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PROBLEMS IN LABOR ARBITRATION

J. NOBLE BRADEN*

An outstanding evidence of the will of Americans to preserve the democratic process and free enterprise has been the widespread adoption of voluntary arbitration for the settlement of disputes arising out of and in connection with collective bargaining agreements. Labor and Management have been most emphatic in their statements favoring the use of voluntary arbitration and most vigorous in their opposition to all suggestions of compulsory arbitration.

The Bureau of Labor Statistics reported in 1940 that an examination of collective bargaining agreements in fourteen leading industries disclosed that three out of four such agreements provided for arbitration as the terminal point in the grievance procedure.¹ Later announcements indicate that the number had increased to ninety percent in 1944, and it has undoubtedly continued to increase.

The Joint Legislative Committee of New York headed by majority leader, Irving M. Ives, now U. S. Senator from New York, after a study of labor management relations, recommended to the New York Legislature in 1940 that the Arbitration Law of the State of New York be amended to permit parties to provide for the use of arbitration not only as the terminal point in grievance procedure but to fix the terms of a succeeding contract. The committee, after discussing a court decision² which held that the existing law did not permit the submission of such disputes, reported:

“Such a salutary redefinition of the statutes governing labor arbitration is desired by both employers and trade unionists. The law as it presently exists should be amended to give effect to the desire of the contracting parties expressed in the contract itself. Questions of wages, hours and working conditions are and should be proper subject matters of arbitration.”³

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1. ARBITRATION PROVISIONS IN UNION AGREEMENTS, BULL. No. 780 (U. S. Dep't Labor 1944).

2. Matter of Buffalo & Erie Railway, 250 N. Y. 275, 165 N. E. 291 (1929).

3. Joint Legislative Committee on Industrial & Labor Relations, Legis. Doc. No. 57, p. 41 (1940).

The law was amended and now provides:

"A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁴

Newspapers, reports of the various Labor Relation Services, statistics of the American Arbitration Association, and of the U. S. Conciliation service (now the Federal Mediation and Conciliation Service) as well as many state municipal mediation agencies, give added evidence of the almost universal use of arbitration for the settlement of labor controversies.

In this increasing use of arbitration, however, there has arisen a number of problems, many of them due to the failure of both parties and arbitrators to inform themselves of the standards and principles of arbitration as laid down by the statutes and court decisions over many years. The condition is not unlike that described in the following eighteenth century quotation:

"As there is no man who has not more or less made Observations on the Proceedings of the Courts of Law and Equity, and who has not likewise, in some Measure, made Complaints of the Expensiveness and Dilatoriness of the Proceedings and Determinations in those Courts; and who does not wish (if he has any Good Will to Mankind at all) that all Men should have Justice done them with more Expedition and less Expense, than attends the Prosecution of a Cause at Law; it will not be improper, nor I hope an unacceptable Undertaking, to endeavor, by laying down the whole Learning of Awards and Arbitraments, to assist Mankind in making them better friends and neighbors, and in securing to them their Fortunes and Possessions and to prevent that even this Method of determining Controversies may not be the foundation of new broils and Contentions."⁵

These words, written over two hundred years ago (1731) by a "Gentleman of the Middle Temple," are most timely today in regard to labor

4. N. Y. Civ. Prac. Act, Art. 84 § 1448, as amended 1940.

5. THE COMPLEAT ARBITRATOR (1721) (out of print).

arbitration. Not that there is great need that the "learning of Awards and Arbitraments" be laid down but rather that parties and arbitrators should study and observe the standards and principles established under common and statutory law, that have been laid down and are set forth by able authorities.⁶

Many experienced in labor relations will differ with this statement and say emphatically that labor arbitration is different and that the principles and standards of commercial arbitration should not apply, that a different process is required for the settlement of labor-management controversies. Many arbitrators and impartial chairmen take that view. But it is clearly evident from the use of restrictive and limited arbitration clauses in collective bargaining agreements, that many parties, labor and management, prefer the judicial process of arbitration. Such preference is even more clearly and emphatically demonstrated by the growing resort to the courts. Both labor and management have challenged the arbitrability of the other's claims and have attacked awards on the ground of "excess of authority" on the part of the arbitrators or failure to observe fair and impartial procedure.

The objective of restrictive and limited clauses is to try to insure a judicial determination of a controversy, to try to prevent the arbitrator from mediating or compromising the dispute and expanding or changing the written agreement of the parties. Typical of these are the arbitration clauses which provide that "the arbitrator may not vary or modify the terms of the contract" . . . "the arbitrator must decide all questions in accordance with the Agreement and shall not add to nor subtract herein" . . . "the authority of the Board of Arbitration shall be only to interpret the provisions of this agreement and apply such provisions to the particular case presented to it" . . . "any arbitration must conform to the terms of this Agreement and cannot go beyond the terms thereof; nor shall the arbitrators directly or indirectly rewrite or insert new clauses in this Agreement."

Most convincing in this regard is the stand taken by labor and management at the President's conference in November, 1945, when the following statement was adopted:

"That the impartial chairman, umpire, arbitrator, or board should have no power to add to, subtract from, change, or modify any

6. See STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* (Vernon Law Book Company, 1930); KELLOR, *ARBITRATION IN ACTION* (Harper & Brothers, 1941); *CODE OF ARBITRATION* (Commerce Clearing House, Inc., 1931).

provision of the agreement, but should be authorized only to interpret the existing provisions of the agreement and apply them to the specific facts of the grievance or dispute."

The increasing resort to courts by labor and management may be observed in the court reports throughout the nation. It is particularly observable in New York, where longer experience with arbitration and a modern law affords better known standards with which to test the adequacy of the process.

