CHAPTER I

RUMINATIONS ABOUT IDEOLOGY, LAW, AND LABOR ARBITRATION

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I propose to try to say something about three persistent and interdependent questions: First, is the arbitration system especially vulnerable to pressures that are incompatible with a fair and even-handed dispute-settling mechanism? Second, what is the appropriate role of the courts in actions challenging an award as wholly incompatible with the governing agreement? Third, what is the proper role of the arbitrator with respect to statutory or policy issues that are enmeshed with issues concerning the interpretation of the collective bargaining agreement?

The first two issues have, of course, been highlighted by the sharply conflicting assessments of arbitration by Mr. Justice Douglas and Judge Hays. There are several ironic aspects to their disagreement. Mr. Justice Douglas, evidencing an unusual devotion to the passive virtues, said in effect: "Anything we can do, arbitrators can do better." Judge Hays, although an eminent ex-arbitrator, answered: "They got plenty o' nuttin' " and "Let's call the whole thing off." Incidentally, my own view [1] about each of those performances is, "It ain't necessarily so."

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[1] See Meltzer, "The Supreme Court, Arbitrability, and Collective Bargaining," 28 *U. Chi. L. Rev.* 464 (1960); Meltzer, "Review of Hays, Labor Arbitration: A Dissenting View," 34 *U. Chi. L. Rev.* 211 (1966). That review is the source of the comments below about the general fitness of arbitration as a method of adjudication.

Appraisal of Judge Hays' Views

Before venturing some comments about the principal counts in Judge Hays' indictment, let me summarize my views about his methodology: His charges generally suffer from a painful lack of documentation, and when he reaches for evidence, his methods are distorted by a passion for denunciation. In short, he has substituted for the Supreme Court's mythology of arbitral excellence a new mythology of arbitral corruption and incompetence.

Any judgment about the competence of arbitrators is complicated by two factors: First, arbitration is obviously not a unitary system. It reflects all the diversities that apply to any single professional group and compounds those diversities by drawing its personnel from a smorgasbord of occupations, all of which may, or may not, constitute a profession. Second, a good deal of arbitration is invisible because only a small proportion of awards is published and because an award is, of course, only a fragment of the total proceeding. For these reasons, I will not engage in the act of faith or despair that any blanket indictment or eulogy involves. But in accordance with a suggestion by Professor Edgar Jones that arbitrators should keep their humility in order, I want to quote a short passage from Bernard Dunau's critical review of Hays' lectures: "It is unfortunately true," Dunau said, "that the level of judging, whether judicial, administrative or arbitral, is in the overall quite mediocre, but for those who have worked in all three forums, the arbitrator does not suffer by comparison." [2] In any case, the parties can much more easily escape from mediocrity in arbitration than in other forums, although their freedom to do so is, of course, limited by the need for joint acceptability.

It is that need which is the basis for the principal count in Hays' indictment. "A proportion of arbitration awards," he tells us, ". . . are decided not on the basis of the evidence or of the contract or other proper considerations" but in a way designed to preserve the arbitrator's employability.[3] And he goes on to suggest that, regardless of the proportion of such awards, which is unknown, a system of adjudication in which the judge's income depends on

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[2] Dunau, "Review of Hays, Labor Arbitration: A Dissenting View," *The American Scholar*, Vol. 35, No. 4, (Autumn 1966), pp. 774-776.
[3] Hays, *Labor Arbitration: A Dissenting View*, (New Haven: Yale University Press, 1966), p. 112.

pleasing those who engage him is *per se* a thoroughly undesirable system, wholly incompatible with the independence a judicial officer should have.[4] This charge plainly goes to the heart of the system and is wholly independent of varying estimates of arbitral competence, although it may have some relationship to occasional excrescences of the system, such as the rigged award.

There is, in my opinion, some basis for the fear that economic self-interest and the desire to be loved, which are linked with future acceptability, will distort adjudication. Such a risk must be acknowledged unless all arbitrators are angels—a position that even Mr. Justice Douglas or, indeed, arbitrators themselves are unlikely to accept. But Judge Hays ignores two important considerations: First, all systems of adjudication involve a similar risk. Second, important safeguards against self-regarding adjudication are built into the arbitration system. The neglect of those safeguards has, in my opinion, led Judge Hays greatly to overrate the distortion that actually results from the need for acceptability.

Safeguards in Arbitration

Those safeguards are well known and have been effectively presented in Saul Wallen's review [5] of Hays' book. Nevertheless, they bear restatement because of their fundamental importance to the integrity of the arbitration system. The losing party is generally the principal threat to the arbitrator's future acceptability. To be sure, all of us have heard even winners grumble about an arbitrator's handling of the hearing or the quality of his opinion, but such complaints are healthy because they suggest that acceptability turns on the overall quality of the arbitrator's performance and not merely on his decision. In any event, the principal question for an arbitrator, assuming for the moment that he is ruled by a greedy desire for more customers, is how to reduce the risk implicit in the fact that one party generally will lose. I can think of no better answer to that question than conscientious workmanship, for such workmanship appears to be the best protection against the veto that labor and management will each be able to exercise in the future. The need for future acceptability would

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[4] *Ibid.*

[5] "Arbitrators and Judges—Dispelling the Hays' Haze," *Labor Law Developments,* Proceedings of The Southwestern Legal Foundation's Twelfth Institute on Labor Law, (Washington: BNA Incorporated, 1966), p. 159.

thus appear to bring the arbitrator's self-interest and disinterested adjudication into harmony rather than conflict. Consequently, even if one accepted a devil's view of arbitrators as a group ruled by love of money, it would not follow that the pressure for future acceptability would corrupt the decisional process. On the contrary, the "invisible hand," so dear to some of my economist friends, appears in the context of arbitration to link the private ends of arbitrators with the public interest in justice. That kind of harmony between private and public purposes is important for the suitability of any adjudicative arrangement and becomes of critical importance as the number of arbitrators devoting substantially full time to arbitration increases.

The devil's theory of arbitration rests, moreover, on some dubious presuppositions about arbitrators as a class. It presupposes that they lack a sense of integrity, of craftsmanship, and of self-respect, and that they are essentially a craven group of money-grubbers, abjectly fearful of displeasing their customers and willing to default on their responsibilities to avoid such displeasure. I find no basis in Hays' book or in my experience for so denigrating a view. Indeed, the arbitrators whom I know impress me as conscientious men, who are willing to call them as they see them. Differing judgments about the character of a large and shifting class may, of course, result from different slices of experience and different standards of judgment, and I do not claim an adequate basis for reliable generalizations about a heterogeneous and largely invisible group.

Judge Hays' view of the parties is no more flattering than his view of arbitrators. He sees the parties with their weapons of economic reprisal ready for use against the arbitrator who rules against them. That view ignores the fact that the parties are sometimes shaken and occasionally even persuaded by a well-reasoned opinion and that the parties also understand that honest and reasonable men may disagree. There are, moreover, bits and pieces of evidence that call into question the judge's dismal forebodings. There are, to my knowledge, refreshing instances where the loser has praised the arbitrator's opinion and has called on him for more work. There are also denials by lawyers appearing in arbitrations that they respond to defeat with indignation or blacklisting. Finally, it is striking that lawyers for unions and

management are respected arbitrators. Their reputation for integrity and competence has overcome suspicions of partisanship generated by their associations or their view of the world. It is, of course, possible that one canny forum-shopper will rely on the partisan connections of an arbitrator to influence him to lean over backwards while the other side will rely on his doing what comes naturally. But, if my thoroughly unscientific poll of lawyers is reliable, it is not such gamesmanship that is at work but rather the parties' confidence that men of integrity and competence can, as adjudicators, transcend their personal loyalties and discipline their personal values. It is the existence of such a tradition in arbitration, as in law or medicine, that is, in my view, the decisive condition for an acceptable system, and I am confident that that condition is usually satisfied.

