

SOME QUESTIONS ABOUT LABOR ARBITRATION

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Congressional passage of the National Labor Relations (Wagner) Act in 1935 was a vital policy decision. Designed to prevent interruptions of the free flow of commerce by the encouragement of collective bargaining, this act has had a tremendous effect upon economic organization and activities, and upon social institutions and attitudes. The impact of this legislation has not yet been fully realized although certain immediate results, such as a rise in union memberships and an effect on strikes and work stoppages, have been carefully observed.¹ Other results are slower to manifest themselves and are still somewhat hazy. The increasing size, wealth, and power of labor organizations have given rise to problems concerning the relationship of unions to their members. Congress has not yet placed any direct controls upon internal union affairs. However, an indication of the approach that may be taken in future labor legislation is to be found in the reporting sections of the Labor-Management Relations (Taft-Hartley) Act.² These sections require that any union, before filing a petition or complaint under the LMRA, have on file with the Secretary of Labor copies of its constitution and by-laws and a report showing the organization's complete financial status and operations. This report must also contain information about membership qualifications and the means used to authorize certain acts by the organization. The concern of Congress for the individual worker is also manifested by the language of section 7, guaranteeing to employees the right to refrain from concerted activities, and section 8(b), protecting individuals from restraint and coercion by unions as well as employers.³

The enactment of the NLRA was, of course, not the first governmental attention to the employee-employer contract; legislatures for many years had been prescribing certain limits and conditions upon this relationship.⁴ The NLRA, however, required a legislative-type contract between management and its employees. The contract re-

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1. Total union membership increased from approximately 6,100,000 in 1934 to about 15,000,000 in 1946. See U.S. BUREAU OF LABOR STATISTICS, DEPT OF LABOR, 40 MONTHLY LAB. REV. 352 (1935); AMERICAN YEAR BOOK 632 (Schuyler ed. 1946). The data on work stoppages and their supposed reasons is carefully collected each year and printed in the May issue of the *Monthly Labor Review*.

2. 61 STAT. 145 (1947), 29 U.S.C. § 159(f)-(h) (1952).

3. 61 STAT. 140 (1947), 29 U.S.C. §§ 157, 158(b)(1), (5) (1952).

4. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643 (1943).

quired is not one of employment, but rather a code of regulations and rules to govern future conduct when a contract of employment is made with an individual. True, there were many collective contracts prior to this act, but this was not the pattern of industrial organization before the catalytic effect of the NLRA.

This legislation fostered the growth of labor organizations by protecting employees in their right to organize without interference. However, the primary goal was to remove possible obstructions to interstate commerce caused by work stoppages. It was believed that this could be done by establishing a working system of collective bargaining. In order to make collective bargaining work, Congress imposed upon the employer the duty to bargain with the representative of his employees. This duty was not to be satisfied by mere mechanical compliance.⁵ This was a duty to bargain in good faith, and, particularly in the period from 1935 to 1947, it was virtually a duty to make a contract.⁶ The present act also imposes the duty to bargain in good faith but then states that "such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."⁷ Good faith is a subjective state of mind which can be ascertained only by objective manifestations. In the bargaining situation these objective manifestations are the substantive proposals made by the parties. Thus, although making a concession is not required, an inflexible position would be evidence of bad faith. In view of the policy of the NLRA to encourage collective bargaining, the appropriate administrative agency or court found, in effect, that anything short of making a contract was a refusal to bargain. Almost any reason for not entering into a contract was evidence of bad faith and constituted a refusal to bargain. The refusal, once it was found to violate the federal legislation, was only to be cured by executing a collective labor contract.

Twenty years later, in a different political and economic climate, it is easy to overlook the hypothesis that this initial contractual relation between management and labor was governmentally imposed. It could be argued that, even in the absence of the NLRA, industry and labor would have eventually entered into a continuing contractual relationship; but it cannot be denied that the relationship was in most industries imposed by federal legislative policy.

When Congress imposed the contractual relation between labor and

5. *Globe Cotton Mills v. NLRB*, 103 F.2d 91 (5th Cir. 1939); *In the Matter of Highland Park Mfg. Co.*, 12 N.L.R.B. 1238 (1939); *Matter of Houde Engineering Corp.*, 1 N.L.R.B. 35 (1934); see Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).