Recently, a union was stayed by the Supreme Court of the State of New York from proceeding with two arbitrations regarding discharges on application by the companies based on the premise that discharges for economic reasons were not arbitrable under the collective bargaining agreements.⁷ Subsequently, the order of the court was modified to permit an arbitration on one phase of the dispute as coming within the provision of the agreement. In another case, the court was asked to vacate the award of an arbitrator on the grounds that he had exceeded his authority. The court set aside the award and directed the re-submission of the dispute to a new arbitrator. In so doing the judge found:

"The arbitrator not only failed to decide all the issues in his report but went outside his duty and gave advice and recorded his opinions. His supplemental decision was void (*Herbst v. Hageners*, 137 N. Y., 290)."⁸

New York is not alone in reporting resort to the courts to challenge observance of good arbitration practice and procedure. In a Massachusetts decision, we find the court stating:

"While . . . defendants knew that the report had been filed and that they made no request for a hearing to present evidence or to meet the "evidence of the report" until after the board had rendered its decision, we are of opinion that it cannot be said as a matter of law that they thus waived their rights to be further heard. In the circumstance, it was the duty of the board not to proceed to decision before further hearing and notice thereof to the defendants. . . . It follows that the board erred as a matter of law in receiving and considering the report of the experts without affording the defendants an opportunity to meet that evidence, and that the award is invalid."⁹

7. *20th Century-Fox Film Corp. v. Screen Publicists' Guild, Local No. 114*, N. Y. L. J., January 9, 1948, p. 104.

8. *Matter of G. M. Ketchum Mfg. Corp.*, N. Y. L. J., July 8, 1947, p. 48.

9. *Burns v. Thomas Cook & Sons, Inc.*, 317 Mass. 398, 58 N. E. 2d 150 (1944).

In Missouri, too, we find an award being set aside for a violation of standard procedure, the third arbitrator having failed to consult his two colleagues before making his award.¹⁰ In the same proceeding, the court had upheld the arbitration agreement and the authority of the arbitrator under common law but was obliged to set aside the award for a failure to carry out an elementary requirement of any judicial board, that of conferring with the other members of the board regarding the decision to be rendered.

With this accumulating evidence that more and more labor and management are requiring that arbitration be carried through as a judicial process, it is evident that the major problem in labor arbitration today is, "What is labor arbitration?" Is it a judicial process? Is it simply another step in collective bargaining? Is it mediation and compromise? Is the arbitrator to be a judge to hear and determine a controversy submitted to him on the evidence and agreement of the parties? Or is he to be a counselor, a sort of labor relations psychiatrist? Shall he not only listen to the evidence and the argument of the parties but also investigate all surrounding conditions, including the general labor relations of the parties? And shall he then not determine the dispute but prescribe changes in methods and in the contract which he believes will enable the parties to get along better in the future? A reading of awards will disclose that some arbitrators believe that is their function.

Experienced arbitrators, labor relation advisers, lawyers, and management and labor officials will present varying points of view and shades of opinion. But certainly, the parties to an arbitration agreement, whether in a collective bargaining contract or under a submission, are entitled to know which process they are providing for and which procedure will be followed in the arbitration.

The editors of "Labor and the Nation" recently submitted a questionnaire to a hundred or more representatives of unions and management, their counsel and to experienced arbitrators. The second question of the questionnaire was, "Is there a common ignorance of arbitration both as to practice and procedure?" The answers are not available as yet but the use of such a question is in itself an indication that such a situation exists, and a review of court decisions, of which a few have been given, is clear evidence of a lack of regard for, if not lack of knowledge of, good arbitration practice.

10. *The Continental Bank & Supply Co. v. International Brotherhood of Bookbinders*, 201 S. W. 2d 531 (Mo. App. 1947).

On the other hand, many experienced labor arbitrators will oppose the restrictions of the arbitration process as developed under common and statute law, and suggest that the settlement of the instant dispute is only part of the arbitrator's function, that parties have to live together after the decision and therefore, the arbitrator must promote better relations as well as decide on the issue.

Harry Shulman, who has rendered distinguished service as impartial umpire under the contract between Ford Motor Company and the United Auto Workers C. I. O. for the past five years, states the case as follows:

"Unlike litigants in a court, the parties in a collective labor agreement must continue to live with each other both during the dispute and thereafter. While they are antagonists in some respects, they are also participants in a joint enterprise with mutual problems and mutual interests. The smooth and successful operation of the enterprise is important to the welfare of both. A labor dispute submitted to arbitration is not a controversy as to a past transaction, like the typical law suit in which each litigant desires to win, and, win or lose, to wind up the litigation and have nothing more to do with the matter. A labor dispute submitted to arbitration is a mutual problem which affects the future relations of the parties and the smooth operation of their enterprise. The objective of the parties, notwithstanding their contentions in advocacy, must be, not to win the immediate contentions, but to achieve the best solution of the problem under the circumstances. An apparent victory, if it does not achieve such a solution, may boomerang into an actual defeat. An award which does not solve the problem and with which the parties must nevertheless live, may become an additional irritant rather than a cure.¹¹

It must be noted, however, that Mr. Shulman is the "impartial umpire," and because of his unique ability has been given wide latitude.

In the contract between the same union and General Motors, a different situation exists. The contract provides:

"The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreement made supplementary hereto; nor to establish or change any wage; nor to rule on any dispute arising under the Section regarding production Standards or any other Section of the Agreement not above enumerated but shall refer any such case back to the parties without decision."

11. From the preface to *OPINIONS OF THE UMPIRE FORD MOTOR CO. AND U. A. W. C. I. O. 1944-1946*; also developed in Shulman, *The Role of the Impartial Umpire*, American Management Series No. 82, p. 10.

Another eminent and experienced arbitrator, Senator Wayne Morse, has been a most consistent and forceful exponent of arbitration as a judicial process:

"The arbitrator sits as a private judge, called upon to determine the legal rights and the economic interests of the parties, as those rights and interests are proved by the records made by the parties themselves. The principle of compromise has absolutely no place in arbitration hearings."¹²

The American Arbitration Association has from its inception been the strongest advocate of the development of arbitration in all fields as a judicial process. Its publications, "Rules of Procedure," "Code of Ethics" and the books written and edited by its First Vice-President, Frances Kellor, as well as Dean Wesley A. Sturges' outstanding text, present almost incontestable evidence for arbitration as a judicial process.¹³

It may be well at this point to review the principles and standards of arbitration as developed over the centuries and established by law. The fact that the principles and practices have been developed through questions arising out of commercial arbitration may give rise to a question as to their applicability to labor arbitration. But these standards are those that will be applied whenever the aid of the courts is sought by a party to a labor arbitration. It must also be remembered that all labor arbitrations are subject to the existing common law and statutory standards. And it must be recalled that the Ives Committee in New York found it necessary only to amend a section of the New York Arbitration Law to make it more available for labor disputes.¹⁴

A review of the established standards of arbitration practice will also afford an opportunity to discuss some of the departures from such principles that are a frequent occurrence in some labor arbitrations.

