CHAPTER 4

ARBITRATORS AND ARBITRABILITY

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The subject of this session is "Arbitrators and Arbitrability," not "Courts and Arbitrability." Exercising the prerogative of a speaker—in contrast, perhaps, to that of an arbitrator—to decide initially and finally his own "jurisdiction," I interpret my assignment as calling primarily for a discussion of the problems of "arbitrability" as they arise in arbitration practice, not as they arise in defining the respective roles of the arbitrators and the courts. The implications of the 1960 Supreme Court "Trilogy" (*Warrior & Gulf*, etc.) [1], as well as the latest "Trilogy" (*Sinclair, Drake Bakeries,* etc.) [2], are lurking behind the scenes as some kind of "brooding omnipresence". These decisions, however, I will allude to only incidentally and collaterally.

I

The distinction between the subjects "Arbitrators and Arbitrability" and "The Courts and Arbitrability," which, as indicated, I derive from the form of "submission" to this panel, is significant. I assume that an underlying factual premise is that arbitrators continue, despite the 1960 "Trilogy," to be confronted with challenges to their "jurisdiction" or "authority," which, if true, means that, while the justices of the Supreme Court may

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1 *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960), 46 LRRM 2416; *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564 (1960), 46 LRRM 2414; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593 (1960), 46 LRRM 2423.

2 *Sinclair Refining Company* v. *Atkinson,* 82 S. Ct. 1328 (1962), 50 LRRM 2433; *Atkinson* v. *Sinclair Refining Company,* 82 S. Ct. 1318 (1962), 50 LRRM 2420; *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers, AFL-CIO,* 82 S. Ct. 1346 (1962), 50 LRRM 2440.

have no problems in this area, the parties remain unconvinced. Arbitration practice, I believe, confirms this to be true, although it may well be parties are less inclined now than formerly to present this kind of issue in an arbitration proceeding.

An additional underlying premise, I believe, is that arbitrators, when confronted with an issue of "arbitrability," proceed to decide it, normally before deciding the so-called merits; that is, arbitrators assume that, even though an issue of "arbitrability" has not been specifically submitted to them for final disposition, they have, perforce, some kind of initial jurisdiction to decide their own jurisdiction, just as court inherently has such jurisdiction. Thus, this kind of issue, presumptively, is one which the arbitrator cannot and does not avoid, whether or not, in passing on the challenge to his power and authority, he is influenced by the 1960 "Trilogy" much, little, or not at all. This assumption is likewise, I think, factually correct.

I would add as a further preliminary statement that, except in unusual circumstances, the arbitrator's decision of an "arbitrability" issue finally disposes of that issue in the proceeding in which the issue is presented for decision. This obviously is the case where the parties have specifically given him the authority to decide the issue. It is also true, as a matter of law, except in the clearest cases of error, under a proper interpretation of the 1960 "Trilogy." [3]

Beyond this, even though the decision might be upset if challenged in the courts, it is not likely to be challenged in most cases for a variety of reasons—respect for the arbitration process (to put the matter most ideally), the cost of judicial proceedings, the uncertainty of the result, or an assessment of the impact of such challenge on the parties' relations. This means, if my assumption is valid, that issues of "arbitrability," in terms of the arbitration

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[3] See, among other discussions of these cases: Aaron, "Arbitration in the Federal Courts; Aftermath of the Trilogy," 9 *U.C.L.A. Law Rev.* 360 (1962); Wellington, "Judicial Review of the Promise to Arbitrate," 37 *N.Y.U. Law Rev.* 471 (1962); Smith, "The Question of 'Arbitrability'—The Roles of the Arbitrator, the Court, and the Parties," 16 *S.W.L.J.* 1 (1962); Hays, "The Supreme Court and Labor Law," 60 *Col. L. Rev.* 454 (1961); Meltzer, "The Supreme Court, Arbitrability, and Collective Bargaining," 28 *U. Chi. L. Rev.* 464 (1961); Wallen, "Recent Supreme Court Decisions on Arbitration: An Arbitrator's View," 63 *W. Va. L. Rev.* 295 (1961); and Davey, "The Supreme Court and Arbitration: "The Musings of an Arbitrator," 36 *Notre Dame Lawyer* 138 (1961).

process, differ more in theory than in practice from other kinds of issues.

It means, further, that in view of the *de facto* as well as *de jure* authority which arbitrators have to decide with finality challenges to their jurisdiction, they have a special responsibility, where a substantial question relating to their jurisdiction or authority is raised, to take the issue seriously (although not more seriously than other serious issues), since the irresponsible exercise of their "bootstraps" jurisdiction might undermine the parties' confidence in the arbitration process even more than irresponsible decisions on the "merits" of the underlying claim.

As a final preliminary statement, may I add that I make no pretense in my remarks today either of originality or of unshakeable judgments, where judgments are expressed. My "unassigned reflective time," which is supposed to be a perquisite of the academic life, but is more fictional than real, has not been adequate to the task of attempting an exhaustive and authoritative analysis, even if the capacity for the job were adequate. I can do no more than indicate some preliminary thoughts about the general framework of the problem, some of the kinds of questions which arise, and, where I have them, some tentative answers to such questions. Much more remains to be done and said about this subject than will be reflected in my efforts today.

II

An approach to any subject requires, at the outset, an attempt to clarify what it is we are talking about. Since we are dealing here with the term "arbitrability" as it applies to the arbitration process and particularly to the domain of the arbitrator as distinguished from that of the courts, I suggest that an issue of "arbitrability" has the following characteristics:

(1) Factually, it is identifiable as one which is described as such, or in terms meant to be the equivalent (such as "jurisdiction" or "authority"), by either or both parties to a case which has come to the arbitrator, through some route, for decision.

(2) It is an issue which, in the minds of either or both parties, is somehow different qualitatively from other kinds of issues in that the party pressing the issue questions the basic propriety of

invoking the arbitrator's services to decide some claim, or to grant the relief asked with respect to such claim. The party posing the issue is saying, in effect, to the other party, "You should not have made this demand in this proceeding," and to the arbitrator, "You should not consider the demand."

(3) It is an issue which, analytically, comprehends both an asserted lack of basic "jurisdiction" in the arbitrator to consider and decide the underlying claim, and an asserted lack of "authority" to render a particular type of award. I am unable to agree that it is helpful for present purposes to attempt to distinguish between these two concepts, as some have sought to do.[4]

(4) It is an issue which may be and sometimes is clearly distinguishable from the "merits" of the underlying claim, but which perhaps at least as often, depends for its answer on, or is related to, the decision on the "merits." When it is of the latter kind, there is, of course, a question whether, conceptually, it is an issue of "arbitrability" at all, although the parties, or a party, may expect it to be treated separately from the "merits."

