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Book Reviews

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MANAGEMENT-UNION ARBITRATION. By Maxwell Copelof. New York: Harper & Brothers, 1949. Pp. 414, 345. $5.00

Maxwell Copelof, a professional arbitrator, devotes the major part of his book to summarizing typical arbitration cases between management and unions. With some exceptions a general pattern is adopted in summarizing the cases. The issue or issues in dispute are set forth, followed by a quotation of applicable contract provisions, the union's position, the company's position and the decision of the arbitrator or arbitrators together with an analysis of the factors that produced the decision. While the summaries are succinctly presented, most of them contain sufficient information to give the reader a considerable understanding of the decisional process of the arbitrator.

The first three chapters consist of general discussion of what are appropriate questions for arbitration, how to choose an arbitrator and the techniques of preparing and presenting cases. From there on, the book is essentially a case book with various classes of cases collected in specific chapters. The classifications considered are cases involving direction of working force, union rights and prerogatives, discharge and other disciplinary cases, wage disputes arising out of contract, incentive pay disputes arising under contract, contract clauses on "fringe issues," disputes not controlled by contract clauses, arbitrating new contract provisions and when to mediate.

Missouri's archaic general arbitration statute makes contracts to arbitrate *in futuro* specifically unenforceable.[1] Consequently, agreements to arbitrate future disputes in collective bargaining agreements have no legal significance whatsoever. It is only because of the moral integrity of both management and labor in this state, together with the fact that arbitration is an especially effective method of settling disputes voluntarily, that the vast majority of these agreements are mutually honored by the parties themselves. Because arbitration is voluntary it is highly important that its spirit and character be understood so that its maximum potentialities can be achieved.[2] Any lawyer who has not been fairly well submersed in the arbitration process will profit from a reading of Mr. Copelof's book. For instance, the cases reveal the value of maintaining a history of the development of specific clauses in a collective bargaining contract—why changes were made, the reason for use of particular words, what questions were discussed in connection with

1. With one exception, all sections of the Missouri general arbitration statute were originally enacted in either 1825 or 1835. That one exception, Section 15233, MO. REV. STAT. (1939), was enacted in 1909 and it is the section which renders unenforceable agreements to arbitrate *in futuro*. See Dworkin v. Caledonian Ins. Co., 285 Mo. 342, 226 S.W. 846 (1920).

2. See Frey, *The Logic of Collective Bargaining and Arbitration*, 12 LAW AND CONTEMP. PROB. 264 (1947).

such wording. This history is frequently decisive in determining the intent of the parties. It can never be overemphasized that the submission agreement should be worded so as to enable a decision that will actually rule on the question involved and will permit an equitable disposition.

Mr. Copelof is a bit critical of lawyers, feeling that many lawyers are hypertechnical and thus thwart the arbitration process. This criticism is not new,[3] nor is it entirely without foundation. In this instance, however, the criticism stems partly from the fact that Mr. Copelof does not consider arbitration to be essentially judicial in nature. He states:[4]

> "Contestants in arbitration proceedings who want a judicial atmosphere and full observance of court room technicalities can always find a lawyer who is willing to play judge for them. Those who are most concerned with getting an arbitration award which really metes out justice, instead of providing a verdict for the side that has the smartest lawyer or other spokesman, will no doubt select an arbitrator who subscribes to this [Copelof's] point of view."

Of course, arbitration proceedings should be as informal and non-technical as possible, but there are certain procedural safeguards that should be followed. In this connection one must examine with caution some of the activities described or advocated by the author.

In a number of case summaries, it is mentioned that the arbitrator made an independent investigation of the facts. The author does not indicate in some of those cases whether all of the parties involved authorized an independent investigation. If there were no such authorization, it would be well to heed the words of Chief Judge Cordozo in *Stefano Berizzi Co. v. Krausz*,[5] a case in which it was held that such an independent investigation was prejudicial misbehavior. It was there said:

> "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."

The chapter on "When to Mediate" reveals a confusion on the part of the author as to the relationship of mediation and arbitration. It also demonstrates a fundamental weakness of not considering arbitration judicial in nature. Most of the cases collected in that chapter did not actually involve mediation. When it is apparent that the parties have not exhausted negotiations between themselves, it is not mediation for an arbitrator to suggest that they endeavor to reach an understanding—so long as the arbitrator does not participate in the negotiations. Nor is

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3. Compare Wirtz, *Collective Bargaining: Lawyers' Role in Negotiations and Arbitration*, 34 A. B. A. J. 547 (July, 1948).
4. P. 49.
5. 239 N. Y. 315, 146 N.E. 436 (1925).

it mediation for an arbitrator to render an award on the merits and then proceed with some advice to the parties with respect to future conduct. Only the most unusual circumstances could justify an arbitrator serving as a mediator or conciliator in a matter in which he might have to render a decision.[6] The essence of mediation is compromise. There is a genuine role for mediation in labor-management relations —but it should not be cloaked as arbitration. No doubt Copelof's rejection of the judicial nature of arbitration leads him to accept more readily than most arbitrators the idea that a person can serve successively (and successfully?) as mediator and arbitrator.

Something of the author's incongruity regarding the relation of law to arbitration appears in the following two statements. He says:[7]

> "Time and again, especially when attorneys represent the parties in dispute, the arbitrator will be confronted with all sorts of citations, or of prior decisions made by him or other arbitrators. These citations, the parties will argue, should be construed as establishing binding precedents and should control the settlement of the current case. Unfortunately, from the lawyer's standpoint, this just doesn't work."

Then ten pages later he says:[8]

> "What amounts to a body of 'common law' is gradually being built up through arbitrators' decisions to cover the situations that most generally arise and that present similar elements."

The issue of "case law" vs. "free decision" in labor arbitration is currently very real.[9] This reviewer joins those who believe the present trend toward "case law" on substantive matters might destroy the essential flexibility of arbitration. That does not mean, however, that arbitration is not of a judicial nature or that procedural standards should not be adopted.

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6. See Braden, *Problems in Labor Arbitration,* 13 MO. L. REV. 143 (1948).
7. Pp. 40-41.
8. P. 51
9. Note, *Case Law or "Free Decision" in Grievance Arbitration,* 62 HARV. L. REV. 118 (1948).