Furthermore, Judge Hays, as I have already suggested, fails to consider the extent to which similar pressures operate on official tribunals. I do not mean to justify distortion, partisanship, or sloppiness in arbitration by pointing to their existence elsewhere. But the judge was engaged in comparing alternative tribunals in a real world. Accordingly, the methods of staffing official tribunals, such as the labor court proposed by Hays, deserve attention. This is not the place for an extended discussion of the factors that enter into the selection of administrative and judicial personnel. It is enough to say that, through the politics of patronage, adjudication often is entrusted to mediocrities, who may seek to remain acceptable to those who have conferred past favors and who may determine future preferment. Indeed, as this Academy has been reminded from time to time,[6] the fear of partisan and mediocre official tribunals has contributed to the growth of labor arbitration. The existence of such fears underscores the limitations in an appraisal of arbitration that, like Judge Hays', exaggerates the vices of arbitrators, then assumes that alternative machinery would conform to an ideal model, and finally concludes that arbitration should be supplanted by new tribunals or that there should be a fundamental alteration in the relationship between arbitration and the judicial system.

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[6] See, *e.g.*, Aaron, "On First Looking Into the Lincoln Mills Decision," *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting of the National Academy of Arbitrators, (Washington: BNA Incorporated, 1959), p. 12.

Public Interest in Arbitration

Even if Judge Hays' dismal appraisal had the analytical and empirical support that it conspicuously lacks, some might suggest that the parties shape and pay for their dispute-settling mechanism and that their choice of a fool or a rogue for an umpire is private rather than public business. That suggestion would, in my view, be manifestly erroneous because it would brush aside important public dimensions of this private system.

Arbitration is an adjunct of a bargaining system that has been shaped by the compulsion of law. Furthermore, both the courts and national and state legislatures have endorsed arbitration; indeed, the courts had placed their coercive power behind arbitration awards long before *Lincoln Mills* [7] and the *Steelworkers* trilogy [8] made arbitration the darling of national labor policy.

The public interest is also involved because arbitration constitutes an alternative and an obstacle to the use of official machinery. Thus, prior resort to arbitration, and indeed its pendency or availability, may move the NLRB to withhold its jurisdiction and may also influence the substance of the Board's action where it takes jurisdiction.[9] Similarly, under the Norris-LaGuardia Act, a moving party may be denied injunctive relief against serious acts of violence on the ground that he has rejected arbitration.[10] Finally, it has been held [11]—erroneously I believe, although I will not argue the point—that arbitral determinations are, in some circumstances, binding in connection with related causes of action maintained in the courts. Plainly, such displacement of official machinery by arbitration would be intolerable if arbitration, as Judge Hays charged, were *per se* a thoroughly undesirable method of adjudication.

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7 *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957), 40 LRRM 2113.
8 *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), 46 LRRM 2414; *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960), 46 LRRM 2416; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), 46 LRRM 2423.
9 See, *e.g., International Ass'n. of Machinists (J. A. Jones Construction Co.),* 135 NLRB 1402, 49 LRRM 1684 (1962).
10 *Trainmen* v. *Toledo P. & W. R. Co.,* 321 U.S. 50 (1944), 13 LRRM 725. But *cf. Local 721, Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247 (1964), 55 LRRM 2580.
11 *Los Angeles Paper Bag Co.* v. *Printing Specialties Union,* 345 F.2d 757, 59 LRRM 2427 (9th Cir., 1965).

The final dimension of the public interest in arbitration is the most important and the most obvious one. Arbitration is designed primarily as an instrument of justice for the industrial community, and the state could not properly rely on an inadequate market mechanism to discharge one of its fundamental responsibilities. Furthermore, the quality of arbitral performance will not only affect equity and efficiency in the plant, but will also have consequences that radiate far beyond the plant. To workers, the line between official and private adjudication is likely to be an unimportant one; and the integrity, actual and apparent, with which arbitrators discharge their function will influence the respect of employees, among others, for the rule of law generally. That consideration, however imponderable, takes on a special importance when the idea of law is being challenged by recourse to force in many sensitive areas of our national life.

Coordination of Arbitral and Judicial Functions

The achievement of the private and public purposes linked to arbitration depends on a suitable coordination of the judicial and the arbitral functions, and it is one aspect of that problem which I now want to explore. The Supreme Court, seeking such coordination in the *Steelworkers* trilogy,[12] emphasized that in general the "merits" were for arbitrators rather than the courts. Those cases, and *Enterprise Wheel*[13] in particular, were, however, not crystal clear as to whether the severe limitations imposed on courts when the issue is whether a dispute should be arbitrated were to be equally applicable when the issue is whether an award should be enforced.

In *Enterprise Wheel,* the Court, you will recall, declared:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When

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[12] *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), 46 LRRM 2414; *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960), 46 LRRM 2416; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), 46 LRRM 2423.

[13] *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), 46 LRRM 2423.

the arbitrator's *words* manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[14]

That passage is susceptible to conflicting interpretations as to the scope of post-arbitral review. Under one interpretation, the arbitrator's award or his remedy is not to be disturbed provided that he says that his award rests on the agreement. It is only when his "words," as distinguished from his result, manifest an infidelity to the agreement that judicial enforcement of his award is to be denied. In other words, unless the arbitrator confesses that he has strayed beyond the agreement, his award is to be treated as drawing its essence from the agreement.[15] That interpretation would serve to exclude courts from the merits and would, accordingly, be faithful to the basic thrust of the trilogy.

Nevertheless, that interpretation is not without its difficulties. It would provide for a somewhat sterile regulation of the arbitrator's rhetoric but not his action. It would, accordingly, not reach situations where his action, speaking louder than his words, plainly appeared not to draw its essence from the collective bargaining agreement. Furthermore, that interpretation might result in discouraging arbitrators from writing opinions, which the Court said were a good idea.

In his lectures, Judge Hays rejected judicial review limited to the rhetoric of the award, and as to post-award review supported a distinction made by the Second Circuit between an arbitrator's "jurisdiction" to be wrong and his "authority" to decide issues contrary to the contract.[16] Perhaps others will find that distinction clearer than I do. My puzzlement results from my assumption that the arbitrator is wrong only when he decides issues contrary to the contract and that accordingly, if he has jurisdiction to be wrong, he has jurisdiction to decide things in a way that a court would consider contrary to the contract. Perhaps, the distinction is between an arbitrator's jurisdiction to be "wrong" and his jurisdiction to be "preposterously wrong."

Despite my doubts about the meaning of the Second Circuit's distinction, I am certain that that distinction foreshadows another

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14 363 U.S. at 597 (emphasis added).
15 See Meltzer, "The Supreme Court, Arbitrability, and Collective Bargaining," 28 *U. Chi. L. Rev.* 464, 484-485 (1960).
16 Hays, *supra,* note 3, at 80-82.

confrontation between courts and arbitrators as to who is to be master of the merits in actions to enforce or vacate an award. Consider, for example, the familiar clause barring the arbitrator from adding to, or subtracting from, or altering, the provisions of the agreement. In almost every case, the disappointed party will be able to point to that clause as a restriction on the arbitrator's award-granting authority. Furthermore, a judicial determination as to whether the arbitrator observed that restriction would almost always involve a scrutiny of the merits. Finally, such a restriction, without being expressly incorporated into the agreement, could be fairly implied, on the basis, indeed, of the Court's statement in *Enterprise Wheel* limiting the arbitrator to the interpretation and administration of the agreement.

The difficulties I have just mentioned were sharpened by *Torrington Co.* v. *Metal Products Workers,*[17] recently decided by a divided Second Circuit. That case involved a 20-year policy that had granted employees paid time off for voting. That policy had been unilaterally established by the company, had never been incorporated in an agreement, and had been formally and publicly renounced by the company about 10 months before the expiration of a prior agreement. In negotiations for the renewal agreement that governed the grievance, the company had stated that it would not reestablish the former policy, whereas the union had called for its reestablishment. The agreement, executed after a long strike in the course of which nonstrikers had not been given paid time off for voting, was silent about that matter. A grievance led to an award that the company remained bound by the established practice until it was changed by mutual agreement. The trial court's decision vacating that award was affirmed by the Second Circuit, on the following grounds: (1) The arbitrator had ignored the company's revocation of its past policy; that revocation had been excluded from arbitration by the narrow arbitration clause incorporated in the prior agreement and had, accordingly, been a matter for the company's discretion.[18] (2) The arbitrator, who had been barred by the governing agreement from adding to its terms, had ignored the fact that "labor contracts generally state affirmatively what conditions the parties agree to, more specifically.