III

It may be useful, for purposes of facilitating description and analysis, to classify some of the kinds of issues which may be said to be "arbitrability" issues, in the light of one or more of the characteristics enumerated above, and to suggest in some instances how certain questions should be answered. The suggested categories, with illustrative examples, follow.

1. *Proceedings wholly ex parte*

The labor agreement may contain an arbitration provision which specifies that the facilities of the Federal Mediation and Conciliation Service, the American Arbitration Association, or some other agency may or shall be used in designating the arbitrator. Suppose that, upon request of the party desiring to arbitrate a claim, the agency submits a "panel" of arbitrators to the parties. The party opposing the claim refuses to participate in the process of selecting the arbitrator, contending that the claim is not arbitrable. The agency then appoints an arbitrator to hear the case. The party opposing arbitration states that he will not participate in the proceeding, and, if the arbitrator sets a hearing date, will not appear at the hearing.

[4] See Schmertz, "When and Where an Issue of Arbitrability Can Be Raised," *Lab. Rep. Bull.* 3 (Prentice-Hall, Inc., July 19, 1962).

The question for the arbitrator is whether or not he will decline to proceed under these circumstances. The question for the opposing party is whether, if the arbitrator does proceed *ex parte,* and renders an award adverse to his position, he will disregard the award on the theory that the award is legally unenforceable solely because of his non-appearance.

These questions pose some problems. I am sure that most arbitrators would be most reluctant to proceed *ex parte,* for obvious reasons, and would try to avoid the problem by inducing the opposing party to appear at least "specially" to be heard on the issue of "arbitrability." However, if the arbitrator is satisfied that the basic labor agreement contemplates that the appointing agency has the authority to make an appointment of the arbitrator if the parties cannot or do not select one through the normal panel procedures, I think he should proceed *ex parte,* making sure, of course, that the opposing party has ample notice of the hearing. If, however, he thinks the arbitration clause leaves the authority of the appointing agency in serious question, he would be well advised to decline the appointment, and leave it to the moving party to make some other move to settle the dispute, perhaps by a suit to compel arbitration.

In these situations the party opposing arbitration likewise has some difficult decisions to make. If the arbitrator indicates he will proceed *ex parte,* if necessary, the opposing party will realize that his failure to appear and be heard will place his total position in jeopardy, so far as the arbitration process is concerned, since his views will presumably not be adequately placed before the arbitrator. Moreover, this attitude may be destructive of good relations with the other party, for whatever this may be worth.

I should think the opposing party would finally decide to make an appearance, and be heard, urging upon the arbitrator the desirability of restricting the initial decision to the issue of arbitrability, unless he is convinced that the other party is attempting to abuse the arbitration process, and he wants to "teach the other fellow a lesson." I should think a decision to refuse to participate would have to be predicated legally on a clear conviction that the claim is non-arbitrable within the standards established by the 1960 "Trilogy," because I would suppose there is at least a

serious question whether the award would be invalid solely because the party has not put in an appearance.[5]

2. *Proceedings partially ex parte*

Two examples come to mind. One is suggested by the Wisconsin litigation in the *Hein-Werner* case,[6] which involved the validity of an award dealing with the seniority rights of ex-supervisors, upon their return to the bargaining unit, where the adversary parties to the arbitration proceeding were the employer (who espoused the cause of the ex-supervisors) and the union (which opposed the employer's position on this issue). The award was held invalid on the ground the ex-supervisors' interests had not been adequately represented. They had neither received notice of, nor been present at, the arbitration hearing, and, in the Court's view, the union, having taken a position adverse to their interests, "as a matter of law" was not giving them fair representation."

As our distinguished brother Fleming and our currently even more distinguished brother Wirtz have pointed out,[7] many arbitrations occur, especially in areas involving the relative rights of employees, where in a sense it can be said that the proceeding is *ex parte* or, in the Wirtz-Fleming terminology, possibly lacking in

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5 The decisions in *Food Handlers Local 425* v. *Pluss Poultry, Inc.*, 260 F. 2d 835 (C.A. 8th, 1958), 43 LRRM 2090, and *Industrial Union* v. *Dunn Worsted Mills*, 131 F. Supp. 945 (D.C. Rhode Island, 1955), 36 LRRM 2629, cast doubt on the validity of an award rendered *ex parte* where the party opposing arbitration has refused to participate in a contractually prescribed method of designating an arbitrator. In these cases, the contract specified that there should be a "board of arbitration," tripartite in nature. The employer refused to designate a member of the board, and the FMCS in the Food Handlers case and the AAA in the Industrial Union case appointed the "neutral" member, who, together with the union-appointed member, proceeded to hear the case. Even if these decisions are sound, which I tend to doubt, they are factually distinguishable from the case where the arbitration clause in the labor agreement provides that a sole arbitrator shall be designated—for example, through the established procedures of the American Arbitration Association—and the party desiring arbitration invokes such procedures in the manner specified in the Rules of the Association. Here an *ex parte* award has been given effect. *Amalgamated Meat Cutters and Butcher Workmen of North America* v. *Penobscot Poultry* Co., 200 F. Supp. 879 (D.C. Maine, 1961), 49 LRRM 2241; *Boot Workers* v. *Faith Shoe Co.*, 201 F. Supp. 234 (D.C. Pa., 1962). It is arguable, I suppose, that, where the contract contemplates the use of a tripartite board, there must, in fact be such a board in order to have a contractually valid kind of arbitration proceeding. See Weiss, "Labor Arbitration in the Federal Courts." 30 *Geo. Wash. L. Rev.* 285, 301-302 (1961).

6 *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 268, 100 N.W. 2d 317 (1960), 34 LA 146.

7 Fleming, "Some Procedural Problems of Due Process and Fair Procedure in Labor Arbitration," 13 *Stanf. L. Rev.* 235 (1961); Wirtz, "Due Process in Arbitration." *The Arbitrator and the Parties* (Washington: BNA Incorporated, 1958).

"due process," as to the individuals who would be adversely affected if the union's or the grievant's position were upheld, since such individuals are ordinarily not formally parties to the proceeding.

The other example is the proceeding where there are involved the interests of a union other than the one which is party to the labor agreement under which the dispute and the proceeding originated. An illustration would be the case where the grievant union is protesting the allocation of work to employees who are represented by the other union. The question, of course, concerns the validity of the award if adverse to the interests of the other union, where that union (as would normally be the case) is not a party to the arbitration proceeding.

These problems are vexing, even more so than those described above as "proceedings wholly ex parte." The two examples obviously differ fundamentally. The first involves among other things an evaluation of the basic role of the union in resolving internal union conflicts with respect to the interpretation of the labor agreement and the role of the arbitrator in relation to such matters. As Fleming has pointed out, most arbitrators would probably disagree with *Hein-Werner,* and would conclude that their "jurisdiction" is not involved.[8] I suspect they are right, as the law now stands, despite *Hein-Werner,* but as Fleming, Wirtz, and Summers[9] have pointed out, there is some uneasiness here, and one cannot predict with assurance that the courts, with their basic concern for "due process," may not force some changes in arbitration procedure in relation to such problems. The case of the award adversely affecting the interests of a non-party union presents the "jurisdictional" question more sharply. Clearly, the award is binding on the union which is party to the agreement out of which the dispute arose, but just as clearly it is not binding upon the nonparty union.

