The trend toward narrowing arbitration springs from well-founded fears by employers that rights and responsibilities the exercise of which are truly untouched by the union contract are nevertheless in peril when they are exposed to an arbitrator—in peril of being clouded, second-guessed, or actually abridged in respects which were not the subject of negotiations, or in which (in the more aggravated cases) the union tried and failed to secure amendment of the contract.

Only arbitrators can dissolve this fear, and they can do it only by exercising self-restraint and by approaching their task with a thorough awareness that their mission is adjudicatory—that (unless the parties have specifically authorized them to be something more) their mission is that of judge, not legislator.

II. WHAT AND WHEN AND HOW TO ARBITRATE

BEN FISCHER*

Frank O'Connell is preoccupied with "rights." He simply assumes management has certain "rights" and collective bargaining is a device whereby unions attempt to wrest these "rights" away from management. Who ordained these rights is not explained; perhaps they were established by law professors.

So here we are again back to the "rights" theory, "divine rights," the master-servant relationship and the whole caboodle of malarky which enable men with good minds and good hearts to waste their time in a sea of speculative nothingness instead of applying themselves to finding solutions to real issues and problems arising from our changing economic and social climate.

If a union had the power to write a contract which said that management has no rights, then what would that prove? And if a company says to a union you have only the right the law gives you, namely the right to bargain (whatever that turns out to be), then what does that prove? Obviously, the only real issue resolved is the relative power of the parties at a given time in a given situation. This is hardly an adequate basis for examining the appropri-

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ate and equitable solutions which might be desirable in the complex areas of the labor-management relationship.

If Mr. O'Connell depends on the courts for support of his doctrine, then he is suggesting that it is the courts that legislate. Is this what he advocates? What laws enacted by what legislative body determine that it is management that has rights and employees who do not?

In regard to the great emphasis upon the parties determining the scope of arbitration, this observation may be in order. The designation of the arbitrator or the method of his selection is clearly up to the parties. If arbitrators act so badly and the parties continue to designate them, are not the parties in fact blessing the objectionable results? If Mr. Garrett and Mr. Feinsinger and Mr. Seward abuse their powers, the parties must be accepting this alleged abuse since they are retaining them in the same posts with the certain expectation that they will carry on pretty much as they have in the past. Now really, isn't this the most meaningful revelation of what the parties want as an accommodation to their needs and desires? In steel, I hear rumblings about firing Garrett and Seward, but most of them come from the union so management must be prepared to accept their crimes despite some grumbling from legal theorists.

The parties say more to each other and to their arbitrator by the personnel they designate than by their doctrinal protestations. May I suggest management knows that the Garretts and the Sewards and the Feinsingers ably implement the ground of accommodation on which the parties can actually walk—and that's why they and others like them stay on, year after year.

After all, what Mr. O'Connell is doing here is presenting a brief on why he should win cases, not providing light on how to make practical progress. I wonder how arbitrators manage to remain so polite. After all, they could say at the hearings and the conferences, "We've heard all this over and over; let's skip it and get to the case (or problem) or else get some arbitrators you do like—if you can mutually agree to the names!"

But actually, many arbitrators view these discussions more philosophically because they have been subjected to experiences

which do not quite square with Mr. O'Connell's representation of management. Although it is true that management may agree with him at a seminar, in the hearing room "it ain't necessarily so."

How often does the company say you must construe the agreement liberally so as to facilitate efficiency and the need for change. How often does management urge the implied right management wants to hang its hat on, namely, "efficiency," whether the agreement mentions it or not. There's another implied right—"sound engineering principles." Still another—"we've always done it this way and there were no formal grievances; this stops the union from now invoking the contract language." Or, "the work has now been made confidential and the union has no right to represent confidential employees—even if the contract doesn't say so—because after all . . ." Here are some implied rights which find no justification, legal, contractual or moral, but which management still urge on arbitrators with monotonous consistency.

Almost every arbitrator here could add to these random samples of management insistence on its own brand of implied rights. It appears to me that it depends on whose ox is being gored by who—or whom!

Now, one would think listening to Frank that management wants the book, the whole book, and nothing but the book. But most of us have seen management on both sides of the contract book, arguing one way in one case and the opposite way in another.

The explanation of why this happens gets pretty close to the nub of our problem. Most companies are not run by lawyers retained to argue arbitration cases or even by the labor relations executives. Operating people may have the final say; or in certain cases it may be accountants or engineers or safety experts or even doctors. These people are not necessarily expert about the book or the theory of implied vs. expressed rights. They have jobs to do; there are powers they insist on exercising. The company representative in arbitration scurries around to find a way to express best and justify the conclusions reached by the guy who has the final say or who is allowed to exercise it. If the book doesn't give support to the company decision, he had better find a little implied right somewhere that does—or another employer.

