Chapter II

ARBITRATION: A UNION VIEWPOINT

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1. Introduction

It would be surperfluous for me to point out to this group the importance and growth of labor arbitration on the national scene. With nearly 18.5 million persons in labor unions mostly covered by 125,000 labor contracts,[1] the number of labor arbitration cases has grown tremendously. The increased numbers of grievance cases and appointments of permanent arbitrators have been supplemented by a rise in the number of cases involving new terms of a contract [2] and a modified form of compulsory arbitration under many state statutes governing public utilities. In fact, this past year has even seen a union unsuccessfully seek court enforcement of a perpetual arbitration clause in a contract for the terms of the new contract.[3] Jurisdictional disputes boards of arbitration have been set up in the building construction field and also within the AFL-CIO, thereby increasing job opportunities for labor arbitrators.[4] In

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[1] Press Release of U.S. Dept. of Labor, October 20, 1957.

[2] Arbitration of the new terms of a contract has been on the upswing in such industries as transit, heat, light, power, water trade, water transportation, printing and publishing, textiles and communications. Bernstein, *The Arbitration of Wages* (1954), p. 14.

[3] *Boston Printing Pressmen's Union* v. *Potter Press,* 241 F. (2d) 787 (CCA-1, 1957) cert. den. Oct. 15, 1957.

[4] For a description of the various boards used in the construction field, see Dunlop, "Jurisdictional Disputes" in *Proceedings* of N.Y. University Second Annual Conference on Labor. Also see papers by Cole, Feinsinger and Dunlop in *Arbitration Today* (Washington: BNA Incorporated, 1955), ch. vii.

addition, new areas of productivity have recently opened up for arbitrators under Section 302(c) of the Taft-Hartley Law and also with the creation of the public appeals boards in the Upholsterers and the United Auto Workers Unions.[5] These increases in the functions of arbitrators will require some "retooling," for these new areas require increased knowledge of labor economics and the internal affairs of labor unions.

With the increase in the number and types of labor arbitration cases, it might be well for us to pause and consider the question—what do unions expect of arbitration, and of the arbitrator in particular? Just what is the function of arbitration as a process and of the arbitrator as the umpire or judge from the union's point of view? This will be the general area of my paper rather than the specific topic of union problems in arbitration, which will be covered more in passing.[6]

Mr. Justice Frankfurter's dissenting opinion in the recent landmark *Lincoln Mills* case[7] quotes approvingly a passage from Dean Harry Shulman's Holmes lecture at Harvard which

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[5] For a description of the UAW Public Review Board, see 40 page pamphlet published by UAW, "A More Perfect Union" (1957). For comments on the Upholsterers' procedure, see *Social Order,* Vol. 3, No. 10, p. 460 (Dec. 10, 1953).

[6] This paper does not deal with many specific problems that unions face in the arbitration field. These include such matters as proper evaluation of grievance cases prior to arbitration; proper preparation and presentation of the arbitration case; the poorly drafted contract clauses, including the arbitration clause; minority problems; internal political pressures; expenses of arbitration; the prearranged decision; group versus individual interests; the coupling of weak and good cases into one hearing; poorly drafted stipulations; inarticulate or unreliable or compromised witnesses; new evidence first introduced by the company at the hearing; insulting company attorneys; impatient arbitrators; opinions critical of the union; or awards dealing with its internal affairs; and fifth amendment cases.

Unions also face such problems as undisciplined members or dissident groups who resent the arbitration process; the decision to arbitrate based on membership voting; the lack of understanding as to the arbitration procedure and purpose; and complaints against company witnesses who are union members.

There is also the problem for some unions of grievance processing and arbitration for non-members in the bargaining unit. See Gregory, "Fiduciary Standards and the Bargaining and Grievance Procedure," 8 *Labor Law Journal* 843, 847 (Dec. 1957).

Unions are also confronted with such new problems as individual suits either to compel arbitration or to secure an adjudication on the merits. See Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 *Labor Law Journal* 850 (Dec. 1957).

[7] *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 at 463 (1957).

may reflect the position of unions towards arbitration at present as well as towards judicial intervention in the past:

> "The arbitration is an integral part of the system of [industrial] self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award?" [8]

2. The Arbitration Process

In the first instance, labor looks at the arbitration process as an extension of the democratic principles to the industrial world. To unions, arbitration is the system of the application of a private rule of law established by the collective bargaining system and is the method by which unresolved plant grievances are determined by a fair and impartial third person. It is an instrument for improved contract administration and an accepted terminal point in the grievance procedure, erasing arbitrary decisions by the company, solving unresolved problems, and preventing frictions, slowdowns, or disorders by union members during the term of the contract. It is also a safety valve for difficult complaints in a highly emotional and dynamic field. It is the agreed-upon substitute of reason under the terms of a labor contract for strikes or economic force or warfare during the contract period.[9] By the grievance and

[8] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1024 (1955). Reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), Appendix A.

[9] See Cox, "Rights Under a Labor Agreement," 69 *Harv. L. Rev.* 601 (Feb. 1956).

arbitration procedure, unions have a check on part of management's governing process that is necessarily administered by "company men" but subject to the rules as laid down in the terms and conditions of the collective bargaining contract. By this procedure, the union hopes to secure coherence and uniformity in interpreting the contract and building up a "common law of the plant." [10] It also gives the individual through his union a day in court not only to have procedural and substantive due process, but also a method by which he is governed by laws (i.e., the private contract law of the plant) administered in the first instance by "company men." It gives the union member a sense of dignity, worth, and importance and a sense of participation and belonging as well as some security in his job, and it enables the union to give its members this sense of security, for the collective agreement usually provides some procedure for challenge of management's power to discipline or discharge which is limited to cause; in addition, it has such other job protections as forms of seniority and minimum rates which oftentimes require interpretation by the arbitrator.

In the second instance, the arbitration process to the union is a democratic, simple, speedy, economical, expert, and private method of settling problems as contrasted with the formal, procedural, and drawn-out legal battles in the public courts before judges who are often not expert in the specialized field of labor relations. It should be stripped of technicality and procedural restrictions so that it bears little resemblance to the "English sporting theory of justice—a cock fight in which that party prevails whose advocate is the gamest bird with the sharpest spurs." [11] It is usually an informal "non-legalistic" method, shaped by the parties to handle emotional plant problems, rather than the technical legal approaches of the courtroom. It is a "family affair" with the public and press excluded, unlike court cases. It is an alternative to expensive court hearings, which in the past have been severely criticized by labor, for it was in the courts that injunctions were obtained, often

[10] See Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 *Labor Law Journal* 850 at 855 (Dec. 1957).

[11] Hays, *Cases and Materials on Civil Procedures* (1947), 794.

ex parte, by the company lawyers from "company" judges to break a strike.

