads as follows:

> The right to contract out work is an inherent, traditional right of management which may not be questioned or subjected to arbitration in the absence of agreement on the part of the defendant or an express limitation thereof set forth in the labor contract.[18]

Let us assume, however, that there is some foundation for the fears I have reported. The solution, it seems to me, is not to insist that issues of arbitrability be tried in court. A safer and simpler procedure would be to submit the question to an arbitrator with the understanding that even if he rules that the grievance is arbitrable, he will have no jurisdiction to decide the case on its merits. Obviously, this procedure is more costly and time-consuming than the more common one of submitting both issues to the same arbitrator, either simultaneously or seriatim; but at least it offers no threat to the institution of arbitration, as the constant resort to courts for interpretation of collective agreements surely does.

## IV

It must be apparent by now that the comments I have made on the determination of questions of arbitrability are simply reflections of a broader conception of the respective roles of courts and arbitrators in the adjustment of labor-management disputes. My views on that subject, as on so many others, were shaped by Harry Shulman, who came the closest, I think, to developing and expounding a comprehensive and coherent philosophy of arbitration. In a memorable address, delivered at the University of California in 1949,[19] Shulman swept away

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[18] *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 43 LRRM 2328, 2331 (D.C.S.D. Ala. 1958).

[19] "The Role of Arbitration in the Collective Bargaining Process," in *Collective Bargaining and Arbitration* 19 (1949).

the superficial differences between the judicial and the arbitration processes that I have previously referred to, and exposed the basic incompatibility between collective bargaining and the resolution of grievances by litigation. 'If arbitration were merely the judicial process of awarding redress for violations of contracts," he said, "there would not be much reason for preferring it over the courts. The objections that litigation is too slow and too costly for this subject matter are not insurmountable. They could be met by the sometimes proposed plan of specialized labor courts with expeditious and inexpensive procedures." [20]

Then why should we not establish such courts? Because, said Shulman,

> they would inevitably develop uniformities or principles that would be applied to all enterprises. They would have to absorb the full shock of criticism that pervades this field. They would become objects of attempted manipulation like the N.L.R.B. and other governmental agencies. They would become agencies of authoritative control from above removed from the unique atmosphere of the particular enterprise.[21]

Shulman thought of arbitration as a procedure that "can be ever consciously directed — not merely to the redress of past wrongs — but to the maintenance and improvement of the parties' present and future collaboration." "Its authority," he said, "comes not from above but from their own specific consent. They can shape it and reshape it. And if they are dissatisfied with the tribunal they can supplant it by their own action without the necessity of instigating a war in the political arena." [22]

Viewing the problems I have been discussing in the light of these principles, one sees immediately that appeals to the courts to enforce or interpret agreements to arbitrate are self-defeating, regardless of the outcome. They are, in fact, the very

[20] *Id.* at 24.
[21] *Ibid.*
[22] *Ibid.*

negation of arbitration, proof that the process of collective bargaining is not functioning as it should be. If the parties cannot learn to use the grievance and arbitration procedure as a means of making collective bargaining work, then the quality of the decisions they get from the courts becomes a matter of only secondary importance.

That is why my thoughts, on first looking into the *Lincoln* Mills decision, have turned not so much toward what the courts will or should do with the increasing number of such cases they will probably be called upon to decide, or even toward ways to influence their thinking or fetter their discretion; rather, they have turned to the question of what is happening to our system of private, voluntary arbitration. I confess to being rather appalled by Justice Douglas' vision of the future, not because of the expanded role he sees for the federal courts in developing the law of collective bargaining, but because the growing demand for such a law signalizes a revolutionary change in the nature of one of our greatest institutions — a change that threatens to sap most of its vitality. Educating the courts in the philosophy of arbitration and passing laws to prevent them from interfering unduly in its processes have become necessary only to the extent that some employers and unions have traded their priceless opportunity to govern themselves under private laws of their own making for the illusory advantages of winning an occasional argument by resorting to litigation.