6. See SPENCER, *THE NATIONAL LABOR RELATIONS ACT (1935)*; Ward, *The Mechanics of Collective Bargaining*, 53 HARV. L. REV. 754 (1940); cf. H.R. 3020, 80th Cong., 1st Sess. § 2(11) (1947).

7. 61 STAT. 142 (1947), 29 U.S.C. § 158(d) (1952).

management it provided machinery to protect concerted activities and to insure a free choice of representatives. Congress also created machinery to establish the contractual relation, but Congress did not foresee the need for any contractual remedies. Twenty years ago it was reasonable not to be concerned with the enforcement and administration of the contract once entered into. At the conclusion of World War II, however, this problem had become somewhat more pressing. Certain sections of the Taft-Hartley Act were addressed to the enforcement of contractual provisions in the labor-management agreement.⁸ The nature of these amendments and their phrasing indicates that Congress supposed that the reasons for a lack of litigation between parties to the industrial relationship were to be found in procedural difficulties and insufficient amounts in controversy.

One of the most important effects of the NLRA as amended by the LMRA is the growth of voluntary arbitration. Because the collective contract is governmentally imposed and because voluntary arbitration is a logical outgrowth of a continuing contractual relationship, unless there are available and feasible alternatives, the imposition of the collective contract has as a long term effect the development of labor arbitration to solve disputes otherwise unprovided for.

II

What remedies are available when a collectively bargained contract is breached?

The most accessible remedy is self-help. When a disagreement about the meaning or application of the contract arises the fastest action is simply to withdraw from the relation and then, as necessary, invoke all the weapons in the arsenal of economic warfare. The power to withdraw exists even though such action breaches a no-strike, no-lockout pledge. The withdrawal itself is not usually illegal, but almost any other economic pressure may be illegal from time to time in one or another jurisdiction. Some industries are considered so vital to our safety and welfare that it is unlikely that withdrawal would be permitted for any length of time; but when any industry affects interstate commerce, this right to withdraw cannot be regulated by the states because of our present national legislation on the subject.⁹

The purpose of work stoppages and other economic pressures is to force the other party to his knees so that he will concede. But a settlement reached through self-help is not based upon reason and is about as logical as settling commercial contract claims by battle or ordeal.

8. 61 STAT. 156 (1947), 29 U.S.C. § 185(a)-(e) (1952). Justice Frankfurter discusses the legislative history of these sections in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 441-49 (1955).

9. *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

Economic warfare, like political warfare, leaves deep and lasting scars. Though no monuments are erected, economic warfare creates stone-like attitudes which are a serious detriment to further compulsory contractual relations.

Using self-help to settle a dispute is not only immature but it is also inefficient. A decision made in this way usually takes months and may take years. It puts both parties to the industrial relationship at an economic disadvantage in their business or domestic communities. After a hard fought economic battle, both sides are under greater pressure in future disputes because they must either recoup their losses or protect the advantage gained.

The important disadvantage is that the problem at hand is not always settled. As in other types of warfare, the economic battle does not erase the cause of the original dispute.

Despite these disadvantages, economic warfare is resorted to with some frequency. Furthermore, some persons of learning and experience in the industrial field are convinced that economic warfare is necessary. As stated by the editors of a current labor law text, "The use of economic pressure is an inherent part of any free collective bargaining system."¹⁰ However that may be, all differences in the labor-management relationship are not and could not be settled in this primitive manner. Only a very small fraction of the total number of labor-management disputes are settled by self-help.

In addition to being impractical, self-help when used by "big" business and "big" labor may not be left to the choice of the parties involved. Outright prohibition of economic warfare is not made except in the case of government employees,¹¹ but there are certain restrictions and procedural requirements which have been imposed upon employers and unions covered by the LMRA.¹² The clear implication of section 210 is that, after these restrictions have been removed and after the procedural requirements have been met, the Congress will step into the dispute to protect national health and safety. Although the Supreme Court disapproved of the methods used in an attempt to settle the 1952 steel strike, the end sought could be reached legally by other means.¹³

If self-help is inappropriate, what other remedy is available to the parties?

A second remedy which is used to a limited extent is litigation, *i.e.*, resort to the formal judicial process. This way of settling a dispute is far superior to self-help. When controversies arising out of a

10. LABOR RELATIONS AND THE LAW 564 (Mathews ed. 1953).

11. 61 STAT. 160 (1947), 29 U.S.C. § 188 (1952).