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17 362 F.2d 677, 62 LRRM 2495 (2d. Cir., 1966).
18 See note 20 *infra* for a comparison of the two arbitration clauses.

what restraints the parties will place on management's freedom of action," [19] and had, consequently, erred in placing on the company the burden of securing the union's consent to the abandonment of the pre-existing policy.[20]

Judicial Review of Arbitration Decisions

Judge Hays did not sit in *Torrington,* but his ideas were there. His colleagues' opinion quoted this statement from his lectures: "No great harm is done by applying a liberal rule as to arbitrability if the court carefully scrutinizes what the arbitrator later decides." [21] The court then delineated the respective roles of the arbitrator and the reviewing court as follows: First, an arbitrator must stay within the confines of the agreement. Second, a reviewing court has a correlative responsibility to enforce that limitation, e.g., to pass on whether the agreement authorizes the arbitrator to expand its express terms on the basis of past practice. Third, the court should not accept the arbitrator's decision where the court can clearly perceive that the arbitrator has derived his authority from sources outside the agreement. The court recognized that its approach might be objected to as an impermissible judicial intrusion on the merits.[22] But the court, relying on the passage from *Enterprise Wheel* that I quoted above, dismissed that objection.

The dissenter in *Torrington,* who also invoked the language of *Enterprise,* forcefully urged that the majority, by examining the

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[19] 362 F.2d 677, 681, 62 LRRM 2495 (2d. Cir., 1966).

[20] The prior agreement had provided: "The arbitrator is bound by and must comply with all the terms of this agreement, and he shall not have any power whatsoever to arbitrate away any part of the agreement, nor add to, delete from, or modify, in any way, any of the provisions of this agreement. *The company's decisions will stand and will not be overruled by an arbitrator unless the arbitrator can find that the company misinterpreted or violated the express terms of this agreement.*" *Id.* at 681 n. 7 (emphasis added). The later agreement, under which the disputed award had been rendered, retained the first sentence quoted above (except for formal changes), omitted the sentence italicized above, and added provisions denying arbitral power over merit increases or wage determinations. *Id.* at 678 n. 2. The court summarily dismissed the possibility that the change in the arbitration provisions, which had been one of the causes of a 16-week strike, implied a rejection of the "reserved rights" theory. *Id.* at 681 n. 7. The court, however, surprisingly failed to mention that the later agreement contained an integration clause—a point that had been emphasized in the company's brief. See 41 *NYU L. Rev.* 1220, 1224 n. 29 (1966).

[21] 362 F.2d at 679-680 n. 4.

[22] *Id.* at 680-681, n. 6.

merits of the award, had disregarded the mandate of the trilogy.[23] He urged also that the majority had in effect revived the *Cutler-Hammer* [24] doctrine in past-award proceedings by substituting a new catch-phrase—"the arbitrator's authority"—for "the arbitrator's jurisdiction." [25] The dissent is, in my view, more faithful to the central thesis of the trilogy.

Nevertheless, at the risk of forfeiting whatever good will I still may have here, I renew an earlier suggestion that the courts in actions involving the validity of the award should have more responsibility for the merits than in actions to compel arbitration.[26] Unlike the Second Circuit's and Judge Hays' view, that suggestion relies not on what is, I believe, an unworkable and spurious dichotomy between "jurisdiction" and "authority," but on the following considerations: At the enforcement stage, the court would have the benefit of the arbitrator's expertise in the same way that a court reviewing the decisions of an administrative agency has the benefit of administrative expertise. The suggested approach would, moreover, permit the arbitration process to realize its potential for therapy and would, at the same time, recognize that the award, although therapy for one party, may be poison to the agreement, whose purpose, after all, is to provide a code for both parties rather than a couch for one of them. Beyond those considerations are more important ones that go to the responsible exercise of judicial power. It is, I believe, questionable to require courts to rubber-stamp the awards of private decision-makers when courts are convinced that there is no rational basis in the agreement for the award they are asked to enforce. In no other area of adjudication are courts asked to exercise their powers while they are denied any responsibility for scrutinizing the results they are to enforce. The courts, moreover, exercise such responsibility in areas at least as complex and specialized as labor arbitration, whose mysteries have, I believe, been sometimes exaggerated. In any case, the unique attempt to shrivel judicial responsibility in enforcing arbitration awards is likely to fail because it runs against the grain of judicial tradition. It is thus not surprising

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[23] *Id.* at 682-683.
[24] *In re International Ass'n of Machinists* v. *Cutler-Hammer, Inc.*, 297 NYS 2.d 519, 74 N.E.2d 464, 20 LRRM 2445 (1947).
[25] See 362 F.2d at 684.
[26] See Meltzer, *supra*, note 15, at 485.

that other circuits have adopted an approach similar to that of the Second Circuit.[27]

The exercise of some judicial responsibility for the results to be enforced seems to me not only inevitable but desirable from the standpoint of arbitration. I do not, of course, mean to suggest the desirability of frequent recalcitrance by the losing party and frequent appeals to the courts. Arbitration is already sufficiently expensive and slow. But the prospect of responsible, albeit limited, judicial review, even though rarely resorted to, is likely to deepen the arbitrator's sensitivity to the admonition in *Enterprise Wheel* about the sources of his authority. The existence of a judicial check on arbitral aberrations is, moreover, likely to make the parties, and especially employers, more willing to agree to arbitration clauses, without demands for exclusion clauses that multiply issues in negotiations. Finally, such review presumably would promote clearer and better-reasoned opinions by arbitrators. In short, I am suggesting that limited judicial review in this context would have its customary institutional values.[28]

There are serious risks, as well as substantial values, involved in even such drastically limited judicial review. The overriding risk is, of course, unenlightened, heavy-handed, and excessive intervention. But that risk is much smaller than it was a generation ago, because of the work of this Academy, because of the emphasis the Supreme Court has given to the values of arbitral autonomy, and because the parties generally realize that such values are jeopardized by excessive reliance on the courts. Indeed, in the Midwest long before the trilogy the parties rarely challenged an award. Thus, when the enactment of the Uniform Arbitration Act was being considered in Illinois, knowledgeable persons could not point to a single instance of recalcitrance. I will resist the temptation to speculate about why there has been considerably greater resort to the courts in the East.

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[27] See, *e.g., H. K. Porter* v. *United Saw File Prod. Workers,* 333 F.2d 596, 56 LRRM 2534 (3d Cir., 1964), involving pro rata pensions for employees who had not fulfilled service requirements and who were terminated as a result of substantial relocation of facilities, discussed in Hays, *supra,* note 3 at 100-102. For a discussion of bases for granting pro rata pensions in such circumstances, see Bernstein, *Future of Private Pensions,* Ch. iv (1964). See also *Truck Drivers* v. *Ulry-Talbert Co.,* 330 F.2d 562, 565, 55 LRRM 2979 (8th Cir., 1964); *cf. Textile Workers* v. *American Thread Co.,* 291 F.2d 894, 48 LRRM 2534 (4th Cir., 1961).

[28] *Cf. St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 79 (1936) (Brandeis, J., concurring).

Proposed Approach

The risks of judicial review might, moreover, be moderated by a limiting formula even though a tradition of judicial self-limitation is obviously more important than limiting verbalisms. Such a tradition might be developed or strengthened by analogizing to the limitation on judicial review of a master's findings in the federal courts. Such findings are to be respected unless manifestly erroneous and thus are entitled to even more deference than those of administrative agencies. In the context of arbitration, such a formula would mean that the award would be enforced unless it clearly lacked a rational basis in the agreement read in the light of the common law of the plant where appropriate.

In this connection, the report of the Senate Subcommittee on Labor concerning the 1966 amendments to the judicial review provisions of the Railway Labor Act is instructive. That report, after referring to the rejection of a proposal that "arbitrariness" or "capriciousness" be ground for setting aside an award, stated: "This was done on the assumption that a Federal Court would have the power to decline to enforce an award which was actually and undisputedly without foundation in reason or in fact, and the committee intends that, under this bill, the courts will have that power." [29] The proposal I have advanced for arbitration subject to Section 301 is in substance similar to the assumption behind the RLA amendment—an amendment that sought to subject the two arbitration systems to the same kind of judicial review.