In some instances, it may appear that unions regard arbitration as an extension of collective bargaining. To the union the collective bargaining agreement represents the end product of the initial stage of the collective bargaining process and the basic guide to another—the grievance procedure and arbitration. As has been repeatedly pointed out, the labor agreement is not an ordinary legal document like a will or trust [12] but is more of a code of ethics, a political platform, a way of living, a general standard or statement of policy, or a rule of law. It results from negotiations that are often heated and trying, with settlements reached after many weary hours of haggling. The contract's broad language which is often directed to laymen is imperfectly drawn, representing compromises and rarely covering every contingency during the contract term. The provisions are broad generalities that look to joint labor-management particularization. Too often contract clauses in various parts of the agreement are not reconciled. In many cases, the myriads of unknown or unforeseen situations are often neglected or tiredly brushed aside and the agreement is silent on a given matter. The precise or dictionary meaning of the contract language often falls short of expressing fundamental postulates, understandings, assumptions, or policies and what Dean Shulman has called a "vast store of amorphous methods, attitudes, fears and problems." [13] In most cases, the parties have presupposed certain given conditions, for contracts are

[12] Prior to S.301 of the Labor-Management Relations Act, the courts developed three separate theories ("usage" or "custom," agency, and third party beneficiary or contract) as to the enforceability of collective bargaining agreements but none of them permitted an unincorporated union to participate in litigation. Gregory, *Labor and the Law* (1946), 381. See also Rice, "Collective Labor Agreements in American Law," 44 *Harv. L. Rev.* 572 (1931). A fourth theory developed which recognized that a collective bargaining agreement was *sui generis;* see Justice Jackson in *J. I. Case* v. *NLRB,* 321 U.S. 332, 335, 64 S.Ct. 576 (1944); and *Long* v. *Baltimore & Ohio R.R.,* 155 Md. 265, 268, 141 A. 504 (1928). See Kaye and Allen, "Union Responsibility and the Enforcement of Collective Bargaining Agreements," 30 *B.U. Law Rev.* (Jan. 1950); Cox, *op. cit.,* 69 *Harv. L. Rev.* 601.

[13] Shulman, "The Role of Arbitration in the Collective Bargaining Process." For the distinction between collective labor agreements and other contracts, see Shulman & Chamberlain, *Labor Relations* (1949), 3-7.

not negotiated in a vacuum but include many "prior practices" or fixed conditions which do not appear in the written agreement.

Under the above conditions, unions rightfully claim that the agreement is not an exclusive statement of all the rights and privileges of both parties but assumes continuation of existing conditions. Unions argue that established practices in existence during the time of the negotiation of the contract and not discussed during the negotiations are implied in fact. Furthermore, unions relying on contract clauses such as those covering recognition, seniority, wage rates and discharge claim that the contract indirectly covers such troublesome problems as subcontracting during the term of the contract, which contains no clause dealing specifically with this topic. To unions, cases involving this type of problem or discharges where there is no discharge clause in the contract are an essential part of the grievance and arbitration process, whereas management criticizes these actions as attempts to make the arbitration process an extension of collective bargaining. To unions, the process of grievance arbitration involves a large measure of agreement making [14] and the gradual creation of an industrial jurisprudence or common law of the plant.[15]

In the multitude of cases involving discipline, where the agreement is clear as to the employer's power to discharge or discipline for cause, the union looks to the arbitration process for an impartial and final determination as to the propriety of the action. The union does not want the arbitrator to give any weight to the employer's judgment, but wants an independent *de novo* decision as to the original cause, the penalty and its relation to the employee's record and "morale" in the plant. In a sense, an arbitration involving discharge and discipline is more than a mere appeal, as far as the union is concerned, but is a case of original and, incidentally, final jurisdiction. In these cases the union, more than management, also expects the

[14] Taylor, "Effectuating the Labor Contract through Labor Arbitration" in *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), chapter II.

[15] For a discussion as to how "the law of the plant" is created by the processing of grievances, see Cox, "Rights Under a Labor Agreement," 69 *Harv. L. Rev.* 601 (Feb. 1956).

arbitration process to be an architect of a theory of corrective, rather than punitive, discipline based on principles of fairness and equity.

Unions look to the arbitration process to secure an expeditious adjudication of disputes by persons trained in the field and familiar with the manner in which the industry operates. They encounter real problems when the company pays only lip service to the cause of arbitration and fails to abide by its broad promise to arbitrate,[16] or to be bound by the qualified arbitrator's decision. They are confronted with management's delays and insistence on the review of the merits of the arbitrator's findings by a court directly or under the guise of jurisdictional grounds, and they oppose the interjection of courts into the so-called "arbitrability" issue prior to the hearing before the expert arbitrator with his knowledge of the surrounding circumstances, the inarticulate major assumptions, and other unstated conditions of the parties that give substance to the broad contract terms in the labor agreement.[17]

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[16] The typical arbitration clause (*i.e.* "submit to arbitration any dispute, difference, disagreement or controversy of any nature or character" or "differences as to the meaning and application of the provisions of this agreement") is certainly broad enough to cover disputes about the meaning of the arbitration clause, reflects the intention of the parties, economizes time and effort, and gives the power of decision to the person most competent to decide wisely. Unfortunately many courts, at the insistence of management, have not adopted this reasonable approach but have been reviewing the merits of awards and determining the scope of the arbitration clause. *United Dairy Workers* v. *Detroit Creamery* Co., 26 LA 677 (Mich. 1956); *Local No. 149 of American Federation of Tech. Engineers* v. *G.E.*, (CCA-1 Dec. 1957); *Western Union Telegraph Co.* v. *American Communications Ass'n.*, 299 N.Y. 177, 86 N.E. 2d 162; *Botany Mills Inc.* v. *Textile Workers Union of America*, 27 LA 165 (N.J. Sup. Ct. 1957); *IAM* v. *Cutler Hammer Inc.*, 271 App. Div. 917, 67 N.Y.S. 2d 317 aff'd 297 N.Y. 519, 74 N.E. 2d 464 (1947); *Screen Cartoonists Guild Local 852* v. *Disney*, 74 Cal. App. 2d 414, 168 P. 2d 983 (1946). See Scoles, "Labor Arbitration Awards," 17 *U. of Chi. Law Rev.* 615 (1950) and Summers, "Judicial Review of Labor Arbitration," 2 *Buffalo L. Rev.* 1 (1952); Cox "Current Problems in the Law of Grievance Arbitration" (1957) pp. 18-31; also see infra pp. 15-24, Freidin, "Labor Arbitration and the Courts" (1952), p. 7; note 21 *Univ. of Chi. L. Rev.* 148 (1953).

[17] See Judge Field's dissent in *IAM* v. *Cutler Hammer Inc.*, 297 N.Y. 519 (1947). See Scoles, *op cit.*, also see *Post Publishing Co.* v. *Cort*, 38 LRRM 2198 (1956) where the Supreme Judicial Court of Massachusetts held that a pending arbitration should not be enjoined because of a dispute as to arbitrability and said, "We see no irreparable injury in first, as promised, carrying out arbitration before the initial tribunal contemplated in the agreement."

In brief, unions consider the arbitration process as a broad and essential element of the total continuing relationship between the parties creating an industrial jurisprudence or common law in the plant, but they encounter many hurdles or problems which prevent this end result in many cases.

