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LABOR-MANAGEMENT ARBITRATION: "THERE OUGHT TO BE A LAW"—OR OUGHT THERE?

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Much legislation over the years, both good and bad, has had its genesis in the ill-considered impulse of someone that "there ought to be a law." Not infrequently the initial question of whether legislation is really needed or desirable merits more serious consideration than the pros and cons as to its proper content once the initial decision has been arrived at. In the present problem both considerations are highly important and great differences of intelligent opinion exist as to both.

When one has in mind that at common law an agreement to arbitrate future disputes has no binding effect, and that an agreement to arbitrate an existing dispute may be abrogated by either party at any time prior to the handing down of an award without suffering any adverse legal consequences, the suggestion that "there ought to be a law" by which parties are required to abide by such agreements may seem worthy of immediate acceptance. And when one further has in mind that instances do sometimes arise, at least in some areas, when parties to such agreements refuse to go to arbitration, that they have been known, albeit on rare occasions, to refuse to carry out an award once it is handed down, and that there seems to be much lack of clarity in the minds of many lawyers as to how to proceed to enforce an award against a recalcitrant party, the suggestion may seem to take on additional merit.

On the other hand, before one succumbs to the arguments supporting the soundness of the timeworn saying in its application to the case of labor-management arbitration, the basic nature of that institution should be carefully considered.

All persons conversant with this problem are familiar with the fact that the traditional arbitration clause as the final step in the grievance procedure

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in a collective bargaining agreement sets up the procedure by which the parties themselves select their arbitrator, or arbitration board, with provision for resort to some other authority to make, or assist in making, the selection if the parties are unable to agree, and that it further uniformly provides that the arbitration award, when made, shall be accepted as final and binding by both parties, with no appeal to or review by any other authority.

This whole procedure, then, becomes a part of the privately created machinery which the parties voluntarily set up for the governance of their day to day relations. So long as it can be kept on a wholly voluntary basis it seems clear that it will continue to serve its intended purpose. It is the willingness of the parties to honor their agreements to accept the arbitration process as controversies arise, and their willingness to honor their agreement to accept the arbitration awards as final and binding, that makes the whole system effective, and acceptable to the parties on any long range basis.

One must have in mind that it is only an occasional controversy that goes to arbitration. The great majority of disputes that arise in the conduct of any industrial enterprise are settled at some stage of the grievance procedure without the necessity of calling on the arbitration process. This grievance procedure, which all modern collective bargaining agreements provide for, is the machinery, devised by the parties by their own voluntary bargaining process, by which they iron out their disputes and misunderstandings, arrive at settlements and implement their relationships in the industrial process. This is a part, and a major part, of their own self-governing process. For the settlement of those few controversies which the parties are not able to resolve in their direct contact adjustment process within the prior steps of the grievance procedure, the final step of arbitration, again of their own devising, comes into play. But it is their process which they have formulated for themselves and which is merely the capstone of their grievance settlement procedure. They have no purpose to submit their dispute to the adjudication of any public or governmental agency, either judicial or administrative, but only to their own privately created machinery which has its existence solely by virtue of their agreement and from which it derives its powers. It is, in many respects, the last step in the bargaining process, when other efforts at settlement have failed, and without which the sole recourse would be to economic force.

It is important to keep in mind that the authority of the arbitrator rests not upon any law or administrative order or regulation, but upon the voluntary agreement of the parties. It is the agreement of the parties, in their submission agreement or otherwise, that determines his authority and fixes his responsibility, and not any official regulation or statutory enactment. Equally significant is the fact that the arbitrator's award is made final and binding upon the parties solely as a result of their own voluntary election and not through any governmental compulsion, judicial or otherwise.

The purpose and the conduct of labor-management arbitration is not on a par with the functioning of a governmental agency whose decisions are enforceable by the courts and are necessarily subject to some measure of judicial review. If a court enforces an arbitration award, or an agreement to arbitrate, it does so, not by way of enforcing a decision of an official or governmental agency, and based on some statutory criterion, but solely on the theory of contract obligation between the parties, both of whom have solemnly agreed to accept the award as final and binding and each of whom has relied upon the promise of the other as the *quid pro quo* for giving up any possible use of economic power to which he might otherwise have resorted. This is further emphasized when we keep firmly in mind that labor-management arbitration is strictly a substitute for resort to economic force and not in any sense a substitute for litigation as in the case of commercial arbitration.

No analogy to court review of the administrative process is to be found in such a situation. The administrative tribunal is created by statute, and the administrative process is a process of adjudication by an authoritative, governmental agency. The enforcement of its decrees and their review to determine conformity to statutory or constitutional requirements are obviously functions for the courts, however desirable it may be to limit the scope of the reviewing court's authority.

But the arbitration process as a purely voluntary arrangement between the parties, representing the culminating step in a privately created procedure for the settlement of grievances, the determinations of which the parties, as the sole creators of that machinery, have expressly agreed shall be final and binding, stands in clear contrast. The very nature of the collective bargaining agreement, of which the grievance and arbitration processes are a major part, makes clear that the parties rely on each other's

willingness to abide by the obligations to which they have pledged their word. When the parties can no longer rely on adherence to these obligations, the grievance procedure, and especially the arbitration process as the final step in that procedure, will have ceased to perform its intended function in the peaceful disposition of industrial conflicts.

Any analysis of the process of labor-management arbitration as it now exists must start with this conception of a purely private and voluntary, non-official, non-governmental, institution. Legislation that directs its procedures and subjects its functioning to judicial control, and its awards to judicial review, largely converts it from its original private nature and attempts to bring it within the legal system, or the system of the administration of justice, like the administrative tribunal, and makes it a part of that legal system of which appeals and judicial review are recognized as a usual, if not an essential, part.

It has been suggested that the price to be paid in this process of transformation, in terms of weakening or destroying voluntarily arbitration, may be too great for the alleged advantages supposed to flow from a comprehensive arbitration statute.

Such, at least, are some of the considerations involved on both sides of the initial question as to whether any legislation, of whatever nature, applicable to labor-management arbitration is necessary or desirable.

With something in excess of ninety per cent of the present day 100,000 or more collective bargaining agreements providing for arbitration as the terminal point of the grievance procedure, and with the practice of arbitration being tremendously increased in the industrialized areas throughout the country, there have emerged widely and increasingly suggestions from various sources that legislation should be enacted, applicable to labor-management arbitration, that would, among other things, provide readily available procedure for enforcing agreements to arbitrate, provide for the expeditious enforcement of arbitration awards, regulate in greater or less detail the arbitration procedure, and give some degree of authority to the courts to modify or vacate arbitration awards on some more or less limited bases. These proposals have varied all the way from the very simple provision to make agreements to arbitrate in the future enforceable, with or without some enumeration of procedures for enforcement of awards, to the comprehensive, complex and detailed statute setting forth a long list of

bases for modifying or vacating awards and subjecting them to a large measure of judicial review. While suggestions for legislation of this nature have emanated from various sources, some confined to a single state and some on a wider basis, particular emphasis has been given to the problem by the somewhat lengthy consideration at the hands of the National Academy of Arbitrators, and by the action of the National Conference of Commissioners on Uniform State Laws at its 1955 meeting giving final approval to comprehensive legislation applicable to both commercial and labor-management arbitration, in the form of a Uniform Arbitration Act, and with the approval of the House of Delegates of the American Bar Association at its 1955 meeting, submitting the Act to the legislatures of the various states for adoption.¹

There is no purpose to include in this article a detailed statement of the present status of arbitration legislation, but it is appropriate to observe that a majority of the states do have arbitration statutes of a sort, the great majority of which were drafted specifically for commercial arbitration, as was the federal Arbitration Act. Several of the state statutes have been amended to provide for their applicability to labor-management arbitration. A goodly proportion of these statutes are in terms applicable only to disputes that may be made the subject of an action at law or of a suit in equity, and a major reason for the present movement for legislative action is the fact that neither at common law nor under many of these statutes is the agreement to arbitrate future disputes, even of this limited character, enforceable. All such statutes do provide, however, for enforcement of arbitration awards, which are also enforceable at common law by what is possibly a somewhat less expeditious process.²

1. Perhaps the most vigorous and consistent exponent or proponent of this legislation, if not the originator of the idea, has been the American Arbitration Association which has had an opportunity to observe at close range the problems as they have arisen and been dealt with by the courts for a number of years in the state of New York under a statute dating back to 1920. Reliance on court intervention has apparently been much more widespread in New York than elsewhere, yet the performance of the New York courts in the field of labor-management arbitration has done little to support the desirability of such a practice.

2. The most complete survey of arbitration legislation available is that published by the United States Department of Labor in 1943 under the title, *LABOR ARBITRATION UNDER STATE STATUTES*. Other useful materials include Dowell, *Judicial Enforcement of Arbitration Awards in Labor Disputes*, 3 *RUTGERS L. REV.* 65 (1949); Epstein, *Legal Aspects of Labor Arbitration*, N. Y. U. SECOND ANNUAL CONFERENCE ON LABOR, p. 383 (1949); FREIDIN, *LABOR ARBITRATION AND THE COURTS* (1952); Gregory and Orlikoff, *The Enforce-*

It is the purpose of this paper to give consideration to the arguments pro and con as to the need for and desirability of any such legislation; whether such legislation applicable to labor-management arbitration, if any, should be separate and different from that applicable to commercial arbitration; whether it should be on a state or a national level; if on a state-level, whether uniform legislation is desirable; and finally, some of the considerations relative to its content.

There was a time not so long ago when the representatives of labor almost uniformly opposed legislation of this sort. Possibly this was a part of the general reluctance on the part of Unions to have the courts enter the labor-management relationship on any basis which was a rather natural reaction from their unfortunate experience in the application of the labor injunction. With the more recent almost universal acceptance by labor of arbitration as the terminal point of the grievance procedure in collective bargaining agreements, and apparently with the feeling that some contracting parties are too frequently reluctant to go to arbitration and may, on occasion, be disinclined to abide by arbitration awards, there appears to have been some modification of this attitude of opposition on the part of labor. The existing attitude of both labor and management with respect to the desirability of such legislation appears to depend to a considerable extent upon local experience, and accordingly that attitude varies greatly from one industrial area to another and from state to state.