12. 61 STAT. 142, 155 (1947), 29 U.S.C. §§ 158(d), 176-80 (1952).

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

collectively bargained contract are taken to the court, it determines procedurally formalized issues by a traditional reason. The result will in most cases solve the problem with some degree of satisfaction. This method, however, is not without its difficulties and disadvantages. Historically, the courts have had great difficulty deciding which established pattern of rules or principles applied to this legislative-type contract.¹⁴ This document has been treated as a mere statement of policy, as an agency situation, and as a contract for the benefit of third parties.¹⁵ Each of these was an ill-fitting garment for this contract, and eventually the courts recognized the document as an ordinary contract between the employer and his employees collectively. Even the recognition of this agreement as a contract has not solved all of the difficulties because the principles of contract, evolved from hundreds of years of commercial dealings, are not easily applied to a contract which is primarily legislative in nature and only partly commercial.

In addition to substantive problems there were many procedural problems to be overcome. The establishment of the right to sue and be sued and provisions for service of process led to problems of enforceability and collection of judgments and orders. Many of these problems of procedure have been settled in the states,¹⁶ and in 1947 Congress provided a solution to the procedural questions for the federal courts by the enactment of section 301 of the LMRA.¹⁷

Is litigation now an efficient and workable method to solve contract disputes that arise between a labor organization and an employer? Apparently there are other disadvantages which prevent a flood of litigation in the courts. The time consumed between service of process and final decision in legal actions is of great importance to the parties. The collective bargain arises from a continuing relationship, and the agreement in question will be rewritten in most cases within two years.¹⁸ The decision is needed promptly, but unfortunately in both state and federal courts parties may make time a factor by using many dubious but legal means to lengthen the period between commencement of a case and its final disposition.

Litigation is expensive. And one side may intentionally increase expenses for the other. The procurement of evidence may be expensive,

14. See Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931); Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938).

15. See Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948).

16. See, e.g., CAL. CODE CIV. PROC. § 388 (1953); MICH. STAT. ANN. § 27.664 (1938); MINN. STAT. ANN. § 540.152 (West Supp. 1954).

17. 61 STAT. 156 (1947), 29 U.S.C. § 185 (1952).

18. In applying the contract-bar rules the NLRB deems two years the proper or usual period for a contract, absent special circumstances. 19 N.L.R.B. ANN. REP. 24 (1954).

printing and reproduction costs are high, and qualified professional services are a cost factor, particularly in extended litigation. Another cost, not as readily apparent, is loss of production time by both employees and management. Often a number of witnesses must be available for lengthy periods of time because it is impossible to tell when a particular matter will be argued or whether testimony will be needed at all.

Another factor which weighs heavily against the use of litigation is that there are only limited remedies available. A damage suit may answer the need in some cases, but in the industrial relationship there are many situations in which an award of damages would not solve the problem. Many times merely the construction of a clause in the agreement is needed and the damages, if any, are retrospective only. Declaratory judgments may be available in some jurisdictions,¹⁹ but many declaratory judgment acts have been so tightly construed that for the purpose of settling disputes arising out of a collectively bargained contract they have been rendered practically useless.²⁰ Equity actions, when available, are also severely hedged in by historical development and a lack of flexibility in remedy. In short, our present legal system is not designed or prepared to handle problems arising out of a legislative-type contract which acts prospectively rather than retrospectively. The best evidence of the inefficiency of courts in this area is the lack of use.

Some countries have recognized the inadequacies of traditional judicial machinery and have incorporated labor courts as a regular part of their judicial system.²¹ To date this country has elected not to go any farther than to create administrative agencies to handle the preliminary steps in the formation of this vital industrial relationship.

III

Is there another method to settle industrial controversies growing out of the collective contract?

A brief survey of practices and current literature indicates that there is another method which is used extensively to the apparent satisfaction of the parties. When self-help and formal litigation have both been found to be inappropriate, the parties to the relation have set up a consensual method of disposing of differences. This method, usually referred to under the general term "arbitration," involves submitting the problem to a third person or persons for disposition.

19. See BORCHARD, *DECLARATORY JUDGEMENTS* 492 (2d ed. 1941).

20. See Note, *Declaratory Judgment and Matured Causes of Action*, 53 COLUM. L. REV. 1130 (1953).

21. Handsaker, *Labor Courts in Germany*, 8 ARB. J. (n.s.) 131 (1953); Lenhoff, *Some Basic Features of American and European Labor Law: A Comparison*, 26 NOTRE DAME LAW. 389 (1951); WUNDERLICH, *GERMAN LABOR COURTS* (1946).