Arbitration may be defined as the voluntary submission of a dispute by the parties thereto to a disinterested party or parties for final determination. It is a quasi-judicial procedure whereby the parties, instead of resorting to the established state or federal courts, determine upon

12. Morse, *The Scope of Arbitration in Labor Disputes*, COMMONWEALTH REVIEW, March 1941, p. 6.

13. See *supra* note 6; also Voluntary Labor Arbitration Rules; Suggestions for the Guidance of Arbitrators; Code of Ethics; Braden, *Toward Effective Arbitration* (1946); How to Select an Arbitrator; A Guide to Labor Arbitration Clauses and other pamphlet publications of the Association.

14. See *supra* note 3.

their own tribunal, select their own judge or judges, and agree to be bound by the decision. Arbitration is not to be confused with mediation or conciliation which are the processes of bringing two parties together in order to work out a compromise of their differences and settle their dispute. In those procedures, the third party takes part in the discussion and attempts to bring about a settlement; whereas in an arbitration, the arbitrator hears the evidence and argument submitted by each party and makes a final decision based thereon which the parties have agreed in advance to accept as final and binding.

Arbitration is one of the oldest procedures for the determination of controversies. It was brought to our shores by the colonists from England where it was extensively used for centuries in the Guilds and was instrumental in establishing many of the trade customs and practices which were later incorporated into the "law merchant" and the common law.

At common law, agreements to arbitrate may be oral or in writing. They are not, however, specifically enforceable. An action for damage will lie for breach of contract but the damages recoverable are usually limited to out-of-pocket expenses, so that except in unusual situations no really adequate remedy exists. When an award is made, however, it may be enforced by an action and the courts will not examine the merits of the controversy but only as to whether or not a contract to arbitrate existed and the arbitrator was free from bias and fairly heard the proceeding. Under common law only existing disputes may be submitted and the award must be unanimous. The award may direct the payment of money damages or require specific performance. Thus an award in a labor dispute could be enforced by common law provided the agreement to arbitrate was made after the dispute had arisen, both parties appeared and were heard and the award was unanimous. An agreement to arbitrate, however, could be terminated at the will of either party any time before the award was made.

Under the statutes in practically all states, an agreement to arbitrate an existing dispute is binding and specific enforcement of the agreement may be had. In the fifteen states which have adopted the so-called "modern arbitration laws," agreements to arbitrate future disputes are also specifically enforceable. Eight of these, however, exclude labor agreements from the scope of the statute.¹⁵ It might be interesting to note that although there

15. The statutes of California, Colorado, Connecticut, Louisiana, Massachusetts, New Jersey and New York provide for the enforcement of future dispute

are some one hundred and sixteen statutes¹⁶ pertaining to labor arbitration and the settlement of labor disputes, all except the Kansas Act simply express a desire that the parties resort to arbitration rather than strike or lockout.¹⁷

It is not the purpose of this paper to make a survey of arbitration laws. Its object is to set forth the principles established for the conduct of arbitration in order that we may compare the legally established practice with that frequently found in labor arbitrations.

The requirements thus far noted that the parties must agree to arbitrate is observed generally. And it is almost a current experience that parties will proceed to arbitrate under the arbitration provisions of a collective bargaining agreement whether such agreement is enforceable under laws or not.

The points of departure from regular and legally established procedures occur in the behavior of parties and arbitrators during the arbitration proceeding.

Under both common and statutory law, arbitrators are required to be impartial, to have no interest in the outcome of the proceeding and no relations with the parties that may give rise to an assumption of bias.

In the tri-partite board extensively used and advocated by the recent War Labor Board, we have a complete departure from this principle. Of course, tri-partite boards had been used before many times but the great impetus given their use during the war caused harm to arbitration as a judicial process.

The opinions of two courts regarding the tri-partite board is illuminating. In a United States Circuit Court opinion, we find the following:

"... we note that under the act (The Transportation Act, applying to railway labor arbitrations) the arbitrators, save the neutrals, may be directly interested in the award and not thereby disqualified. *This was a radical and, we may add, an unfortunate departure from the common law.* . . . An openminded consideration of the questions at issue can hardly be expected where arbitrators are

clauses in labor as well as commercial contracts (the California law was so interpreted in *Levy v. Superior Court*, 104 P. 2d 770 (Cal. 1940); the Pennsylvania law has been held applicable in labor contracts, *Kaplan v. Bagrier*, 12 Pa. Dist. 693 (1929), but only if the issue submitted to arbitration is "actionable at law."

16. LABOR ARBITRATION UNDER STATE STATUTES (U. S. Dep't Labor 1943).

17. A recent change in such legislation is the enactment of statutes for the compulsory arbitration of labor disputes affecting public utilities in Florida, Indiana, Michigan, Nebraska, New Jersey, Pennsylvania and Wisconsin.

chosen to represent contestants. It is somewhat of a misnomer to call them arbitrators. They are advocates. It could hardly be expected that such partisans would surrender one iota of their claims until the arrival of the psychological moment for concessions."¹⁸ (*italics supplied*)

The Court of Appeals of New York expressed itself more forcefully and laid down a course of behavior that is observed more in the breach by most appointees of the parties in labor arbitration than in the performance. The court stated:

"But, first, the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi judicial capacity, and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel, and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias, and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of his conduct."¹⁹

What has been the result of this "radical, and we may add, an unfortunate departure from the common law"? Frequently, it is "new broils and contentions," as the "Gentleman of the Middle Temple" has suggested. On the other hand, advocates of the tri-partite board argue that only by having representatives of the parties on the board, will the third, the impartial member, be restrained from making a decision unacceptable to both parties. It prevents the third arbitrator from going "haywire" is the statement often heard. Any one familiar with labor arbitration and the care and consideration which parties use in the selection of the third arbitrator and with the arbitrators who have served and are serving in important wage

18. *A. T. & S. F. Ry. v. Brotherhood*, 26 F. 2d 413, 419 (C.C.A. 7th 1928).