Unfortunately, some unions also regard the arbitration process as a "catchall" for most of their daily problems. Difficult decisions are sometimes avoided by the leadership, and the matters are turned over to arbitration. Political and related pressures within the union along with a desire for "face-saving" or "buck-passing" force undeserving cases ("dogs") to arbitration. The "theory of numbers" also encourages some weak arbitration cases especially after a series of losses by the union. In other cases, the arbitration process is used by both parties as a means to arrive at an apparently mutually satisfactory prearranged decision handed down by a third person. In some few cases, the unions do try to make arbitration an extension of collective bargaining and they attempt to obtain through arbitration what they feel they cannot obtain in the collective bargaining process. These illustrations, however, constitute a small fraction of arbitration cases and do not represent the true attitude of the majority of unions towards the arbitration process which is considered an essential element of our democratic society.

3. The Arbitrator

The key man in any arbitration is, of course, the arbitrator. What do the unions expect of him and what is his true function? What should he do, why is he "blacklisted," what about his opinions, how should he conduct the hearing and what limitations are imposed upon him? These are some of the areas which occur to me that may be of special interest to persons who are professional arbitrators and may reflect some of the problems that face unions and arbitrators in the arbitration process.

First of all, to the union, the arbitrator is an indispensable part of a system of self-government created and confined to the parties. He administers the rule of law established by their agreement and serves at their pleasure. Unions have problems

with arbitration when the arbitrator does not realize that his function is to give both sides a fair opportunity to present its "full" case and to make a decision on the merits of the entire case.

Unfortunately, some unions look to the arbitrator in many cases to "bail them out." More often than employers, unions go into arbitrations without benefit of counsel,[18] or without adequate preparation, or with only a vague idea of the real issues involved. In such cases, these unions rely heavily on the arbitrator to frame the question, make the arguments for the union, ask the proper questions and decide the case on the contract and the "true" merits rather than on the presentation at the arbitration hearing. Needless to say, the arbitrators have done this to the consternation of management and especially to the chagrin of some members of the legal fraternity. Unions believe that arbitrators must do even more than federal judges and take an active part in the investigation. Unions sometimes have problems with evidence at the hearing, for they expect the arbitrator to be satisfied with less proof than in the usual court cases, as, for example, in the "heart" or "physical exam" cases where the doctors may not testify and the arbitrator is forced to choose between conflicting medical reports. The union expects the arbitrator to inform himself as fully as possible about the case in spite of inexpert or inadequate presentation, and to act as an investigator and expert as well as a perfect judge.

Unions usually have problems with an arbitrator who tries to mediate a case that is presented for arbitration. With few limited exceptions mostly confined to permanent arbitrators or tripartite setups,[19] unions want the arbitrator to hand down a written decision rather than a mediation settlement. When the case has gone to arbitration and an arbitrator has been called in, I find that the unions want a decision rather than any mediation attempts they could have tried to obtain by other

[18] Of 754 cases studied by the AAA, companies alone were represented in 38.7 per cent of the cases, whereas unions only were represented in 12.9 per cent. "Procedural Aspects of Labor-Management Arbitration," 12 *Arb. Journal* 67, at p. 73 (No. 2, 1957).

[19] See "Use of Tripartite Boards in Labor, Commercial, and International Arbitration," Note in 68 *Harv. L. Rev.* 293 (1954).

means if they so desired. At the same time, I am not suggesting the "dictionary" approach to labor contracts but a practical and equitable one with a full understanding of all the issues, the surrounding conditions, and the assumptions involved in any labor agreement.

The value of the arbitrator's opinions is sometimes questioned. Unlike a mystery story, I admit that I frequently turn to the award on the final page of an arbitration decision first, and I know that many of my labor clients do the same thing. At the same time, I assure you that we do read the full opinions and decisions and use them for precedents, guidance for future action, for a reexamination of contract clauses, for future negotiations, and for discussions by leaders and the rank and file. Unions also use opinions to help explain the award and to obtain its general acceptance; furthermore, they use opinions to explain or rationalize (sometimes erroneously) the agreement to the dissatisfied employee or shop steward or to the membership. Furthermore, to the advocates, opinions are important to prove that the arbitrator has based his awards on reasons applied to the agreement and these become precedents. In fact, the opinions may even be helpful in convincing both parties that their arbitrator is inadequate and should not be reinstated.

At the same time, it should be recognized that there are unions which have problems with opinions. In Massachusetts at present, there is a conflict in the tripartite state arbitration board relative to opinions. The chairman, who is a lawyer, favors written opinions, whereas the industry and labor members favor a continuation of the 50-year-old policy against opinions. Their opposition is based in part on the fear that opinions may promote increased court review of arbitration decisions, may delay arbitration awards, and may upset a traditional and practical policy which has worked well over the years. Many unions in the Commonwealth use this tripartite board with its awards partly because there is no charge for arbitration, and partly because they are not interested in the opinions but merely in the awards. Other unions may be fearful of opinions in cases that have been poorly presented or where the stipulation or contract clauses they accepted have

been cleverly drafted by company counsel or where the arbitrator may create new problems for the union by his language.

One labor attorney has caustically criticized the over-zealous or philosophical arbitrators for regarding the arbitration field "as their own with the union and management participants as convenient vehicles for self-expression and self-aggrandizement." [20] He claims that we need a re-examination "to stay the rapid process of hardening of the arteries which is giving us judicial if not judicious, pronouncements instead of practical solutions predicated on a desire to foster continuing harmony between the parties in dispute . . . Arbitrators take themselves much too seriously and have a passion for self expression which is revealed by opinions which are either unnessary or unnecessarily extended. The parties are then left in the unenviable position of trying to fathom the arbitrator's intent, so that the determination of the immediate dispute becomes enmeshed with the creation of fresh subjects of difference. This is usually the result of an arbitrator's effort not only to solve the problems before him but all other problems of a kindred nature which are likely to arise." [21]

In the same vein, some unions also state that there are new problems in arbitration caused by the increasing professionalization of the arbitration function. The insistence on "excessive legalism" including overtechnical presentation with strict adherence to the rules of evidence and rigid formality in the examination of witnesses by some arbitrators has tended to "freeze" the process. The demand for prehearing and/or posthearing briefs which delay the decisions has been called "functional featherbedding." [22] In addition, the excessive citation of outside decisions and undue reliance on precedents by arbitrators "fosters a dangerous misconception as to the nature of the arbitration process itself and ignores the basic fact that arbitration is intended for final determination of specific disputes

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[20] Cooper, "An Appraisal of Labor Arbitration: A Labor Viewpoint," 8 *Industrial and Labor Relations Review,* (Oct. 1954), p. 84.

[21] *Ibid.*

[22] Davey, "Labor Arbitration: A Current Appraisal," 9 *Industrial and Labor Relations Review* (Oct. 1955), pp. 85, 88-9.

on specific sets of facts under a particular contract." [23] Unions expect an arbitrator to conduct an orderly and simple hearing without all the formalities and rigid rules of a court of law and to write a concise, reasoned, and practical decision.