Voluntary arbitration arises normally out of a contractual relationship. Two persons in controversy may submit their disagreement to a third person for settlement, but this is not usually done after the disagreement arises. In most instances the parties agree that if any dispute arises out of a subsequent contractual relation, it shall, if not settled by preliminary procedures, be submitted to arbitration. *Ad hoc* arbitration to settle a dispute between persons not previously in some contractual relationship exists, but arbitration has had its greatest use and growth in areas where there is an existing contractual relationship.

Over three hundred years ago Hobbes observed that men in controversy must either arbitrate, come to blows, or leave the matter undecided.²² Actually, arbitration is as old as the Bible.²³ Through the years, however, it has changed its setting from time to time. International commercial arbitration is probably the oldest formalized arbitration, but internal commercial arbitration followed very closely. The most recent area of expansion is in the field of labor.²⁴

Labor arbitration was not widely accepted until the early forties, but this should not overshadow a long and admirable background in certain industries. A contract between the Knights of Labor and the shoe factories of Portsmouth, Ohio, signed March 11, 1886, provided a grievance procedure culminating in arbitration which would not be out of place in any contemporary collectively bargained contract. This agreement provided that after the three steps of the grievance procedure were exhausted without settlement each party was to select an arbitrator and that these arbitrators would in turn select a third, "whose decision in the matter shall be final and binding."²⁵ Arbitration provisions were not infrequently found in labor agreements throughout the last half of the nineteenth century.²⁶ Probably the oldest continuous provision for arbitration is that found in the full-fashioned hosiery industry. This long and successful arbitration experience dates back to 1886.

Arbitration in the labor field has had its greatest success in those areas of our economy where collective bargaining is well established. One of the underlying reasons for this concurrent development is found in an aspect of arbitration usually referred to as "face saving." When parties in the labor-management relationship are compelled to use force or to resort to litigation they find themselves required to

22. HOBBS, *LEVIATHAN* 26 (Blackwell's ed. 1946).

23. 1 KINGS 3: 16-28.

24. ELKOURI, *HOW ARBITRATION WORKS* 2 (1952); Taylor, *The Arbitration of Labor Disputes*, 1 *ARB. J.* (n.s.) 409 (1946).

25. Desser, *Early Labor Grievance-Arbitration Agreement*, 2 *ARB. J.* (n.s.) 253, 254 (1947).

26. See Oliver, *The Arbitration of Labor Disputes*, 83 *U. PA. L. REV.* 206, 213 (1934).

take a public stand on issues which must be oversimplified. For public consumption it is necessary to take a position either for or against a particular demand, whereas most issues are complex with various factors weighing on either side. A later public retraction from such position is difficult and embarrassing, for in situations of economic warfare or litigation one party must "win" and the other must "lose." On the other hand, in the normal arbitration hearing, public vindication is not a factor. It is not necessary for the parties to simplify and condense their positions into "either-or" arguments for general consumption. Parties in arbitration may concede, shift, or change their position without the necessity of concern for the outward appearance. The agreement to arbitrate is in itself a consensual arrangement that is conducive to a problem-solving attitude rather than the sometimes violent attitudes that are engendered in the presence of economic force or formal litigation.

During recent years the use of arbitration has greatly increased in its quantitative incidence so that today it has become a tremendous force working toward the maintenance of industrial peace. Arbitration as a way of life in American industry has contributed greatly to the economic miracles we have all witnessed in recent years.

However, this method of settling disputes in industry has been opposed by both labor and capital. It was early thought, and argued at length, that the intervention of a third person in the collective bargaining relationship was a surrender of vital rights by both parties. This argument has a superficial reasonableness, but experience and analysis have found the argument wanting in substance. In voluntary arbitration the parties are free to control the submission of the controversy and to have decided only that issue which they have agreed shall be decided. The arbitrator is engaged to make a decision that the parties themselves cannot make. In making this decision he does not act as an indifferent unguided machine. By their agreement to arbitrate the parties have established a certain framework within which the arbitrator must function. In addition to the parties' consent to submit differences to a qualified third party whose selection is governed by the same basic provision, the individual questions are usually framed by consent and embodied in the "submission." By this submission the parties retain complete control over the framework in which the decision-maker operates. Thus, between the contractual provisions providing for arbitration and the submission agreement in a given controversy, the arbitrator is usually given a narrow area in which to exercise his judgment. Add to this the factual material that is selected exclusively by the parties to present to the decision-maker, and it is difficult to understand how the parties have surrendered vital rights. The alternatives—self-help and litigation—involve a

complete forfeiture of consensual control. It may be argued that the above consensual analysis is not applicable to day-by-day industrial controversies. However, the fact that the consensual submission is made in loose and general language, or not made at all, does not negate the right which rests with the parties to specify and limit the basic framework within which the decision is to be made.