19. *American Eagle Fire Insurance Co. v. New Jersey Insurance Co.*, 240 N. Y. 398, 148 N. E. 562 (1925).

and contract making arbitrations, is completely unimpressed by such statements.

The tri-partite board is more often the cause of delay and nearly always makes the task of the impartial member a most difficult and unhappy one.

The representatives of the parties (that is what they are in most instances) do not even try to act as arbitrators. Instead of trying to judge the merits of the matter before them, they continually advocate the position taken by their principals.

It is not unusual, when the discussion reaches the final stages to find short adjournments taken in order that such representatives of the parties may telephone their principals and receive advice or, probably, permission to yield on some point of contention.

It was this type of wage determination that gave rise to the "bingo" story of an arbitration which has been current recently. The story is that a third arbitrator driven to desperation by his colleagues and their unyielding advocacy of the amounts of wage increase advocated by their respective principals, suggested he would place the amount he believed should be granted, and they the amount sought by each, on separate pieces of paper and whichever was nearest to his, would be the amount awarded. No comment is needed on such a procedure.

A survey (not published) of the opinion of a hundred leading arbitrators in all sections of the country two years ago disclosed an overwhelming vote against the tri-partite system. The experienced arbitrator found that whatever advantage was gained from the opportunity to be advised by colleagues who presumably had intimate knowledge of the situation, was completely offset by the disadvantages.

If three arbitrators are desired, they should be mutually selected, have no connection with the parties and no interest in the dispute. If a horse trading process is desired, let it be a part of collective bargaining or grievance process and not a corruption of the arbitration process.

Another method by which the suggested advantages of the tri-partite board may be retained and the impartial arbitrator be permitted to retain his judicial character and the arbitration process permitted to function, is to provide in the agreement to arbitrate that in the event of a deadlock, the decision of the impartial arbitrator will be accepted and binding. No majority decision will be necessary.

Two more recent decisions of the New York Courts regarding the requirement of impartiality may be noted. In one, the court directed the removal and replacement of an arbitrator named by a union on a tri-partite board because he was a vice-president of the national organization:

"The objection made to the arbitrators designated by the petitioner is well founded, in view of the fact that one of them is the president of the petitioner and the other an officer of an affiliated union. The petitioner will be required to designate two impartial arbitrators in the place of those heretofore designated by it."²⁰

In another case, the court removed an arbitrator appointed by the court when his impartiality was challenged by one of the parties. A party (the employer) alleged that he could not expect to receive a fair consideration of the contract terms dispute from an arbitrator that had an expressed philosophy favorable to the union and its cause. The court stated:

"... the arbitrator has for some time past evinced a course of conduct that places him not merely among those articulate concerning the social and economic problems confronting us but rather among those who with all the ardor of advocacy at their command as partisans, urge the cause of labor so stirringly. Even more, it is fair to say, that this advocacy is not set in the framework of belief or desire to establish a unified relationship of management and labor, with increasing enlightenment in conferring upon all the people the benefits of industrial enterprise, but rather in opposing the interests of management and labor as irreconcilable."²¹

The decision was appealed but upheld.

Arbitration statutes and the decisions of the courts require that arbitrators fix a time and place for the hearing and take the proof of each party in the presence of the other (unless, of course, the other party fails to be present after due notice and a default arbitration is permitted under the prevailing arbitration law). In reviewing the procedure followed by arbitrators of the U. S. Conciliation Service, Professor Updegraff states that, "in some instances, local custom seems to require that the Arbitrator first talk alone with the representatives of one side and later with the representatives of the other. This *may* be followed by a hearing at which both sides are fully represented."²² Whether the written consent of the parties

20. *Matter of Hawley*, N. Y. L. J., June 30, 1942.

21. *Western Union Telegraph Co. v. Selly*, 60 N. Y. S. 2d 411, 412 (Sup. Ct. 1946), *aff'd* 295 N. Y. 395, 68 N. E. 2d 183 (1946).

22. Updegraff, *War Time Arbitration of Labor Disputes*, 29 IOWA L. REV. 328, 340 (1944).

for this variation from established required procedure is obtained is not indicated.

The lack of knowledge of even the logical requirements for a hearing and reception of evidence is at times startling. Some time ago, a hearing was arranged for the determination of a dispute between a large manufacturing concern and a union. The arbitrator, a well known attorney and professor of law, was the fifth member of the arbitration board. He delayed opening the hearing when he found only four persons present in addition to himself. He inquired when the others were expected, to be told that no one else was to be there. It appeared that both sides believed that arbitration is only another step in collective bargaining and that the fifth arbitrator was to aid in the mediation of the dispute and if he was unable to bring the parties to an agreement, he would cast the deciding vote. The fifth arbitrator then proceeded to explain the arbitral process and after a two hour delay, witnesses were assembled, documents and records secured and a proper hearing was held.

The courts have held that arbitrators must hear all evidence, material to the dispute, but they may not make independent investigations, or seek evidence and information outside of the hearing. Chief Judge Cardozo, in the New York Court of Appeals stated:

"We think the conduct of this arbitrator was misbehavior prejudicing the rights of one of the parties within the meaning of the statute. . . . True, the arbitrator in this proceeding acted in good faith, but misbehavior, though without taint of corruption or fraud, may be born of indiscretion. . . . There would be little profit in fixing a time and place of hearing, if the arbitrators were at liberty when the hearing was over to gather evidence *ex parte*, and rest their award upon it."²³

That last sentence of Judge Cardozo is a simple statement of an age old principle that a party must be confronted with the evidence that may be used against him. But it is common practice for labor arbitrators proceeding without rules and standards to make independent investigations, confer with parties separately without disclosing to the other information so obtained. Some arbitrators make it a practice to discuss cases with colleagues and consult awards of other arbitrators without giving the parties an opportunity to examine such decisions and comment thereon. Perhaps

23. *Berizzi Co. v. Krausz*, 239 N. Y. 315, 146 N. E. 436 (1925).

such practice may be helpful but it is not good arbitration procedure. If it is to be indulged in, the parties should be so informed and asked to consent thereto. In any event, if the parties desire arbitration subject to review by the courts to insure a fair and impartial hearing and an award within the authority conferred upon the arbitrator by their mutual agreement, the procedure must follow the established principles of arbitration as a judicial process.