No effort will be made in this article to make an extended list of persons active in the field of labor relations who have expressed their views with respect to this problem, but attention may, not inappropriately, be called to the work of the "Governor's Commission on Labor Legislation" in Pennsylvania under the chairmanship of Mr. M. Herbert Syme of Philadelphia, a transcript of whose hearings held in 1953 contains statements of several men of extensive experience in this field, invited on a tripartite basis, including several distinguished scholars, teachers and arbitrators, along with outstanding representatives of both labor and management, and indicating varying shades of opinion. Both within this group

ment of Labor Arbitration Agreements, 17 UNIV. OF CHI. L. REV. 233 (1950); Lillard, *State Arbitration Statutes Applicable to Labor Disputes*, 19 MO. L. REV. 280 (1954); Plock, *Methods Adopted by States for Settlement of Labor Disputes Without Original Recourse to Courts*, 34 IOWA L. REV. 430 (1949) and many others. (See also Prentice-Hall and Commerce Clearing House loose leaf services).

and elsewhere contrariety of opinion exists without regard to which segment of the tripartite representation the individual may be identified with.

A recognition of the arguments pro and con as to the need for and desirability of such legislation seems to be appropriate as a basis for some detailed consideration of their merits and as criteria from which to judge proposed or existing legislation in the field.

I. ARGUMENTS FOR LEGISLATION APPLICABLE TO LABOR-MANAGEMENT ARBITRATION

The strongest arguments on behalf of such legislation are usually directed to the fact, recognized above, that agreements to arbitrate future disputes, or even existing disputes, are not enforceable at common law, and that a party can withdraw from an arbitration proceeding and repudiate his agreement to arbitrate at any time prior to the making of an award. It is also suggested that reliance upon the common law for enforcement of arbitration awards is hardly satisfactory, since, it is alleged, a lengthy lawsuit with probable delaying appellate review is likely to be involved, thus destroying the practical value the award would have if expeditiously enforced. Whether substantially the same statement may not be equally directed to the enforcement process under statute, and whether resort to the courts, always unfortunate, may be encouraged by the existence of the statute, are matters for subsequent consideration. The arguments here recorded for legislation are largely grounded on the assumptions, first, that resort to the courts is essential, and second, that the common law does not provide an adequate remedy. These assumptions are both vigorously refuted by those opposed to such legislation, particularly so as to the first. And while those who support such legislation freely admit that the vast majority of parties to collective bargaining agreements, probably 98 or 99 per cent or more, live up to their agreements to go to arbitration and to accept awards as final and binding, the other 1 or 2 per cent may refuse, and if they are permitted thus to defeat their obligations, so the argument runs, the recognized status of voluntary arbitration as the final step in the settlement of labor-management disputes may well be substantially undermined and, by the possible resort to economic force, the stability of the collective bargaining relationship likewise weakened in the process.

In the light of these suggestions, proposed legislation making all agreements to arbitrate binding and enforceable, and providing procedure for

expeditious enforcement of arbitration awards has developed substantial support. Beyond that point, however, pronounced differences of opinion readily assert themselves.

While the above matters are those usually asserted as giving rise to the need for legislation, few if any proposed or existing statutes are so limited. Most statutes, as illustrated by that existing in New York and the new Uniform Arbitration Act, contain, among other things, more or less detailed provisions for the appointment of arbitrators by the court under specified circumstances, the use of depositions and subpoenas, the authority of the court to compel or to stay the arbitration process, and to modify or vacate the award on numerous stated grounds, with provisions for appeal as in other civil actions.

Much greater controversy arises with respect to these latter provisions than concerning the former matters listed as giving rise to the general arguments in favor of such legislation. Some attention will be given to these provisions later.

II. ARGUMENTS AGAINST LEGISLATION APPLICABLE TO LABOR-MANAGEMENT ARBITRATION

Two general types of arguments are advanced against legislation of this nature. The first is based on the feeling that such legislation is not necessary. The second, which is not entirely separate from the first, emphasizes a possible danger to the continued effective development of voluntary labor-management arbitration as we now know it by the enactment of such legislation. Much of the emphasis in both is directed to the importance of promoting and encouraging the arbitration process and the necessity for keeping the whole process on a voluntary basis.

This, of course, relates itself to the larger question of where we want to go in labor relations. Do we want more or less government control? Are we to have more or less government intervention in the handling of industrial relations? Do we want to extend government intervention, which so readily lends itself to the snow-balling process, or do we want to encourage the parties to manage their own relationships, including the final disposition of their controversies through their own privately devised processes? Do we want to start the process of converting this privately regulated relationship in the settlement of grievances and the disposition of contro-

versies by private voluntary arbitration into a government controlled relationship, either administratively or judicially, or should we take cognizance of the tremendous strides that have been made in the past dozen years or so in developing and implementing machinery for the processing and settlement of grievances, and their final disposition by private arbitration free from the hand of government, take cognizance of and pride in the far reaching contributions the parties have made and are making toward industrial peace through wholly private processes, and permit the experimental development to continue wholly unhampered?

Anyone who reads this article is likely to remember that the major accomplishment of the President's Labor-Management Conference of November, 1945, was the unanimous recommendation that provision for arbitration as the final step in the grievance procedure be included in all collective bargaining agreements. The proof of the value of voluntary arbitration in the peaceful settlement of industrial disputes in the years since that date, as well as before, and its bright promise for the future demand that we should continue to make the encouragement of its use our principal concern.

Perhaps we should direct our major efforts to the improvement of the private processes of grievance settlement and voluntary arbitration, rather than seeking to inject government control, through the courts or otherwise, into the process. To the extent that we provide for government intervention, even by the process of judicial enforcement, may we thereby weaken the reliance of the parties on the processes they have created by which they dispose of their differences by mutual agreement, or by the process of voluntary arbitration which they have set up by mutual agreement? If we measure the progress of these processes by reference to the relationship of labor and industry only a few short years ago, the results are little short of phenomenal. Can we not well be patient and allow a little more time for the continued working out of this voluntary cooperative process? Above all else we must be careful to do nothing that would discourage its use or slow its development.

In this connection it is worth while to observe the testimony of Dr. George W. Taylor before the Pennsylvania Governor's Commission on Labor Legislation emphasizing his belief that the less legislation on this subject the better, that the soundest policy is to keep the government out

of the field and to encourage the parties to set up and rely finally upon their own machinery.³

In somewhat similar fashion Dr. Alexander Frey of the University of Pennsylvania Law School, in the same proceeding, expressed grave doubt as to the desirability of such legislation and the possible adverse effect it may have on voluntary arbitration and labor relations on a long range basis. He would keep legislation to a minimum and probably go no further than "to revise some judicial errors that may have crept into this field of the law." Better draftsmanship of the arbitration clauses in collective bargaining agreements is suggested as a more feasible long range basis of attack.⁴

Others have emphasized that the most that any such legislation should do in application to labor-management arbitration would be to provide that provisions in collective bargaining agreements for the arbitration of existing or future disputes shall be valid, binding, enforceable and irrevocable except upon such grounds as exist at law or in equity for the revocation of any contract. Such a limited provision would, apparently, provide the needed revision of "judicial errors" referred to above, and would have the merit, in the minds of its sponsors, that the parties would not encounter the rather detailed procedural requirements common in most legislation of this nature. In this connection we are reminded that the facilities of the common law could be relied on for enforcement, and that any shortcomings in the remedies thus provided may be more than counterbalanced by "freedom from the multitudinous motions to compel arbitration, motions to stay arbitration, motions to review, and motions to enforce, which are the inevitable consequences of integrating labor arbitration into a statutory procedure intended and probably necessary for the determination of commercial disputes".⁵ In this connection it must be observed that the disposition of these various and sundry motions are all subject to appeal and further judicial review.

If there is any inclination to doubt the delaying possibilities in this connection under such proposed legislation, one need only take a casual look

3. Proceedings of Pennsylvania Governor's Commission on Labor Legislation, February 16, 1953, pp. 63-64.

4. *Id.*, March 6, 1953, at pp. 88-95.

5. *Id.*, May 29, 1953, at pp. 42-46.

at the Uniform Arbitration Act which, in addition to authorizing court proceedings (1) to compel arbitration, (2) to stay arbitration [Section 2]; (3) to appoint arbitrators [Section 3]; (4) to confirm an award [Section 11]; (5) to vacate an award, with seven distinct and varying grounds upon the basis of which the award may be vacated by court action [Section 12]; and (6) to modify or correct an award on three distinct bases [Section 13]; makes specific provision for appeal from "(1) an order denying an application to compel arbitration . . . , (2) an order granting an application to compel arbitration . . . , (3) an order confirming or denying confirmation of an award, (4) an order modifying or correcting an award, (5) an order vacating an award without directing a rehearing," plus any further "(6) . . . judgment or decree entered pursuant to the provisions of this act". As to all it is provided that "the appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action" [Section 19 (a) and (b)].

Such a casual glance reads content into the "multitudinous motions" over which the above quotation expressed concern.

It is suggested that the confusion and delays attendant upon the application of all of these, and many other, statutory provisions bid fair to modify substantially the existing simple, informal, expeditious process of voluntary labor-management arbitration, and to set up a reliance on court proceedings as the final step to which the once final process of arbitration may well become a preliminary. It has been well said that "The essence of the arbitral process is that it leads to a quick, final and binding decision which is designed to be the end point, and not the starting point of a dispute."

From a wholly different source comes the similar suggestion that the success of labor-management arbitration is due almost entirely to the voluntary acceptance of the whole process by both management and labor, and that we are better off without such proposed legislation because of the delay, uncertainty and consequent confusion resulting from judicial intervention and judicial review of arbitration decisions.