There is another, less important risk involved in even limited judicial review, i.e., it might compel arbitrators to write opinions in all cases, with a view to insulating their awards against judicial reversals. Indeed, Professor Wellington, who has also suggested that courts should exercise more responsibility when their enforcement powers are invoked, has intimated that arbitrators might or should be required to write opinions.[30] Although I concede that a well-reasoned opinion is generally desirable, I doubt that courts would or should impose an inflexible requirement as to opinion-writing. In most cases, the award itself will make it clear that it

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[29] See *S. Rep. No.* 1201, 89th Cong., 2d Sess., 1966, p. 3.
[30] See Wellington, "Judicial Review of the Promise to Arbitrate," 37 *NYU L. Rev.* 471, 483 (1962).

draws its essence from the agreement. Even in the cases where that relationship is not self-evident, an opinion, although especially useful, need not be required since the brief of the party that had prevailed in arbitration could present the basis for the award. Perhaps, however, a requirement, like that imposed on trial courts, to set forth findings of fact would be desirable. Such a requirement would merely recognize the obligation that every conscientious arbitrator imposes on himself.[31]

I realize that a proposal for a recognition of increased judicial responsibility in the post-award proceedings will strike many of you as a heretical retrogression that involves substantial threat to the arbitration process. I concede that danger and that there is plenty of room for reasonable disagreement about the desirability of increased judicial review, the possibility of limiting it, and indeed whether the formula I am suggesting would increase judicial review or would, as I believe, only bring it out into the open. In any event, let me make it clear that my position does not rest on the ideology of despair but rather on the conviction that arbitration, like other systems of adjudication, should not be able to conscript judicial power while denying judicial responsibility; that the courts would exercise their limited responsibility judiciously; and that such limited judicial supervision would strengthen the institution of arbitration.

Relationship of Award to Public Policy

Arbitral fidelity to the agreement is also involved in the last question I shall discuss, i.e., the arbitrator's responsibility when an award warranted by the agreement would be repugnant to an applicable federal or state policy or rule of public policy.

The following situations suggested by recent cases illustrate the general questions involved: First, a grievant who volunteered to attend a training course paid for by the employer claims overtime for travel to and from school. Under the governing contract, read in the light of past practice, it is clear that the grievant's claim should be denied, but the arbitrator reads the FLSA as requiring payment for travel time.[32] Second, a layoff is plainly consistent

[31] A transcript of the proceedings would not be a prerequisite for judicial review of an award. *Cf. Griffin* v. *Illinois*, 351 U.S. 12, 20, 24, 30-31 (1956).
[32] *Pennsylvania Electric Co.*, 47 LA 526 (1966).

with the agreement but is attacked as involving discrimination repugnant to Title VII of the Civil Rights Act.[33] A similar issue might be raised when there is no contractual basis for requiring an employer to supply information that would be required by the NLRB as an incident of the duty to bargain in good faith.[34] Since that issue is to get major attention later on in these proceedings, I will do no more than mention it here.

In the first two situations I have described, what effect, if any, should the arbitrator give to the law, which, we will assume, would be contravened by an award based on the agreement?

Before exploring that question, it is appropriate to distinguish it from other questions that have a surface similarity but are fundamentally different. One such question is how the just-cause standard should be applied and the applicable burden of persuasion defined where a grievant's employment, as in the case of an airline pilot, involves substantial risks to the public and to fellow employees and where regulation imposes duties on employers that reflect the risks involved. In such situations there is no necessary incompatibility between the contractual standard and that drawn from regulation or public policy;[35] for the contractual standard is formulated loosely, presumably for the purpose of permitting consideration of all relevant factors, including, of course, the relevant regulation or public policy. Similarly, where a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation. Arbitral interpretation of agreements, like judicial interpretation of statutes, should seek to avoid a construction that would be invalid under a

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33 *Eaton Mfg. Co.*, 47 LA 1045-1050 (1966) (Arbitration clause restricting arbitration to grievances "involving interpretation of the contract" does not confer jurisdiction over grievance that employer, although observing the provisions of the agreement concerning bumping and recall of females from layoff, violated Title VII of the Civil Rights Act of 1964.); *cf. UAW* v. *Chace*, 64 LRRM 2098 (E.D. Mich., 1966); *Southern Airways, Inc.*, 47 LA 1135, 1140 (1966). For a questionable assertion of sweeping powers by an arbitrator, see *Hotel Employers Ass'n. of San Francisco*, 47 LA 873 (1966), where the arbitrator not only found that an agreement between employers and a civil rights group conflicted with a prior collective bargaining agreement but also purported to invalidate the civil rights agreement on the ground that it contravened state and national prohibitions of racial discrimination, even though the civil rights group was not a party to the arbitration.

34 See, *e.g.*, *Bethlehem Steel Co.*, 31 LA 423, 426 (1938).

35 *Cf.* Blumrosen, "Public Policy Considerations in Labor Arbitration Cases," 14 *Rutgers L. Rev.* 217, 222 (1960).

higher law. In both of the situations just mentioned, the art of construction and the actual or imputed intention of the parties make it possible to avoid a direct conflict between the agreement and the law.

Where, however, there is an irrepressible conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law. My position is based on several interrelated considerations: The first one is the mandate implicit in the following statement from *Enterprise Wheel:* "[The award] may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of his submission."[36]

The basis for this approach is, of course, that the parties typically call on an arbitrator to construe and not to destroy their agreement.[37] There is, moreover, no reason to credit arbitrators with any competence, let alone any special expertise, with respect to the law, as distinguished from the agreement. A good many arbitrators lack any legal training at all,[38] and even lawyer-arbitrators do not necessarily hold themselves out as knowledgeable about the broad range of statutory and administrative materials that may be relevant in labor arbitrations. Indeed, my impression—and it is only that—is that nonlawyer arbitrators are more willing to rush in where lawyers fear to tread. Here again, an analogy to administrative tribunals is instructive. Such agencies consider themselves bound by the statutes entrusted to their administration and

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[36] 363 U.S. at 597.

[37] The parties may, of course, submit to an arbitrator either the issue of whether a given agreement is compatible with a pertinent statute or "problems" that result from the need to accommodate an agreement and the law. But such submissions, which may call for the reshaping of the agreement, are infrequent. In any event, there is not, in my opinion, any persuasive basis for giving any special deference to arbitral determinations as to the reach of the law. If, however, the parties have agreed to submit to the arbitrator issues as to the impact of regulation on the agreement and if his award calls for action that is compatible with both the submission agreement and the law, there is no reason for the courts to withhold enforcement of the award.

[38] It is true that NLRB members are not necessarily lawyers. But those who rely on that point to support an argument for broad arbitral jurisdiction over legal issues often ignore important differences between arbitrators and Board members: (1) The latter have colleagues who are lawyers, as well as a staff of legal advisors. (2) Board hearings are conducted by trial examiners who, under recent Civil Service requirements, must be duly licensed lawyers, U.S. Civil Service Comm., Announcement No. 318, *Hearing Examiners* 5 (1965). (3) Board members deal continuously with a single statute whereas arbitrators, if required to deal with the law governing collective agreements, would from time to time be confronted with a considerably broader range of national and unpreempted state regulation.

leave to the courts challenges to the constitutional validity of such statutes. Arbitrators should in general accord a similar respect to the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law. Otherwise, arbitrators would be deciding issues that go beyond not only the submission agreement but also arbitral competence. Arbitrators would, moreover, be doing so within a procedural framework different from that applicable to official tribunals. Finally, they would be impinging on an area in which courts or other official tribunals are granted plenary authority.[39] Under such circumstances, the limited judicial review appropriate for arbitral interpretations of the agreement would be wholly inappropriate for arbitral interpretation of the law.

Grounds for Challenge

The position that I have outlined may be challenged on the following grounds, among others: It is wasteful and misleading for an arbitrator to render an award that is clearly repugnant to a controlling statute. Furthermore, insofar as such an award commands illegal conduct, it makes the arbitrator a party to illegality, requires a judicial proceeding to set things straight,[40] and generally demeans the arbitration process by inviting noncompliance with, and reversal of, awards.

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[39] Although the Board's deference to arbitration is to be discussed by others, I wish in passing to express my strong doubts about its approach in the celebrated case of *International Harvester Co.*, 138 NLRB 923, 51 LRRM 1155 (1962), *aff'd. Ramsey* v. *NLRB*, 327 F.2d 784, 55 LRRM 2441 (7th Cir., 1964), *cert. denied*, 377 U.S. 1003 (1964), 56 LRRM 2544. *Cf. Ford Motor Co.*, 131 NLRB 1462, 48 LRRM 1280 (1961). For a thoughtful criticism of *International Harvester*, see Summers, "Labor Arbitration: A Private Process with a Public Function," 34 *Rev. Jur. U.P.R.* 477, 492-494 (1965).