The comment of the New York Court of Appeals made in a decision on a labor arbitration proceeding clearly demonstrates the applicability of good arbitration law and practice:

"Under the new statute arbitration became both orderly and enforceable and was made subject in effect to a decree for specific performance. A quarter of a century of its operation has demonstrated its usefulness and general acceptability."²⁴

In noting this decision in the Survey of New York Law 1946-1947, Frank H. Towsley, of the New York University Law School, noted:

"Arbitration of labor disputes is assuming more and more an important place in the economy and probably the process will go on. Thanks to a model statute, complete coordination is possible with the judicial system."²⁵

If the parties to labor controversy desire to use arbitration for the determination thereof, with the opportunity to resort to the courts rather than tests of economic strength when arbitration is misused, the standards and principles established under common and statute law must be observed. Without such observance, the result of labor arbitration will certainly be unreliable, unpredictable and unsatisfactory.

It appears, therefore, that parties to labor contracts must face the problem of deciding whether they want arbitration as a judicial process with its established procedure or some other process of adjusting their disputes. If some other process is desired, then it should be specified. It may be called *adjustment*, *mediation*, or *settlement by an impartial chairman*. Arbitration must not be confused with collective bargaining, mediation or adjustment. That appears to be the outstanding problem in labor arbitration today; one, however, that appears to be well on the road to solution. The majority, through their acts in adopting specific arbitration clauses, in

24. *In re Feuer Transportation, Inc.*, 295 N. Y. 87, 65 N. E. 2d 178 (1946).

25. Towsley, *Labor Law*, 22 N. Y. U. L. Q. REV. 690 (1947).

the appeals to the courts and from the pronouncement of leaders of management and labor, favor arbitration, the judicial process.

The problem of whether labor arbitration is to conform to practices and standards established over the years under common and statutory arbitration is one that concerns all those interested in arbitration, not alone those interested in labor-management arbitration but arbitration committees of commercial organizations, Chambers of Commerce, Stock and Commodity Exchanges and Boards of Trade with long histories in the use of arbitration.²⁶ They are concerned lest the practice of arbitration, as laid down by experience, is to be corrupted by new practices developed by inexperienced arbitrators of labor disputes.

ARBITRATION EXPENSE

Next in importance to the problem of whether labor arbitration will conform to the established standards of arbitration as a judicial process is the criticism frequently met today of the expense of arbitration. The fees of the arbitrator and the expense of stenographic reports of the proceeding often are a source of concern. Each party is free to determine the cost of counsel or to eliminate such cost by presenting the case personally. But they are equally responsible for the fee of the arbitrator and frequently the stenographer, and sometimes they are not able to exercise judgment in the matter. Too often, under stress of circumstances, they agree to compensation of the arbitrator at rates higher than they believe is justified in order not to be placed in an embarrassing or possibly prejudicial position. The same is true of stenographic expense. With no desire or even necessity for a stenographic record, one is agreed to because the other party suggests that the arbitrator should have one.

Arbitrator's Fees

"Time" in commenting on the service of Harry Shulman as the umpire under the contract between the United Auto Workers and the Ford Motor Company reports:²⁷

"Last year he refused a proffered \$6,500 raise to his \$12,000 salary (jointly paid by union and management) saying he did not want to have a money interest in the job."

26. YEAR BOOK ON COMMERCIAL ARBITRATION (Oxford University Press, 1927).

27. Time, September 30, 1946.

That statement should be the platform of every arbitrator and judicial officer. It is the spirit and adherence to the principle of service above monetary gain that has motivated the careers of our most notable judges. There is no question that any of the outstanding judges of our federal or state courts could earn much more by practicing law than by continuing to serve as judges. But a desire for public service, a sense of social responsibility, the satisfaction of administering justice, is a large reward.

Again referring to the age old tradition of arbitration in the United States, it will be found that compensation for service as an arbitrator under the rules and procedure of the commercial and trade organizations of the country was either a small honorarium or nothing. In the oldest arbitration tribunal, that of the Chamber of Commerce of the State of New York²⁸ an honorarium of ten dollars (formerly paid in the form of a gold piece) is the rule.

In the twenty-six years experience of the Commercial Arbitration Tribunal of the American Arbitration Association, arbitrators have served without compensation except in rare instances. In cases where hearings have been protracted and special professional knowledge has been required, fees have been paid. In no case have the fees exceeded one hundred dollars per day although the arbitrators have been among the most distinguished professional and business men whose usual earnings were many times the fee received.

In a survey of the activities of the American Arbitration Association, "Fortune" made special note of the services rendered by members of the panel of arbitrators.

"However well organized the Association is, however sound its rules and regulations, it remains apparent that the success of arbitration depends primarily on the arbitrators. The arbitrator's job is a hard one. He is asked to assume a heavy personal responsibility. In many cases he is selected because he is known to have remarkably full technical knowledge and long experience in the subject disputed. He is expected to make all this, together with a good deal of his time, freely available, although he never gets any

28. The Chamber was chartered by King George III in 1768 and has had a continuous existence since that time. Its Arbitration Committee has functioned since the first meeting of the Chamber in 1768. Although devoted exclusively to commercial arbitration, the Committee reported in 1913 that it had intervened in a strike in the clothing industry in New York in December 1912 and attempted to mediate the dispute and had assisted in the mediation of other labor disputes during the year.