The importance of arbitration in our present industrial system as a method for settling disputes is revealed in the subject matter of these disputes and in an examination of the extent of the arbitrator's authority.

In a discussion of the subject matter of labor arbitration, "new contract" disputes must be separated from disputes involving grievances under existing agreements. New contract arbitration is designed to settle the terms of a contract to be entered into by the parties. Grievance arbitration determines the application and interpretation of an existent contract. In new contract arbitration the subject is submitted *ad hoc* in each case. Such arbitration may call for a determination of any issue falling within the broad limits of that area in which collective bargaining is legally required. Here the submission agreement is all-important as there is no existing contract setting limits for the arbitrator. Both labor and management feel that new contract arbitration should not be used as a substitute for collective bargaining, but only to avoid costly resort to economic warfare. But it is just at the point of drastic economic sanctions that contract arbitration has its greatest utility and importance.

Professors Warren and Bernstein sent questionnaires to over five hundred corporations, unions, and arbitrators seeking to find the present status of thought on contract arbitration. The results, which indicated vast differences of opinion within each of these groups, were summarized as follows:

These clashing viewpoints and the complexities of contract arbitration provoked extensive comment. Even those who approve leave no doubt that they wish it used only rarely. As one arbitrator observes, "In most cases contracts should be collectively bargained and a better contract is arrived at in that event." Several, accordingly, suggest confining contract arbitration to industries directly affecting the public. An arbitrator proposes it for wage reopening cases. "If the parties agree in advance to arbitrate all contract disputes," an eastern arbitrator warns, "they may find themselves 'stuck' with permanent arbitration that will operate . . . as compulsory arbitration. The experience of the street railway industry under this form of arbitration has not been too happy."²⁷

27. Warren & Bernstein, *A Profile of Labor Arbitration*, 4 IND. & LAB. REL. REV. 200, 203 (1951).

Professor Taylor of the University of Pennsylvania, former chairman of the War Labor Board and of the Wage Stabilization Board, asks the question whether new contract arbitration can be used more fully in resolving industrial disputes and makes this prediction:

There is no doubt that it can be and will be if labor and management take seriously their obligation to resort to strikes and lock-outs only after making every reasonable effort to settle their disputes by peaceful means. The full utilization of this kind of voluntary arbitration depends, in large measure, upon the ability and the willingness of labor and management to give concentrated and intelligent attention to the stipulation to arbitrate as an important labor relations document. The challenge is so to develop that instrument that arbitration proceedings can be undertaken with a minimum of risk to both parties and retention in their hands of control over the process. Voluntary arbitration does offer a way to minimize loss of employment and interruptions of production, and its possibilities need full exploration in the quest for industrial peace.²⁸

Although contract arbitration has not reached the acceptance that has been accorded to grievance arbitration, it probably will be used increasingly in the future as a rational method of avoiding economic waste. The parties face certain dangers in its use; but if this type of arbitration is used with special attention paid to the scope of the problem to be decided, the risks are small when weighed against the only other known alternative—self-help. And in certain basic industries, the self-help alternative may not be permitted when it endangers the health and safety of our society.

Turning to grievance arbitration, *i.e.*, that arbitration which interprets the terms of the contract, there is a much different picture. In this area virtually no dissent from the principle of arbitration is found. There are, however, differences concerning the subject matter and the scope of the arbitrator's authority. The Bureau of Labor Statistics found that about 89 per cent of the collectively bargained contracts in effect in 1952 contained a provision for arbitration of those grievances not settled by the preliminary steps in the procedure.²⁹

In grievance arbitration one important conflict exists between those who feel that all differences between labor and management should be arbitrated under a general arbitration provision and those who feel that only matters arising out of an interpretation of the contract

28. Taylor, *The Arbitration of Labor Disputes*, 1 *ARB. J.* (n.s.) 409, 414 (1946); see Braden, *Arbitration and Arbitration Provisions*, in *NEW YORK UNIVERSITY SECOND ANNUAL CONFERENCE ON LABOR* 355 (1949).