[40] It appears preferable to postpone judicial scrutiny of an arguably illegal contractual provision until an award has been rendered, thereby providing the opportunity for a construction of an ambiguous provision that would make it compatible with the law. It is true that such postponement might involve delays and industrial unrest, triggered by noncompliance with an arbitration award. But delay is an inescapable cost of any primary jurisdiction approach, and industrial unrest might be reduced by a clear statement by the arbitrator and the parties concerning the existence of an unresolved issue of law. Where an award is attacked in a judicial proceeding as contrary to the NLRA, judicial competence to deal with such questions may be challenged. For suggestions that such challenges should be rejected, see Sovern, "Section 301 and the Primary Jurisdiction of the NLRB," 76 *Harv. L. Rev.* 529, 551, 564 (1963); Meltzer, "The Supreme Court, Congress and State Jurisdiction over Labor Relations II," 59 *Colum. L. Rev.* 269, 291-292 (1959).

Although those considerations reflect a praiseworthy desire to have arbitrators solve the whole problem in a fashion compatible with the pertinent regulatory framework, they are, in my opinion, not persuasive. Any deception of the parties could be avoided by the arbitrator's noting that he is not passing on the validity of any contractual provision that appears to be questionable or invalid under the law. Similarly, if an award based solely on the agreement would call for illegal action, the arbitrator could make it clear that his mandate is contingent on the legality of the contractual provision involved. In this connection, it should be observed that such provisional enforcement of illegal or unconstitutional provisions is a familiar and inescapable incident of the existence of multiple tribunals with different spheres of 'responsibility.[41] Finally, a distinction between clear and not so clear statutory violations—which, incidentally, is *Cutler-Hammer* with a reverse twist—is likely to produce substantial administrative difficulties as well as bad law.

The overtime case I referred to earlier is instructive on the last point. The arbitrator there relied on an interpretative bulletin issued under the FLSA and treated the interpretation as conclusive.[42] He made no reference to a well-known Supreme Court case that expressly denied conclusive effect to such interpretation.[43] It is not clear from his award that the status of the interpretative bulletin was argued. In any event, that issue surely deserved more consideration than it appeared to have been given.

Some of you may be ready to tax me with an inconsistency in that I am prepared to import something like the *Cutler-Hammer* test into judicial review of awards while rejecting a similar test as a basis for arbitral invalidation of a contractual provision clearly repugnant to an applicable statute. But the apparent inconsistency is not a real one because of the fundamental difference between

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[41] For example, an administrative agency may issue an order that it deems unconstitutional, leaving the constitutional issues to the courts. Similarly, it has been suggested that in actions covered by Section 301 of the LMRA, courts should enforce an agreement the execution of which was an unfair labor practice in that the union then lacked majority support. See Sovern, *supra,* note 40, at 542-543, and Meltzer, *supra,* note 40, at 292-295.

[42] See *Pennsylvania Electric Co.,* 47 LA 526, 527-528 (1966).

[43] See *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139 (1944); *Idaho Metal Works* v. *Wirtz,* 383 U.S. 190, 194, 207-208 (1966); 1 *Davis, Administrative Law Treatise,* §§ 5.03-5.05 (1958).

the arbitral and judicial roles. An arbitrator is, in general, the proctor of the agreement and not of the statutes; thus, in the absence of arbitration he has no responsibility for the statutory scheme. Furthermore, he does not directly exercise the coercive power of the state. A court, by contrast, exercises such power and in doing so is concerned not only with the agreement but also with the law that limits and governs it. To grant courts limited responsibility for measuring the award against the agreement while denying arbitrators a similar responsibility for measuring the agreement against the law is, in each case, to confer responsibility that reflects the different functions being performed and the different presuppositions about the competence of the respective tribunals.

Conclusion

My discussion of the three questions I outlined has, I know, departed from the submission in the program, which called for an assessment of arbitration. As I have suggested, the heterogeneity and substantial invisibility of arbitration are serious obstacles to assessments that have a more substantial basis than the ideology of hope or of despair. In addition, reliable assessments presuppose systematic study of the impact of the arbitration process on concrete relationships, on communications between managers and the managed, on training, on morale in all echelons, on equity and efficiency, and on bargaining. To attempt to isolate arbitration from all other variables relevant to those matters is, I know, a tall order.

Furthermore, in suggesting more research I have, unwisely perhaps, overcome my usual allergy to such suggestions that are not accompanied by detailed blueprints. I have done so because this Academy has made a useful beginning in stimulating such inquiries. They should, of course, be supplemented by additional and rigorously designed studies of how arbitrators are selected and by detached and systematic study of awards and the total adjudicative process. Since arbitrators may be reluctant to criticize each other and since many qualified critics are arbitrators, it would be desirable to stimulate such study by those courts of last resort for other forms of adjudication, namely, the law reviews. Perhaps the Academy might consider it desirable to stimulate such interest by offering prizes for excellent student work.

I do not mean to oversell the possible contribution of the studies I have mentioned to the resolution of the underlying controversies that surround arbitration. Similar studies of other adjudicative processes, such as my colleagues' study of the jury system,[44] suggest that more data may narrow the issues but will not resolve the ideological conflicts that envelop all modes of adjudication. In the end, then, judgments about arbitration will rest on faith as well as reason. My own faith in the usefulness of arbitration and the integrity of arbitrators as a class has not been shaken by recent exercises in demonology. And the work of this Academy and the concern that it has reflected for the integrity and competence of arbitration will surely make it easier to keep the faith and, what is more important, will contribute to works appropriate to that faith.

Discussion

CHAIRMAN DUNLOP: After that masterful presentation, I cannot call for the beginning of discussion without thanking you, Bernie, for three things:

First, for those kind words about the arbitration system, recognizing that within the system there is a variety of types of arbitrators and parties;

Second, for opening up for our discussion one of the most important problems in the area of arbitration, the issue of coordination of the judicial and the arbitration function;

And third, for an excellent demonstration of the high standard of conscientious workmanship which you commend in the arbitration process.

From the point of view of a nonlawyer, your talk can be divided into three parts, and I suggest we concentrate our discussion on the last two parts.

The first part is beating Judge Hays over the head, politely and reverently. The second part concerns the relationship between arbitration and the judicial system, or the review process in the enforcement of an arbitration award before the courts. The third

[44] See Kalven & Zeisel, *The American Jury*, (Boston: Little, Brown & Co., 1966).

part involves the relationship of the arbitrator's decision to matters of public policy, particularly as incorporated in the statutes or other administrative rulings.

I suggest we initiate our discussion with the second of these parts, and then go on with the third. I will make a few remarks, which will be very brief, with respect to this question of judicial review in the enforcement of arbitrators' awards, saving for later discussion a remark or two about the second question I am proposing, namely, the relationship of the arbitrator's award to public policy.

As I analyze what we heard this morning, we have three views concerning judicial review, each involving increasing penetration of the courts into the merits of arbitration awards. We were told first that there is something called the prevailing law, which says the courts will not upset the award if it draws its essence from the collective bargaining agreement.

Then there is the Meltzer formula which, on its face, involves a little greater degree of penetration, and that formula, as expressed by him, is: "In the context of arbitration such a formula would mean that the award would be enforced, unless it clearly lacked a rational basis in the agreement, read in the light of the common law of the plant where appropriate." Those are magnificent words —"a rational basis in the agreement, read in the light of the common law of the plant where appropriate."

The third theory of penetration, greater than the others, is that reflected in the views of Judge Hays, which might for practical purposes be construed in some people's minds to mean almost full review of the merits.

I think I understand these three concepts, but my problem with this discussion is that there are two different modes of discussing them.

One is the question of what these three formulas say in words, and on the other hand what, in fact, these three formulas mean, and what judges actually would do under each of these three different views. Because the practical impact of any new formula is unclear, I have great hesitation, frankly, in going very far from where we are now. I support Mr. Meltzer in bringing the problem

of judicial review more into the open, but I find it very difficult to anticipate the practical effect of his language, as compared to the existing view. I can see a world in which judges would readily find in many awards a lack of a rational basis in the agreement—it doesn't appear rational to the judge—and the judge's view of the common law of the plant and his view of what was appropriate might very well open up the award to very substantial review on its merits.