fee for his services. The interesting fact is that, far from being difficult, persuading the right sort of men to act as arbitrators is very easy. Willingness to serve testifies to a high sense of social duty and an admirable public spirit. In short, the arbitrator's services, though unpaid, are not unrewarded. His time is taken and he is put to some trouble, but to the agreeable sense of doing his duty, he adds the gratification of having his worth and wisdom appreciated and of sitting, at their express request, in absolute judgment on his fellows. The opportunity is one men rarely refuse."²⁹

Although the principal activity of the Association was commercial arbitration, as early as 1925 it was called upon to administer labor arbitration between theatrical managers and actors under the basic agreement of the Actors Equity Association, A.F. of L.³⁰ In all those years the third member of the arbitration board appointed by agreement of the parties from the panel of the Association has served without compensation. With the increase in collective bargaining following the enactment of the 1933 National Industrial Recovery Act (clause 7A) increasing requests were received by the Association for the administration of labor arbitration from both unions and management. The passage of the Wagner Act (1937) brought more requests and made it necessary for the Association to organize a new section for labor arbitration, the Voluntary Labor Arbitration Tribunal, and for years arbitrators serving in that Tribunal also served without compensation. As late as 1945, seventy nine percent of the members of the panels so served. The report for 1947 shows the figure almost reversed—fifty-nine percent were compensated.

What changed the practice?

First, the tremendous increase in the use of arbitration in the war period due to the No Strike, No Lockout pledge of labor and management and the compulsory use of arbitration directed by the War Labor Board. Second, the necessity of devoting considerable time and effort to a study of the regulations and rulings of the War Labor Board in order competently to decide the disputes being presented to arbitration. The "little steel" formula, area rates, differentials, intra-plant inequities, inter-plant inequities, sound

29. *Fortune*, December, 1938.

30. The basic agreement between actors and managers has included an arbitration clause since the settlement of the actors' strike of 1919. Arbitration under the Rules of the American Arbitration Association has been included in the contract since 1927.

and tested going rates, wage brackets, union security, overtime, time and one half, and double time, and many other policy announcements of the Board created a profession not only of advisers and counselors but also of arbitrators who had to train themselves to understand and apply the Board's regulations. Their awards were subject to review by the War Labor Board whenever wages were arbitrated. A manual issued by the War Labor Board in October, 1943 contains forty pages of regulations, and new policies were being announced frequently.

Management and Union adrift in a sea of uncertainty, anxious to promote the war effort, to avoid work stoppages, were quick to accept the services of "experts" to determine their differences. Almost any individual who had served a few months as an employee of some governmental agency, concerned in any way with labor relations, offered to serve as an expert arbitrator.

A member of the New York Bar who has appeared in many labor management proceedings, recently made the following statement before the American Management Association:

"The country has in the last few years spawned an enormous number of men who hold themselves out as arbitrators, and who in some way or other have succeeded in having their names put on various panels of governmental and semi-governmental agencies."³¹

The influence which guided many was not public service. It was rather the news of large fees such as one which caused considerable comment, where a charge of \$2,500 was made for two hearings and the writing of an award all accomplished in four days.

The government policy of appointing arbitrators and fixing a per diem of about eighteen dollars and expenses but encouraging the appointee to suggest that the parties pay a fee and relieve the budget of the expense was a most influential contributing factor.

Many stories have been told of the methods used to secure substantial fees from parties. It has been reported that both labor and management have taken advantage of the suggestion of the arbitrator that he would like the parties to agree upon his fee—how one or the other has been most generous in suggesting the amount in order to embarrass the other or seek

31. Maximov, *Arbitration and the Scope of Collective Bargaining*, Personnel Series No. 110, p. 31 (1947).

favor from the arbitrator. That the discussion of a fee in the presence of the arbitrator has been held to be grounds for the setting aside of the award seems never to have occurred to either the arbitrator or the parties.³² A common statement is "the first thing to arbitrate is the arbitrator's fee."

It is also well known that in proceedings without rules and administration, fees have been fixed at higher amounts because it was anticipated that one party would fail to pay. These and similar unethical and questionable practices, of course, are not the rule but their prevalence is such as to give cause for alarm lest the arbitration process be discredited.

In an attempt to set a standard during the war, the War Labor Board announced as a policy that arbitrators' fees should be from twenty-five to one hundred dollars per day and that only in complex and difficult cases should the larger fee be paid. The U. S. Conciliation Service made a similar statement, later modified by increasing the maximum to one hundred fifty dollars. The Service also agreed to supply arbitrators paid by the government in cases where either of the parties found the payment of a fee to be a hardship.

The American Arbitration Association reiterated its established policy of allowing the parties to agree to pay a fee if they so desired but insisted that no discussion of the fee take place with the arbitrator. It required that arrangement for a fee be made through the Association as administrator and be agreed to in writing in advance, the agreement to fix a *per diem* rate for each day of hearing and to provide what fee would be paid for time spent in the study of the evidence and writing of the award and opinion.

Not alone is the fee paid to the arbitrator a major consideration. The length of the proceeding and frequency of recourse to arbitration also have an important bearing on expense.

It has been charged that an arbitrator will prolong the hearing in order to increase the amount of his compensation when he is to receive a *per diem* fee. Experience in thousands of cases does not sustain that charge. The parties and their counsel are responsible. They come to hearings inadequately or wholly unprepared. Adjournments must then be granted to secure evidence. At times, one side will deliberately slow down the proceeding to delay the award or cause expense and exasperation to the other party.

Frequent use of arbitration due to failure honestly to negotiate the

32. *Miles Laboratories v. American Pharmaceutical Co.*, 261 App. Div. 108, 24 N. Y. S. 2d 405 (1941).

settlement of the grievance in the procedure established in the collective bargaining agreement will make arbitration a most costly process. Insistence upon a separate arbitrator for each grievance is another method to increase expense and one that has been recommended by so called labor relation advisers with the belief that to make arbitration "cost the Union money" will discourage use of the process.

There appears to be no reason why one arbitrator may not determine a number of grievances in one proceeding, unless they are so different that the service of an arbitrator of different experience and skill is required. A job evaluation, or work assignment dispute may require a different arbitrator than the one selected to interpret a seniority clause.

It is short-sighted to suggest that better labor relations will result by making arbitration costly. Such a course will only lead to increased ill feeling. Delay in settling grievances can only engender animosity.