The practical question for arbitrators in this problem area is whether they can or should involve themselves by innovating procedures designed to anticipate and ameliorate the problems involved. Their role is a restricted one, according to standard

[8] Fleming, *op. cit.,* n.7.

[9] Fleming, *op. cit.,* n.7; Wirtz, *op. cit.,* n.7; Summers, "Individual Rights in Collective Agreements and Arbitration," 37 *N.Y.U.L. Rev.* 362 (1962).

dogma, since they derive their authority only from the contract under which their services are engaged. They will probably continue to proceed in the types of cases I have described without worrying (officially) about their "jurisdiction."

The possibility, however, exists that the arbitration process is becoming institutionalized, as a matter of law, so that arbitrators will have increasing authority, *qua* arbitrators, with respect to matters fundamental to conceptions of fairness and to the ultimate integrity of the process. In any event, they (or at least some of them) are not without influence outside their formal role and may have ideas worth considering in relation to these problems as the parties evolve their arbitration procedures.

3. *Jurisdiction to function*

Occasionally a situation may be presented in which the claim is that the arbitrator lacks the authority to proceed or function at all. This can occur, for example, where it is contended that the basic arbitration agreement, whether incorporated in the collective agreement or taking the form of a special submission agreement, is invalid, or where it is contended that, the labor agreement providing for arbitration having expired before the arbitration stage has been reached, the arbitrator is without power to take the case.

The claim of basic invalidity of the agreement to arbitrate is likely to be a rare case. Prior to *Lincoln Mills,*[10] such a claim could have been based, in some states, on the proposition that an agreement to arbitrate a future dispute is unenforceable. Fortunately, this issue has been laid to rest by *Lincoln Mills,* and is not likely to occur except in the situation where it is alleged that the parties are involved in essentially local commerce, so that federal law is inapplicable.

Other possible grounds of alleged invalidity are, however, available as a matter of basic contract law. Illustratively, it could be argued that the agreement was entered into under duress, or that it is unenforceable because of lack or failure of consideration, or because of some substantial breach of obligation by the party seeking arbitration, such as breach of the no-strike clause of the

[10] *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957), 40 LRRM 2113.

agreement. These can be matters of considerable legal intricacy. The initial question facing the arbitrator is whether he must, perforce, decide such issues, or should bypass them and proceed to the "merits" on the theory that they are beyond his province.

The latter approach, I suggest, is the correct one, supportable both as a matter of principle and of practicality. It seems to me the arbitrator can properly say, in such cases, that the role assigned to him is to interpret and apply an agreement which purports, on its face, to establish the arbitration process, and that any question concerning its basic validity should be resolved by the courts if the party seriously presses the issue.

The situation bears some resemblance to the case where a statute creates an administrative tribunal such as the NLRB, and a party before the agency challenges the constitutionality of the underlying legislation. The prevailing view is that the tribunal should presume the validity of the statute.[11] The wisdom of this approach, in terms of the arbitration process, lies partially in the fact that legal issues of this kind frequently are beyond the basic competence of the arbitrator, if he is not a lawyer, but more fundamentally in the fact that such issues are extraneous to the basic function of the arbitrator, which is to interpret and apply the substantive provisions of the agreement. Thus, I think the arbitrator should refuse to decide issues raised concerning the basic validity of the labor agreement in its entirety, or of the submission agreement, unless the parties have jointly submitted such issues to him for decision.

I do not intend, by these remarks, to imply that so-called "legal" issues should never be taken into account by the arbitrator in deciding a question of interpretation or application of some provision of the labor agreement. If a party claims that some substantive provision of the contract is invalid as a matter of law, I am not at all sure that he may properly "duck" this issue simply by saying his task is only to interpret and apply what the parties have written, whatever the provision may be. The assigned task of the arbitrator is to determine whether a party to the contract has breached some binding obligation. If a provision of the agreement has no binding force, under the law, it is arguable that there

[11] Davis, *Administrative Law* (West Publishing Co., 1959), p. 363.

actually is no such provision for the arbitrator to interpret and apply.

The claim that the arbitrator lacks jurisdiction because the underlying labor agreement out of which the grievance arose has expired could be regarded in the same light as the case where the question of the existence of a binding agreement to arbitrate is at issue, since basic questions concerning the legal nature of the collective agreement are involved. Does a right which has accrued under a pre-existing agreement "vest" or die with the expiration of the agreement? If it vests, does the remedy now lie in some other procedure, such as a lawsuit, or does the arbitration process remain available, even though the contract establishing the process has terminated?

Without any attempt at elaboration or legal documentation, my own view is that there are some kinds of rights which do, indeed, vest, and are not lost upon the expiration of the agreement out of which they arose. Whether the arbitration process remains available to enforce these rights is not so clear, because an affirmative answer assumes that pre-existing contractual commitments (for example, requiring participation in the process of selecting an arbitrator) continue though the contract has expired. As in the case of the claim of basic invalidity of the contract, itself, there are here involved some fundamental legal questions.

The situations, however, are different in that, by hypothesis, the underlying agreement has expired by its terms, and the arbitrator might, understandably, refuse to act if he can't even find in the picture what purports to be an existing agreement giving him authority to act. The "Trilogy" decision in *Enterprise* might give him some comfort if he elects to proceed, though I think it does not authoritatively answer the question if the grievance was not even filed, or submitted to the arbitration process, before the contract expired.[12] My tentative conclusion as to this type of case is that the arbitrator should refuse to proceed, but I am far from certain that, if he did, his decision to assume jurisdiction could be successfully challenged in the courts.[13]

[12] In Enterprise, the grievance procedure had at least been invoked while the labor agreement was in effect, and the specific question concerned the jurisdiction of the arbitrator to render an award, subsequent to the expiration date of the labor agreement, requiring the employer to reinstate an employee.

[13] Can it not be contended with some plausibility that the question of the arbitra-

4. *Jurisdiction of the "cause" or claim*

Under this caption I include such matters as the following: (a) The alleged failure to invoke the grievance or arbitration process within specified contractual time limits; (b) alleged lack of jurisdiction because of improper joinder in a single proceeding of more than one grievance; (c) alleged lack of jurisdiction because the grievance or arbitration claim was filed by an improper party—for example, by the union rather than by an individual employee; and (d) alleged lack of jurisdiction because the issue properly belongs before another forum, such as the NLRB.