29. MOORE & NIX, *ARBITRATION PROVISIONS IN COLLECTIVE AGREEMENTS*, 1952, at 261 (U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, 76 MONTHLY LAB. REV. 1953).

should be brought before the arbitrator or umpire. Speaking at Columbia University, John A. Lapp made this observation:

Most labor contracts extend arbitration to all grievances, complaints or disputes arising either from the terms of the written document or otherwise. Some contracts limit arbitration to interpretations while others exclude specified subjects from arbitration. Two of the obvious exclusions in all contracts are that the terms of the contract cannot be altered by an arbitration award, and that an award cannot violate a law or take away a right under a law.³⁰

In summarizing its findings, the Bureau of Labor Statistics had this to say about the jurisdiction of the arbitrator:

A special analysis of one-third of the arbitration provisions in effect in 1952 was made to determine what matters were within the scope of arbitration. Eighty-two percent of these clauses provided for arbitration of disputes over the interpretation and application of the agreement. This basic area was restricted in some agreements by specific exclusion of certain subjects from arbitration even though they were included in the agreement. Among the issues sometimes excluded were grievances relating to management rights, union membership, production standards, rates on new or changed jobs, and health, welfare, and pension benefits.

The scope of arbitration was stated in very general terms in the remaining 18 percent of the agreements which were specially analyzed. In this category were such clauses as "any grievances, disputes, or controversies between the parties" and "all disputes and grievances which arise over this agreement as well as those on matters not specifically covered by this agreement." Under such general clauses, arbitrable issues might include disputes over interests as well as rights.³¹

Professors Warren and Bernstein³² found the basic question in grievance arbitration to be whether anything beyond the terms of the contract can be submitted to arbitration. Their sampling showed that management has more reservations about the subject matter of this type of arbitration than either arbitrators or unions. All three groups quizzed had some reservations.

In our contemporary industrial relations scene, arbitration of grievances is the rule. A consensual form of industrial government is now operating. The collectively bargained contract stands as a legislative enactment governing future conduct which is administered by management and reviewed under grievance procedures culminating in informal judicial review by voluntary arbitration. The clause providing for this latter step normally states that arbitration shall be

30. Lapp, *Grievance Arbitration Under Collective Agreements*, 5 *ARB. J.* (n.s.) 109 (1950).

31. MOORE & NIX, *supra* note 29, at 264.

32. See note 27 *supra*.

restricted to matters arising from interpretation of the contract and its application. Instances in which arbitration is unavailable when cases are not settled by the grievance procedure are indeed rare. Such a restriction sometimes grows out of a fear that the impartial third party will not have the necessary understanding of the complex subject matter.³³ The answer to this is to be found within the framework of the arbitration procedure itself. Each party has ample opportunity to educate the arbitrator in the necessary technical problems involved in the case. In the usual arbitration proceeding the parties have the opportunity to present facts unhampered by the technical rules of evidence and they have occasion to argue both orally and by memorandum. With these opportunities the argument that the arbitrator will be technically unable to determine the proper result is hardly tenable.

Distinct from problems of subject matter, in grievance arbitration there is an additional problem of determining what authority is to be given to the arbitrator in relation to the disposition of a case. Thus, an arbitrator may have a submission which merely asks, "What disposition is to be made of this grievance?" On the other extreme, he may have a contractual prohibition which prevents him from deciding anything but an issue of good faith and from answering in any manner except "yes" or "no."

The usual contract provides that the complaint unsettled at the final step of the grievance procedure "shall be subject to arbitration." Occasionally another provision of the contract will provide some standards for the arbitrator to use in making his decision.³⁴ The parties are required to make a stipulation at the hearing which will state with some particularity what issues are to be decided. When the parties are acting in good faith, the stipulation is worded so that a final disposition of the matter may result from the impending hearing.