Why are certain arbitrators "blacklisted" by various unions? The answer to this question is probably more important to you who are professional arbitrators than any other area of my discussion. Without the benefit of a closed shop, without the protection of any license, and without the security of long-term contracts in a profession where expendability is the rule rather than the exception and where the person works solely at the pleasure of the parties, with no seniority, or grievance or discharge clauses,[24] the person who is willing to undertake this risky profession of arbitration joins the labor union lawyer who is also considered a "necessary evil." Unfortunately, there is no one answer to the question of "blacklisting." Some reasons have already been suggested. The arbitrator who tries to mediate or who neglects to write an opinion or who sends the case back to the parties may well be dropped in future cases. In addition, certain arbitrators are scratched because they have been too busy and have not been readily available for an immediate hearing. The arbitrator who forgets that the arbitration process should be simple, speedy and economical is also risking unemployment, for unions expect quick as well as just decisions. Since arbitration is becoming more costly partly because of the employer's insistence on a multiplicity of hearings, partly because of the number of witnesses and pay for lost time, and partly because of "padding," this has created new problems for the union which sometimes criticizes only the arbitrator involved and blames him for the new high cost

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[23] *Ibid.*

[24] Possibly arbitrators should insist on three-man boards for self-protection in many cases. Professor Taylor tells the story of a case where the parties stated: "We would rather select the arbitrator than have Washington select the arbitrator. We are not sure of anybody we select but we are going to flank him with the vice-president and the president and the union to watch him which makes sense. It cuts the risk down and it develops the use of the forgotten document in labor relations." Taylor, "Remarks at Conference on Training Law Students in Labor Relations" (June 16, 1947), quoted in Cox, *Cases on Labor Law* (1948), p. 189.

of arbitration [25] just as they blame the labor lawyers rather than the Taft-Hartley Act for adverse rulings. In part, the theory of numbers decapitates arbitrators, for a union which has won a series of consecutive victories from one arbitrator may shy clear of him in the next important case, whereas another union which has consistently lost will prefer a new arbitrator.

The "new look" is another occupational hazard for arbitrators, for I have had unions call and advise me that the company will take any arbitrator provided he has never had a case in the industry. On a lesser plane than management, unions tend to characterize or label arbitrators and call them "hard-hearted in discharge cases," "management-minded" in promotions or demotions, "legalistic," etc. These unfortunate labels unfairly passed on by word of mouth may limit the availability of certain arbitrators in an entire industry. In some limited areas, arbitrators who are also advocates for one side or the other are still accepted, but I predict that this group will be gradually diminished because the labor field is too emotional, dynamic, and fluid. Furthermore, an arbitrator who has failed to give the union a "full hearing," which includes much irrelevancy, speechmaking, and even hearsay, is often not invited back. In addition, a union, in my opinion, resents an arbitrator who says too much by giving gratuitous advice in a decision; for example, the arbitrator who decides a case against the employees based on the contract, but then adds that morally the employer should pay these employees, risks the capital punishment of labor relations at the hands of the union especially if in fact the employer does not follow this unnecessary gratuitous advice. Arbitrators who claim that the parties should write clearer contract clauses may not be fired but may be decreasing their job opportunities, for these very vague clauses constitute one of the most prolific sources of arbitration cases. At the same time, arbitrators who write lengthy, philosophical, and unclear opinions may be put out of business. In addition,

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[25] In fact, of the 1195 cases studied by the AAA, the most common total fee (412 cases) was within the $200 to $299 group, and more than 82 per cent of the total fees of the arbitrators were within the $399.99 or less category. AAA Report—"Procedural Aspects of Labor-Management Arbitration," 12 *Arb. Journal* 67, at p. 85 (No. 2, 1957).

misinterpretations of written decisions read coldly without a proper consideration of the background circumstances, the peculiarly individual factors involved in a given case and not expressed in the written opinion, have caused arbitrators to lose their positions unfairly.

Another reason for the so-called "blacklisting" is the "bad" decision. Unlike the judge who is appointed for a long-term or for life in some states and whose decisions can be appealed, the arbitrator who is the final appeal agent serves at the pleasure of the parties and will be discharged when he renders what a union considers an "unconscionable" opinion or decision. In this class would be decisions that the union accepts resentfully, for the decisions fail to appreciate the real issues involved, rely on procedure rather than merit, overlook the union-management relationship in a particular establishment, neglect substantial factors in the case which may have been inarticulately presented, reverse prior decisions without any adequate distinctions, disturb the parties' continuing relationship, or are abstractly correct but impractical in the day-to-day application of the agreement. These are some of the factors that make the profession of arbitration a poor risk for unemployment insurance.[26]

As Professor Shulman pointed out: "General acceptance and satisfaction (with the award) is an attainable ideal. Its attainment depends upon the parties' seriousness of purpose to make their system of self-government work, and their confidence in the arbitrator. That confidence will ensue if the arbitrator's work inspires the feeling that he has integrity, independence, and courage so that he is not susceptible to pressure, blandishment, or threat of economic loss; that he is intelligent enough to comprehend the parties' contentions and sympathetic enough to understand their significance to them; that he is not easily hoodwinked by bluff or histrionics; that he makes earnest effort to inform himself fully and does not go off half-

[26] It is reassuring to note that a statistical report of 1183 cases by the American Arbitration Association states, "The conclusion seems warranted that individual persons are selected for their impartiality, integrity, competence, character and standing in the labor-relations community." "Procedural Aspects of Labor-Management Arbitration," 12 *Arb. Journal* 67, at p. 71 (No. 2, 1957).

cocked; and that his final judgment is the product of deliberation and reason so applied on the basis of the standards and the authority which they entrusted to him." [27]

4. Arbitration and the Courts

One additional area with increased problems to unions in the arbitration field should be mentioned. As a result of the recent decisions of the U. S. Supreme Court in the labor-sponsored *Lincoln Mills* and two companion cases,[28] it is now the law of the land that the federal courts will enforce agreements to arbitrate grievance disputes. This decision by implication rejects the common law rule [29] and is of vital importance not only to the parties but also to all arbitrators, for it emphasizes the new and crucial role of judicial intervention in the field of labor arbitration.[30] At the same time, it should be recognized that there are two divergent views on this entire matter.

There are some persons who believe that in the long run labor is sacrificing too much by this new reliance on court intervention in the field of labor arbitration.[31] Professor Shulman believed that the collective labor agreement with a grievance procedure ending in arbitration establishes an autonomous rule of law and reason which the courts should leave untouched

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[27] Shulman, *op. cit.*, p. 1019.

[28] *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957); *Goodall-Sanford Inc.* v. *United Textile Workers,* 353 U.S. 550 (1957); *General Electric Co.* v. *Local 205, United Elec. Workers,* 353 U.S. 547 (1957); For a criticism of these cases, see Bickel and Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," *71 Harv. L. Rev.* 1 (Nov. 1957).

[29] 353 US at 456. For a discussion of the infirmities of common law, see Braden, "Problems in Labor Arbitration" 13 *Mo. L. Rev.* 143, 150 (1948); Cox, "Current Problems in the Law of Grievance Arbitration" (Nov. 14, 1957).