Little need be said here about these types of claims. Certainly, the arbitrator must proceed to dispose of them one way or the other. Arbitrators are reputed to be reluctant to dismiss a claim for want of its timely filing; yet the obligation to do so is inescapable unless special circumstances, such as a practice of disregard of such limitations, indicate a proper basis for invoking the doctrines of waiver or estoppel, or some basis, both under the contract and in view of the facts, for holding that the claim actually arose at a point falling within the applicable time limitation.

The solution of the problem of the "multiple grievance" ought, I think, generally be resolved in favor of jurisdiction, unless the contract specifically provides otherwise, although I will not elaborate the reasons for this view on this occasion.[14]

Whether a claim should be dismissed because allegedly filed by an improper party should be answered in terms of the specificity of the contract on this point, past practice, and any relevant bargaining history evidence that the parties have considered this a matter of importance.

The claim that the issue belongs before another tribunal, such

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tor's "jurisdiction" or "authority" involves, in such a case, an interpretation of the arbitration clause, as well as the substantive provisions, of the "expired" agreement, and that an interpretation could be upheld, within the principles laid down in the "Trilogy", and especially in the light of the Court's treatment of the issue presented in the Enterprise case, that the parties contemplated the continuing availability of the arbitration process to resolve claims which had accrued while the agreement was in effect?

[14] The approach could be that an arbitration tribunal established by contract, like an adjudicating agency otherwise established, is authorized to handle whatever cases are "docketed" within the time limitations and through the procedures specified in the agreement.

as the NLRB, should normally be dismissed even if it could have been presented in the other forum, if, as I assume, the labor agreement contains a provision which is relied upon in support of the grievance.[15]

5. *Jurisdiction of the subject matter*

The problems subsumed under this heading are manifold. The kinds of issues which may be raised include the following:

(a) *The claim that the subject is specifically excluded from the arbitration process.* Illustrations are the exclusion from the arbitrator's powers of authority to "establish wage scales," or "rates on new jobs," or to determine production standards.[16] Here the lack of jurisdiction or authority is clear if the exclusionary language is clear. It seems obvious, however, that the arbitrator has and should exercise the authority to resolve questions of interpretation of the exclusionary clauses, themselves.

(b) *The claim of lack of jurisdiction because the "management rights" clause of the agreement, or some other provision, specifically reserves to management the right to act with respect to the subject matter.* Illustrative examples would be reservations of the right to subcontract, or to relocate a plant, or to transfer operations from one plant to another. These situations might be thought to be indistinguishable, in terms of the arbitrator's authority, from those in which, as mentioned above, the arbitration clause, itself, specifically excludes certain subjects from arbitration. Perhaps they are, but there is at least a technical distinction, for in the latter case it is arguable that there is complete lack of jurisdiction in the arbitrator over the subject matter, whereas in the former case (assuming the standard type of arbitration clause), it is clear that the arbitrator's authority includes the right to interpret the managerial reservations. I have suggested elsewhere that, at the very least, the

[15] Certainly the fact that a given obligation (e.g., to refrain from discrimination against an employee because of his union affiliation, or to recognize the union as collective bargaining representative) exists under the NLRA does not preclude the union from seeking and obtaining an independent contractual commitment from the employer of the same kind. The NLRB does not take the position that such agreements are not contractually enforceable, although it need not consider itself bound by the results reached under a contract arbitration procedure. See *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), 36 LRRM 1152.

[16] Such provisions are found, illustratively, in the current Ford-UAW agreement.

psychological impact on the arbitrator in reacting to the two types of cases may be different.[17] Moreover, a reservation of a managerial right to take some kind of action, while dispositive of the question of management's right to act, may leave open arbitrable contract issues concerning the impact on employees of the exercise of such right, or at least the bargainability of such issues under the contract "recognition" clause.

(c) *The claim that jurisdiction is lacking because the subject matter falls within the managerial prerogative either on the "residual rights" theory or because of the existence in the contract of a broad and general "management rights" clause.* This is a kind of "arbitrability" issue which probably occurs as frequently as any other. It is not strictly "jurisdictional" in the legal sense, if I interpret the 1960 "Trilogy" correctly, because it usually involves, fundamentally, the interpretation of the contract as a whole in relation to the question whether some limitation on management's right to act is implicit in the agreement. Typical of such problems is the belabored "subcontracting" issue. It is in this area that the parties take their greatest chances with the arbitration process, for much depends on the individual arbitrator's basic view concerning the nature of the collective agreement, the "reserved rights" theory, the relevance of bargaining history on specific subjects, and the like. I shall not venture into these problems for the reason, among others, that my paper would become a monograph were I to attempt to do so.

(d) *The claim of lack of jurisdiction because the grievance is not based on any provision in the contract specifically touching the subject matter, and the arbitrator's authority is specifically limited to claims based on contract provisions specifically touching the subject matter.* There are contracts which contain these kinds of limitations. Given contract language of this sort, the arbitrator should refuse to decide the "merits" if he is satisfied, past practice containing no indication to the contrary, that the parties intended that these provisions be taken literally, and if he is further satisfied (which, in some circumstances, may be a large order) that the grievance does

[17] Smith, *op. cit.*, n. 3, at p. 28.

not, in fact, touch or concern, even by implication, any provision incorporated in the labor agreement.

(e) *The claim of lack of jurisdiction on the ground that the grievance relies, for its substantive basis, upon an alleged past practice rather than on any provision of the agreement, or on an "understanding" reached outside the contract.* If the contract specifically excludes such claims from the arbitration process, the arbitrator should dismiss the claim as non-arbitrable if he is satisfied, past practice again containing no indication to the contrary, that the parties meant what they said, and if he is convinced that a "past practice" relied upon does not in any way involve the interpretation or application of a provision, or an agglomeration of provisions, of the agreement. With respect to the matter, especially, of alleged understandings *dehors* the formal agreement, however, a distinction might well be taken, under certain circumstances, between those antedating and those post-dating the agreement. It is certainly not beyond the realm of rationality that the arbitrator could regard the latter as subsumed under and in effect a part of the labor agreement, and thus as commitments within his jurisdiction to enforce.

(f) *The claim of lack of jurisdiction to award a particular remedy.* To take two examples, which, I think, pose very different problems in terms of difficulty, I would cite (1) the claim that, under a "just cause" provision in the contract relating to employee discipline, the arbitrator lacks the authority to modify a penalty if cause for any discipline is established, and (2) the claim that the arbitrator lacks the authority to award "damages" where the union's breach of a no-strike agreement has been submitted to arbitration, and the contract is silent concerning the arbitrator's remedial authority in this situation. While some literally minded courts have had difficulty in the employee discipline cases,[18] I think the existence of the authority to modify a penalty can easily be considered, as of this state of the development of industrial jurisprudence, as being established, and, furthermore, as a remedy which the arbitrator should not hesitate to use unless he is specifically restricted. The

[18] See, for example, *Textile Workers, Local 1386* v. *American Thread Co.*, 291 F. 2d 894 (C.A. 4th, 1961), 48 LRRM 2534.

question of the assessment of damages for violation of a no-strike agreement, however, is something else again. As a matter of law, under the 1960 "Trilogy," and in view of the *Drake Bakeries* decision [19] I would suppose an assumption of jurisdiction to award damages could not be successfully challenged in the courts. However, it is far from clear that the arbitrator *should* assume such jurisdiction, at least until enough arbitrators venture into this field to justify the conclusion that the parties must have contemplated this kind of remedial authority when they wrote their contract.