This, I take it, is substantially what Harry Shulman was saying in the final paragraph of his great Oliver Wendell Holmes Lecture, "Reason, Contract, and Law in Labor Relations," [23] which was, significantly, quoted with approval by Mr. Justice Frankfurter in his dissent in the *Lincoln Mills* case.[24]

Let me conclude, then, with a brief exhortation. *Lincoln Mills* presents us with a threat and a challenge. The threat is clear: if the present trend toward seeking the enforcement or

[23] 68 *Harv. L. Rev.* 999, 1024 (1955).

[24] *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 463 (1957).

interpretation of collective agreements in the courts, rather than in arbitration, continues unchecked, the relations between employers and employees will eventually be governed, as Shulman warned, by "agencies of authoritative control from above removed from the unique atmosphere of the particular enterprise." Under such a system the arbitrator's function would cease to be the interpretation and application of the collective agreement under procedures devised by the parties, and would become more and more the interpretation and application of the federal law of arbitration. Moreover, under such a system the pressure on the losing party in an arbitration case to appeal the decision to the higher authority of the courts would be almost irresistible.

The challenge of *Lincoln Mills,* especially to members of our profession, is no less apparent; it is to demonstrate, by our actions and by our teaching, that the benefits of industrial self-government far outweigh its imperfections, and that arbitration, despite its weaknesses and abuses, offers far greater hope than litigation for the development of sound labor-management relations in a free enterprise system.

*Discussion—*

DAVID E. FELLER*

I am very glad that the Chairman invited both questions and comment, since I do not intend to ask a question but to make a rather extensive comment.**

I should explain that my assertiveness in this connection arises from the fact that I feel a measure of personal responsibility for the decision in the *Lincoln Mills* case which has been attacked here, or at least mentioned, so vigorously. As one of the counsel for the Textile Workers Union in that case and for the United Textile Workers in the *Goodall-Sanford* case, I did

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** *Editor's Note:* Because of the interest generated by Mr. Feller's impromptu comments from the floor, the Editor invited him to submit their gist in written form for inclusion in this volume.

vigorously urge the Supreme Court to hold as it did. And at least some of the opinion of the Court reflects argumentation which I had a part in presenting to the Court in support of the proposition which the Court eventually adopted.

This is, of course, no reason for me to justify the Court's decision. Unions very often are compelled by the force of particular circumstances to advance views in a judicial proceeding which may be justified only by the necessities of the particular case. Under such circumstances, the union may win a case but it can hardly be said to be committed to the principle which it may have advanced simply as a method of doing so.

That was not the situation in *Lincoln Mills* or in *Goodall-Sanford*. The unions in both of those cases were, of course, anxious to win the particular cases but I am disclosing no secrets if I say that they were equally anxious to establish the principle involved in those cases. As a matter of fact, our office was involved in the presentation of these cases in the Supreme Court only because of the view of the Industrial Union Department of the AFL-CIO that the result sought to be achieved was a desirable one from the viewpoint of the labor movement and of the arbitration process.

The expressions of concern as to the effect of the *Lincoln Mills* decision on the arbitration process are, therefore, of considerable moment to me. If it is correct that the effects of the *Lincoln Mills* decision are almost certain to be disruptive, then the labor movement has made a serious error in prosecuting these cases in the manner in which it did. If it is true, as Ben Aaron said, that by winning the *Lincoln Mills* case the unions may have traded the advantages of the system of private arbitration for "the illusory advantages of winning an occasional argument," then that error may have been grievous indeed.

I must confess, however, that I am not persuaded by what has been said here that the unions did make an error, or that unions, employers or arbitrators should view the *Lincoln Mills* decision with apprehension. Indeed, to the contrary, I feel that

the labor movement was correct in its view that the result which it sought in the *Lincoln Mills* case will serve to fortify rather than to undermine the system of private arbitration.