The importance of keeping labor-management arbitration on a completely voluntary basis can hardly be overemphasized. It is, of course,

6. *Id.*, April 8, 1953, at p. 69.

initially a private arrangement entered into wholly voluntarily by the parties for the final settlement of non-legal controversies by a neutral third party as a means of preventing resort to economic force, and controversies which neither party ordinarily would be willing to submit to the determination of a court. Those who oppose such legislation as here under consideration feel strongly that labor-management arbitration will serve its intended purpose fully effectively only when the parties to it regard the arbitrator's award as finally and completely binding in all cases without possible resort to the courts. And they feel equally strongly that when the artificial prop of recourse to judicial intervention is provided by statute, with its alleged encouragement of the parties to regard that as the final step in the procedure, the chances that it will ever achieve its full effectiveness are likely to be measurably lessened. Furthermore, it is believed that a statute providing numerous bases upon which a court may inquire into and set aside an arbitration award is fundamentally inconsistent with the basic purposes which the parties to a collective bargaining agreement seek to implement when they include in that agreement a provision for private arbitration and stipulate that the determination of the arbitrator, or the arbitration board, shall be accepted as final and binding by both parties to the agreement. One witness before the Pennsylvania Governor's Commission expressed somewhat the same thought by saying, "Unless the arbitrator's award is made as final as possible you will defeat the whole thinking of arbitration and you start your round of litigation. We are trying to avoid that litigation and find a speedy end to the difficulty of the parties".⁷

Some who believe legislation of the sort here under consideration is undesirable and who are deeply concerned about maintaining the completely voluntary character of labor-management arbitration in all of its aspects have made the suggestion that since it is a substitute for resort to economic force, the sanctions for possible refusal to conform to an agreement to go to arbitration or to carry out an award should be left up to the parties' own devising. The strike or the lockout, or the threat thereof, it is sometimes suggested, could be used instead of resort to the courts on the theory that the government should be kept entirely out of the process except in serious emergencies, and that the more drastic remedy of economic self help would be a more potent persuasive to abide by the obligations to go to arbitration or to accept an award than a possible resort to the courts.

7. *Id.*, at p. 9.

Without endorsing these suggestions as pointing the way to the desirable solution, it is not inappropriate to observe in this connection that the provision for arbitration usually goes hand in hand with a no-strike, no-lockout clause. When the parties agree on arbitration as the final step in the grievance procedure in their collective bargaining agreement, they, at the same time, commonly agree to forego their right to resort to economic force and thus place their full reliance upon final and binding arbitration. And in a good many instances both unions and companies agree to give up this right only with considerable reluctance. If arbitration is not to be final, whether by being made subject to some measure of court review by vacation of awards, *et cetera*, or otherwise, the reasons and the justifications for having given up their right to resort to economic force would certainly seem to be materially weakened if not destroyed. To the extent that the arbitration award is not to be final, to that extent those reasons and justifications largely or completely cease to exist.

In reply to the suggestion of self help it is pointedly asserted that, as a practical matter, reliance on such economic sanctions frequently would be a wholly inadequate remedy. Seldom, if ever, would an employer find it feasible to shut down his plant in order to force a recalcitrant union to go to arbitration or conform to an award. In like fashion, similar reliance by a union would often be a wholly ineffective remedy, as in the case of a seasonal employment when a strike would be a wholly useless weapon during a layoff or enforced vacation.⁸ The injury to the public by invoking such sanctions is also emphasized as a strong consideration against resort thereto.

In somewhat the same connection, those who prefer to rely upon the remedies provided by statute rather than self help, or what they regard as the inadequate machinery of the common law, emphasize that it may well be more or less a useless process to provide for arbitration of grievances and have an arbitrator decide that "A" should have been promoted, or that "B" has been unfairly discharged, and then have no orderly process for effective enforcement of the award.⁹

The partial reply to this, of course, is the suggestion that reasonably effective enforcement, even if somewhat less expeditious, is available at com-

8. *Id.*, May 29, 1953, pp. 66-67.

9. *Id.*, February 16, 1953, pp. 9-10.

mon law,¹⁰ and without the open invitation and encouragement to reliance upon resort to the courts provided by the proposed legislation.

As suggested above, prevailing viewpoints with respect to this problem may vary from one area to another, largely dependent upon local experience. Thus, local references are not inappropriate.

This general problem has been before the Labor Law Committee of the Missouri Bar intermittently over a period of years and the reaction resulting from its rather mature consideration may very well serve to demonstrate one point of view based upon experience in one area.

In 1949 a sub-committee of the Labor Law Committee of the Missouri Bar drafted a proposed "Voluntary Labor-Management Arbitration Act" for the State of Missouri, patterned largely on the New York Act and not greatly different from the new Uniform Arbitration Act. Due to the development of serious doubt among the membership of the full Committee as to the need for such legislation and the feeling that its effect might be to discourage rather than encourage voluntary labor-management arbitration, the measure was never completed and given approval by the full Committee and never presented to the state legislature. When the present proposed Uniform Arbitration Act was made available from the National Conference of Commissioners on Uniform State Laws following the 1954 meeting, copies were circulated to all members of that Committee for serious study. At its midyear meeting in February of 1955, with 23 members present, all experienced in labor relations and in arbitration and representing about equally management and labor, with some four or five who would be classed as representatives of the public, this Committee went on record almost unanimously as being strongly opposed to any such legislation, including the proposed Uniform Arbitration Act. It has been recently suggested by a

10. See 6 WILLISTON, CONTRACTS, § 1927, p. 5387 *et seq.* (Rev. Ed. 1938); RESTATEMENT OF LAW OF CONTRACTS, § 445 (1932); Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925); Park Construction Co. v. Independent School District, 209 Minn. 182, 296 N.W. 475 (1941); Hamlin v. Duke, 28 Mo. 166 (1859); Bunnell v. Reynolds, 226 S.W. 614 (Mo. App. 1920); Fernandes Grain Co. v. Hunter, 274 S.W. 901 (Mo. App. 1925); Continental Bank & Supply Co. v. International Brotherhood of Bookbinders, Local 243, 239 Mo. App. 1247, 201 S.W.2d 531 (1947); McAmis v. Panhandle Eastern Pipe Line Co., 273 S.W.2d 789 (Mo. App. 1954); Rueda v. Union Pacific Railroad, 180 Ore. 133, 175 P.2d 778 (1946). For reference to cases from many other jurisdictions see, Dowell, *Judicial Enforcement of Arbitration Awards in Labor Disputes*, 3 RUTGERS L. REV. 65 (1949); Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233 (1950); FRIEDIN, LABOR ARBITRATION AND THE COURTS (1952).

well known student of this problem that about the only people who now oppose legislation of this nature are professors and arbitrators. In this case the only two committee members who were at all inclined to favor such legislation were two of the public representatives. Two members of the original three-man sub-committee who drafted the proposed act in 1949, those representing labor and industry, were present and expressed themselves as vigorously opposed, saying they had once thought such legislation might be desirable but that further experience in the field and more mature consideration had convinced them otherwise.

The opposition was largely grounded on the belief that such legislation is wholly unnecessary in Missouri and in the Midwest area. That belief is based on experience. It practically never happens in this area that a party to a collective bargaining agreement containing an arbitration clause refuses to honor his obligation to go to arbitration when a case arises, and with equal uniformity it practically never happens that a party to an arbitration award fails or refuses to abide by that award. If an occasional case should arise, it is argued that it is better to leave the matter to the common law. In what is apparently the only recent case in this area of refusal to abide by an arbitration award, the primary basis was a strong contention that the matter involved was an unfair labor practice and within the exclusive jurisdiction of the National Labor Relations Board under the doctrine of the *Garner* case.¹¹ This was a discharge case, and besides a claim of discrimination because of union activities, the discharge was alleged to be an unjust punishment for minor misconduct. The court eliminated the first matter as being exclusively for the National Labor Relations Board, but held the second was a proper matter for an arbitration award, and rendered judgment for the employee and the union in their suit to compel the company to comply with the award. Thus the absence of an applicable statute did not prevent effective enforcement of the arbitration award.¹² The process of voluntary arbitration is working exceptionally well in this area without benefit of statute, and the theory being followed is that we should let well enough alone. True, Missouri has an arbitration statute of 1825 vintage, with major amendments in 1835 and a few subsequent thereto, drafted for commercial arbitration, which is not applied to labor arbitration.

11. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485 (1953).

12. *McAmis v. Panhandle Eastern Pipe Line Company*, 273 S.W.2d 789 (Mo. App. 1954).

It has been the feeling of the Labor Law Committee of the Missouri Bar that the major elements of strength in labor-management arbitration as it now exists in this area lie in its completely voluntary character and the unanimity with which all parties honor their obligations to go to arbitration and to accept the award as final and binding wholly without the intervention of the courts. It has been the fear of this group that if a statute were enacted with its readily available invitations to petition a court to modify or vacate an award, these elements of strength might well be weakened or destroyed.¹³ The reasoning of the Committee was somewhat as follows: At present if a disgruntled party to an adverse arbitration award asks his lawyer what, if anything, he can do, he is invariably reminded of his agreement to abide by the award as final and binding and is advised that in good conscience he must do just that, which he always does. But if a statute like the Uniform Act were in existence, with its seven distinct grounds for vacating an award plus others as bases for modification, his lawyer must tell him that it is open to him to petition the court to modify or vacate the award on the statutory grounds, with the result, so it is feared, that such awards may no longer be regarded as final, and court intervention may become common, even be considered the final step, with its attendant delays and added expense. As expressed by one member, the primary merit of labor arbitration is that it is quick, inexpensive and final, and it is feared that such legislation might serve to take away the speed, the simplicity and also the finality of private voluntary arbitration and subject it to the delays, complications and expense of court proceedings with attendant appeals in a long drawn out procedure wholly inconsistent with the purposes of the voluntary labor-management arbitration process. Again, voluntarism and finality are commonly emphasized as the outstanding features of present day labor-management arbitration. The weakening or destruction of either would largely put an end to the major advantages of the arbitration process as we now know it. It is the fear that legislation of the sort here under consideration might have just such an effect that gives rise to the opposition here indicated.

And while the detailed recital of the experience of the Labor Law Committee of the Missouri Bar set forth above represents only a single state and

13. For the expression of a somewhat similar view, see Proceedings of Pennsylvania Governor's Commission on Labor Legislation, March 6, 1953, p. 10, and May 29, 1953, pp. 45-47.

is based largely on local experience in Missouri and the Midwest area, representatives of similar committees in some other states, with wide experience in labor relations and arbitration, indicate the belief that the consensus of opinion of experienced representatives of both labor and industry in their states is likewise to the effect that need does not exist for such legislation. While no effort will be made to list areas from which such reports come, two states with substantial industry and with committees so indicating are Massachusetts and Illinois. This is not to suggest that contrary opinions might not emanate from other areas, or even from some persons of experience in the same areas. Of the seventeen "experts" (the term is used advisedly in this case) who were called before the Pennsylvania Governor's Commission on Labor Legislation referred to above, a majority expressed themselves as favoring some legislation in this field, though several would restrict the coverage quite narrowly.