I confess, therefore, to be perplexed, because this discussion proceeds on two levels: One on the theory—words used—and the other on how the judges and how each of the parties would, in fact, read and practice each of these doctrines. As an academician, I certainly am in favor of further discussion of this vital range of problems. I am not sure that the discussion can proceed too far without a careful review of how each theory would in fact operate.

I have the view that if the courts penetrate further into the arbitration process, as they are likely to do, the parties to the collective bargaining agreement in the end may have to write into their agreement provisions specifying the type and scope of judicial review that they intend, just as, after a number of NLRB decisions on the subject of what was bargainable, a number of parties in the United States found it necessary to write into their agreement what their full agreement meant. And it may very well be that this problem is sufficiently important so that it ought not to be left solely to the courts.

I might say, in passing, that the scope of review by the NLRB and the courts was recently defined by an arbitration machinery, relating to jurisdictional disputes, over which I preside in the construction industry.

I believe there are real problems in the field discussed by Mr. Meltzer. There are screwy arbitrators. We have boards of arbitration which have no neutrals on them. We have cases in which we find individual employees appearing before joint bodies with their own lawyers, with their own representatives, outside the normal two-party process of arbitration. In other words, the arbitration system involves an increasing variety of situations. We think of a neutral acting in a normal grievance case, either *ad hoc* or as an umpire, but that is not always the situation. Because of this

diversity in the arbitration process, I share with Mr. Meltzer the concern that we may have inequitable and unreasonable results on occasion.

With those brief introductory remarks, I think it is my obligation to open for discussion this interesting paper, and particularly that part of it which deals with the review by the courts of the enforcement of arbitration awards. Our format is that anyone should be entitled to ask a question or make a brief comment.

Bernie, I take it you are prepared to reply to questions? I ask you not to comment on my remarks until later.

PARKE W. MOEW [Hughes Aircraft Company, Culver City, Calif.]: Would you care to comment on the ability of the parties to the contract to withhold judicial review of an award by the courts?

PROFESSOR MELTZER: I agree with John's suggestion. The parties have considerable flexibility in defining the role of the courts or in excluding them completely. But given the assumption of some judicial control implicit in many agreements—an assumption reenforced by *Enterprise Wheel*—the parties, if they mean to exclude the courts entirely, should use very clear language to do so.

Courts could not, of course, be excluded from considering the compatibility of an award with a governing statute. But courts would be concerned only with the validity of the award if the parties made it clear that the arbitrator's interpretation of the agreement was not to be subject to judicial scrutiny. In short, parties can fashion their own agreement with respect to the role of the courts, subject only to statutory mandates or general rules of public policy that cannot be contracted away, for example, rules against bribery.

ARTHUR WISEHART [American Airlines]: Would there be, in your view, any distinction between the extent of judicial review of a determination by an adjustment board under the Railway Labor Act as opposed to an arbitration review pursuant to the Taft-Hartley Act? And in that connection, I have this thought in mind. Under the Taft-Hartley Act, arbitration is voluntary; the parties, presumably, could give the arbitrator jurisdiction not only to be wrong, but to be crazy, and his decision would end the case.

But the Supreme Court has held under the Railway Labor Act that there must be compulsory arbitration and not a system of voluntary arbitration. If the parties in that situation do, as is customary, simply adopt the statutory language giving the Board jurisdiction over grievances or disputes involving interpretation or application of the agreement, can there not be greater judicial review because arbitration is not a part of their voluntary bargain but is something they are required to adopt by law?

PROFESSOR MELTZER: We have quite a complicated history under the Railway Labor Act. Before the *Gunther* case, courts in effect conducted a trial *de novo,* with prima facie effect given to the prior award. In *Gunther,* decided before the 1966 amendments, the Supreme Court moved the RLA system closer to the trilogy. One purpose of the 1966 amendments was to curtail the scope of judicial review. In fact, the language of those amendments, without the committee report, excludes judicial review on the merits. But the committee report indicates that a small opening was to be left for such review. Precisely what will happen when the courts begin to work under the new framework requires a guide to the perplexed that I am not prepared to give at the moment.

As an original question, it is fairly arguable, as you suggest, that the imposition of a method of adjustment by fiat involves greater governmental responsibility for insuring some check against capricious adjudication. But the language of the 1966 amendments, as distinguished from their legislative history, appears to reject that argument.

DANIEL KORNBLOOM [New York, N.Y.]: As you know, we have had increasing criticism of the arbitration process because of "creeping legalism." One of the obvious effects of your recommendation for limited judicial review promotes that criticism in a serious way. For instance, an overzealous judge would want to look at the record, and inevitably this would increase the need for transcripts. This would be a matter of very serious concern if your recommendation were adopted.

PROFESSOR MELTZER: For every criticism of arbitration there is a countervailing criticism. Arbitration has also been criticized as a forum with no rules whatever, with resultant disorder. Indeed,

in connection with the history of alternatives to conventional litigation, it is usually said that after a time legal rules and technicalities begin to accumulate. Incidentally, one can say that the NLRB has introduced a new legalism in the context of the grievance-arbitration process; that is, discovery through the use of the Board's processes when a party refuses to provide information that is necessary to assess the merit of a potential grievance, at least where that information is reasonably accessible and where its nondisclosure seems unjustified.

Judicial review, guided by an understanding of the distinctive nature and role of arbitration, need not and would not enforce undesirable legalisms. The prospect of such review might impart a minimum of order to the system. If such order could be promoted without ritualistic technicalities, the result would be all to the good. I recognize the risks of judicial blundering, but I believe they are outweighed by the risks of arbitral disorder if arbitrators are given a blank check.

CHAIRMAN DUNLOP: I am not clear, Bernie. You said in your paper that an opinion was not required, only an award. Now is the transcript, in your view, required, or not?

PROFESSOR MELTZER: I don't believe a transcript is required. Findings of fact by the arbitrator, together with the agreement, would permit a court to make a judgment as to whether there was a rational basis in the agreement as a predicate for the award. In addition, the party objecting to the award would have the laboring oar; and, if he couldn't make his case because there was no transcript, his objection, rather than the award, would fail.

PAUL PAYNE [UCLA]: Has arbitration reached the stage where it can provide an appellate provision within its own structure, that is, where an arbitrator may be called upon to review the decision of a prior arbitrator? Take the case of an airline pilot who was discharged for some reason and the arbitrator reinstated him to the job. The airline company says, "We cannot possibly let this man pilot a plane," and they transfer him to another job paying the same salary. The union files another grievance, saying it is an unfair transfer. The company says it is company policy. Is the second arbitrator, in effect, serving as an appellate judge reviewing the

decision of the first arbitrator, and is this proper in the arbitration process?

PROFESSOR MELTZER: As I understand it, some systems have provided for such review. In my view, it would not be a substitute for the minimum kind of judicial supervision that I suggest. My view rests basically on the notion that if the courts are asked to bring their coercive powers into play, it is inevitable and desirable that they should have some concern for the nature of the award they are being asked to enforce.

CHAIRMAN DUNLOP: As a matter of fact, I sit as an appellate arbitrator in jurisdictional disputes on cases that come on appeal from lower boards. So as you say, Bernie, there are many such systems in existence at the present time, with no transcript but lots of papers.

BENJAMIN AARON [UCLA]: I am very much interested in Bernie's thesis and your comments. As I understand it, John, you have indicated there are various degrees of judicial penetration into the arbitration case. I believe that Bernie has sought a middle ground between two extremes—the present one, which despite the inadequacy of Judge Hays' indictment has created serious doubts among many of us as to the adequacy of a system which requires the enforcement by a court of some arbitration decisions that outrage our sense of equity and propriety; and at the other extreme, a system that allows judges simply to substitute their often uninformed and prejudiced judgment for the judgment of the arbitrator, which they regard as uninformed and prejudiced.

The question is, can we expect the degree of judicial restraint that is absolutely necessary if the proposal of Professor Meltzer is to work? It seems to me that, although there would undoubtedly be some abuse of judicial discretion within the framework of the limited judicial review that Professor Meltzer advocates, on the whole we might end up with a slightly better system. Whether we will get the chance to try it is something else. This is a political question, and one that we need not concern ourselves with at this point.