The basis for Ben Aaron's criticism, as I understand him, is a comparison between arbitration enforced by law, on the one hand, and arbitration which is undertaken voluntarily on the other. The latter is far superior to the former. Hence, he argues, unions have erred gravely in undertaking to obtain judicial enforcement of the agreement to arbitrate.

The difficulty with this view is that it makes a false comparison. In no case in which judicial enforcement of the agreement to arbitrate is asked is it fair to compare the values of arbitration undertaken voluntarily and arbitration enforced by law. For, by hypothesis, the need for judicial enforcement only arises where the agreement to arbitrate is not voluntarily complied with. The question, really, is whether the system of private voluntary arbitration is damaged more by the existences of instances in which parties who have agreed to arbitrate simply refuse to comply with their agreements, or by a judicial sanction making those commitments enforceable. I submit that no case has been made for the proposition that it is healthier for the arbitration process to allow the parties the freedom to ignore their agreement than it is to compel them to abide by it.

The question can be very bluntly put in the context of the enforcement of arbitration awards. Several members of the Academy have issued awards with which employers have simply refused to comply. Whit McCoy had a case with the Cone Mills Corporation and the Textile Workers Union. Milton Schmidt decided a discharge case at the Enterprise Wheel Bearing Company. In both cases the employers refused to comply with the awards. It does not seem to be sensible to say that the integrity of the system of voluntary arbitration would be preserved by a judicial decision that these awards, when made, could be ignored. To the contrary, judicial enforcement of the awards seems to me to be far preferable to a judicial recognition that they are merely nullities. Of course, it would be

better if the awards were complied with in the first place, without judicial intervention. But that is not the question.

In any case, whether or not there should be judicial intervention is not really the question. The argument against federal judicial intervention which several of the speakers have made seems to me to be as irrelevant as was the unions' argument against federal regulation of union unfair labor practices which was made when Taft-Hartley was up for discussion in 1947. The unions at that time argued as if the question was whether union action should be subject to restraint or non-restraint. But, as subsequent events proved, this was not the real question. The real question was whether the restraint was to be federal or state. And, as the courts have now told us, the decision to establish federal restraints has, except in the area of common law restraints against violence, and, of course, union security, excluded the possibility of state restraint.

Just so, the question presented by the *Lincoln Mills* case is not really whether there should or should not be judicial intervention but whether the judicial intervention should be state or federal. The basic question in *Lincoln Mills,* after all, was basically a question of federal jurisdiction. The first question presented was not whether arbitration could be compelled but whether a suit could be brought in the federal courts. If so, the second question was whether the governing law to be applied was to be federal or state. The last question was whether, if the governing law were federal, an executory agreement to arbitrate would be enforceable. At which of these points does the arbitration profession tremble? Surely not at the last point. Concededly, in the states which have not modified the common law rule against the enforcement of an agreement to arbitrate, the rule of *Lincoln Mills* will permit enforcement where it could not otherwise be had. But in most of our larger industrial states, the effect of *Lincoln Mills* will not be to permit enforcement of arbitration but to permit such enforcement by the federal courts in accordance with federal law rather than by state courts in accordance with state law. When

we compare these alternatives, I do not think that any case can be made whatsoever for the proposition that the result in *Lincoln Mills* is to be deplored. To the contrary, the experience of the federal courts with the National Labor Relations Act and the general caliber of those courts will lead, in my view, to a far more hospitable climate to the system we are all anxious to see thrive than will the atmosphere of many state courts.

This point is even more emphatically made with respect to the question of enforcement of arbitration awards. So far as I know, arbitration awards are enforceable in all states. Each state, however, has its own rules as to the extent to which the courts will review the arbitrator's award. Now the next step in the development of Section 301 jurisdiction will be determination of the question of whether Section 301 provides federal jurisdiction over union suits to compel enforcement of arbitrator's awards. That question is presently pending in the Fourth Circuit in the *Cone Mills* case. If I read Ben Aaron correctly, his argument would at least imply that an ultimate decision that the federal courts can enforce arbitrators' awards under section 301 would be undesirable. I think, to the contrary, that a fairly strong case can be made for the likelihood that the kind of judicial recognition of the arbitration process which those who believe in voluntary arbitration desire will more likely be achieved if arbitrators' awards are enforced by unions under section 301 than if they are enforced, either by unions or by individuals, under state law.