[30] For a discussion of some of the issues raised by the *Lincoln Mills* case, see "Report of the Committee on Labor Arbitration," Proc., Sec. of Labor Relations Law of ABA (1957) 55. Also see *Bernhardt* v. *Polygraphic Co. of America,* 350 U.S. 196 (1957), where the antagonism of the Supreme Court to forum shopping was most recently expressed.

[31] Syme, "Voluntary Labor Arbitration is Threatened," 7 *Lab. L.J.* 142 (March, 1956); see also Howard "Labor-Management Arbitration: There Ought to Be a Law—Or Ought There?" 21 *Mo. L. Rev.* 1 (Jan. 1956). See testimony of Dr. George W. Taylor and Dr. Alexander Frey before the Pennsylvania Governor's Commission on Labor Legislation, "Transcript of Pennsylvania Governor's Commission on Labor Legislation," Feb. 16, 1953, pp. 63-4; and March 6, 1953, pp. 88-95.

and he stated, "The courts cannot, by occasional decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government." [32] In addition, many older labor persons who recall the social insensitivity of some courts to the labor movement and the bad experiences of labor with the courts in injunction cases that were decided on economic predilections look with fear on any increased judicial intervention in spite of the short-run victories in the *Lincoln Mills* and the two companion cases. Some observers point out that by implication the gains of the *Lincoln Mills* case will be offset by the real possibility that the U. S. Supreme Court may decide that the Norris-LaGuardia Act no longer prevents the enjoining of a strike in breach of a contract, as it did in the railroad industry under the Railway Labor Act in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).[33] It might be that Justice Frankfurter, who was one of the proponents of the Norris-LaGuardia Act, may have realized this when in his dissent he alone voiced the older view that "judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes." Furthermore, many critics point to the large number of court cases in those states where arbitration statutes exist, and to the comparatively few cases where the parties do not live up to arbitration agreements or awards in those industrial states where there are no arbitration statutes and where finality and voluntarism in arbitration are recognized.[34] Furthermore, many persons criticize the development, in states with legislation, of the *Cutler-Hammer* doctrine,[35] which permits the courts to pass

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[32] Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harv. L. Rev.* 999, 1024 (April, 1955).

[33] Cox, "Current Problems in the Law of Grievance Arbitration," pp. 11-16; But cf. *W. L. Mead Inc.* v. *Int. Bro. of Teamsters*, 217 F. 2d 6 (1-CCA-1954).

[34] In Volumes 26, 27 and 28 through page 470 of the *BNA Labor Arbitration Reports*, there were a total of 125 court decisions reported, out of which 77 were N.Y. cases and 25 were federal decisions, leaving but 23 court cases reported in the other 47 states; of the 1183 cases in 1954 studied by the AAA, only 12 cases or 1 percent involved court action.

[35] See footnote 17 *supra;* Cox, "Current Problems in the Law of Grievance Arbitration," pp. 22-31; and Summers, "Judicial Review of Labor Arbitration," 2

(Footnote continued on following page.)

upon arbitrability in the first instance, and they also criticize the recent General Electric decision by the First Circuit Court of Appeals[36] as disturbing symptoms of judicial distrust for labor arbitration.[37] Finally many arbitrators prefer the common law rules, even with their infirmities,[38] for the arbitrator's decision is final on all questions of fact and law even though wrong; in fact the arbitrator has no obligation to apply the law even as he understands it and he only "puts his foot into it" when he talks too much and writes that he is trying to apply the law and then he misconceives it.[39]

At the same time there are many persons who believe that there is a need for federal or state arbitration statutes changing the common law rules and that there is a definite place for limited judicial intervention.[40] There is no necessity to recall the infirmities of the common law, whereby agreements to arbitrate are revocable[41] and certain awards involving reinstatements are not enforceable.[42] Although nearly all com-

Buffalo L. Rev. 1 (1952); Cox, "Some Lawyers' Problems in Grievance Arbitration," 40 *Minn. L. Rev.* 41 (1955); Clifton, "Arbitration and Arbitrability," *3d Annual Conference on Labor,* N.Y.U. 187 (1950). See also *Greyhound Corp.* v. *Division 1384 of Amalgamated Association of Street etc. Employees of America,* 44 Wash. 2d 808, 271 P. 2d 689 (1954).

[36] *Local No. 149 of the American Federation of Technical Engineers* v. *General Electric Co.,* #5201 (1-CCA, Dec. 16, 1957).

[37] Cox, *op. cit.,* p. 22-31. Also see Mayer, "Arbitration and the Judicial Sword of Damocles," 4 *Labor Law Journal* (Nov. 1953) 724 where at p. 773 he refers "to the attitude of the courts in muscling their way into the substantive rather than the judicial phases of the arbitration process, by insisting that a dispute has merit;" he also refers to "judicial bulls in the delicate china shop of labor arbitration goring their way toward the destruction of the true broad purpose of the arbitration process."

[38] For a criticism and review of the comon law, see Cox, *op. cit.* and footnotes cited therein; See also discussion in *Trinidad Fruit Co.* v. *Red Cross Line,* 264 U.S. 109, 123, 125.

[39] *Motor Haulage Co.* v. *I.B.T.,* 272 App. Div. 382, 71 N.Y.S. 2d 352 (1947); *J. F. Fitzgerald Const Co.* v. *Southbridge Water Supply Co.,* 304 Mass. 130, 23 N.E. 2d 165 (1939).

[40] Isaacson, "A Partial Defense of the Uniform Arbitration Act," 7 *Lab. L. J.* 329 (June 1956); see also "Report of the Committee of Labor Arbitration," Sec. of Labor Relations Law of ABA, 55-79 (1957).

[41] *Vynior's Case,* 4 Coke 816-82a (1809); *Sanford* v. *Boston Edison Co.,* 316 Mass. 631; *Trinidad Fruit Co.* v. *Red Cross Line,* 264 U.S. 109, 123-5.

[42] See *Magliozzi* v. *Handschumacher & Co.,* 327 Mass. 569, where the court reserved decision on the point while calling attention to the difficulty.

panies and unions voluntarily live up to their promises to arbitrate, there has developed in recent years a reluctance by some companies to arbitrate, as evidenced by the increasing number of suits brought to compel arbitration under Section 301 of the Taft-Hartley Act. If management refuses to arbitrate or live up to the award at common law, the union's "usual method of adjustment" is to strike, but this method is unavailable under adverse conditions.[43] Furthermore, the present status of the law creates problems for unions and affords ample opportunity for litigation and delay, especially in the area of arbitrability,[44] for some of the state arbitration statutes [45] may except "labor agreements," are open to divergent interpretations [46] and have interjected the courts into the arbitration fields.[47]

Since unions now almost universally accept arbitration as the terminal point of the grievance procedure in collective bargaining agreements which run for two and three years, and since unions are now subject to damage suits for breach of the arbitration clause even where there is no no-strike clause in the agreement,[48] many unions now actually favor arbitration legislation.[49] Unions point out that under the Taft-Hartley Act the alternative to court actions to enforce arbitration agreements is the "usual methods of adjustment," which may not be readily available if the plant has moved, the union is weak, or the grievance is relatively minor. Indeed Justice Frankfurter's observation concerning the undesirability of judicial intervention becomes meaningful only if he is prepared to hold with the majority in Lincoln Mills that the *quid pro quo,* namely the no-strike obligation, is automatically can-

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[43] See *Report* of the Committee on Labor Arbitration of ABA (1955), pp. 1-15; and 1956, pp. 55-67; see also Isaacson, *op. cit.*

[44] See footnote 16, *supra.*

[45] N.Y. Civil Practice Act, Article 84; Purdon's Penna. Stat., Tit. 5, Ch. 4; Cal. Code of Civil Procedure, S. 1280 *et seq.;* see U.S. Dept. of Labor, "Labor Arbitration Under State Statutes" (1943).