CHAIRMAN DUNLOP: It is time to move to the second of the two areas of the paper which I suggested at the outset that we concentrate upon. You will recall that the second range of issues dealt

with the relationship of the arbitration award to public policy, as expressed in regulations and statutes. As I understand it, Mr. Meltzer came out rather strongly, flat-footedly, on the side of saying that where there is an irrepressible conflict, the arbitrator should respect the agreement and ignore the law, leaving the question of the applicability of the law or public policy to be handled through other proceedings and in other tribunals.

Who would care to comment on this question?

E. F. LANG: It seems to me you are talking about two different situations. In one you are asking the arbitrator to add an obligation to the contract; in other words, you are asking the arbitrator to enforce, possibly, Title VII of the Equal Job Opportunity Act. In the other, it seems to me you are asking the arbitrator to subtract something from the contract. Take, for example, a situation in which the union says all Negroes should be laid off first, and the employer says no.

PROFESSOR MELTZER: I think the issue is fairly posed. I would not draw distinctions between additions to or subtractions from the agreement. It is quite clear, in the case you posed, that the arbitrator would have a sense of uneasiness, no matter what he did. But we have to come back to the issue that has been submitted to him. I take it he is being asked whether given conduct violates the agreement, and I take it, also, there are other tribunals with distinctive modes of enforcement available to enforce the statute. I suggest that we leave that kind of enforcement to other tribunals. I ask the arbitrator only to make clear, when the parties have raised a question of possible conflict between the agreement and the law, that he is not passing on the law. He is passing on the agreement. Otherwise we are going to get into all sorts of difficulties.

Suppose the parties are quite willing to live with a clear violation of the law, for example, an invalid union security provision. Let us assume that the issue before the arbitrator is whether the contract has been violated. Now, if the arbitrator also has responsibility for the law, does he, like a judge, also have the responsibility, or at least the authority, to raise on his own motion questions arising from an applicable statute?

B. J. MCMAHON [Aerojet General Corp., Downey, Calif.]: I would like, Mr. Meltzer, to suggest the probable outcome of a

situation that faces the parties in this State. We have a number of work agreements which incorporate clauses barring discrimination based on sex. Some of these agreements also include a statement as to the maximum amount of weight that can be lifted by a woman. We have state legislation that prescribes certain standards in that respect. We also have Title VII of the Equal Job Opportunity Act which says there shall be no discrimination, again on the basis of sex. Suppose a situation in which the employer refuses to assign a woman a job that requires the lifting of more than 25 pounds. The union challenges the action, claiming that it violates Title VII. The employer urges that he had to refuse the woman the job on the basis of the contract and the state legislation. What should an arbitrator do in this situation?

PROFESSOR MELTZER: Obviously, I would like to have the provisions of the contract and the statutes before me—perhaps also a retainer. Nevertheless, handicapped as I am, I would say it is sometimes appropriate to read a given contractual provision as importing regulation concerning discrimination. In such a case the arbitrator should have a look at the law, as in the case I mentioned concerning just cause for terminating an airline pilot. In some cases, by proper construction of the agreement, an arbitrator or a company could avoid any conflict between the contract and the law.

Your case suggests another difficult question that might confront an arbitrator; that is, what state laws have been preempted by the National Labor Relations Act. Because of that difficulty and other difficulties that I mentioned, it seems to me that unless the contract fairly calls for consideration of statutory provisions in construing it, the better course for the arbitrator would be to keep hands off the law. Where, however, the contract can reasonably be construed as incorporating the whole framework of regulation, the parties presumably have been alerted, and presumably will call upon a lawyer rather than a time-study man to deal with the underlying issue.

Again, it is a question of interpretation and of looking at the particular document in the light of the particular relationship.

JOHN DUNSFORD [St. Louis, Mo.]: I would like to return, for a moment, to the question of the arbitrator's restricting himself ex-

clusively to the interpretation of the contract without regard to public policy. I think we all appreciate the weight of the comment that bad law may be created by the arbitrator. On the other hand, I wonder how Professor Meltzer analyzes the position of the arbitrator himself who, for example, finds in the contract an illegal union-shop provision and is asked to ignore the illegality of that provision and, in effect, limit himself to the enforcement of it. Should the parties desire to continue under it? The possibility of bad law being created can be resolved by the court system, but the use of the arbitrator to perpetuate something like this, if he should believe—regardless of whether his judgment be good or bad—that it is illegal, seems to me to be a prostitution of the arbitration process itself.

PROFESSOR MELTZER: I think that is a problem, but it is a problem that can be handled.

When I was an arbitrator, my first case involved a provision that I thought was in violation of Section 8 (a) (3) of the NLRA. It also involved a situation where, I believed, the employer had violated the agreement. What I did was to drop a footnote in my opinion saying I was not passing on the legality of the clause on which the grievance rested. That device gave notice to the interests involved, the employees as well as the employer, that the agreement involved a question of law that was not being decided. I am concerned about arbitrators trying to resolve difficult issues under the NLRA, such as those raised by hot-cargo provisions, for several reasons: first, such determinations may go beyond the submission; second, they require competence of a kind that arbitrators may not have in fact and are not supposed to have in theory; third, such determinations involve substantial tensions with the preemption doctrine and the policy of uniformity that it reflects.

The disposition of Title VII problems by arbitrators involves another set of difficulties. The statute sets up complicated machinery for conciliation and mediation. An arbitrator, although he should be concerned about lending himself to illegalities, should also be concerned about being faithful to the basic procedural framework established for dealing with quite sensitive issues in employer-employee relationships. So it seems to me, again, that self-limitation on the part of the arbitrator is desirable and can be reconciled with his obligation under the law, including the proce-

dural mechanisms that have been established to deal with the difficult problems enmeshed with issues of contract construction.

A GUEST [U.S. Steel, Culver City, Calif.]: Professor Meltzer, I understand you to say that you feel the obligation of arbitrators is to ignore the law and to confine themselves to the terms of the agreement, even though the parties may have negotiated what in the arbitrator's opinion is an illegal contract provision. But now I understand you to say that by a footnote you once indicated that you were not passing on the legality of that provision. Aren't you, by that footnote, obviously raising the question of legality? You indicated that your reasoning in stating that the arbitrator should ignore the law was that, first, it was not his function, and second, there was the question of competency, that his job was to construe and not to destroy.

Isn't your footnote, so to speak, subject to the same criticism? Isn't the arbitrator taking upon himself that competency and questioning, perhaps in an indirect way but still questioning, the legality of the contract?

PROFESSOR MELTZER: The arbitrator's suggestion that there may be an issue as to the validity of a contractual provision does not purport to invalidate such a provision. There would be some room for disagreement even about my proposal for a modest footnote, designed to assuage arbitral sensibilities, to make clear the role played by the arbitrator, and to put the parties on notice generally. Sometimes violations of the law reflected in an agreement are inadvertent rather than deliberate. The footnote device would notify the parties about an inadvertent slip. That device reflects a middle ground between two possible extremes. One extreme is to say nothing about a statutory issue; the other is to enforce the underlying statutes even though such enforcement would nullify the agreement.

GUEST: Perhaps it would be appropriate to say that he is ignoring the law.

PROFESSOR MELTZER: I believe he should ignore the law in issuing his award. The award should be grounded on the contract. In writing his opinion, I would consider it appropriate for him to take notice of the law to the extent of indicating that he is not passing on the legality of the contract provision.

CHAIRMAN DUNLOP: May I comment on that? Bernie, it will come to you as no surprise that in actual practice a number of us find that such problems, on occasion, may be fruitfully discussed informally, and that at various times these problems are worked out perhaps in a mediating sort of way. Or the parties may recognize a problem which they themselves will attend to later. I presume that nothing you have said would preclude someone from handling the problem in that way. You are stating the way you feel the issue should be handled in a final opinion.

I am also certain you would agree that there are a great many cases that arise where the question of legality is not as clear cut as some of the examples we have chosen this morning. There are areas of uncertainty with respect to a wide range of problems. Only the rare case would be as clear cut as the several examples we have had presented.