There is, I believe, a real judicial threat to the arbitration process. That threat, however, is quite a different one from the one which the speakers here have concerned themselves with. The Fifth Circuit recently, in *Ware* v. *Woodward Iron Co.* (43 LRRM 2147), held that a discharged individual could ignore the grievance and arbitration procedure and bring suit to collect damages for an alleged discharge in violation of a seniority clause. It relied, in large part, on the decision of the Alabama Supreme Court in *Sizemore* v. *Tennessee Coal and*

*Iron Corp.*, in which damages were recovered for violation of a safety and health clause. I understand that there are similar decisions in the State of Mississippi, and, as you are all aware, the federal courts have come to this same result with respect to the arbitration provisions of the Railway Labor Act in discharge cases.

Here, I submit, is a real threat to the arbitration process which has been so laboriously built up over the past decade or so. If individual employees are given the right to bring suit to collect damages for claimed breaches of the collective bargaining contract even though they have refused to submit those grievances to the arbitration process specified in the contract, then the entire basis upon which unions and companies have built their structure will collapse.

Now this threat may appear at first glance to be unrelated to the *Lincoln Mills* case, but I submit that on analysis the two are really part of the same problem. You all remember Mr. Justice Frankfurter's opinion in the *Westinghouse* case. In that case he held that section 301 did not confer jurisdiction on the federal courts to hear a union's complaint that an employer had failed to pay wages due. He did so, expressly, in light of the stated fact that individuals could bring suit to enforce their claimed rights under that contract in the state courts. Mr. Justice Frankfurter's views necessarily led him to dissent in *Lincoln Mills*. Equally, Mr. Justice Douglas' opinion in the *Lincoln Mills* case was foreshadowed by his dissent in *Westinghouse*. The difference between the two viewpoints is not really a difference between those who would prefer judicial intervention and those who would oppose it, but a question of whether that intervention is to be at the behest of individuals or of the union, as well as whether it is to be state intervention or federal intervention. Again I think that any fair estimate of the probable effects upon the arbitration process of judicial determinations with respect to it in suits brought by individual employees, as opposed to suits brought by a union, would argue most strongly for a union's right in the premises.

Perhaps the whole matter can be best summed up, in my view, in the *Cone Mills* case, to which I referred earlier. In that case, Whit McCoy decided the case in favor of the union's contention. The Company took the position that his award was contrary to law and exceeded his authority. I won't take this group's time to recite the circumstances of the case, but I can assure you that such contentions in the light of the facts of the case would shock almost all of you. The Union sought enforcement of the award in the federal court under section 301 relying exclusively on the *Lincoln Mills* decision. The Company resisted the Union's action, relying on *Westinghouse* and urging that the only judicial forum for testing the propriety of the arbitrator's award was a North Carolina court. An individual's right to pay under the award was a wage claim not within federal jurisdiction, under Westinghouse, they argued, and he could sue for the money due on the award in a state court.

The District Court decided in favor of the Company (43 LRRM 2012), and the matter is now on appeal. I have no doubt what the views of this body would be as to the desirable result in that case. But I call to your attention the fact that if *Lincoln Mills* had not been decided as it was decided, and, if you please, if the union had not sought an "illusory advantage" by taking that case to the Supreme Court, there would be no question that the result urged by the Company in the *Cone Mills* case would have been the proper result under the rule of the *Westinghouse* decision.