If you see the parties as a complex of forces, then Mr. O'Connell's observations are almost beside the point. Who cares about Lady Whosis or John Doe vs. Local X? The people who are at the heart of the labor-management relationship are motivated not by the courts but by more vulgar notions like money, and that's what we had to do to get that order out; or, on the union side—what do you mean the company can cut my pay, what am I paying dues for?

Ralph Seward made one of his periodic valiant efforts to bury this rights debate in a remarkably revealing, non-foggy speech before this Academy last year in New York. But it doesn't seem to matter how many times this corpse is buried, it shows up again. Some of us thought Ralph, whether a good, bad, or indifferent arbitrator, surely earned his degree as an undertaker. But perhaps we were wrong. Perhaps we are witnessing a late, late show—the corpse that will not stay buried, no matter what.

So, Frank, please redirect your considerable talents. There are most troublesome problems in the collective bargaining area that bother people who have to operate the plants and people who represent the employees and the wishes they express from time to time. Help is needed—for solutions, not for the assertion of doctrines based on idle hope that problems will go away if only these arbitrators who are constantly being drafted by the parties would not defy the wishes of these who came back over and over again for more of the same.

An effort to develop some general and universal principles of arbitration scope or of terminal facilities for grievance settlement, separate from the totality of a collective bargaining relationship, is futile and potentially disruptive of many well-established relationships. Arbitration is not an end; it is a means. Arbitration is not the foundation of collective bargaining; it is a procedure sometimes resorted to by parties for many and various reasons. Arbitration as such is not universally or eternally good or bad, desirable or undesirable, a source of comfort or a source of trouble. It is a tool and its nature and effectiveness are usually merely symptoms of what kind of relationship the parties are able to create or unable to accomplish in their own private dealings.

As I see the so-called "trilogy" of the Supreme Court, it is essentially a recognition of the private nature of the bargaining rela-

tionship and the integral part that arbitration plays in that relationship. If the parties dislike the rules they establish or the procedures they adopt, they can change them. If they do not want arbitration but instead decide to resort to the courts for enforcement of their own contract, presumably the courts are available for this purpose. If the parties want to permit direct economic action as the tool available for enforcement efforts, they can do this. If it is the arbitration route they choose, they create it and fashion it as they see fit. If they want to combine these methods they can do that too.

The parties do what they do, usually because they mutually and willingly agree on a course of action. Sometimes, however, it may be the result of one party or the other having strength enough to impose its will and the determination to do so. Unilateral imposition of will may, it seems to me, turn out to be short-sighted. A union may be able to dictate to an enterprise, but such a course does not necessarily prove good for the union, the employers, or the general welfare. A company may be able to dictate to or even to destroy a union, but this, I submit, is not good for the company, the employees, or the general welfare if you assume that industrial democracy and human dignity and progress are among the most basic objectives in a democratic society. As President Johnson pointed out in his State of the Union address, our purpose is to serve the quality of life and not merely to accumulate great riches. These objectives I believe can be accomplished in part through strong, responsible, and effective unions.

Not everyone agrees with this view. Some intensely dislike unions or consider them evils that must be tolerated only to the extent legally required. Others think unions are all right just so long as they do not interfere with management's control over wages, hours, or working conditions. Essentially, these people want company unions, not instruments for genuine collective bargaining.

In recent years some very amiable gentlemen have tried to rationalize an approach to the effect that unions are fine if they do not interfere with management's determination of wages, hours, and working conditions to any significant degree; or if they confine their interference to wages; or if they serve as voices of the workers

and safety valves but not as agencies with power. This is the notion that collective bargaining is good if it is not effective.

Admittedly, some unions might use power unwisely, as is equally true of management or government. All three exercise power with varying degrees of good sense, reasonableness, and devotion to the real welfare of our society. It is inevitable that there will be departures from somebody's view of what is right, both because the standard of what is right varies and is not inviolate, and because performance is not always consistent with the highest goals available.

It is always useful to consider how we can avoid possible excesses in the exercise of power, wherever it resides. For our discussion purposes today, however, I will assume that both parties in a labor-management relationship desire accommodation and cooperation. I will assume that in response to their challenging problems they honestly desire to strive for solutions, progress, and improvement.