Experience has proven that prompt recourse to arbitration before competent arbitrators brings about better understanding and good relations.

Stenographic Fees

The cost of a stenographic record not infrequently is greater than the fee paid to the arbitrator. Is a record necessary? The informality of the arbitration proceeding, the acceptance of any evidence, the freedom allowed witness in answering questions, sometimes result in a very long record. Many of the facts presented are undisputed and only a small part of the record is ever consulted. Financial statements, statistical information, payrolls, seniority records, are generally supplied as exhibits. It is from these rather than the record that the determinative information is secured by the arbitrator. Of course, this is not always so but in most of the cases such exhibits are furnished. In the majority of cases it will be found upon questioning experienced arbitrators that the stenographic report of the proceeding is not required. When the arbitrator, however, includes in his opinion a summary of the evidence of each party, he needs the record to prepare such summary. Why is it necessary to include a summary in the opinion?—to prove careful consideration of the evidence?—Surely the parties, by their selection of the arbitrator, indicated their confidence that such consideration would be given.

Full and careful presentation of a case with adequate exhibits and a brief will do much to make a stenographic record unnecessary and remove a most costly expense of arbitration.

What is the solution of the problem of the high cost of arbitrators' fees? First must come the recognition that the arbitrator is a judicial officer, not a negotiator, adjuster, mediator, or another aid to collective bargaining. That his service is an opportunity to aid the public good—that he is not simply a laborer worthy of his hire as has been suggested in a recent book. The experience of the American Arbitration Association and the hundreds of commercial arbitration boards throughout the country is substantial evidence of the public service motive. Members of the Association's Panel of approximately eleven thousand have agreed to serve without compensation, some in all instances, others whenever it is required. The willingness of Americans generally to serve their communities, state and nation for the public welfare is well known. Heads of business, labor leaders, professional men have always most willingly responded to calls for service as is evidenced by the numerous committees that are continually meeting in Washington and throughout the country for public service, and frequently, at the expense of these individuals. Not that all arbitrators should serve without compensation but the motivating force must be the willingness to serve as a public duty, as a high sense of social obligation and not for a "money interest in the job."

The second requirement toward a solution of the fee problem is a change of attitude of the parties. The situation has been excellently stated by Alexander Hamilton Frey:

"The real problem is no longer a lack of competent, impartial arbitrators. What is needed is a change in the outlook of both company and union representatives concerning the qualifications of an arbitrator. . . . Self-interest would therefore indicate that each party should make no effort to induce the other to agree to an arbitrator from whom a biased, lop-sided award might secretly be expected. Moreover, a greater willingness to take some chances in the selection of an arbitrator must be developed by both sides.

"Honesty and fearlessness are, of course, requisites for any arbitrator. An agreeable personality is highly desirable. In addition, astuteness, and experience which will enable him readily to comprehend and to evaluate the respective contentions, are important assets. But all too often the parties, while insisting upon these qualities, also appear to expect their choice to fall upon a man who is a complete blank with respect to political, social, economic or other predilections! This attitude reminds one of the saying, 'Why be difficult when with just a little more effort you can be impossible?'

"In every community there are some men whose training has

been such as to develop in them intellectual honesty—a capacity for suppressing preconceptions and arriving at conclusions on the basis of objective considerations, especially when confronted with the responsibility of deciding the fortunes of others. No arbitrator is infallible. Mistakes and even prejudices will from time to time prove detrimental to one of the parties. But it is easy to magnify the dangers and to forget that the alternatives to arbitration as a solution of a deadlock—strikes, lockouts and their concomitants, or possibly governmental intervention—can be far more devastating.”³³

Hardly anything more need be added. Before the War Labor Board and the widespread use of the tri-partite board with that peculiar entity, the “public member,” there was considerable use of business men with reputations for fairness and public spirit in labor arbitration. On occasion, labor executives and attorneys for labor unions were agreed upon for service. Today, such agreements are rare. There are notable exceptions and as the memory of the tri-partite boards grows dim, perhaps once again it will be realized that all arbitrators are members of the public. Fairness is not confined to any class—it is an American trait. The confidence of the parties, as displayed by their joint selection of an arbitrator, will inspire in him not only an obligation to judge fairly but a spirit of impartiality and a sense of justice. The performance of the boy selected by his fellows to umpire a sand lot baseball game is a well known example of this American trait,—good sportsmanship.

The third suggestion in an attempt to solve the problem is to recognize and give attention to the different types of labor-management disputes. Disputes regarding “interests,” the terms of the collective bargaining contract, will generally require more expert service and more protracted hearings and study than a dispute over “rights,” or the interpretation of an established contract. Such a dispute frequently requires the services of a professional labor relations expert, an arbitrator devoting all or a major part of his time to labor relations. Such an arbitrator must be compensated and adequately compensated in order that professional experience and knowledge will be available when required. To pay the same per diem rate to a casual arbitrator for the determination of a discharge case or some other minor interpretation of a contract is obviously unrealistic.

33. Frey, *Logic of Collective Bargaining and Arbitration*, 12 LAW AND CONTEMP. PROB. 264, 278 (1947).

Fees should be based on the nature of the controversy, the standing of the arbitrator, ability of the parties to pay; as well as the time spent in the proceeding; and a rate fixed in advance of the appointment.

Disputes involving the interpretation and application of provisions of the collective bargaining agreement, except where some major issue is raised, should be submitted to the casual arbitrator, one who will serve frequently without a fee. Such references will accomplish a number of desirable objectives, expense will be kept down, more arbitrators will be available and more will gain experience. In addition, the expert, the professional labor relations arbitrator, will have more time to give to the contract making arbitrations which are increasing in both number and importance. Parties and arbitrators will both benefit.

The use of non-compensated arbitrators will also permit the use of arbitration by small business and the union with limited membership.

The increased use of the arbitration process, the greater opportunity for public service, the larger number of arbitrators familiar with labor-management problems will all contribute to the public good, to the advancement of better labor-management understanding, the technique of getting along together and of better human relations.