In some circumstances the parties cannot agree to a stipulation that will dispose of the matter; in other circumstances the terms of the existing contract make the form mandatory. This is illustrated by

33. Sometimes contracts limit the arbitrator to matters not involving technical knowledge and in such cases a specialist is required to decide technical matters. "Should the matter to be arbitrated involve job assignments or work loads, then said list shall be composed of qualified textile technicians." Contract, Spartan Mills and UFWA (AFL) § 3 (1952). "If in the opinion of the Company or the Union, the matter to be arbitrated is of such nature as to require the services of a technician, the arbiter shall avail himself of the technical services of the South Carolina Department of Labor or the Federal Mediation and Conciliation Service. Any technician so secured must be an impartial, qualified and trained expert in Industrial Engineering and acceptable to both the Union and the Company." Contract, Pacific Mills and TWUA (CIO) § 6(b) (1952). See also Contract, Crown Cotton Mills and TWUA (CIO) § 4(f) (1951).

34. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 908-16, COLLECTIVE BARGAINING PROVISIONS: GRIEVANCE AND ARBITRATION PROVISIONS 87-96 (1950).

promotions under so-called job posting systems. The union files a grievance on behalf of some member or individual claiming that the seniority provision of the contract has been violated. In such a case, if the arbitrator is asked a yes or no question about the propriety of the company's action, a negative answer will not dispose of the difficulty for the company can then award the promotion to another, not the individual in the first case. A grievance could then be filed upon the basis of this action. If, however, the arbitrator is asked which of two or three persons should have been given the job under the contract provision, there can be no further dispute arising out of that same job vacancy.

It is wise for the parties to limit the arbitrator to an interpretation of the contract and its application. But to provide for arbitration and then limit the arbitrator severely by the terms of the contract or the submission would seem to be an indication of either a basic distrust of the institution of arbitration or a misunderstanding of its nature and usefulness. Occasionally, initial proceedings under arbitration clauses result in a bad experience which causes parties to be arbitration-shy for long periods.

IV

The present status of voluntary arbitration in terms of the use, subject matter, and extent of the authority granted to the arbitrator shows that labor arbitration is not only the best *de facto* alternative to self-help or litigation, but it is a very efficient and practical means to settle labor-management controversies. Two further alternatives have been selected in other countries to dispose of similar labor disputes. The labor courts of France, Germany, and the Scandinavian countries have been referred to previously. Australia and New Zealand have found it expedient to use an involuntary arbitration system.³⁵ Neither of these alternatives has been widely suggested in this country, although the latter has been offered in watered-down forms in several instances.³⁶ In the extreme national emergency created by World War II, the War Labor Board acted in part as a labor court and imposed what amounted to involuntary arbitration in certain circumstances.³⁷

There are five possible ways to solve a dispute arising from a collectively bargained relationship: self-help, litigation, voluntary arbitration, involuntary arbitration, and the use of special governmentally

35. See the discussion of this in MATHEWS, *LABOR RELATIONS AND THE LAW* 288 (1953).

36. Frey, *The Logic of Collective Bargaining and Arbitration*, 12 *LAW & CONTEMP. PROB.* 264, 272 (1947); Richberg, *Case for Restriction of Strikes by Law*, *LAB. REL. REP.* (19 L.R.R.M. 143) (Address, American Bar Association, October 29, 1946); SLICHTER, *THE CHALLENGE OF INDUSTRIAL RELATIONS* 164 (1947).

37. See Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 *HARV. L. REV.* 309 (1945).

created labor courts. Other ways may exist or be devised, but these are the principal methods used in the world today. The first two methods, which are used to some extent, are not adequate at present to solve the existing controversies. The third is used extensively in contract administration and to a limited but growing extent in new contract disputes. The last two are not considered appropriate for our present form of social, economic, and political organization. Although there are many hotly argued problems growing out of existing voluntary arbitration systems, they are working well as a whole. An assumption might be made that we have solved the problems arising out of the making and administration of labor-management agreements by a smooth-working system of voluntary arbitration. However, legal institutions, like other established ways, are in a constant state of flux. It is necessary when considering decision-making processes to be alert for signs of change which may be of growing importance.