There comes from the testimony before that Commission the very strong suggestion that in any case legislation applicable to labor-management arbitration should not go further than to modify the common law to the extent of providing that agreements to arbitrate should be recognized as valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for revocation of any contract, with a possible provision for a stay of litigation in any controversy to which a valid agreement to arbitrate is applicable, and leave the problems of enforcement to the general powers of the court without any further statutory aid.¹⁴ One important reason for this suggestion is the belief that if the statute sets up detailed provisions for court intervention, a great many more cases of resort to court proceedings are likely to occur, just because the statute has made them readily available.¹⁵ This same point of view is emphasized by another witness before this Commission by saying "if you attempt to regulate arbitration proceedings . . . and how the award is to be enforced . . . you will have to set up a fairly comprehensive scheme of judicial procedure for enforcement, review and so forth, and if that exists on the statute books it will be taken advantage of wherever there is a dispute by any party about arbitration of a particular case". This he illustrates by saying, "where you have a statute . . . and it says so and so, and I must make my move to stay the arbitration within ten days . . ., then the party is apt to say, what do

14. *Id.*, May 29, 1953, at pp. 44, 45.

15. *Id.* at pp. 54, 55.

I have to lose, let's have a motion to stay the arbitration. Whereas, to go into court for an injunction against the arbitration, he will . . . do it only if he has a very strong case."¹⁶ Anything that would have a tendency to encourage or increase resort to the courts at any stage of the arbitration process is widely viewed as most undesirable, both because of the practical effect upon the operation of the process in the particular case and because it is fundamentally inconsistent with the basic purposes which voluntary labor-management arbitration is intended to serve.

It is probably not inappropriate to take a closer look at the basis upon which the alleged need for such legislation is said to exist on the one hand and denied on the other. Apparently those taking the two opposing views may very well base their conclusions on the same experience in some instances. For example, Mr. Noble Braden, Dean Wesley Sturges and Mr. Clarence E. Stewart appearing before the Pennsylvania Governor's Commission on Labor Legislation all indicated approval of the idea of having such legislation, yet the highest estimate they gave for any area of the percentage of cases in which resort to the courts had taken place was something less than 2 per cent.¹⁷ It was pointed out that the high mark in New York had been approximately 200 cases in one period out of a total of some 10,000 to 12,000, and that usually the percentage was lower. No other state is even alleged to approach this percentage unless it might be Connecticut, and both states have had legislation of the sort here under consideration for several years. To what extent the presence of such legislation may have contributed to an inclination to make use of it, it is not possible to judge. The testimony of one witness here referred to, applicable to a single large company having some 250 arbitration cases a year for more than ten years scattered throughout several states, asserted that in only one case had an effort been made to go to court.¹⁸

One arbitrator with long, extensive and distinguished experience in the field of labor appearing before the Pennsylvania Governor's Commission testified that, out of all of the many cases in which he had served, in only two instances had a party sought to go to court.¹⁹ One of the most widely experienced arbitrators in the country, Dr. George W. Taylor, also testify-

16. *Id.* at pp. 46, 49.

17. Proceedings of Pennsylvania Governor's Commission on Labor Legislation, February 16, 1953, pp. 10, 40; March 6, 1953, p. 95.

18. *Id.*, April 8, 1953, at pp. 28-30.

19. *Id.*, February 23, 1953, at p. 21.

ing before the Pennsylvania Governor's Commission, stated that "of all the decisions I have ever issued (as a labor arbitrator) none of them went to court, and they are in the thousands". He further stated that he "only had one decision where either party refused to follow it". In that case the Union struck because management refused to abide by the decision.²⁰ Still another experienced arbitrator testifying before the same Commission, stated that out of more than 900 cases he had decided, only one went to court.²¹

Perhaps the strongest statement in this regard presented to this Governor's Commission to indicate the almost universal disinclination of parties to collective bargaining agreements calling for arbitration to carry their controversies into the courts, came from Mr. Donald J. Sherbondy, Assistant General Counsel for the Pittsburg Plate Glass Company. He pointed out that the company had some 30,000 employees in plants scattered throughout the United States, with more than 230 collective bargaining agreements, all, or practically all, containing arbitration and no-strike provisions since their so-called "industrial peace clause" was inaugurated in 1946. Since that date, with hundreds of cases going to arbitration, "there has not been a single instance in which either the Company or the Union has gone to court to enforce an agreement to arbitrate labor disputes or to seek any action with respect to a labor arbitration award. The parties don't want to go to court."²²

The really phenomenal record of voluntary compliance with arbitration awards has been indicated by reference to results of specific studies. "For example", it is reported that "during the ten years ending in 1945, over 1,500 cases were heard by the impartial chairman in the full fashioned hosiery industry, without one case of non-acceptance. In the men's clothing industry in New York, out of 898 cases referred to arbitrators between 1924 and 1936, in only seven cases was there wilful non-compliance with an arbitrator's decision, and only two went to the courts. Not one of the first 1,616 cases heard by the National Railway Mediation Board went to the courts. Only six of the first 5,000 cases heard by the Railroad Adjustment Board were litigated".²³ Another study of more general and varied labor

20. *Id.*, at p. 53.

21. *Id.*, March 6, 1953, p. 57, Dr. Robert P. Brecht of the Wharton School of the University of Pennsylvania.

22. *Id.*, April 8, 1953, at p. 95.

23. Dowell, *Judicial Enforcement of Arbitration Awards in Labor Disputes*, 3 *RUTGERS L. REV.* 65 (1949).

arbitration cases based on reports by the parties involved in them, reported that "In only 51 of the 16,819 arbitrations — 0.3 per cent — in which the respondents participated in the prior two year period did either party refuse to accept the award".²⁴ What percentage of this small number, if any, may actually have gone to court is not revealed.

Responses to a questionnaire recently sent by the writer to some 200 experienced labor arbitrators throughout the United States revealed that out of 47,092 cases heard by the arbitrators replying, during the past ten years, a party had declined to follow an award in only 81 cases, and only 51 cases reached the courts. In other words, only slightly more than one case in a thousand, or one tenth of one per cent go to court, and in less than two tenths of one per cent does a party fail to comply voluntarily with the award. With the exception of the approximately 2 per cent reported for an unusually high period in New York, the three tenths of one per cent represents the high point of refusal to accept arbitration awards above referred to, and apparently only a small fraction of those actually went to court.

As to the higher percentages in New York, it should be observed that these include commercial arbitration cases in which the inclination to go to court appears to be much greater and for the disposition of which the courts are better fitted. It appears to be true, however, that even when restricted to labor-management arbitration, resort to the courts has been substantially greater in New York than elsewhere.

Many have inclined to the judgment that the presence of a statute in New York over a period of many years with its numerous bases for court intervention, in effect inviting resort to the courts by any disgruntled party, is largely responsible for the unfortunate experience in this regard in that state. Accordingly it has been frequently suggested that the experience with litigation under the New York Arbitration Act stands as a warning that legislation in this field may well do more harm than good.

There are no figures available in most jurisdictions, but obviously in the great majority of areas the percentage of cases in which either party seeks to invoke the aid of a court is infinitesimally small, in others wholly

24. Warren and Bernstein, *A Profile of Labor Arbitration*, 4 *INDUST. & LAB. REL. REV.* 200, 217 (1951). The authors of this report indicate that because of certain duplications the stated percentage was probably too high.

non-existent. It is, therefore, obvious that the demand for legislation providing for recourse to the courts is not based on any general or widespread practical need, if one may base judgment on the frequency with which a party to an arbitration agreement resorts to a court, or, for that matter, fails to carry out an award voluntarily.

No attempt will be made by the writer to give a definitive answer to the question whether such legislation as here under consideration is desirable, but rather to point up the questions that must be faced by those responsible for legislation in any particular state where the issue is raised.

Among the questions that must be considered is that of whether there is practical and substantial need for legislation applicable to labor-management arbitration under the circumstances existing in the particular jurisdiction. Is there danger that the presence of such legislation may weaken the basic strength of voluntary arbitration as it now exists? Is it better and more consistent with the basic purposes of voluntary labor-management arbitration to leave the extremely few cases in which a party refuses to go to arbitration under his agreement, or refuses to abide by an award, to the devices of the parties themselves, or to a resort to the common law and equitable remedies already available rather than to inject the courts into the process by means of legislation such as is now being proposed?

If there be areas in which either labor or management, or both, create a problem by refusing to honor their obligations to go to arbitration, or to abide by and carry out arbitration awards, then legislation may be desirable. Where such a situation does not exist, as it certainly does not in the mid-west area, and as it apparently does not in most areas, such legislation could serve no useful purpose and might well do much harm.

III. IF LEGISLATION IS DESIRABLE, SHOULD IT BE SEPARATE FROM THAT APPLICABLE TO COMMERCIAL ARBITRATION?

In any jurisdiction in which the prevailing opinion may support the need for legislation applicable to labor-management arbitration, the second question as to whether such legislation should be kept separate and distinct, or whether it may properly take the form of amendments to an existing commercial arbitration statute, or be enacted as a comprehensive statute applicable to both, becomes an extremely important question.

A. Arguments for Separate Legislation

As previously indicated, nearly all existing legislation dealing with this matter has been drafted primarily or exclusively for commercial arbitration, and in some instances, by amendment, a provision has been inserted making it applicable to labor-management arbitration, possibly without, as some allege, sufficiently careful consideration of whether existing provisions are appropriately applicable to labor-management arbitration. The second sentence of Section 1 of the new Uniform Arbitration Act is somewhat of the nature of the usual amendment and reads as follows:

“This act *also* applies to arbitration agreements between employers and employees or between their respective representatives, [unless otherwise provided in the agreement.]” (Emphasis supplied.)

This language, especially with the word “also”, would seem to be more consistent with a purpose to amend an act otherwise specifically applicable to commercial arbitration so as to make it also applicable to labor-management arbitration than to indicate the coverage of an act drawn originally to so apply. It is the belief of many that a large number of the provisions of this act that may be appropriately applicable to commercial arbitration have no proper application to labor-management arbitration.