But first, let me acknowledge the O'Connell-GE these since I would be rude to ignore my colleague's thesis. The GE thesis is not essentially the product of collective bargaining. It is conceived by management and imposed on workers. I, for one, look forward to the day when the employees of the electrical manufacturing industry are sufficiently united and strong in their collective bargaining to establish enforcement terms in their contracts which are based on a mutuality of status, and not on the paternalism of an all-knowing management.

Genuine collective bargaining is an essential response to the nature of the inter-relationship between political democracy and its implication in the work place. Trying to make democracy effective in the work place is challenging and difficult indeed. The problems are sometimes simple but more often and increasingly they are intricate and ambiguous. Note just a few typical issues—contracting out, overtime scheduling, seniority, training, foremen working, wage rate determination in an era of radical technological changes, scheduling in continuous process industries, safety provisions and procedures, to name just a few.

To say these and similar matters should be left to unilateral resolution by management is to deny the protection of collective bargaining in matters which are extremely meaningful to the rank and file. However, to believe that collective bargaining solutions can always be achieved in crystal-clear contract terms is wishful thinking at best.

For instance, one can write a clause that explicitly states: "No contracting out." But management is not likely to agree to such a clause and the clause may, in fact, prove unworkable during periods of high employment in areas of labor shortage. Or one can take a categorical position that contracting out is not the business of the union; this position is highly unrealistic because contracting out can adversely affect the most basic needs of workers for jobs, security, and earnings. If we examine recent experience, we find equivocal determinations of this issue—both in contract language and in arbitration awards. The lack of certainty does not result from the failure of the parties or the incompetence of arbitrators. It reflects rather the inherent difficulties posed by the problem.

Overtime scheduling is another intricate case. Some employees want overtime; some do not. Some desire to work overtime, but want the right to refuse it when it interferes with their personal needs. A union may oppose, for institutional reasons, overtime, although many of its members themselves want overtime. Management on the other hand may favor overtime because it provides a flexible means for getting work done. Or management may oppose overtime but find that seniority agreements force it to use overtime because reassignment, recall, or transfer procedures are complex or restrictive.

We could go on reviewing issue after issue. The story would vary with each, but an underlying thread would appear—ambiguity and extreme difficulty of definitive solution.

Problems concerning working conditions can often be solved on the spot between a foreman and the union representative. But the solutions may be ad hoc in nature and may not establish guideposts for other cases. Yet, a comprehensive contract provision which provides clear-cut guideposts is sometimes hard to achieve even if there is a common desire to find one.

What should parties dealing in good faith do about these problems? If one or the other could impose its will, the temptation to do so would perhaps be irresistible. This might produce a clear result, but it would not necessarily make it right or produce a solution which would survive. In most cases, in industries such as steel, auto, and rubber, it is more likely that mutual accommodations must be found because neither party can successfully dictate to the other.

I submit that such accommodations often leave much to be determined. It would be ideal if the parties could resolve all their problems on a day-to-day basis as they arise. But obviously every case cannot be mutually resolved. The parties must, therefore, seek and find a workable terminal facility in order to settle those disputes.

A major device that we have for dealing with such problems is private arbitration. Often we give the arbitrator an almost impossible task; we take to him issues so complex that no clear-cut contract provision can be written by the parties. Then we ask him to decide individual cases within the confines of contract provisions which are necessarily couched in generalization or ambiguities. If the arbitrator finds that without a clear-cut guide to justify upholding a grievance he must deny it—which seems to be the O'Connell-GE thesis—then the parties have an untenable situation. The union cannot tolerate the result and is driven to more extreme procedures —write what we want or else a costly, crippling strike; or throw out arbitration and we'll strike over grievances. What else is there to do?

Let no one take comfort in the assumption that a victory for the management's rights theory either through arbitration, cleverly-contrived contract clauses, or somehow reversing the "trilogy" doctrine would solve anything. Such a victory would be empty because the problem would still require a solution. The GE-type arbitration clause is not exportable. In fact, I feel certain the day will come when those subjected to it will scuttle such clauses and develop a more mutually agreeable terminal facility for grievances.

The trend is and is likely to be not towards the GE approach but in a different direction. As vital problems are submitted for final determination to private arbitration, the parties must and

will concern themselves more and more with the quality of arbitration, the practical grasp the arbitrator has of the realities confronting workers and managers, and the efficiency of the process itself.

We should concern ourselves more with improving arbitration, rather than making eloquent speeches castigating arbitrators. Improving the quality of arbitration presents a real challenge to all of us. Its importance does not permit us to duck and hope the problem will go away. There is no evidence that the need or the problem will disappear.