[46] See Cox, "Current Problems in the Law of Grievance Arbitration" (Nov. 14, 1957), pp. 5-7.

[47] See footnote 16, *supra.*

[48] *International Brotherhood of Teamsters* v. *W. L. Mead Inc.,* 230 F. 2d 576 (1-CCA), cert. dismissed 352 U.S. 802 (1956).

[49] In Massachusetts, the Uniform Arbitration Act has been sponsored by the state C.I.O. In several other states, labor has also supported the act.

celled out by the employer's refusal to arbitrate. Unions feel, however, that companies should not be allowed to renege on their promises to arbitrate or abide by unfavorable decisions of an arbitrator. With the current decline in business activities and employment and the increased attacks on them, unions are wary that more companies will succumb to these temptations. They are also fearful that under the *Lincoln Mills* case the federal courts will adopt the doctrines of the *Cutler Hammer* and the new *G.E.* cases.[50] Consequently, labor unions are changing their position relative to legislation covering arbitration but at the same time they are opposed to legislation which in the words of Attorney Mayer throws "judicial bulls in the delicate china shop of labor arbitration." [51] Rather they favor the type of legislation which will place the two processes in their respective places, for "both the institutions of self-government proliferated by collective bargaining and the surrounding legal system can gain strength from mutual support provided that legal rights and duties under collective bargaining are not imposed by conventional legal rules but are drawn out of the institutions of the industrial relations shaped to their needs, and provided also that the law achieves a workable division of authority between the arbitration and the courts." [52]

Regardless of your own predilections on the desirability of judicial intervention, the *Lincoln Mills* case, along with many state statutes at present, have put the courts into the field of labor arbitration. Under the *Lincoln Mills* decision, the federal courts will enforce arbitration clauses and will have to fashion by "judicial inventiveness" their own procedural rules and substantive doctrines on a case-by-case basis from federal legislation with its underlying policies, from common law rules and general legal principles, and from state arbitration laws and decisions which the federal courts will look to as persuasive

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[50] See *supra*, pp. 53, 63, 64.

[51] Mayer, "Judicial 'Bulls' in the Delicate China Shop of Labor Arbitration," 2 *Labor Law Journal* 502 (1951).

[52] Cox, "Current Problems in the Law of Grievance Arbitration," address at the University of Cincinnati Conference on Labor Arbitration (Nov. 14, 1957) and Cox, "Rights Under a Labor Agreement," 69 *Harv. L. Rev.* 601, 604-5 (1956).

authority and for guidance but not as binding rules.[53] The federal judges are now confronted with a host of problems including the proper procedures, the issues and defenses available in enforcing the contract or the arbitration award, and in particular the scope of judicial review. Furthermore, there is the problem of intrastate businesses not covered by the federal law, as well as the problem of enforcing the award. Since the Supreme Court in the *Lincoln Mills* case by implication has held that the U. S. Arbitration Act is not applicable to labor contracts,[54] there seems to be a need to limit the *Cutler-Hammer* doctrine and to fill the gaps by a carefully drawn statute.

For this purpose, I recommend for the serious consideration of the National Academy of Arbitrators the proposed Uniform Arbitration Act, adopted by the National Conference of Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association.[55] This act reverses the common law rules and provides for enforcement of agreements to arbitrate, as well as a stay of any action pending arbitration and a summary procedure for the enforcement of an arbitra-

[53] Justice Douglas who delivered the opinion of the court in the *Lincoln Mills* case also wrote the dissent in the *Westinghouse case,* 348 U.S. 437 (1955) and said at 465, "I agree with Mr. Justice Reed that Congress in the Taft-Hartley Law created federal sanctions for collective bargaining agreements, made the cases and controversies concerning them justiciable questions for the federal courts and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for construction and interpretation of those collective bargaining agreements." In *Lincoln Mills* he states, "any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."

[54] Possibly the U.S. Arbitration Act should also be amended to apply to labor contracts, 57 *Col. L. Rev.* (Dec. 1957) 1123 at 1138; Judge Wyzanski has suggested that the present U.S. Arbitration Act can be used now by analogy, where appropriate, even though it is not strictly binding. See *Textile Workers Union* v. *American Thread Co.,* 113 F. Supp. 137 at 142 (D. Mass. 1953). Prior to the Lincoln Mills case, Judge Magruder concluded that the U.S. Arbitration Act was applicable to arbitration clauses in collective bargaining agreements covering employees engaged in the production of goods for commerce. *Local 205 U. E.* v. *General Electric Co.,* 233 F. (2d) 85 (1-CCA 1956); affirmed on other grounds, 353 U.S. 547 (1957).

[55] A good argument can be made for a separate labor statute divorced from commercial arbitration. See *Report* of Committee on Arbitration of ABA (1955) pp. 15-20. In addition, the problem of federal preemption will have to be considered. See Report of Committee on Labor Arbitration in 1957 Proceedings of Section of Labor Relations Law, 55, 62-64.

tion award. It rejects the much-criticized *Cutler-Hammer* doctrine that the court must determine the question of arbitrability [56] and places this issue in the first instance before the arbitrator with subsequent judicial review. In my opinion, this act properly defines the respective roles of the arbitrator and the courts and meets the practical realities of the labor relations field with its many specialized problems previously outlined.[57] It recognizes the general legal principles which require exhaustion of administrative remedies [58] and give an administrative agency primary authority to determine its own jurisdiction.[59] It prevents duplication of two hearings whenever the question of arbitrability overlaps the merits, and it recognizes that a collective bargaining agreement is not an ordinary legal document but involves many major assumptions, frames of references, accepted basic conditions, procedures or practices, and fundamental postulates which may be unwritten in the short, and often hastily drafted, document used and written by laymen. It also recognizes, as Judge Magruder stated, that "under the simplified and speedy procedures of an arbitration more evidence with regard to the unexpressed assumptions may be available and an arbitrator may have the additional advantage of background knowledge derived from past experiences with the parties." [60] It provides that the legal rights and duties under a collective bargaining agreement are drawn out of the institutions of the industrial relations and shaped to their needs rather than imposed by the conventional legal rules and it helps to develop the system of private industrial jurisprudence or common law of the plant. It may well

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[56] 271 App. Div. 917, 67 N.Y.S. 2d 317, aff'd 297 N.Y. 519, 74 N.E. 2d 464; see also *Botany Mills* v. *Textile Workers of America,* 27 LA 165 (N.J. Super Ct., 1957); see Cox, "Current Problems in the Law of Grievance Arbitration," pp. 22-31; and Summers, "Judicial Review of Labor Arbitration," 2 *Buffalo L. Rev.* 1 (1952); Scoles, "Review of Labor Arbitration Awards," 17 *U. of Chi. L. Rev.* 616 (1950). Cf. *Greyhound Corp.* v. *Div. 1384 Amalgamated Ass'n of Street, etc. Employees,* 44 Wn. 2d 808, 271 F. 2d 689.