The foregoing enumeration is undoubtedly incomplete, but I believe it is a fair sampling of kinds of issues which, in arbitration practice, are identifiable as "arbitrability" issues. I want to turn, now, to some other matters which relate to the general title of this paper, but are not structurally connected with my previous remarks. The specific questions for discussion which are listed on the program (and which I had to supply before I knew just what I wanted to say on this occasion) should be discussed. In addition I want to report some of the kinds of reactions which Prof. Dallas Jones and I have been receiving from members of the Academy in connection with a project we have undertaken to assess the impacts of the 1960 "Trilogy," the 1962 "Trilogy" (*Sinclair, Drake Bakeries,* etc.), and certain significant lower court decisions (*Glidden, Ross Gear,* and *Webster Electric*) [20] upon arbitrators, courts, and the collective bargaining process in relation to arbitration.

The "questions" listed on the program announcement

(1) Are the legitimate interests of the parties adequately served by submitting issues of arbitrability to arbitrators?

Upon reflection, I suppose the term "legitimate interests," in the context of this question, means simply and only whether the arbitration process can be relied upon to keep issues from being decided which ought not to be decided. The alternative, I sup-

[19] *Drake Bakeries, Inc.* v. *Local 450, American Bakery & Confectionery Workers, AFL-CIO,* 82 S. Ct. 1346 (1962), 50 LRRM 2440.

[20] *Zdanok* v. *Glidden Company,* 288 F. 2d 99 (1961), 47 LRRM 2865; *Oddie* v. *Ross Gear & Tool Co.,* 195 F.S. 826 (E.D. Mich., 1961), 48 LRRM 2586, *reversed* 50 LRRM 2763 (C.A. 6th, 1962); *UAW* v. *Webster Electric Co.,* 299 F. 2d 195 (C.A. 7th, 1962), 49 LRRM 2592.

pose, is the judicial process. Prof. Jones and I hope ultimately to have some more adequate basis for judgment on this matter after we have completed our survey.

To some degree preconceptions are involved, because in some cases the determination whether an issue "ought" to be decided on its merits by the arbitrator will depend upon one's concept of the basic nature of the collective agreement, and of the contractual relationship. Arbitrators, like judges, have differing views on these matters. My supposition, however, is that the perceptions, predilections, and capacities of arbitrators, taken as a group, are at least qualitatively as good as those of judges, taken as a group, and that the arbitration process is adequately responsive to serious issues of "arbitrability." I hope this hypothesis will not disqualify us from assessing the results of our projected survey.

(2) In view of the 1960 "Trilogy," are arbitrators inclined to decide issues of arbitrability in favor of arbitral jurisdiction?

As originally framed for inclusion in the program announcement, the question inquired not only *whether* arbitrators are inclined, in view of the "Trilogy," to decide issues of arbitrability in favor of arbitral jurisdiction, but, also, whether they *should* be so inclined. These obviously are different questions.

My guess is that the 1960 "Trilogy" has probably had some impact upon arbitrators in the direction indicated. Perhaps our somewhat cynical management and labor friends would say the Supreme Court's decisions and pronouncements have simply fortified the arbitrators in tendencies already and inevitably present in the direction of assumption of jurisdiction to decide issues.

You will be interested, perhaps, in some of the indications shown by our survey of members of the Academy with respect to this matter. We asked each member to indicate, *first,* whether his impression is that the 1960 "Trilogy" has induced arbitrators to rule in favor of arbitral jurisdiction to a greater extent than was true prior to these decisions, and, *second,* whether our particular arbitrator-correspondent, himself, considered that he has been thus influenced.

Our "returns" are incomplete, but, I think, will not surprise

you. By a 3-1 margin the arbitrators have answered the first question affirmatively; but by a 4-1 margin they have answered the second question negatively. In other words, they tend to think other arbitrators have been influenced by the "Trilogy" as indicated, but they tend also to disavow any such influence upon themselves. On the question of arbitrators' impressions of the impact of the "Trilogy" on arbitrators in general, the following comments from our correspondents show one kind of reaction:

> *Arbitrator "A":* These decisions, apart from their specific holdings, have created an atmosphere in which it is easier to deny than to sustain a claim of non-arbitrability. It is almost as if the Supreme Court has made it the thing to do.
>
> *Arbitrator "B"* (a lawyer): I think this is particularly true of the non-law trained arbitrator, some of whom without complete understanding have vaguely inferred that something in these cases and in the Lincoln-Mills case has by some alchemy made many things arbitrable upon demand of one party even though they previously were not.

On the question of the influence of the decisions on our correspondents, themselves, the following quotations are in contrast with the most prevalently expressed view:

> *Arbitrator "C":* [I have been influenced] especially in the area of establishing practices as part of the contract, though not expressed in it.
>
> *Arbitrator "D":* I suspect most arbitrators can now face up to a substantive issue with a new degree of assurance, thanks to Trilogy I. These decisions appear to offer us some definitive guide-lines which like a compass, so to speak, point to the "true north."

Our respected colleague, Ben Scheiber, who said he could be quoted, stated: ". . . while I am inclined to believe that I have not been greatly influenced by these decisions, and have felt no compulsion to polish my Arbitrable Halo because of the symbolic orchids which these decisions tend to pin on the arbitrator's coat lapels, I, of course, cannot be absolutely sure of this." Whether, from an examination of actual decisions on issues of "arbitrability," we shall be able to shed some light on this apparent inconsistency of impressions remains to be seen. We hope so.

The question whether the 1960 "Trilogy" *should* induce arbitrators in the direction of holding issues arbitrable involves two

distinct subsidiary questions. The first is whether, as a matter of federal substantive law, the Court's decisions are controlling upon the arbitrator in the sense that, if the Court would conclude an issue is arbitrable, the arbitrator must do likewise if the award is to stand the test of judicial review. The proper answer here, in my opinion, as I have stated on another occasion,[21] and as Ben Aaron and other commentators have likewise concluded,[22] is that the decisions are not thus controlling. They settle issues of arbitrability only at the level of the propriety of judicial interception or review of the arbitration process. They lay down rules for the courts, not for the arbitrators, and they narrow the permissible range of judicial intervention. By the same token, however, they enlarge the legal and actual freedom of the arbitrator to pass on issues relating to his own jurisdiction and authority. His range of non-reviewable discretion includes the authority to reject as well as to assume jurisdiction.