High quality arbitration has a broad scope indeed, not in a legalistic sense but in the most practical terms. An arbitrator should thoroughly come to know the plant, its operations, its practices, the union structure and policies, and the management organization. In the best situations I have known, the arbitrator has known as much as the parties appearing before him. The depth of his investigations and the breadth of his experience can well bring him even greater practical knowledge.

It always fascinates me to hear someone, with a recent or casual relationship with a company, who berates arbitrators as outsiders, even when the arbitrator has been around longer than he, been exposed to more of the problems of the enterprise, and has contributed more to the policies actually governing the labor-management relationship. What makes the arbitrator an outsider when he spends all or most of his working hours inside? What makes the company hireling an insider when his knowledge is recent and his actual experience superficial?

From these observations I conclude, *first,* that an arbitration setup should be stable, so that there is continuity, knowledge, and experience brought to the arbitration bench. While the parties can do much to assure stability, the arbitrator must earn continuity of his relationship by virtue of ability, fairness, hard work, and a common sense relationship with the parties at all levels.

Where do we get arbitrators who have these enviable virtues? Talent is important but exposure is equally essential. Those of us who can do so have the obligation as a matter of self-interest to provide training or interning opportunities. Wherever possible,

the parties should be willing to permit arbitrators of the first rank to have associates of lesser experience or even of no experience. This is risky, and even costly. But lack of high quality arbitration because of lack of experienced, able arbitrators is even more costly when weighed against the impact of poor decisions and a relationship suffering from lack of confidence in the arbitration process.

There may be other training methods. In highly-organized industries it may be possible to use new men on less demanding cases so that they get to know the industry and so that the parties get to measure and know them.

No matter how we do it, however, it is of the first importance that major unions and companies seek out ways to find and to develop arbitrators to do the job we want done as we want it done. This is as much an obligation of the parties as any other training, recruiting, or manning program.

Secondly, we do not assure high quality arbitration by living amid hypocrisy. If we give an arbitrator a task which is complex and elusive, and then complain because he doesn't treat it as simple and precise, we are obstructing the process. If our complaint is against the other party but we level it at the arbitrator as a more vulnerable target, we are helping to undermine the process. An arbitrator should expect criticism, even unfair criticism. But there are types and degrees and sources of criticism which go beyond what we can expect arbitrators to readily tolerate.

Thirdly, the parties have an obligation to be helpful to arbitrators. Although arbitration is adversary in nature, the representatives of the parties do owe the arbitrator some assistance. The arbitrator has to know what the parties are driving at and what they agree upon. It is possible that arbitrators sometimes view the parties only as participants in a never-ending war, yet this view is usually quite inaccurate. Why can't the parties share with the arbitrators their common hopes and common views? In a mature relationship there is much more agreement than conflict. This part of the relationship is important for the arbitrator if his role is to be balanced and constructive.

Fourth and finally, the need for quality arbitration arise not

only in permanent umpireships and large company-union arrangements but also in connection with the thousands of cases decided on an ad hoc basis. In many respects these situations are the most difficult. When an occasional case is arbitrated, the parties do not usually have the inclination to do more than present their story and hope for a fair decision. In these cases the arbitrator has special responsibilities because these parties, although less experienced, are nevertheless entitled to the best possible performance.

Too often, however, we see a disturbing hangover from the past. When major companies insist that each group of cases, or even each individual grievance must be heard by a different arbitrator, we have reached the ultimate in nonsense. This approach assumes arbitrators are fakers or crooks, governed by box scores and devoid of integrity. Sometimes I suspect those who persist in this type of arbitration are so cynical themselves, they can't believe others might be honest.

Even though the improvement and development of sound arbitration is urgently needed, realistically no one can write a manual for all America on how to write a labor contract, how to arbitrate and what and when to arbitrate. These are problems which vary by industry, by union, by time and by place. Consideration of the wide variety of experiences, however, can be of real value to all of us.

For instance, I do not have one harsh word for the auto system whereby certain items are excluded from arbitration and strikes are permitted over those issues. The stakes are large in regard to those issues, and a great industry and a great union have chosen the strike route rather than arbitration. It is interesting to note, however, that the UAW uses other systems in other industries where conditions so warrant.

The steel union and the steel companies in their contracts do not restrict the subjects for arbitration. The only limitation placed upon the jurisdiction of the arbitrator is that he must apply the terms of the contract, local agreements, and local practices. But our contract with Alcoa does restrict the scope of arbitration where certain difficult problems are excluded from arbitration and made subject to strike action instead.