It is broadly recognized, of course, that there are fundamental distinctions between commercial arbitration and labor-management arbitration, that the relationships between the parties in the two cases are fundamentally different, and that the two types of arbitration are designed for very different purposes. Commercial arbitration concerns itself with the business relations between parties who deal with each other at arms length, frequently in a single business transaction, commonly on a temporary basis which may terminate in a very short time, with no purpose on the part of either party to renew the relationship, and which, in any event, is likely to be brought to an end by the controversy which eventuates in the arbitration. Any arbitration proceeding growing out of such a relationship comes as a substitute for litigation and deals with problems commonly of a legal nature, with which courts are familiar and to which ordinary court procedures are properly and appropriately applicable. The parties to a commercial contract provide for arbitration as a more speedy and less expensive method of settling their disputes than by the law suit which they thereby hope to avoid, but if the arbitration process should fail the parties quite naturally

fall back on judicial intervention which would have been their sole reliance had they not agreed upon arbitration as a substitute therefor. Awards in such cases most commonly involve a matter of dollars and cents fulfillment of a contract obligation or come as compensation or damages for a breach thereof. And the necessity for a speedy and final disposition between parties who are probably parting business company permanently is likely to be a matter of relatively little gravity as compared with the urgency involved in a labor controversy where the economic relationship of the parties is such that they must continue to live together and work together, where an undue delay in the final disposition of any controversy adversely affects that continuing relationship, where the effective and expeditious disposition of one controversy may well prevent another from arising, and where the failure to accept an arbitration award as final and binding is likely to leave a permanent scar upon their long time relationship.

In emphasizing both the need for speed and an essential difference between the two types of arbitration, Dean Wesley A. Sturges asserted before the Pennsylvania Governor's Commission that "The potential strike or lockout which may be associated with, or in the background of labor controversies also press for a speedy determination of the issues—and more speedy than court dockets can accommodate."²⁵

As contrasted with commercial arbitration, labor-management arbitration is a substitute for resort to economic force. It is a substitute for the strike or the lockout, or the threat thereof. More realistically and more accurately, perhaps, it may be regarded as a mechanism provided for averting or preventing the strike and the lockout. And it deals not with dollars and cents issues but with complex problems of seniority, work week, work day, reporting pay, job posting and bidding, job evaluation, job classifications, job descriptions and job content, employee qualifications, lay-offs, promotions, discipline, absenteeism, incentive plans, piece rates, and many other complicated and technical matters, based upon the provisions of a collective bargaining agreement setting up the working rules to govern the day-to-day relationship between an employer and his employees, with which the average court is totally unfamiliar, to the disposition of which the court process is ill adapted, and which must be disposed of finally without delay

25. Proceedings of Pennsylvania Governor's Commission on Labor Legislation, March 6, 1953, p. 28.

if the continuing relationship of management and labor is to operate effectively. Unlike commercial arbitration which commonly marks the end of the relationship between the parties involved, labor-management arbitration bears no similarity in its purposes or its effects to a suit for damages for which commercial arbitration is likely to be a substitute. Instead, it involves controversies that call for equitable solutions designed to enable the parties to go on living together and working together in harmony.

The process of labor-management arbitration is not only unrelated to the judicial process in its reason for being, in contrast with commercial arbitration, but it is the capstone of a system of self-government which the parties have devised for themselves to prevent work stoppages and other economic strife, and in the operation of which complete avoidance of court intervention is a prime objective. It has been emphasized that the interpretation of provisions in a collective bargaining agreement, intended to promote industrial peace by the use of a privately agreed upon grievance procedure in which voluntary private arbitration is the final step, and the interpretation and application of a statute directed to the implementation and enforcement of awards arising therefrom, must be regarded as quite different from the interpretation and application of a statute directed primarily to the expeditious enforcement by the courts of dollars and cents awards arising from arbitration of ordinary commercial disputes. The handling of a matter effectively to promote industrial peace is likely to be very different from both commercial arbitration and court determination. Many provisions of the average commercial arbitration statute, dealing with enforcement, review and possible vacation of awards, which may serve a useful purpose in that connection, may well be regarded, because of their consequent delaying effect, among others, as being of highly questionable propriety in a statute applicable to labor-management arbitration. Suggestions have accordingly been made that legislation applicable to labor-management arbitration, if any is to be had, should not only be separate from that applicable to commercial arbitration, but also that it should be confined to a declaration that provisions in collective bargaining agreements for the arbitration of future disputes, or any agreement between an employer and a labor organization to arbitrate an existing dispute, shall be valid and enforceable and that the matter of any possible resort to the courts should be left to a common law basis.

It is common practice to refer to a collective bargaining agreement as a contract, and it is relatively easy for the uninitiated to jump to the

conclusion that the same provisions made applicable to the process of arbitration under contracts involved in commercial relationships can properly be made equally applicable to arbitrations arising under contracts between an employer and a labor union. Perhaps the fallacy in so easily arriving at this conclusion stems from the initial inaccuracy in such use of the term contract. The similarity between the ordinary commercial contract commonly involved in arbitration and the comprehensive and complex collective bargaining agreement between a major corporation and the labor organization representing its employees, is almost totally non-existent. Though commonly called a contract, the latter is more nearly a code of regulations controlling the maze of relationships of the parties and intended to endure, with minor revisions from time to time, for an indefinite period. While it may, and usually does, have a fixed termination date, neither party has any notion that their relationship will come to an end as of that date, or that the major provisions of the existing agreement will not continue without substantial change.

In such an agreement the parties have devised their own system, through their grievance procedure, for the settlement of all disputes arising between them, and with arbitration as the final step in the process, intended to be completely final and binding without the possible intervention of any other authority.

As contrasted with the ordinary commercial contract with its specific terms dealing with relationships capable of precise evaluation and with which the courts are accustomed to deal, the typical collective bargaining agreement is essentially an instrument of self government or a set of working rules designed by the parties, to govern their day to day dealings with each other, commonly completed under the pressure of a midnight deadline, never providing for all of the eventualities likely to arise, and frequently embodied in language resulting from compromise and lacking in clarity or exactness to express the will of either party, much less the complete understanding of both. As one writer has expressed it, "Labor agreements are drawn in an atmosphere of tension. Out of a cauldron of controversy which might have been pot-boiling for days, if not weeks, comes the molten product of a meeting of the minds which is hammered into language, frequently by lay people. The very wide scope of the usual arbitration clause . . . reflects the expectation of the parties that matters would surely come up in the day-to-day implementation of the agreement,

which the parties did not cover as completely as they might have done were they not engaged in a type of controversy which generally requires urgent resolution.²⁶ Such an instrument acquires clarity of meaning and stability within the understanding of the parties only through the practice of the parties themselves in its day-to-day application and administration in the process of grievance settlement and through arbitration. This is wholly and completely different from the commercial contract and commercial arbitration. The two are established for different reasons, the parties involved bear vastly different relations to each other, and the effect of the two processes upon the future relations of the parties is almost certain to be entirely different. The one type of arbitration deals with an agreement which contemplates a continuing relationship which must go on indefinitely, even though the detailed meaning of the terms of the agreement may never be minutely defined, and within the application of which new and unforeseen contingencies will continue to arise which in turn must be subjected to the process of rational solution for which the agreement provides. The other type comes into operation when one party is accused of violating the terms of a more specific contract and is merely a short cut for court litigation in a relationship already broken beyond repair in many instances before the remedy comes into operation. Any delay through resort to a court at some stage in this arbitration process, even to vacate or modify an award, runs no great risk of injuring a sensitive and continuing relationship. Such is definitely not true in the case of labor-management arbitration.

The different relationship between labor and management and the very different problem of settling disputes arising under their agreements are well indicated by a leading representative of labor in a prepared statement presented to the Pennsylvania Governor's Commission on Labor Legislation when he said: "The collective bargaining relationship is a living, changing, dynamic one. Disputes which arise under a labor contract where the parties live and work together every day," and, it may be added, must continue to do so regardless of the outcome of any dispute, "must be settled quickly, inexpensively, and with a view more to smoothing the relationship for the future than to which side may be right in the

26. Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 LAB. L. J. 723, 725 (1953).

particular dispute to be settled.” By way of emphasizing the unsuitability of the courts to perform this function directly, and as a preliminary to his later emphasis upon the strictly limited scope within which courts should be permitted to deal with the arbitration process in the labor field, he adds, “Judges are particularly unsuited to perform this function,” they “are unfamiliar with complex subjects of incentive plans, job evaluations, seniority, *et cetera*, which are part of the fabric of labor agreements.” Again he says, “labor arbitration is an entirely different institution from commercial arbitration, and a statute which is designed for the latter does not necessarily meet the needs of the former.”²⁷ It is upon such a basis that the great majority of published statements which the present writer has been able to find urge very strongly that legislation, if any is to be had, applicable to labor-management arbitration should be separate from that applicable to commercial arbitration, that it should be much less comprehensive than the usual statute applicable to the latter, and that the opportunities for resort to the courts should be very much more narrowly restricted. The fact that a comprehensive statute with more or less elaborate provisions for judicial enforcement and review of arbitration awards, and of the obligations to go to arbitration may be regarded as appropriate in relation to the ordinary commercial contract providing for the arbitration process, does not necessarily mean that the same would be appropriately applicable to the relationship under a collective bargaining agreement that also provides for arbitration as the final step in its grievance procedure.

In many areas, and particularly is that true in the Middle West with which the present writer is most intimately familiar, the refusal to honor an obligation under a collective bargaining agreement to go to arbitration just does not arise, as apparently it frequently does under the commercial contract, and which is contemplated under Section 2 (a) of the Uniform Arbitration Act, Section 1450 of the New York Act,²⁸ and corresponding

27. Statement of Mr. Arthur J. Goldberg, General Counsel, Congress of Industrial Organizations and the United Steelworkers of America, CIO, Proceedings of Pennsylvania Governor's Commission, April 8, 1953, pp. 61-62, 65. It is of interest to note that of the seventeen highly experienced persons called to testify before this Commission, nine emphasized the viewpoint thus expressed, while five did not testify specifically with respect to this aspect of the problem, and only three doubted that it was necessary to keep the legislation separate.