HARVEY CANE [Aluminum Company of America]: Mr. Meltzer, I assume it is not unusual to have a labor agreement stipulate as one of its provisions that nothing in the agreement will be construed as conflicting with local or federal statutes. How would you view your responsibility, or lack of responsibility, to rule on such a situation?

PROFESSOR MELTZER: First of all, I would keep that clause in the forefront in construing the agreement. If the parties in their submission made it clear that they wanted an advisory opinion, so to speak, on what the law permitted, I might give them an advisory opinion. But I think I would make it clear to them, formally and informally, that the opinion was only advisory, that they could not expect an official tribunal to give that kind of award the same deference that is granted to an award grounded in the agreement. I might even suggest that there were some issues with which I was not competent to deal.

Let me make your question more specific; let us take an agreement which says that seniority arrangements should be such and such and which also says no interpretation shall be issued which is contrary to the governing law. Now, if the arbitrator, reading the agreement, decides that it can be construed only in a way that would be incompatible with the governing law, what does he do? He may be able to eliminate the invalid clause and apply the rest

of the agreement. But in other situations, such elimination would deprive him of any contractual standard for decision. In the latter situation does he write a new provision for the parties?

Unless we have something like arbitration over new terms with respect to any provision of the agreement that conflicts with the law, is seems to me that the arbitrator's hands would be tied. He could say, "This provision is contrary to the law. Therefore, I can grant no award based on this provision." Beyond that, the possibilities of adjustment to the law are probably infinite. And where does he get the authority to pick a particular adjustment not based on the agreement when he is dealing with grievance arbitration rather than arbitration over the terms of a contract?

If, under a given submission agreement, the arbitrator believed that his award had to conform to the law, he probably would be overgenerous in his interpretation of the law, because he would want to avoid any possibility of conflict between his award and the law. Before he develops a new contractual standard, he should be quite clear that that is what the parties "intended" him to do, on the basis of their collective bargaining agreement or submission agreement. In the absence of such authorization by the parties, I can see situations where the arbitrator's final response would be, "There is no award that I can give that would not conflict with the law or the agreement; consequently, I do nothing, and I invite you to go to the right forum to determine the impact of the law on the agreement, or to revise your agreement, or to authorize an arbitrator to do so."

E. RILEY CASEY [Washington, D.C.]: Professor Meltzer, don't you, in fact, have three situations in which you as arbitrator must invoke statutory provisions? It seems to me you have the probative situation in which the parties enter into an agreement to include guards in a bargaining unit. What incentive is that to the arbitrator? You have a situation, for example, such as the one raised a moment ago by the gentleman from California regarding the California law on sex discrimination. Title VII comes along and says there shall be no discrimination on sex. But isn't there an obligation upon the arbitrator in such a situation to come out with some guidance and assist the parties to get their contract beyond the conflict that exists between federal and state law? And you have a third situation in which there is an illegal union security

clause. Don't you have a mandatory obligation not to be party to an illegal situation? Should you not spell out the national law that is being violated by the parties to the agreement?

PROFESSOR MELTZER: Let me take those three situations.

I don't find any difficulty with the guards problem because it is my understanding of the National Labor Relations Act that an employer may include guards within the unit of employees in the same way in which he may include supervisors; the law will not, however, compel such mixed units.

Now with respect to the other two categories, I cannot add anything to what I said earlier. I think the California situation, as it was described, is the most interesting one. When you have a contract with provisions about discrimination and weight lifting and the rest, an arbitrator could properly consider unpreempted state and federal legislation in giving content to such loose or ambiguous terms. For example, I would expect an arbitrator, confronted with a clause barring discrimination on account of union activities, to be sensitive to the protections that the Board has evolved in enforcing a counterpart provision in the NLRA. In such a case there is no necessary conflict between the agreement and the statute; furthermore, the contractual term is an elastic one that could properly be given content by looking at pertinent Board decisions. Where, however, contract provisions are clearly repugnant to the statute, it may be argued that the arbitrator should not be indifferent to their illegality but should, instead, strike them down or at least refuse to enforce them. The trouble is that there will be differences as to what is clearly repugnant to the statute, and we will move from cases of clear repugnance to gray cases of the kind that John has described.

Obviously, if an arbitrator says he has an affirmative duty to enforce the law, that ends it; he has an affirmative duty to enforce the law despite the exclusivity that surrounds the enforcement of the National Labor Relations Act. If I say the National Labor Relations Board has an affirmative and exclusive duty, that ends the controversy. The issue is, however, what is the proper domain of an arbitrator who is asked to interpret an agreement? Under such circumstances, I believe that the system would work better

if the arbitrator confined himself to interpreting or applying the agreement.

WILLIAM SIMKIN: (Director, Federal Mediation & Conciliation Service): As an erstwhile arbitrator, I wonder if an experience I had has some relevance to this discussion. It also gets away from the retainer problem.

Back in the forties many of us in this room were faced with some rough questions about the Selective Service Act at a time when the lower courts were in a state of confusion, to put it mildly. Some of us who were nonlawyers, including myself, stuck our necks out on the conflict of laws. Frankly, we made some successful guesses as to what the eventual outcome of the situation would be. I don't know that it helped the problem that most of us guessed right, but in any event, it seemed to me at the time we had no right to do anything else but assume the obligation.

I am wondering whether, in the eventual outcome of those cases —and I have a suspicion that the Supreme Court was not totally ignorant of our decisions—the Court was influenced by our actions. I don't know whether you want to comment on this or whether it is relevant to the matter of interest.

PROFESSOR MELTZER: It is certainly relevant, and with that kind of illustration, Bill, the retainer should be doubled. I would like to know what question was put to you by the parties.

WILLIAM SIMKIN: The question concerned specific grievances, not just one, but a number of them. The parties presented their arguments under the contract. Both sides also presented their notions of what the law was at that time, and we were faced with that conglomerate kind of presentation.

PROFESSOR MELTZER: Did the parties ask you whether the employer violated the agreement, or whether the agreement violated the Selective Service Act?

WILLIAM SIMKIN: We didn't have a submission. They said, "We have a problem. What should we do with it?"

PROFESSOR MELTZER: I take it there were two dimensions to the problem: one, the contract; the other, the law. And the question becomes what the parties asked the arbitrator to do. Let's assume

the question submitted was whether the contract had been violated. Then you might have answered, "You haven't violated the contract, but there is a question under the law as to whether the contract is invalid because it is repugnant to the law." If the parties dumped a problem in your lap and said, "Please solve it," you obviously would have to take account of the law, and invalidate or reshape the agreement if necessary.

The question to be answered thus turns on a fair construction of the submission agreement. I am not suggesting a doctrinaire interpretation of the submission agreement, but when the issue submitted is clearly grounded on the contract, I am suggesting that arbitrators should stay within the confines of the submission.

A GUEST: I am a guest here, not an arbitrator. I work in the shipyards in San Pedro. It seems that our speaker left a matter up in the air that I would like him to discuss, that is, practices not covered by the language of the contract. In one instance, the company issued a notice that it would not follow the practice in the yard in regard to a particular matter. This matter was never actually decided in negotiations. The union submitted a grievance and went to arbitration. The arbitrator ruled in favor of the union. Later, the decision was challenged in court by the company, and the court would not enforce the decision.

My question is: Should this be left up in the air? Will arbitrators be influenced by such court decisions?

PROFESSOR MELTZER: We have to distinguish between several situations. In the first situation, if, during the term of an agreement, the employer unilaterally changes a practice, the issue is whether the agreement expressly or by implication requires the continuation of that practice during the term of the agreement. Generalizations on that issue are risky. In the second situation, the employer announces that he won't continue the practice after the expiration of the current agreement and acts accordingly. Here the employer takes the position that there is no agreement to continue the practice unless the union persuades him or forces him to agree to its continuation. The validity of the employer's position depends on whether the old practice continues until both parties agree to get rid of the practice. In general, where an employer has given fair notice that he will abandon a practice after

the expiration of an agreement, I doubt that he would, or should, be required to continue that practice until the union agrees to its abandonment. For that reason, I found that the arbitrator's decision in the *Torrington* case went far, indeed, in freezing the rules. I would be interested in knowing what a member of this group would have done if he had been the arbitrator in the *Torrington* case.

CHAIRMAN DUNLOP: I think the local working rules require me to bring this discussion to a conclusion, and to thank Mr. Meltzer for a very stimulating paper. Thank you.