Since I am fairly confident of what the opinion of this group would be as to how the *Cone Mills* case should be decided, I am led to wonder why the concern which Ben Aaron has expressed concerning the *Lincoln Mills* decision exists. I think I know the reason for that concern. A decision opening up the federal courts to suits to compel arbitration will lead certain courts to decide whether controversies are arbitrable and there have been some decisions on that issue which are, truthfully, shocking. Ben looks at the decision of the District Court in the *Warrior*

*& Gulf* case, for example, and is appalled by the fact that a district judge found the controversy not to be arbitrable which Ben, were he the arbitrator, would clearly have felt was arbitrable. And, Ben feels, a series of decisions of this nature may lead parties to make contentions as to arbitrability which they would not otherwise make and which disturb him.

On the last point, I disagree somewhat. And, in passing, I disagree also with what I thought I heard Archie Cox say. His view, as I understood it, was that the existence of a legal right to enforce arbitration may lead employers who would otherwise arbitrate voluntarily to refuse to do so until compelled by the courts. I simply do not think that is so. I know of no evidence to indicate that there is a larger proportion of instances in which employers refuse to arbitrate in states which have enforced arbitration than in states which have not. And, on a parity with Archie's reasoning, one might go on to argue that judicial remedies for breach of all contracts should be eliminated in order to encourage voluntary compliance with them — a notion that I do not think would commend itself to many. In the particular case which Ben cites — *Warrior & Gulf* — I happen to know that the choice was what I believe it to be in most cases, either arbitration compelled by law or no arbitration at all.

I quite agree with Ben, however, that the District Court decision in *Warrior & Gulf* is a horror. And if arbitrators are so foolish as to follow it, it will do the arbitration process no good at all. The decision is almost as bad as the decisions of the New York courts under the New York arbitration statute. It expresses a judicial hostility to the arbitration process, not a judicial receptiveness, a hostility almost as great as a refusal to order arbitration in any case.

But *Warrior & Gulf* is not final. It is on appeal. And if the judicial philosophy expressed in *Warrior & Gulf* constitutes a danger to arbitration and is of genuine concern to this body, then I suggest that you do something about it. Rather than expressing concern that unions have traded self-government

for "illusory advantages" I suggest you do something in the *Warrior & Gulf* case. There is a device known as the *amicus* brief. I note that the Academy has a committee dealing with legislation. Why not a committee designated to present the views of the Academy to the courts in cases like *Warrior & Gulf?* If you assist in obtaining proper judicial development under *Lincoln Mills,* you will have done much to avoid the dangers about which Ben is so apprehensive.

I believe that even if *Warrior & Gulf* should stand the system of voluntary arbitration will be no worse off than it was as a result, say, of *Cutler-Hammer* in New York. Certainly it will be no worse off than it would have been if the company's refusal to arbitrate had simply ended the matter—with only an individual law suit under Alabama law as a method of determining the proper meaning and application of the collective agreement. But I also think that, with proper help, the arbitration process can be actively helped by obtaining an affirmative judicial declaration as to the scope of the arbitration process and I urge your assistance in that regard.

In the federal courts we are already one up. Unnoticed in all the comment here about *Lincoln Mills* so far is one significant factor. Mr. Justice Douglas based his opinion upon the one central concept which I believe to be essential to a proper understanding of the grievance arbitration process—a concept which has eluded most state courts. That concept is that grievance arbitration, unlike commercial arbitration, is not a substitute for litigation but a substitute for the strike. In a pamphlet which we quoted to the Supreme Court in the *Lincoln Mills* case, Jesse Freiden many years ago pointed out that the failure to grasp this essential distinction was at the root of most of the judicial hostility to grievance arbitration. The rules, standards and attitudes which a court brings to a process designed as an alternative to a judicial proceeding are simply not applicable to a device designed, not to specify the damages due for a completed transaction, but to provide a system of peaceful adjudi-

cation in place of industrial warfare. Implicit in the holding in *Lincoln Mills* that arbitration under a collective agreement is enforceable because, and I emphasize because, it is the *quid pro quo* for the agreement not to strike, is a judicial recognition of this critical concept. I may be wrong but I believe that on this foundation we can help the courts to build a structure which will re-enforce rather than sap the vitality of the process in which we all believe.