Is one course right and the other wrong? Not necessarily. Each situation must be handled in the light of its own realities and merits. Perhaps the steel setup will some day be changed and become more like Alcoa. Perhaps Alcoa will some day be changed and be more like steel's present arrangements. It is entirely speculative to generalize or to try to enforce a single solution to grievance handling regardless of circumstances. The solution should and will come from the parties. In fact, the same arrangements in different situations can produce different results, depending on the desires and attitudes of the parties themselves.

There are many considerations that lead to devising approaches to arbitration. I can conceive of a company and union not seeking the establishment of precedent or doctrine, but just wanting to dispose of each grievance. This is foreign to the experience of most of us but not necessarily outrageous. If the parties have faith in their day-to-day, man-to-man relationship, they may guard that relationship vigilantly and not want practices and precedents to hem them in.

On the other extreme, picture the giant, far-flung corporation dealing with a single union for 90 to 95 percent of its employees. Perhaps the problems of policy coordination and supervision of supervisors are so great that consistency becomes all-important, coordination is considered vital, and therefore arbitration becomes an important tool for helping to develop policy. In such cases, predictability may be more important to management than the wins and losses. Any result may be preferable to not knowing what to expect, and the union representatives may well agree.

There are countless approaches between these extremes. Most of us want a fairly consistent policy in arbitration but not rigid consistency. We feel the need for full consideration of each case, its facts, its merits, and a fair outcome even though, superficially at least, the line of decisions may appear inconsistent.

Notice should also be taken of the existence of not merely two views—one union and one company—but many separate views of grievance handling. Individual union representatives may have different expectations from the arbitration process, and may even change these expectations when different situations arise. Individual company representatives may have widely divergent views,

depending in part on whether they are operators, engineers, accountants, lawyers, or industrial relations people. Even within each of these groups there is no assumption of single-mindedness.

Most of us would suggest that in the long run we are best served by adherence to the contract terms as the guide for *all* arbitration. Although the parties may make their own settlements without feeling restricted by contract limitations, the arbitrator cannot properly superimpose his judgment on the basis that he "knows best" what the parties should do. He should know best only in terms of what the contract means, and he can know best if he lives with its interpretation day-in and day-out. He is not there to appease either side; in the long run he is there to convince both parties that he is competent as an interpreter of the agreement, as a fact finder, and as an able practitioner with the competence to apply the facts to the contract and the contract to the facts.

It is true that arbitration may reveal that the contract, as read and interpreted by the arbitrator, is deficient or unfair in some respects. This is for the parties to correct, if they agree to do so, not for the arbitrator to deal with. To an arbitrator, the agreement must be the industrial law whether he likes it or not.

Having put forth these several generalizations, may I hasten to add that while these thoughts probably represent a broad consensus, they too can be unacceptable to able and sincere labor and management practitioners who have different notions, and indeed, what may be for themselves better notions. I would suggest also that other terminal facilities for grievances, such as the right to strike, have been found very useful. In some relationships the parties choose this route as a matter of taste or tradition. Others perhaps choose it out of desperation because it seems less fearsome than the alternative of negotiating contract clauses to provide guides for arbitration. Probably, one reason an industry like steel is not one where strikes over any grievances have been made permissible is found in the technology of the steel-making processes, the long preparations required for an orderly strike if it is not to be enormously destructive, and the small units in which issues arise which could result in strikes. Yet, even these circumstances could change due to the technological revolution in steel.

My overall conclusions are obviously not very precise. I see much room for variety and variation. The fearful ones who bemoan the "trilogy" and quiver over the potential villany of arbitrators should find a more constructive way to amuse themselves. There is serious business at hand. The economic welfare of the nation needs vigorous, healthy collective bargaining to grapple with increasingly difficult problems. The solution to these problems, especially in major industries, must include considerable reliance on arbitration—effective, competent arbitration. There is no magic formula, no automated device for assuring effective arbitration. It is the responsibility of the parties to address themselves now to this task.

If management chooses the road of so emasculating arbitration as to render it impotent, then the whole structure of free collective bargaining will be endangered. Labor will not be subjugated, even if paid good wages or provided with numerous fringe benefits. Free working people want a say in the government of the work place. If collective bargaining cannot provide this vehicle for democratic participation, it could well be that employees and their unions could turn to government. Government-supervised works councils and labor courts are not uncommon in democratic nations, but I am certain we are better off with our free, private systems of industrial government. To those who agree, I suggest we should concentrate on making our system work well in order that it will endure.