There are signs of change in the institution of voluntary labor arbitration. First is the frequency and economic importance of arbitration compared with other forms of decision making in labor disputes. Arbitration has been expanding in both use and importance at a tremendous rate, particularly since the termination of World War II. More persons and economic business units are being affected by arbitration awards every month. An institution with such wide application cannot escape careful scrutiny on behalf of those persons immediately concerned and, ultimately, on behalf of the body public. Aside from growth, there are at least two other trends that are of concern. The first is the increasing deference paid to the arbitration process by the courts. In deciding cases under section 301 of the LMRA, the federal courts have stated that if there is an arbitration provision in the contract which covers the controversy at hand, the parties must exhaust their remedies under that contractual provision before they can pursue the remedy provided by the act.³⁸ A number of state arbitration acts which have been construed to exclude disputes growing out of collectively bargained contracts³⁹ have been amended in recent years to specifically include labor matters.⁴⁰ Many states have enacted compulsory arbitration statutes applicable to public utilities. Without further discussion these developments may be added to the lengthening

38. See Katz & Jaffe, *Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act*, 8 *ARB. J.* (n.s.) 80 (1953).

39. See Comment, *State Arbitration Statutes Applicable to Labor Disputes*, 19 *MO. L. REV.* 280 (1954); Syme, *Arbitrability of Labor Disputes*, 5 *RUTGERS L. REV.* 455, 458 (1951).

40. R.I. GEN. LAWS c. 475, § 1 (1938), amended by R.I. GEN. ACTS c. 3517 (1955); OHIO SENATE BILL 327 (1955).

list of instances of judicial and legislative cognizance of the arbitral method of settling labor disputes.

Probably the most important instance of the increasing attention being paid to arbitration is the recently proposed Uniform Arbitration Act, which was approved in August 1955 by the Conference of the Commissioners on Uniform Laws and by the American Bar Association. In twenty-five clearly written sections the proposed uniform act provides for the validity of arbitration agreements in the labor field (the act is not restricted to labor controversies) and for specific performance of such agreements and the corollary of enjoining litigation pending arbitration. It is provided that each party has the right to be represented by an attorney and that the arbitrator shall have the right to use the subpoena and to take depositions. An award in writing is mandatory, and the act provides a procedure for a rehearing within a set number of days. A rather extensive judicial review is established which includes the power in the reviewing court to order a rehearing by the same or different arbitrators. An award may be vacated when the arbitrator exceeds his authority or when he renders an award contrary to public policy. The act then provides that an appeal may be taken from any disposition made by the initial reviewing court except from an order to arbitrate.

One important aspect of this proposed uniform law is that it does not affect in any way the consensual element in the original agreement to arbitrate. However, after the initial determination to arbitrate is made by the parties there is a formalization of procedures and rights, and an extensive legal procedural framework for review.

V

Because of the increasing breadth and importance of labor arbitration and because of the changes which are taking place in this institution, the following questions are of increasing significance.

How does this evolution affect the parties? How will these changes affect the arbitrator? What interest, if any, does the public have in this institution and the rights affected thereby?

The parties are interested primarily in efficient settlement of disputes. Do they have an equally important long-range interest in the direction that the cumulative changes take? Are the changes, ever occurring in this institution, tending to move voluntary arbitration nearer to one of the other alternative means of settling labor-management differences? What of those controversies which may not be settled by self-help because of public health, safety, and welfare?

What of the individual whose rights are adjusted, enforced, or lost

by this means? Is his position enhanced or endangered by the changing nature of voluntary arbitration?⁴¹

What of the arbitrator? Does increasing legal recognition of this institution and formalization of it affect his original status as a private employee of the parties? Does this man or board of men have any responsibility beyond the settlement of the immediate controversy? Will this man become a "professional" or a specialist to an increasing extent?

Do these persons concerned with the immediate disposition of an arbitration case have a duty beyond economic self-interest? If they have such a duty, what is its nature and to whom is it owed?⁴² Is it socially desirable to have the ever-increasing costs of this dispute settlement allocated solely between the parties in the present manner or should the public bear a part of the cost as in formal judicial litigation? What of the substantive law of industrial relations as developed by arbitrators? Will present trends in arbitration force it into relatively rigid common-law patterns or will it continue to grow as a body of customary law? If allowed to crystallize will this body of industrial law fail to respond to rapid economic change? What, if anything, is to be done in the instances where other means of settlement are now used?

If voluntary arbitration is the solution best suited to our present socio-economic organization, it is important that these questions be answered in terms of current changes.

The existing private government of the industrial community will be allowed to continue within public government only so long as the private goals and achievements are not in conflict with national policy.

41. See Jaffe, *Labor Arbitration and the Individual Worker*, 287 ANNALS 34 (1953).

42. See Freidin, *The Public Interest in Labor Dispute Settlement*, 12 LAW & CONTEMP. PROB. 367 (1947).