[57] See *supra,* pp. 51-53.

[58] Berger, "Exhaustion of Administrative Remedies," 48 *Yale L. J.* 981 (1939).

[59] *Myers* v. *Bethlehem Shipbuilding Co.,* 303 U.S. 41 (1938); See Davis Administrative Law (1951) S. 186; *Macauley* v. *Waterman S. S. Comp.,* 327 U.S. 540 (1946).

[60] Cf. *Local 149* v. *G. E.,* see *supra,* p. 53.

help to reverse the current tendency towards judicial definition of the jurisdiction of the arbitrator and towards increasing review of the merits of awards.[61]

Commenting on the respective roles of the arbitrator and the courts, Professor Archibald Cox has recently pointed out: "The character of their arbitration proceedings should be shaped by the parties through conscious decisions and unconscious evolution just as they determine other aspects of their relationship. (Rather), the argument is that the courts should not preclude or discourage this view of arbitration by undertaking to determine whether the proposed interpretation is reasonable in advance of the arbitration hearing on the basis of a bare reading of the words. After the arbitrator has made his award there may be additional room for judicial scrutiny. The facts will have been developed. The arbitrator will have written an opinion in which he can explain the basis of his judgment. If it rests upon an interpretation which appears irrational even in the light of the background, past history and purpose of the words and the jurisprudence evolved by the parties, as explained in the opinion, then perhaps the award should be vacated as beyond the power of the arbitrator to interpret the agreement. So long as the courts retain this final opportunity to scrutinize the award, less harm is done by sending an apparently weak case to arbitration than by denying the moving party the opportunity to be heard in the forum having the primary responsibility for determining the issue."

Consequently, I reiterate my earlier recommendation that your group give serious consideration to supporting generally the uniform arbitration statute on a state level and possibly amendments to the U. S. Arbitration Act on a federal level.[62] It seems to me that since the federal courts and many state courts

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[61] Summers, *op. cit.*, Scoles, "Review of Labor Arbitration Awards," 17 *U. Chi. L. Rev.* 616 (1950). Cox, "Legal Aspects of Labor Arbitration in New England," pp. 18-25; See *Local 205* v. *G. E.*, 233 F. 2d 85, 101 (1956); see also *Local 149 of American Federation of Technical Engineers* v. *General Electric Co.*, (1-CCA, Dec. 16, 1957) at pp. 7-9. See also Horvitz, "An Appraisal of Labor Arbitration," 8 *Industrial and Labor Relations Review* (Oct. 1954), 86.

[62] "It has been recently suggested by a well known authority in this field that about the only people who now oppose legislation of this nature are professors and arbitrators." See Report of Committee on Labor Arbitration; Section of Labor Relations Law of ABA (1956) 55, 60.

are already becoming fairly deeply involved in labor arbitration, there is a definite need to clarify through legislative action not only procedural problems but also the respective roles of the arbitrator and the court judge. The legislative method, in my opinion, can help to maintain your own job opportunities by guarding your own jurisdiction and preventing excessive judicial intervention in the field of labor arbitration.

Possibly an early case in the courts of Massachusetts which Professor Cox has uncovered can illustrate my point and be a warning to the arbitrators who overlook the problem of judicial intervention. The case turned on the validity of the following award:

> "Award. The, undersigned, arbitrators within named, having heard the parties by their several statements under oath and there being wide divergence in their statements aforesaid, we come to the final conclusion that we do not agree on any conclusion; but our agreement is that the arbitrators shall be paid for their services." [63]

Professor Cox further pointed out, "It will be a matter of regret to all arbitrators if not to the parties to learn that so statesmanlike a decision was held invalid by our Supreme Judicial Court." [64]

5. Conclusion

In conclusion, I should like to repeat that the grievance and arbitration procedure in labor relations has been recognized as one of the greatest, if not the greatest, contribution of labor unions to our American democratic scene.[65] It helps to develop a form of industrial jurisprudence and industrial democracy

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[63] Cf. *Smith* v. *Holcomb,* 99 Mass. 552.

[64] Cox, "Legal Aspects of Labor Arbitration in New England," speech before N.E. Law Institute. At the same time, arbitrators may feel more secure as a result of the noteworthy decision last year whereby the N.Y. Court relying on an early case from Massachusetts held that arbitrators have the same immunity from suit by an unsuccessful litigant as do judges. *Babylon Milk & Cream Co.* v. *Horvitz,* 151 N.Y.S. 2d 221, 26 LA 121 (N.Y. Sup. Ct. 1956).

[65] Shulman, *op. cit.,* 1002, Millis and Montgomery, *Organized Labor* (1945), p. 890.

which is essential to political democracy in any democratic society. Its success or failure depends on the parties and the arbitrators. From the union viewpoint which I have tried generally to express today, I can say that, although unions do have some definite problems with arbitration, generally they support the arbitration system and possibly vice versa. Both parties, as well as the arbitrators, should, in my opinion, do everything within their power to eliminate some of these problems and to make the system operate efficiently, economically, speedily, within reasonable bounds, and with a proper role for the arbitrators and the courts. By our joint efforts, we can help to make a positive contribution to our democratic way of life.

Discussion—

LEWIS M. GILL *

In the mercifully short space of time allotted for these comments, some selectivity is required. Mr. Segal's imposing paper has covered a wide range of subjects. I shall not try to touch upon them all.

Specifically, I shall resist the temptation to discuss the Uniform Arbitration Act, on which he has given us some fresh and provocative remarks. The Academy has devoted a good deal of time to that subject already, and will devote more in the future. I shall defer to the Academy's illustrious committee on that topic for the agonizing reappraisal which Mr. Segal's remarks may well inspire.

My comments will be directed to the earlier portion of his paper, particularly his ominous listing of the rich variety of ways in which arbitrators may qualify for union blacklists, deservedly or otherwise.

The listing of objectionable practices may be broken down into two broad categories: (1) those as to which management may take an opposite view, and (2) those as to which management may be expected to join in the castigation.

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Before getting to the specific points, let me say a word in defense of so-called blacklisting of arbitrators in general. Perhaps because the term arouses unhappy memories in the labor relations field, it is often suggested that blacklisting of an arbitrator, by either side, is an evil or frivolous practice, used only by those who are immature, poor sports, or possessed of an unbecoming anxiety to win the case at hand.