28. Section 1462, Article 84, Civil Practice Act of New York.

sections of other similar statutes. Instead, serious controversy may arise as to the arbitrability of a particular dispute. Apparently, the determination of that issue would be devolved upon the court under the statutes just referred to, and such has happened frequently under the New York statute, yet no statement regarding this problem by any person conversant with the problems of labor-management relations and labor-management arbitration has been found that has been other than a rather urgent insistence that the problem of arbitrability, involving, as it necessarily does, a matter of interpretation of the agreement, should be decided, and decided with the same finality as other issues, by the arbitrator.

Finally, it is suggested that if the same statute is being applied to both types of arbitration, court decisions under it in commercial arbitration cases may by confusion be improperly applied as precedent for cases involving labor-management arbitration, to which their application may be highly inappropriate. To the extent that a decision dealing with the former may be used indiscriminately as a precedent for dealing with a case of the latter type, the result may well be most unfortunate. The possibility of using inapplicable precedents arising out of commercial arbitration cases in the disposition of a labor-management arbitration case is widely emphasized as a reason for keeping the statutes separate. In this connection in emphasizing that some provisions appropriate enough in a statute applicable to commercial arbitration have no proper place in a statute applicable to labor, it is strongly urged that what may be valid grounds for modifying or vacating a commercial award may have no validity when applied to labor. The extent to which a court may be permitted to review a commercial award dealing with matters with which a court is fully familiar is one thing, while the same review of the issues of a labor arbitration with which the court is wholly unfamiliar is something very different and may do great harm to the labor-management relationship. It is also emphasized as major considerations that the procedures in the latter case need to be much more expeditious and the scope of review needs to be much more restricted.

B. Arguments Against Separate Legislation

The arguments against separate legislation seem to be primarily of two types. First is the general statement that in those states where a single

existing statute is applicable to both commercial arbitration and labor-management arbitration it appears to work fairly satisfactorily.²⁹

The second argument, not infrequently prefaced by a statement of some of the major differences and some of the reasons for keeping the two separate, suggests that such a separation might well tend to confusion of handling on the part of the courts if considerably different statutes are enacted to apply to the two types of arbitration. A court would find it cumbersome and confusing, we are told, to have one set of rules or statutory provisions applicable to commercial arbitration and a different set applicable to labor-management arbitration, with a probable tendency on the part of the court to merge the two, or confuse their interpretation and application.

A third very frank suggestion is made on the part of some who favor such legislation to the effect that for practical purposes a demand for a separate statute might well tend to divide and weaken the support for the passage of legislation applicable to labor-management arbitration. Whether this should be listed as a rational argument for a single comprehensive statute applicable to both seems highly questionable. No other reasons or arguments for the single statute applicable to both have been encountered.

IV. SHOULD SUCH LEGISLATION BE ON A STATE LEVEL OR A NATIONAL LEVEL?

The movement for legislation of the type here under consideration has largely been on a local basis among the individual states, except for urgings of officials of the American Arbitration Association and the activities of the National Conference of Commissioners on Uniform State Laws directed to the formulation of the Uniform Arbitration Act, and this, of course, contemplates action on a state level.

The principal basis upon which it is suggested that such legislation should be on a national level is that the great bulk of labor relations problems involve interstate commerce, and that with collective bargaining being widely conducted on a company-wide or industry-wide basis, legisla-

29. Substantial doubt may be raised as to the soundness of this observation by reference to the materials cited *infra*, note 32.

tion should be uniformly applicable throughout the area to which the agreement out of which an arbitration controversy arises is made to apply.

In this connection suggestions have been made for national legislation, some by way of amendment of the Federal Arbitration Act, others for the addition of amendments to Section 301 of the Labor Management Relations Act.

A. If on a State Level, is a Uniform Act Desirable?

Some of the same reasoning noted above with reference to industry-wide bargaining, *et cetera*, has been made the basis of the suggestion that if legislation of this type is to be on a state level it should be by way of a uniform act. It is suggested, for example, that a company may have plants in a number of states, all under control of the same collective bargaining agreement, and that arbitration controversies arising in the different states under that agreement, possibly under the same provisions and the same or similar facts, ought to be controlled by the same legislation.

On the other hand, it is also suggested from other quarters that in view of the widely varying experience in the field of labor-management arbitration from state to state or from one industrial area to another, and the consequent differences of opinion as to the need for such legislation, the matter ought to be left on an individual state basis. Some will want no legislation and see the need for none. Some may want only the simplest sort of an act that merely provides for making agreements to arbitrate valid, binding and enforceable, with or without some allegedly more expeditious machinery for enforcement of awards. Still others may feel that a more comprehensive statute similar to the New York Act or the Uniform Act will best meet their needs. From this point of view it is strongly contended that it should be left wholly on an individual state basis.

In this latter connection it has been suggested that the activity of the National Conference, if any, might better have been directed to the proposal of a Model Act rather than a Uniform Act.

The Labor Law Committee of The Missouri Bar directed its Chairman to advise the National Conference of its opposition to a uniform act on this subject. Its reasoning was based on the proposition that this whole field is relatively new and still in the developmental stage, and that if any

legislation is to be had it should remain, at least for a substantial period of time, on an experimental basis from state to state; that thinking on the matter has not sufficiently jelled and that experience is not sufficiently mature in the field of labor-management arbitration to justify an attempt at uniform legislation at this time.

It would seem that all of these suggestions are worthy of serious consideration by those confronted with the problem.

V. DESIRABLE CONTENT OF SUCH LEGISLATION

While no effort will be made here to formulate proposed legislation which the present writer would consider desirable or acceptable, it does not seem inappropriate to comment on certain provisions in existing statutes, and particularly on those in the Uniform Arbitration Act now submitted to the states for adoption. To comment on every provision of the Uniform Act would unduly extend this article, but those giving rise to most differences of opinion will be subjected to some discussion.

Generally speaking, all who look with any favor upon the idea of having legislation in this field accept the desirability of provisions making agreements to arbitrate existing or future disputes valid, binding and enforceable except upon such grounds as exist at law or in equity for the revocation of a contract, as set forth in Section 1 of the Uniform Act. Perhaps a substantial majority of this group would also accept the idea of including what is expected to be expeditious machinery for the enforcement of arbitration awards. There are, however, illustrative of the many varying opinions on this problem, exceptions to both and several have suggested the former without the latter.

As indicated earlier, much greater contrariety of opinion develops after this point is passed.

Section 3 of the Uniform Act authorizes appointment of arbitrators by the court on application of a party, where the parties have not stipulated in their arbitration agreement for such selection or where one selected fails to act. It is to be observed that the selection of an arbitrator is regarded by the parties to a labor-management arbitration as an extremely important matter, and it is frequently attended with very considerable difficulty. In this connection it is seriously questioned whether the local

trial court, as would be involved in accordance with Sections 17 and 18, is likely to be in a very advantageous position to make a wise selection. With all due respect to the judiciary, it is not inappropriate to observe that many local trial courts are not well informed with respect to problems even of labor law, that they are less well informed about the broad range of problems involved in labor-management relations, and that they are almost totally unfamiliar with problems of labor-management arbitration. To suggest that such a court is not likely to know, or to be possessed of a list of, qualified available arbitrators, or to be in a position to judge of the proper qualifications, is not to cast any reflections upon the court. Some other public agency, such as the Federal Mediation and Conciliation Service or a state mediation board, or a private agency such as the American Arbitration Association, might well be in a much better position to perform the task effectively. Opposition to statutory provision for court appointment of arbitrators has also been expressed by many on the theory that it weakens the voluntary aspect of the arbitration process, whereas the voluntary agreement of the parties to have the arbitrator selected by a designated agency when they fail to agree, does not have the same effect.

Section 5 of the Uniform Act providing for the hearing authorizes a determination upon the *evidence* produced, entitles the parties to present *evidence* material to the controversy and to cross-examine witnesses, while a later section authorizes the use of subpoenas for the production of *evidence* and the taking of depositions for use as *evidence*. There is no elaboration of the word *evidence* as thus used, and whether it may be susceptible to the interpretation that the legal rules of evidence are applicable may be something less than entirely clear. The fact that past practice in labor-management arbitration has been against application of the statutory or common law rules of evidence would not necessarily control the interpretation. In view of the fact that there has been a very widespread practice in the framing of legislation applicable to the procedures of administrative agencies to make express provision for relief from the application of legal rules of evidence to the extent considered desirable, and in view of the further fact that some current tendencies are in the direction of requiring greater adherence to the common law or statutory rules of evidence in what are originally intended to be wholly informal procedures, the case for clarification of this matter would seem to be a strong one. Certainly compulsory adherence to the exclusionary rules of evidence would

be hard to square with the traditional development of the voluntary labor-management arbitration process, to say nothing of the difficulty of their application at the hands of lay arbitrators. Under the statute as worded, could the admission of hearsay or other "incompetent" evidence be held to provide a basis for vacating an award under Section 12 as amounting to the conduct of the hearing "contrary to the provisions of Section 5, [so] as to prejudice substantially the rights of a party"? If the effect of Section 5 is at all doubtful in this respect, as the present writer fears it may be, clarification would certainly seem to be highly desirable.

If there is any possibility that Section 6 of the Uniform Act authorizing a party to be represented by an attorney could be interpreted to require such representation, it should be clarified so as to make it clear that a party may present his own case, be represented by an attorney, or by any other representative he may see fit to select. The decision to be represented by an experienced attorney may be very wise, but the rather widespread practice of having arbitration cases presented by the business agent, international representative, or other official of the union, and by the director of industrial relations of the employer should not receive statutory discouragement so long as we are dealing with voluntary labor-management arbitration.