THE TAFT-HARTLEY ACT AND ARBITRATION

No discussion of labor arbitration problems today can omit some comment on the effect of the Labor Management Relations Act, 1947, on the arbitration of labor management disputes. In the statement of policy set forth in Section 201 of Title II, the Act provides:

"It is the policy of the United States that the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation and *voluntary arbitration* to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours and working conditions and to make all reasonable efforts to settle their differences by mutual agreement." (Italics supplied.)

The above is the only mention of arbitration by name in the Act. This may be attributed to the general complaint of management that it had been forced to arbitrate during the war years by pressure of government agencies and with government appointed arbitrators. It is significant that in the establishment of the new Federal Mediation and Conciliation Service, no

mention of arbitration is made despite the fact that its predecessor, the Conciliation Service, had maintained for years a special division of arbitrators.

The Act, however, stresses time and again the use of voluntary agreement and voluntary processes for the settlement of labor-management disputes.

Under the Act, moreover, are two important areas in which it is indicated arbitration may be used. In Section 10 (i) the parties to a dispute regarding a charge of an unfair labor practice are permitted ten days to adjust the dispute or agree upon methods for the voluntary adjustment of the dispute. Thus, the arbitration of jurisdictional disputes is encouraged.

Advantage of this provision is taken in an unusual clause in the contracts between some of the unions under collective bargaining agreements with members of the Brewers Board of Trade of New York. A typical provision is:

"In the event, however, that a dispute should arise during the term of this agreement between any other union having a legitimate contract with the Brewers Board of Trade, Inc. and Local 56, International Brotherhood of Firemen, Oilers and Maintenance Mechanics, A.F. of L., then the dispute shall be referred in the first instance to the business representatives of the respective local unions involved for settlement. If the business representatives fail to reach a settlement, within ten days, then the matter shall be referred to arbitration in accordance with the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association. The arbitrator shall be selected only by the two unions involved in the dispute and he shall be a person acceptable to both of them. Pending the final determination of such dispute the status quo ante shall be maintained."

The second section of the Taft-Hartley Act making definite provision for the possible use of the arbitration process is the section regarding union welfare funds, Section 302, paragraph C (4 B) which provides that in the event the

"employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the District Court of the United States for the district where the trust fund has its principal office."

This restrained use of the word "arbitration" in the text of the Act is no restraint in the use of the process. Indeed, in the words of Sylvan Gotshal of the New York Bar in his recent paper regarding the possibilities of arbitration under the act—

"There is every reason to believe, however, that arbitration will assume a more important role under the Taft-Hartley Law, and that it will serve to settle as a final step in well organized grievance procedures an ever increasing number of industrial controversies."³⁴

There is also every reason to believe (and recent experience has demonstrated) that voluntary arbitration is being used increasingly for the determination of disputes as to the terms of contracts also. Both kinds of arbitration are possible and encouraged by the Act by the emphasis therein of the use of voluntary methods for the settlement of labor management disputes.

There are other problems than those presented above and the need for discussion is great. But discussion based not on theory alone but also upon adequate examination of experiences recent and past. An important move in that direction is under way. On the initiative of the American Arbitration Association, representatives of the American Bar Association (Labor Law Section), The National Academy of Arbitrators, the Labor Relations Research Association, and the Arbitration Association are meeting from time to time to consider and plan for the discussion of such problems. Among those recently suggested for consideration are: inadequate arbitration clauses, common ignorance of arbitration procedure, criteria for wage arbitrations, arbitrators' fees, publication of awards, shall awards establish precedents, code of ethics, more adequate arbitration laws, and effect of the Taft-Hartley Act.

CONCLUSION

Ninety-odd per cent of all collective bargaining agreements provide for arbitration as a final step in the grievance procedure as has been previously indicated. The increasing submission of disputes regarding the terms of such contracts is notable. Voluntary arbitration is accepted today almost without question by labor and management. It is established procedure to break a deadlock. For every strike there are thousands of successful settlements of labor-management disputes by arbitration.

34. Gotshal, *Arbitration and Its Possibilities and Limitations under the Taft-Hartley Law*, 2 ARB. J. 318 (1947).

What is needed now is not acceptance of arbitration but education and enlightenment regarding the process. Labor, management and arbitrators must distinguish arbitration from collective bargaining and mediation. Labor arbitration must conform to the established principles and standards laid down in common and statutory law. It must not and cannot be subjected to change and variation at the whim of an arbitrator.

The late Chief Justice Charles Evans Hughes expressed it well in the following words:

"Deliberation, fairness, conscientious appraisal of evidence, determination according to the facts, *and the impartial application of the law*, whether the controversies are decided in the courts or in administrative tribunals—there are the safeguards of society. For the law is naught but words, save as the law is administered."³⁵ (italics supplied)

Impartial application of the arbitration law that has established the principles and standards for arbitration practice and procedure will insure Labor and Management of a process that will be uniform throughout the country, a process that is predictable and certain and that will insure the impartial determination of any controversy. No lawyer would think of practicing in a court without first ascertaining and learning its rules. No one would think of playing cards, golf, or enter upon any other type of contest without learning the rules of the game, but in labor arbitration too many have marched forward as parties, counsellors or arbitrators, without learning, without study, and with an entire disregard of the fundamentals of the arbitration process.

The time has come to stop, consider and decide that arbitration is a judicial process, that its standards and principles as laid down by law will be observed. The time has come to review the experience of the last ten years and reform the practices that have brought criticism and condemnation.

The democratic processes of free collective bargaining and free enterprise must not be destroyed. Disputes must be settled lest the ill feeling and acrimony engendered by strife separate us and make us the prey of outside subversive influence that will bring about the loss of our democracy.

35. Delivered at the Sixteenth Annual Meeting of the American Law Institute, Washington, D. C., in May, 1938.

Let us arbitrate voluntarily, the democratic, the American way, referring our disputes to disinterested, impartial arbitrators who will follow the rules of the game and insure a fair and just decision, not only for the benefit of the parties in dispute but in the public interest so that non-participants in the controversy will not have to pay a heavy toll in life, liberty and happiness through the stoppage of the economic functions of a free people.