The second subsidiary question, however, is whether the Court's decisions and pronouncements, though not controlling, *should* influence the thinking of arbitrators in the exercise of their discretion on issues of arbitrability. For example, if the "subcontracting" question is before an arbitrator for decision, as in *Warrior & Gulf,* on similar facts, or if a question is raised concerning the remedial authority of the arbitrator, as in *Enterprise,* should the Court's observations about such matters as the nature of the collective agreement, the functions and role of the arbitrator, and the meaning (or lack of meaning) of the "management rights" clause be given some credence by the arbitrator?

A "pat" answer would be to say that they should be persuasive to the extent they commend themselves to the arbitrator as sound expressions of principle, but no more so than the observations of others, such as other arbitrators or commentators. I remind you, however, that the Supreme Court has assumed, under the authority of Section 301 of the Taft-Hartley Act, the role of shaping federal substantive law concerning the nature of the collective bargaining agreement. It can be argued, therefore, that the Court's pronouncements on this subject are entitled to greater respect than are those of others.

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21 Smith, *op. cit.,* n. 3, at p. 12.
22 See discussions cited *supra,* n. 3.

The ultimate question may be put this way: When the Court speaks concerning the meaning and implications of provisions of a labor agreement, are its views to be taken as laying down rules of interpretation which are part of the federal substantive law? The problem here reaches beyond issues of arbitrability and into the "merits" of claims concerning the interpretation of the agreement.

If, for example, a *Webster-type* case concerning the question of the existence of an implied restriction on subcontracting should reach the Supreme Court, and the Court should construe the "union shop" clause as did the Seventh Circuit (as giving rise to an implied prohibition on subcontracting), could such a decision properly be disregarded by an arbitrator even though he disagrees with it? If one regards such a decision by the Court only as indicating its view of the implications deriving from some clause in the labor agreement—that is, that the Court, like the arbitrator, is simply interpreting the agreement which is before it—the clear answer is that the arbitrator can disagree, and should disagree, if some other interpretation seems to him to be proper.

If, on the other hand, one regards such a decision by the Court as meaning that a provision or provisions of the labor agreement have certain meanings and implications as a matter of federal substantive law, or as controlling indications of the parties' intent, the ultimate question in terms of the arbitration process is whether an arbitrator is bound to accept and apply such views in order to render an award which is not subject to being set aside. Orthodox analysis would indicate a negative answer, since it is assumed the arbitrator has the power to make an incorrect as well as a correct decision, even on a question of law. But I suggest that we are here involved in an area of special difficulty in view of the ultimate control which the federal judiciary has over the arbitration process, the role ascribed to it in developing a federal law concerning the labor agreement, and the disposition of the Supreme Court, evident in areas such as the delineation of federal and state authority, to regard as desirable a pattern of national uniformity of labor law.

These comments are offered only as a tentative analysis, for the purpose of suggesting the problems involved, and not as indi-

cations of the answers I would give upon the basis of a more extensive consideration of these problems. This is one of the areas to which Prof. Jones and I hope to address ourselves at a later date.

(3) In determining "arbitrability," should arbitrators be influenced more by specific limitations than by general or specific reservations in the "management" or other clauses of the agreement?

The formulation of this question in the program, as with respect to question No. 2, is not accurate in terms of how it was submitted for inclusion. The question should read as follows: "In determining whether a claim is arbitrable, *are* arbitrators influenced (or should they be) more by specific limitations in the *arbitration* clauses than by general or specific reservations of rights in the 'management' or other clauses of the agreement?" Thus, the intent was to encompass not only the question whether arbitrators *should* be thus influenced, but whether experience shows that they *are* thus influenced, and the question was intended to be directed to a comparison of specific exclusionary language in the arbitration clause with specific reservations of managerial rights in other clauses of the agreement.

I have already discussed this matter, and have indicated that I think the answers, at least on the "ought" or "should" question, are affirmative, on balance. Whether empirical examination of arbitration decisions will support this conclusion remains to be seen.

(4) Since determination of arbitrability often requires consideration of the merits of the claim, should arbitrators consider as binding or persuasive decisions by Federal courts on such issues?

Here again, in my discussion of Question No. 2, I have indicated a tentative analysis of this problem. Further discussion of it is reserved for the future.

V

The survey of the views of members of the Academy, to which I referred earlier, included one other matter which touches upon the problem of "jurisdiction" or "arbitrability," in the area of

remedial powers, broadly defined, to which I have already alluded. We asked the arbitrators this question: "In your opinion is the arbitration process suitable for the disposition of damage claims for breach by the union of a no-strike agreement?" Statistically, the "returns" thus far received show that arbitrators think the arbitration process suitable, by a vote of about 60%. However, some very interesting reactions have been received, and I think they suggest some questions which should be explored in some depth.

The arbitrators note the obvious difference between deciding whether there was, in fact, a breach of the no-strike agreement and deciding whether damages should be awarded. There seems to be a general consensus that arbitrators are perfectly competent to decide the first question, and, indeed, that this type of question falls within the area of the arbitrator's special expertise. They are much less certain, however, of their competence, at least those who are not lawyers, to handle the assessment of damages.

Some express concern that there may be involved here some evidentiary and other problems which are different from and more difficult than those usually encountered, although others disagree. Some arbitrators seem to feel that their "life expectancy" in terms of future acceptability would be jeopardized by performing their inevitable duty, if jurisdiction is assumed, of imposing what might be very heavy monetary penalties upon their good union customers. They would prefer to leave this distasteful task to the courts. Others are not concerned about this.

Finally, there is a very considerable question in the minds of many arbitrators whether the parties intended that the arbitration process be used for this purpose. It is this last point, of course, which relates this problem to the subject of my paper, which is, to repeat, "Arbitrators and Arbitrability."

Some of the answers given by members of the Academy are so interesting that I quote a few of them here without in any way attempting to indicate to what extent they are typical: [23]

> *Arbitrator "A":* [The arbitration process is suitable.] On the other hand, assuming a violation, there is no doubt that this kind of issue is highly volatile and that an arbitrator would incur the

[23] The "alphabetical" identification of arbitrators does not necessarily refer to the same arbitrators previously so identified.

enmity of the disaffected union. But if this is a factor which appears significant on first glance, surely any arbitrator of any experience who has handled discharge cases and has held against unions in the process, should recognize that the heat may differ in degree but he still can be scorched. Therefore I would say that an arbitrator should expect this kind of reaction and therefore it is not a reason to withhold from this kind of dispute.