There is widespread objection to the provisions of Section 7 of the Uniform Act authorizing the use of subpoenas and depositions, and presumably their enforcement by contempt process at the hands of the court, and the introduction of witness fees, as being wholly unnecessary in labor-management arbitration, and as being basically inconsistent with the whole voluntary character of the proceeding. These provisions are largely taken from corresponding provisions of the American Arbitration Association's Model Act and are similar to those contained in the usual commercial arbitration statute. It needs to be kept in mind, however, that voluntary labor-management arbitration as it has developed to date in this country is commonly a very informal proceeding, and desirably so. It is highly doubtful that it could have met with such widespread acceptance if it had been otherwise. Reasons against keeping it thus informal are not apparent. The more similarity to court procedure that is introduced and the more opportunities there are provided for court intervention, the further we depart from the voluntary aspect of its origin and the more likely we are to destroy the easy spontaneity of the present informal process. It very

seldom happens that either party is dependent upon an unwilling witness, and almost without exception, the parties are willing to present any witnesses and provide any materials that are requested by the arbitrator, and do it in conformity with the easy informality that pervades the whole of the present voluntary process. There is also the further possibility that the provision for depositions may cast doubt on the continued usability of affidavits in evidence as is generally recognized at present. The fact needs to be kept in mind that this is the process set up by the parties and not a public trial. The process is theirs and the machinery is of their own devising. If they have found no need for subpoenas and depositions, and there is no evidence that they have, there seems to be no reason for forcing their use upon them. In like fashion the provision for fees for the attendance of witnesses is wholly unrealistic as applied to labor-management arbitration. Witnesses are practically always employees or officers of the company called from their jobs to testify and returned when the need for their presence ceases, and without loss of pay. No doubt these provisions may have an appropriate place in commercial arbitration, but the need for them is not apparent in relation to labor-management arbitration. It seems obvious that these provisions, and many others, have been drafted with commercial arbitration only in mind, or copied from or patterned after provisions that were originally so drafted, and without any notion that they are needed for labor-management arbitration. All of which adds up to a potent argument for keeping the two statutes separate and not cluttering up any statute applicable to labor-management arbitration with inapplicable and unnecessary provisions. The fact that the arbitrator in a labor case is quite frequently not a lawyer is also not without its significance when we consider various proposals that have so strong a tendency to make over the arbitration process into the image of a court proceeding.

Objection has been asserted to the provisions of Section 10 of the Uniform Act permitting the award to direct the payment of fees and expenses as being wholly unnecessary in labor-management arbitration, and also as undesirable since it is traditional and uniform that expenses are shared equally by the parties. If, as seems probable, the wording of this Section may be construed as permitting the arbitrator, in the absence of controlling language in the arbitration agreement, to assess the fees and expenses against a party as is common in the assessment of court costs, it would seem to be wholly inconsistent with the nature of the relationship between parties to labor-management arbitration.

This is a good illustration, as there are so many others, of the fact that the provisions of the Uniform Act are taken from or patterned after the provisions of acts originally drawn for application to commercial arbitration. As a matter of fact, the Uniform Act itself was apparently drawn primarily for commercial arbitration with labor-management arbitration incidentally to be covered *also*, as indicated in Section 1 of the Act. In the case of commercial arbitration, whatever provisions of the parties own devising are to be applicable must be found in the arbitration agreement, whether drawn up specially for the particular controversy, or contained in the contract spelling out the particular relationship out of which the controversy arose. The situation is not quite the same in labor-management arbitration. In a large percentage of the latter cases there exists no arbitration agreement drawn up for application to the particular case, or if there is it may be a very simple and abbreviated document. But in the background is the collective bargaining agreement that spells out these matters in considerable detail for purposes of general application, and the parties find it unnecessary to spell them out again in a special arbitration agreement if one does exist. Even if we assume that the reference to the arbitration agreement in the statute as contained in Section 10 is to be construed as applicable in all cases to the general provisions for arbitration in the collective bargaining agreement, the real point is that the draftsmen must have had in mind the special arbitration agreement in commercial arbitration and the appropriateness of the provisions of Section 10 in their application to that type of arbitration. The provisions are not properly applicable to and are wholly unnecessary for labor-management arbitration. If, in a rare instance, adequate provision with respect to fees and expenses is not made either in the collective bargaining agreement or in the separate arbitration agreement, where there is one, the matter is uniformly agreed upon at the time of the hearing and the statutory provision is still both unnecessary and undesirable.

The most serious objections to such legislation and the greatest controversies arising therefrom have to do with provisions for court modification or vacation of awards as provided for in Sections 12 and 13 of the Uniform Act. Both the New York statute and the Uniform Act set out several bases for such court action, those in the latter being listed above.

It is to be observed that the five bases upon which the New York Act³⁰ authorizes an award to be set aside have been broadly viewed as providing too wide a leeway for court interference which the courts of that state have made the basis for an undue and even an unauthorized encroachment upon the function of the arbitrator. When it is further observed that the Uniform Act sets forth in substance all five of those bases, and then enormously broadens the leeway for court action by adding two extremely flexible and indefinite bases, namely, that the award is "contrary to public policy" [Section 12 (a) (3)], and that "the award is so grossly erroneous as to imply bad faith on the part of the arbitrators" [Section 12 (a) (6)], it becomes apparent that the possibilities for court action by way of encroachment upon the functions intended to be devolved upon the arbitrator must, for some time to come, remain a matter of highly uncertain speculation wherever that Act is adopted.

It is widely suggested that the bases upon which a court may vacate an arbitration award should be kept to a very low minimum, such as fraud, corruption, or gross misconduct, absence of a fair hearing, and possibly that the arbitrator acted outside his authority by deciding something that was not submitted to him. This last, however, may be fraught with particular dangers in the matter of court review. This fear, so widely expressed, that the court will indulge in too broad a review, is largely based on observation of what courts have done under much less broad statutes, particularly that in New York. The same type of objection, and for similar reasons, has been offered against too much leeway being left to the court in passing upon the issue of whether the arbitration process should be stayed in a particular case, as generously authorized in Section 2 of the Uniform Act, or whether an alleged agreement to arbitrate is enforceable and properly applicable under a specified set of circumstances. Questions of arbitrability passed upon by the courts almost always involve the very matters of interpretation of the agreement which the parties have intended to leave to the arbitrator. Several have pointed out the seriousness of the situation in New York where it is asserted that all too often the courts, in the name of determining arbitrability, have determined the substance of the issues involved.³¹

30. Section 1462, Article 84 of the Civil Practice Act of New York.

31. See, *e.g.*, Proceedings of Pennsylvania Governor's Commission on Labor Legislation, March 6, 1953, p. 44.

In all of the major divisions of this paper these same considerations are present. In stating the reasons against having any such legislation, in contending for a separate statute applicable to labor-management arbitration from that applicable to commercial arbitration, if legislation there is to be, and in urging that the leeway for court intervention in any case be very narrowly restricted, the point of view rests very largely upon the fear that we may devise a system under which the court will too often and unduly encroach upon the functions of the arbitrator. In the case of commercial arbitration this presents relatively small difficulty. The issues arising under the commercial contract are of the common grist for the judicial mill, and the worst that happens is that the parties are deprived of their short cut which they intended to substitute for a court adjudication. But in the case of labor-management arbitration the complex issues arising under a collective bargaining agreement often present problems with which the courts are totally unfamiliar and which neither party had any purpose to submit to judicial determination. The case for those who feel this fear of improper judicial encroachment upon the arbitration process is rather effectively and vigorously buttressed by several ably written articles based on much careful research.³² All of these articles present repeated instances of what are considered abuses of power by the courts, primarily in a single jurisdiction, by way of encroaching upon the functions intended by the parties to be entrusted to the arbitrator. It would be an unnecessary repetition and would unduly extend this discussion to attempt here to analyze the numerous cases discussed in these articles. Even judges have warned against the tendency of the courts to go beyond their proper sphere in the handling of such cases. Judge Samuel H. Hofstadter in his article, "The Courts and Arbitration"³³ warns against the danger that "the court trespass on the domain of the arbitrator, and pass on the very controversy which the parties

32. Cox, *Legal Aspects of Labor Arbitration in New England*, 8 *ARB. J.* (n.s.) 5 (1953); Mayer, *Judicial 'Bulls' in the Delicate China Shop of Labor Arbitration*, 2 *LAB. L. J.* 502 (1951), and *Arbitration and the Judicial Sword of Damocles*, 4 *LAB. L. J.* 723 (1953); Rosenfarb, *The Courts and Arbitration*, *PROCEEDINGS OF NEW YORK UNIVERSITY'S SIXTH ANNUAL CONFERENCE ON LABOR*, p. 161 (1953); Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 *U. OF CHI. L. REV.* 616 (1950); and Summers, *Judicial Review of Labor Arbitration*, or *Alice Through the Looking Glass*, 2 *BUFFALO L. REV.* 1 (1952). JESSE FRIEDIN'S monograph, *LABOR ARBITRATION AND THE COURTS* (1952), is perhaps somewhat more restrained in its criticism of the courts, but is a highly effective treatment of the same problem.

33. 9 *ARB. J.* (n.s.) 179, 188 (1954).

have committed to him." He strongly intimates that the court had exceeded its proper function when he said, "It is questionable whether this restraint was manifested in holding not arbitrable, under a comprehensive arbitration clause, a dispute between buyer and seller arising from the buyer's contention that the seller had not exercised in good faith his contract right to require cash payments in advance of delivery if, in his 'sole opinion', the buyer's responsibility should become impaired or unsatisfactory to the seller and that no forbearance or course of dealings should affect the seller's right to do so."³⁴ Is not this the very kind of controversy arbitrators are peculiarly fitted to decide and which businessmen, in making arbitration agreements, intend them to decide?"

In the famous case of *Western Union Telegraph Co. v. American Communications Association*, involving the question whether a refusal to handle "hot traffic" is a strike or work stoppage, and whether the tradition and custom in the industry may be considered in interpreting a collective bargaining agreement, three judges of the New York Court of Appeals in dissent joined in the statement, "That was a pure question of interpretation and application, and the very kind of question which the parties themselves had agreed should be decided by the arbitrator alone."³⁵

It is perhaps correct to say that greatest concern expressed with respect to what the content of any legislation should be relates itself to a desire to protect the arbitration process against delays incident upon the intervention of the courts, and a desire effectively to insulate the arbitrator's function against an improper encroachment by the judiciary. Both types of considerations weigh heavily with those who conclude that we should leave the process of labor-management arbitration free from legislative control, that any legislation applicable thereto that may be passed should be kept separate from that designed for commercial arbitration, and that legislation, if any, should be very simple and restrict any possible intervention by the courts to a very narrow basis.

Conclusions

The present study in its immediate undertaking and in its background was not intended to be directed so much to arriving at definite conclusions

34. *Alpert v. Admiration Knitwear Co., Inc.*, 304 N.Y. 1 (1952).