I would suggest that such a view is unrealistic and naïve. Except in occasional "political" cases, it is a fact of life that each side *does* want to win the case at hand, and I see nothing improper in striking off the names of arbitrators who are deemed, rightly or wrongly, as unlikely to view the case as the particular party wants it viewed.

It does not seem to me that inquiry as to an arbitrator's past experience and reputation, among fellow unionists or employers, is the mark of a poor sport; rather it seems a logical and intelligent thing to do. To say otherwise is to assume that all active arbitrators are equally skilled and have the same approach to all issues, which is patently not so.

The real objection is to unintelligent or unfair blacklisting, not to blacklisting as such. Here we come to some specific views in Mr. Segal's paper.

Taking up first some points on which management may be expected to disagree, I have picked four items for comment.

1. Mr. Segal states that unions generally favor the view that the contract "is not an exclusive statement of all the rights and privileges of both parties, but assumes continuation of existing conditions." While the views of management and union may well vary in particular cases, depending on whose ox is about to be gored by continuation of the existing conditions, it seems fair to say that management generally tends to favor a more restrictive view of the contract.

Unless the contract contains some specific provision limiting the arbitrator's scope in this field, I would suggest that Mr. Segal's point here is well taken. To rule out a grievance on the ground that it is not covered by a specific contract provision seems to encourage the telephone-book type of contract, and to make negotiations more complex and difficult.

2. In discipline cases, Mr. Segal takes a full cut at the ball, indeed, with this assertion: "The union does not want the arbitrator to give any weight to the employer's judgment but wants an independent de novo decision . . ." Here we find a sharp issue with the general management viewpoint, which is that the employer's judgment should be given heavy weight, and only overturned if shown to be arbitrary or discriminatory.

This subject has been debated at length in gatherings such as this; indeed, it may well be number one on the hit parade of topics for arbitration conclaves.

I would not subscribe to Mr. Segal's sweeping language on this point, but my view is closer to his than it is to the management view just described. Where the contract provides that discharge or discipline shall be for "just cause," it seems to me that the arbitrator does have a responsibility to make virtually a de novo judgment as to whether there was just cause for the penalty involved. He is, to be sure, substituting his judgment for that of the employer, but that seems to be exactly what the contract calls for.

I would, however, make two qualifications on this general observation. One is that the issue is not really de novo, in the sense that the arbitrator should decide what he would have done had he been handling the case for the company. He might have taken a lenient view of the case for various reasons; the question is rather whether there was just cause for what the company did. A certain amount of semantics enters in here, but I think there is a fairly clear line of distinction.

The other qualification concerns the contract language. If the contract provides, rather than "just cause," that "No employee shall be discharged arbitrarily," for example, then the horse takes on a different coloration entirely. Under that type of provision, I should think the arbitrator's function is clearly *not* to make a virtual de novo judgment. Here again semantics creep in; an arbitrator may be inclined to brand the company's judgment as arbitrary if it conflicts with his own. However, it seems plain that under this type of provision, the company's judgment is entitled to more weight than it is under the "just cause" type of provision.

3. Pointing out that unions sometimes look to arbitrators to "bail them out" of cases which are inadequately prepared or presented, Mr. Segal suggests that unions often feel that arbitrators should "frame the question, make the arguments for the union, ask the proper questions and "decide the case on the contract and the 'true' merits rather than on the presentation at the arbitration hearing."

While he describes this tendency as "unfortunate," it is nevertheless suggested that this is a fairly general point of view. I would seriously question how general it is, but will comment on it anyway.

Here again, I would not subscribe to the sweeping nature of the above statement of the arbitrator's function, but the extreme opposite view, sometimes heard from management (or even from some unions), does not hold any greater appeal. That is the view that the arbitrator should maintain a sphinx-like silence throughout the hearing, and decide the case on what information is presented to him, whether it illuminates the issue or not. It seems to me that we have a real obligation to seek out the pertinent facts, and that if one side or the other is annoyed by questions which seem to be helping its adversaries, that is basically one of the occupational risks we must take.

Needless to say, there is no need to call a moratorium on common sense in this situation. Either or both of the parties may well be disenchanted by an arbitrator who barges into the questioning prematurely or excessively or delivers long soliloquies at the drop of a hat.

4. Mr. Segal avers that arbitrators often are not invited for return engagements when they fail to "give the union a 'full hearing' which includes much irrelevancy, speechmaking, and even hearsay." This opens up an interesting question as to how much control the arbitrator should assert over such verbal meanderings at the hearing.

I doubt that many unions would object to some reasonable measure of control; indeed, the union may at times be grateful if the arbitrator shuts off some long-winded member of the committee. Here we need whatever skills at diplomacy there may be in our arsenals.

One technique which has worked on occasion is to suggest that while you will let the testimony in if it is deemed important, it is only fair to point out that the other side will, of course, be entitled to answer, and that the resultant lengthy excursion may well prolong the hearing and add to the expense all out of proportion to the evidentiary value, if any.

A good deal of caution should be exercised, however, in cutting off testimony, even by diplomatic suggestion. One of Harry Shulman's most felicitous comments in his Holmes Lecture at Harvard in February 1955 is pertinent here: "The more serious danger," he said, "is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude of the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out."

My time is nearly up, but a few remarks can be squeezed in on four other points. As to these, I would suppose managements generally would concur in Mr. Segal's criticisms of the arbitrators. If I am right about that, some stern self-appraisal seems plainly in order on the part of arbitrators who desire to remain in business.

1. First is the fairly widespread complaint about arbitrators who seek to mediate parties who don't want to be mediated. Here diplomacy and intuition of the highest order is needed, to distinguish between situations in which some suggestion of a settlement avenue may be welcomed, and those in which it may boomerang.

A great deal could be said on the question of what constitutes "mediation" in various instances, but I think we can all agree that "naked" attempts to pressure unwilling parties into a settlement are outside our proper rule.

2. As to arbitrators' opinions, I concur with Mr. Segal's condemnation of those who write no opinions at all; absent a request from the parties for an award without opinion, it seems a clear part of our responsibility to explain our reasons.

At the other extreme, it also seems proper to join Mr. Segal in frowning upon lengthy tomes which suggest either an at-

tempt to justify a large fee or an unbecoming passion for self-expression.

3. He also scores the practice (I suspect a rare one) of indulging in "functional featherbedding" by soliciting the filing of briefs, and the "excessive citation of outside decisions," which smacks of featherbedding or fee-building and also indicates a drift toward legalism.

I concur in these impeachments; we are, after all, hired to decide the cases for the parties who hire us, not to write glittering essays for publication or posterity.

4. Finally, his plea for more speed in issuance of the decisions is one which we may well heed.

I would suggest that it is not only more satisfactory to the parties to get the cases out of the way quickly, but also that it may be easier for us to write them up while the testimony is fresh in mind.

One consoling thought suggests itself here. If unions, and managements too, tend to reject arbitrators who have become so busy that their awards are a long time in coming, that may result in spreading some of the cases around to the many deserving members of our fraternity who could use a little more business!