Arbitrator "B": I have doubt, but not conviction about the suitability of arbitration of damage claims, for these reasons:

i) Some arbitrators are not professionally equipped to deal with the technicalities of the law of damages;

ii) Much more importantly, I believe that a judgment in favor of an employer against a union in a civil action is often the beginning rather than the end of negotiation about the amount to be paid; an arbitration award, by contrast, is supposed to terminate the matter that has been arbitrated. Something would be lost, I think, if observance of an arbitrator's award were itself to be negotiable;

iii) An arbitrator who has continuing contact with the parties may have a tough time excluding from his mind some of his background of informal information, such as knowledge of the union's ability to pay. If the parties expect him to mediate the claim for damages, this background will be helpful. But if the arbitrator's task is solely to *assess* damages, his judgment may be distorted by information extrinsic to the particular case before him;

iv) The arbitration tribunal is more readily accessible than most civil courts, with their clogged calendars. Ordinarily this is a great advantage. Damage claims, however, reflect emotion-charged situations. Whether it is desirable to bring them on for an early hearing, before passions have had time to cool off a bit, is problematical. In this instance the more leisurely judicial process may enhance the chances of ultimate settlement without the necessity of a trial.

Arbitrator "C": I don't believe the arbitration process is particularly suited for the disposition of damage claims for breach by the union of a no-strike agreement. I am aware that such damage claims are now coming before arbitrators with increasing frequency, but I regret this development. In the area of damage suits, I think the courts are more competent than the arbitrators, and I feel it would be unwise for arbitrators to become involved in such actions. There are several reasons for this feeling. In the first place, damage suits don't contribute much to the labor-management relationship. Secondly, such suits are frequently

standard tactics when the parties are engaged in industrial warfare, and the suits are often withdrawn when a strike settlement is reached. Finally, and perhaps most important, damage suits of this kind do not fall within the vital but restricted area of grievance disposition which the arbitration process is primarily designed to handle. The employer generally has the remedy of discipline or discharge in alleged breach of a no-strike agreement.

On the other hand, if the parties enter into a Submission Agreement authorizing the arbitrator to deal with the question of damages, then he has no alternative but to accept jurisdiction. In the absence of such clear-cut authority, it would seem advisable to avoid arbitration of such matters.

Arbitrator "D": My shot-gun reaction is that there is nothing in the nature of the arbitration process which would render it unsuitable for the disposition of such claims. Like problems are handled by arbitrators all the time in commercial arbitration. However, the presentation and defense of claims of this nature probably would require much more time than now is used in the average labor arbitration, and certainly would require representation of both parties by legal counsel. It may be, also, that the unavailability of compulsory process to compel the production of testimony and of other evidence would render it difficult to handle these claims adequately in arbitration. This is all the comment that occurs to me.

Arbitrator "E": I believe the arbitration process is just as suitable for the disposition of damage claims for breach by the union of a no-strike agreement as it is to dispose of damage claims against runaway or subcontracting employers. However, I have had a good deal of doubt about the suitability of the process in the latter cases. To adjudicate damages in runaway shop cases in a process where the rules of evidence are as loose as they are in arbitration, and the arbitrator lets everything in "for what it is worth," with the result that the "worth" may get up to several hundred thousand dollars, as in some recent runaway cases, is a bit appalling. My associates and I are inclined to wonder whether arbitrators will have the intestinal fortitude to visit similar penalties upon unions which breach a no-strike agreement.

Arbitrator "F": I don't think I would want to say that anything the courts can do we can do better. But it is not immediately apparent to me why damage claims are more suitably determined through the judicial than the arbitral process. We determine issues of contract breach every day. We also are involved regularly in fashioning appropriate remedies for breach. The strike damage remedy would involve us, to be sure, in what might be complex issues of proof. But if courts can do it, why

> can't arbitrators? Perhaps it may be reasoned that we have no special expertise in measuring damages to a business done by a strike interruption. I am inclined to concede this. But there are, after all, other advantages of arbitration, such as speed, informality, flexibility of evidence matters, and avoiding, in some states the vagaries of a jury verdict. As a matter of fact, the arbitration of damage claims was long established before labor arbitration caught on.
>
> *Arbitrator "G":* The non-law trained man might be pretty dangerous. However, if the parties do proceed to submit their questions of damages to arbitration rather than to a court, they are likely to get by chance some very good results from arbitration. "Even a blind pig will occasionally find an acorn." Incidentally, they could get some very bad results from some of our, let's say, "less gifted" courts.
>
> *Arbitrator "H":* (a non-lawyer) [Thinks the arbitration process suitable, but with considerable doubt.] I would be inclined on this point to defer to the judgment of yourself and your lawyer-arbitrator colleagues.

In addition, to quote by name one of our colleagues, Lew Gill (who authorized the quotation): "I'm deliberately trying to keep an open mind on this question, since I have a case coming up next month involving that identical question." I think I should also quote our President, Ben Aaron, since his pertinent remarks are already in the public domain:

> Of course, if the arbitration provision broadly includes "all grievances," and if the employer, as in the *Drake Bakeries* case, is expressly given the right to file grievances and appeal them to arbitration, it may be argued that his claim that the union has violated the no-strike clause should be handled in the same manner as any other grievance. But that argument overlooks several important considerations. First, the assessment of damages for breach of contract is not a normal function of arbitrators and is only rarely provided for in collective agreements. Thus, in the usual case, the arbitrator would lack the authority—to say nothing of the informed judgment—to determine the measure of damages, even though he found that the union had violated the no-strike clause. Second, the arbitrator's award is not self-enforcing. The employer would thus be put to the additional trouble of securing his damages by court action after he had won his case on the merits in arbitration. Therefore, absent specific language in the agreement giving the arbitrator jurisdiction over claims that the no-strike clause has been violated, it would seem that

considerations of fairness and common sense favor determination of that issue and the granting of appropriate relief in the nature of damages by the courts.[24]

Need I say more about this problem than to make the obvious point that the questions of "arbitrability" of damage claims for breach of no-strike agreements, and of the suitability of the arbitration process with respect to such claims, at this juncture are aboard a ship in an uncharted sea. But it is not the Saragossa sea. There are both direct and cross currents which are likely to produce some motion of the vessel in some direction.

VI

The foregoing concludes what I have to say, for now, concerning the subject assigned to me. Many experienced arbitrators, particularly those functioning as umpires with substantial experience with particular parties, say they scarcely ever encounter a problem of "arbitrability," as such. I suspect, however, that they mean by this either of two things—either the questions relating to their authority are so well settled that an issue identifiable as one of "arbitrability" is seldom presented to them; or else an issue which could and would be considered as involving "arbitrability" by other parties under other contracts is presented to the umpire for what it in many cases basically is, as an issue on the "merits." *Ad hoc* arbitrators, however, continue to face the issue, although perhaps less frequently than before the 1960 "Trilogy." Analysis of the kinds of issues thus presented continues, I believe, to be an important task.