35. 299 N.Y. 177, 86 N.E.2d 162, 169 (1949).

as to a portrayal of the opposing points of view, the pros and cons of proposed or possible legislation, and the reasons therefor. As Chairman of the Labor Law Committee of the Missouri Bar during several years in which this matter was intermittently under consideration, and as Chairman of the Labor Arbitration Committee of the Section of Labor Relations Law of the American Bar Association in 1954-1955, the writer attempted, of necessity, to approach the problem objectively and without advancing personal judgments or conclusions. Much of the 1955 report written for the latter committee has formed the foundation for and been incorporated in the present article.³⁶ In consideration of these problems as a Commissioner for the state of Missouri in the deliberations of the National Conference of Commissioners on Uniform State Laws when it considered and approved the Uniform Arbitration Act, and in the more exhaustive study of the problems in the preparation of this article, certain conclusions have become inevitable.

Initially, it should be made clear that commercial arbitration and what may or may not be desirable by way of legislation applicable thereto is of no concern to the writer in the present study, but only labor-management arbitration.

So restricted, the conviction seems inescapable that no legislation is necessary, and therefore none is desirable, in the midwest area with which the writer is most intimately familiar. Parties to an agreement to arbitrate contained in a collective bargaining agreement habitually and with practically complete uniformity honor their agreements, and with equal unanimity abide by the awards issuing from arbitration cases. And this is peculiarly a field in which legislation should not be imposed without the demonstrated existence of a real need. Admittedly this conviction is based primarily on experience and observation, largely of a local nature.

A somewhat extensive and prolonged study of the operation of voluntary arbitration elsewhere in this country compels the belief that there are very few areas with respect to which the same conclusion would not be equally valid. The most significant alleged exception is the State of New

36. This committee consisted of eleven members, nine of whom approved the report and two of whom were not heard from. Most of the arguments pro and con included in the present article were set out in brief form in that committee report. Use of the material, which was wholly the composition of the present writer as committee chairman, has been approved by the Chairman of the Section both for 1954-55 and for 1955-56.

York, and what its experience might have been without the presence of its arbitration statute over the past thirty-five years, and its open invitation to call upon the courts to intervene, no one can know.

Most of the arguments for legislation are highly speculative. This is well illustrated by the testimony of one industry lawyer before the Pennsylvania Governor's Commission.³⁷ After pointing out that with many hundreds of arbitration cases between his company and various unions over the past eight or ten years, there had never been a single case in which either party had sought court action either to enforce the agreement to arbitrate or to carry out an award, and after referring to reports of surveys indicating the infinitesimally small percentage of cases in other areas where either party failed to honor his obligation, he nevertheless asserted the need for legislation and said, "We don't have final and binding arbitration if we don't have an assured procedure to see that agreements to arbitrate are enforced and that awards are final and binding."

He then points out that there have been several cases in which the unions have raised a question as to whether his company was carrying out awards properly, but in every case they were able to work the problem out. And after saying he trusts that will always be the case, he raises the question, "but suppose it isn't? What is the Union's remedy?" He then asserts that there ought to be a statute with a clear remedy, otherwise the whole system of industrial peace based on arbitration might be jeopardized.

It is submitted that the same factual recital might equally well have been used as the basis for a firm conclusion that no legislation is necessary.

In the same testimony, with reference to the opportunity for court review, and after emphasizing the importance of restricting it very narrowly, some legislation is urged to make it possible for a court to provide a remedy for a supposed or fictitious situation that just might occur, in which an arbitrator in a discharge case might feel that not only the discharged employees but also the plant management and the local union are at fault, and accordingly might not only uphold the discharge but also direct that the president of the local union and the assistant superintendent of the plant must be removed. Or, he supposed another case, equally absurd, in

37. Proceedings of Pennsylvania Governor's Commission on Labor Legislation, April 8, 1953, pp. 94-98.

which the arbitrator changes the language of the contract. He then concludes that we must have legislation on the basis of which a court can keep an arbitrator within the scope of his authority. His parting admonition to the Commission was for prompt action—"because an ounce of prevention is worth a pound of cure."³⁸

This argument is substantially on a par with much presented before the National Conference of Commissioners on Uniform State Laws on the basis of which the Uniform Act was approved. Not what had happened or what is happening, but what just might happen. It would seem equally easy and valid in supposing, that we suppose something more closely akin to the facts and suppose that the arbitrator is habitually careful to stay within his authorization. And instead of the "ounce of prevention" and the "pound of cure", one with a contrary viewpoint might well suggest that in a situation in which so much more progress has been made toward the achievement of industrial peace in the past ten or a dozen years than labor, industry or any one else had dared to hope, that possibly we might better "let sleeping dogs lie", "let well enough alone", or just not "rock the boat."

As suggested earlier in the body of the article, if a local situation exists in any state where the failure of parties to honor their obligations to go to arbitration as contained in their collective bargaining agreements becomes a real problem, or where refusal to abide by arbitration awards threatens to weaken or destroy the effectiveness of labor-management arbitration as an instrument for industrial peace, then legislation would seem to be justified. But the dangers from unnecessary legislation in this field are certainly sufficient to caution very strongly against merely stand-by legislation—just in case.

The second major conclusion that has appeared to the writer as wholly inevitable is that any legislation applicable to labor-management arbitration, if any there is to be, should be kept wholly separate from that applicable to commercial arbitration. This conclusion is based on several factors, discussed above, and they will not be rehashed here in detail. First, the two are wholly different in nature, dealing with entirely different types of relationships and devised to serve wholly different purposes. The one

38. *Id.*, at p. 98.

as a substitute for litigation and the other as a substitute for or preventive of resort to economic force have been sufficiently emphasized heretofore.

Second, existing commercial arbitration statutes, which practically all existing statutes are, embrace a multitude of details which their sponsors have believed to be necessary and desirable for commercial arbitration, and many in a position to be well informed have insisted that the success of commercial arbitration depends upon the existence of an effective statute. It is firmly the conviction of this writer that most of the provisions of these statutes are wholly unnecessary for labor-management arbitration and that many are downright harmful. If it is necessary that the commercial statute be thus comprehensive, the only reasonable alternative is to keep the two separate.

Finally, the likelihood, or almost the certainty, that a court will use decisions in commercial arbitration cases as precedent in cases involving labor-management arbitration and where they are most likely not to be appropriate is a very important reason for maintaining the separation.

The third and final major conclusion that seems compulsory is that if any legislation is to be made applicable to labor-management arbitration, it should be brief and simple, and the opportunity for court intervention should be kept to a very low minimum.

In this connection it is worthy of observation that the Uniform Act specifies no less than nineteen separate and different specific opportunities for court intervention, with ample provisions for appeal. Six specific situations are listed in which an appeal may be taken, broadly related to most of the nineteen opportunities for original court intervention referred to above, with the last, in comprehensive fashion authorizing appeals from any "judgment or decree entered pursuant to the provisions of this act."³⁹ It hardly seems necessary to belabor the point that this creates a situation far removed from the simple, informal, voluntary, final and binding labor-management arbitration contemplated by the parties when they include in their collective bargaining agreement what they regard as effective machinery for the maintenance of industrial peace built around their grievance procedure and culminating in their no-strike, no-lockout clause

39. Uniform Arbitration Act, Section 19 (6).

combined with provisions for final and binding arbitration without provision for or contemplation of intervention by any other authority.

Prolonged study of this problem has served to emphasize the merits of the suggestion, earlier recorded, that legislation should wisely stop with the first sentence of the Uniform Act making agreements to arbitrate existing or future disputes "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract", and leave its enforcement to the general powers of the courts without benefit of further statutory provisions.

In this connection also it is well to recall the warning urged by many that the bases for court vacation of the arbitration award should be restricted to such matters as fraud, corruption, gross misconduct, or absence of a fair hearing. Since these bases are all available at common law, the previous suggestion seems a very meritorious one. And while the common law procedure may be a bit less expeditious than that which may be provided by statute, when we stop to consider that it is so very seldom necessary to use it, the further suggestion that this weakness, if such it be, is more than off-set by "freedom from the multitudinous motions to compel arbitration, motions to stay arbitration, motions to review, and motions to enforce", with additional motions to vacate, modify or correct on numerous grounds, "which are the inevitable consequences of integrating labor arbitration into a" comprehensive "procedure intended and probably necessary for the determination of commercial disputes",⁴⁰ is certainly worthy of most serious consideration.

While there are those who appear to object even to the simple statutory provision for enforceability of agreements to arbitrate suggested last above, emphasizing the belief that the original decisions as to the unenforceability of such agreements was a departure from proper contract law,⁴¹ the fact the common law doctrine of unenforceability does exist in most jurisdictions may seem sufficient justification for such a statutory enactment. The belief that even so simple a statutory provision as thus suggested, by providing a basis for compelling arbitration, is inconsistent

40. Proceedings of Pennsylvania Governor's Commission on Labor Legislation, May 29, 1953, pp. 45-46.

41. *Id.*, March 6, 1953, p. 90.

with the purely voluntary character desirable in labor-management arbitration, is sufficient to create opposition by some students of this problem. One writer has emphasized this aspect of the problem, based, however, on the more comprehensive statute, by saying "The commencement of an arbitration proceeding by court compulsion means a vanishing of its voluntary nature, and a spirit of litigation prevails. Enforced arbitration is not arbitration."⁴² Perhaps it is correct to question whether it is voluntary arbitration of the sort we wish to preserve.

If this discussion may close by a return to its starting point, it may be recalled that the principal basic reasons for proposing legislation applicable to labor-management arbitration rest upon the facts that agreements to arbitrate in the future are not enforceable at common law and that a party to an arbitration may withdraw at any time before the making of an award without suffering any adverse legal consequences. If, then, we address ourselves solely to the one major weakness of the present situation, the simple statutory provision last suggested above for making agreements to arbitrate enforceable would seem to provide all the remedy that is at all urgently called for, and without creating most of the weaknesses and dangers felt to exist in making the more comprehensive statute applicable to labor-management arbitration.

The major concern of all interested in this problem should be to avoid any action that might weaken the effective operation of voluntary labor-management arbitration, or discourage its development as a more effective agency for the promotion of industrial peace.

42. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1267 (1933).