Discussion—

LOUIS A. CRANE *

If the apparent concern about arbitrators' decisions involving their own "jurisdiction" or "authority" has done nothing else, it has provided us with Professor Smith's excellent analysis. He has described accurately the characteristics of "arbitrability" issues. He has catalogued the various forms the issues take, and he has

[24] Aaron, *op. cit.*, n. 3.

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posed some of the problems they raise. Also, it seems to me that he has placed the 1960 "Trilogy" in its proper perspective when he says ". . . they (the Supreme Court decisions) settle the issues of arbitrability only at the level of the propriety of judicial interception or review of the arbitration process. They lay down rules for the courts, not for the arbitrators, and they narrow the permissible range of judicial intervention."

However, to the extent that the Supreme Court's decisions circumscribe the area of judicial intervention and lay down rules for the courts, they provide the parties with some guidance in deciding whether to seek a court's aid in compelling arbitration or staying arbitration proceedings, whether to present an issue of "arbitrability" to an arbitrator, and whether to accept the arbitrator's decision or to ask a court to set it aside.

The Supreme Court's decisions also have provided a basis for the parties to reappraise the arbitration clauses in their collective bargaining agreements in the light of their respective interests. Arbitration belongs to the parties, and it is for them in their agreement to make clear what the proper subjects of arbitration shall be, what subjects shall be excluded from arbitration, what procedures must be followed before arbitration is available, and what "authority" an arbitrator shall have. Failure of the parties to reach an understanding on these matters and to state fully their intentions may create serious questions of arbitrability.

When issues of arbitrability arise and they are submitted to an arbitrator, the arbitrator must take the arbitration provisions and the facts as he finds them. Presumably, the arbitration provisions—whether they are "broad" or "restricted" or merely unusual—represent the parties' own assessment of where their mutual interests lie. These interests are vindicated and protected by an arbitrator when he determines the right of the party seeking arbitration to invoke the arbitration process within the framework of the agreement.

Issues of "arbitrability," like other kinds of issues, may involve questions of fact as well as questions of contract construction. There seems to be little, if any, qualitative difference between resolving a question of whether a company had waived the late

appeal of a grievance and a question of whether a disciplined employee did what he was accused of doing. Both are questions of fact which must be resolved. There likewise seems to be little, if any, qualitative difference between a determination of whether an arbitration clause encompasses a particular grievance and a determination of whether employees are entitled to four hours' call-in pay in the circumstances which necessitated sending them home after 10 minutes' work. Both are questions of contract interpretation or construction.

Legal implications aside, there is no real difference between issues of "arbitrability" and other kinds of issues which the parties submit to arbitrators for decision. Yet, according to the questions listed on the program (and to some extent Professor Smith's paper), you get the feeling that asking an arbitrator to decide his own "jurisdiction" or "authority" is like asking a rabbit to guard a carrot patch.

These reservations, I gather, stem from a fear that arbitrators might be unduly influenced by the 1960 "Trilogy" as a declaration of public policy favoring "arbitrability." Reliance upon a general public policy and disregarding the circumstances confronting you is a dangerous business. What is more, declarations of public policy favoring arbitration as a means for resolving labor disputes arising under a collective bargaining agreement are nothing new. They antedate the 1960 "Trilogy." Perhaps, all things being equal, arbitrators would tend to hold a grievance "arbitrable." But, without an extensive and intensive study, it would be difficult to say whether this is due to arbitrators' concepts of the nature of the collective bargaining agreements, the Supreme Court's declarations or a feeling that any doubt should be resolved in favor of giving a man his "day in court."

Discussion—

PETER M. KELLIHER*

This discussion of Russ Smith's paper would have more dramatic interest if the discussants could find some basis for sharp

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disagreement with his conclusions. He has, however, clearly posed the problems, stated the authoritative findings where they exist, and courageously offered his own solutions in many unchartered areas. While it is true that perhaps most of our members have lived through an arbitration lifetime without ever conducting an ex-parte hearing, or having their awards challenged in courts of law, the issue of arbitrability is nevertheless very much alive. This is true whether the question is nakedly presented as one of jurisdiction or whether it appears in a more disguised form. Where, in a situation similar to the Hein-Werner case, the interests of certain of the employees are adverse to the position taken by the union, the query is raised whether the arbitrator should not take a hand in securing "due process." Upon learning the nature of the issue, should he not urge the parties to have all of the employees affected present at the hearing. If they are present, should the union not be persuaded—despite its conviction that it speaks for all employees as the bargaining agent—that due process can be obtained and future possible problems avoided by giving these employees an opportunity to speak and testify.

Because a common factual situation frequently exists both as to the issue of jurisdiction as well as the issue "on the merits," should arbitrators not undertake to have the parties proceed "on the merits" while preserving the jurisdictional objection? In matters where time limits are involved and the contractual provisions are clear, on the other hand, it is my opinion that the arbitrator should immediately decide this issue at the hearing and prior to proceeding to any discussion "on the merits." To return, however, directly to the issues considered by the speaker, most arbitrators do take very seriously the issue of arbitrability. It is difficult to believe that arbitrators have changed their mental processes in any fundamental sense as a result of the 1960 "Trilogy." It is doubtful whether the fear of court reversal had any actual impact on the arbitrators' decisions in this field even prior to the "Trilogy." Certainly, in most areas of the country, there were only isolated attacks through courts on the arbitrator's assumption of jurisdiction in most of these matters.

The survey of Russ Smith and Dallas Jones did give our membership an opportunity to voice its views on the question of the desirability of the use of the arbitration process in the assessment

of damages for the violation of a no-strike agreement. Only a limited number of contractual provisions do permit management to present grievances. Such a condition would occur only in those contracts containing such an express provision or as a result of a special submission agreement authorizing an arbitrator to determine such an issue. The most significant objection here is whether, under the normal contractual relationship, the parties do intend that arbitrators should determine this type of an issue. Is not such an issue beyond the usual day-to-day grievance role of the arbitrator? Since an award favoring the company would in most cases result in court litigation to enforce the award, should not such a difficult and technical problem of damages be presented to courts as a complete matter *ab initio?* Arbitrators lack the necessary judicial powers to compel the production of testimony and often are unable to subpoena records in order to handle adequately these types of claims. This arbitrator does have some reservation as to whether, even in "run-away shop" cases, arbitration is the proper forum to determine these difficult questions of damages.

The most significant portion of our speaker's address relates to the role of the Supreme Court under the authority of Section 301 of the Taft-Hartley Act in shaping a federal substantive law concerning the nature of the collective bargaining agreement and the arbitrator's acceptance of Supreme Court decisions in his determinations.

Arbitrators should concur in the desirability of a pattern of national uniformity in the field of labor law and do recognize the ultimate control which the federal judiciary has of the arbitration process.