

## ARBITRATIONS AND LABOR RELATIONS

CLARENCE M. UPDEGRAFF†

### I. INTRODUCTION

Some of the early records of men indicate various primitive methods of resolving disputes.<sup>1</sup> Obviously, when law is undifferentiated as an element of social control from superstition (religion) and social approval (or public opinion) no true judicial system can exist. There is evidence that in many parts of the world there were early appeals for divine intercession in the pre-law period.<sup>2</sup> These took the forms of trials by battle, trials by ordeal and later, in a first groping for decision on a logical basis, compurgation.<sup>3</sup> In the next stage of social development, *lex*, *fas* and *boni mores* begin to be differentiated. For some time, the weakest of these is *lex*, or law. But in the legal systems which survive to maturity, it comes to dominate the elements of religion and public opinion as the ultimate factor in social control.<sup>4</sup>

As law develops, whether through recognition and enforcement of custom as binding upon all parties, as theoretically divinely ordained or as declared by authoritarian decree or statute, compulsory obedience to the courts emerges. Informal decision of all types of disputes by arbitrators, however, continues until they are finally excluded from dealing with criminal questions when at length the penal laws are differentiated from the civil. Later arbitration comes to be regarded as less desirable in some ways and less effective than the more authoritative court action, but it does not disappear. Some of the oldest law books of our Anglo-American legal system contain occasional

---

† Professor of Law, University of Iowa School of Law.

1. Engelmann and Millar, *History of Continental Civil Procedure* (1927) 1, 6, 117, 259, 612, 787, 847 and numerous references therein; see also "Judgment of Solomon," 1 Kings 3, 16-28; 1 Pollock & Maitland, *History of English Law* (2d ed. 1923) xxvii-xxix, 4 (Bishops as arbitrators in the 4th century in purely secular disputes.)

2. Plucknett, *A Concise History of the Common Law* 108 et seq.

3. Plucknett, *op. cit. supra* note 2, at 109-110, 325, 379, 390, 565, 578; Pound and Plucknett, *Readings on the History, etc. of the Common Law* (3d ed. 1927) 134 et seq.

4. Pound, *Law and Morals* 27-31, 33; cf. Plucknett, *op. cit. supra* note 2, at 4-5.

reference to "arbitrement."<sup>5</sup> It is obvious that moral questions or obligations for which no legal rights are developed must continue to depend upon arbitral procedure or be unenforced. The fact is, however, that in all times even legal questions have been frequently submitted to arbitration instead of to the courts. In the time of Lord Coke, this practice was so common that that great champion of the common law declared an agreement in advance to submit a possible dispute to arbitration would be non-binding upon the parties because against public policy as tending to defeat or restrict the normal jurisdiction of the courts.<sup>6</sup> This statement had a profound effect upon the subsequent course of arbitral development and statute making.<sup>7</sup>

As already intimated, arbitral procedure has always been less formal than that which obtained in the courts of law and equity. For this reason, many people have found it more desirable as a mode of trying a dispute. They feel that through this informality they can more thoroughly get their thinking and their interpretation of the important facts before the trier of the issue, and that the decision itself, therefore, will reflect more practical reality as they conceive it. These appeals to arbitration are in part a shrinking from formal court action and a seeking for plain and informal justice, rather than that which disputants fear the court will offer, *i. e.*, austere, rigid, remote and abstract decision.<sup>8</sup>

Please do not misunderstand me to state that I agree with this appraisal of court action. I merely state it as a practical and realistic factor or attitude, which constrains some people, educated as well as uneducated, to turn instinctively toward arbitration rather than adjudication for the solution of a dispute.

Among the consequences of the informality and flexibility of arbitral procedure is that these characteristics permit the submission of many and various types of disputes to the umpire or arbitral board. Technical legal questions (not involving

---

5. See Updegraff and McCoy, *Arbitration of Labor Disputes* (1946) 5 and authorities there cited. Cf. Keller, *Der Romische Civilprozess und die Actionen* sec. 81.

6. *Vynior's Case* (1609) 4 Co. 81b, Trin. Term, 7 Jac. 1.

7. See Updegraff and McCoy, *op. cit. supra* note 5, at 42 et seq.

8. See Carey, L. J., *Arbitration, Its Place in Today's Disputes* (1942) 5 U. of Detroit L. J. 180 et seq.; Wolaver, *The Historical Background of Commercial Arbitration* (1934) 83 U. of Pa. L. Rev. 132-146.

criminal law) can be decided. The arbitrator may apply common law principles and statutory rules. He may also decide for the parties matters that have nothing to do with law, such as wage increases, grants of paid vacations, paid holidays, health and medical aid, retirement and pension plans, and similar matters. The arbitrator can obviously conclude all types of routine grievances which may arise under a contract. These may embrace everything from the amount of an incentive rate to a demand for employment during a work shortage on the basis of some theory of seniority. Even the grievance that demands reinstatement and back pay for a discharged employee, sometimes involving questions of law as well as contractual rights, may be decided by means of arbitration.<sup>9</sup>

## II. SELECTION OF ARBITRATOR

Such early information as can be found upon the subject must be read to indicate that in early times the arbitrator was most commonly selected by agreement of the parties.<sup>10</sup> To a large degree this remains true today. Certain changes and developments, however, have taken place. A few decades ago, an arbitrator was more likely than not to be one of supposed skill in the trade, business or profession in which the dispute arose. At the present time, however, the parties are more likely to search for one who is skilled in interpreting evidence and weighing and balancing it, rather than one having technically complete information in the field of the dispute. For example, very few arbitrators today can be said to be skilled tool and die makers, carpenters, shoe craftsmen, or otherwise. Most arbitrators are lawyers, while some economists and others are active in the field. Whatever background of educational and experimental qualifications is present, however, the parties now appear to select the party to make the decision on the basis of his capacity to appreciate evidence and follow it to a sound solution, rather than upon his previously established competence as a journeyman or well-informed member of the business field in which the

---

9. For a great number of examples see any of the several currently published Labor Law Services, *e. g.*, Commerce Clearing House, Bureau of Nat'l Affairs, and Prentice-Hall.

10. See *Vynior's Case* (1609) 4 Co. 81b, Trin. Term, 7 Jac. 1 and cases in Bracton's Note Book, S. 649 (1231), S. 732 (1233) and S. 983 (1244). Cf. 1 Kings 3, 16 "Then there came two women, that were harlots, unto the king, and stood before him" etc.

dispute exists. That the presently required qualifications are proving to be generally satisfactory is attested by the fact that even questions involving very technical problems of manufacturing are now commonly submitted to law trained men and economists for final awards in the light of evidence and arguments presented to them and intended to clarify in their minds whatever technical knowledge of the subject may be necessary to reach a sound decision.

Today, as formerly, many arbitrators are selected on an *ad hoc* basis by mutual agreement of the parties after a dispute has arisen. In numerous instances, the parties by contract have agreed upon some appointing agency, such as the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the American Arbitrational Association, a governor, a judge or some other official. Probably the most rapidly growing practice in recent years has been that of inserting the name of a contract arbitrator or umpire into the annual agreement with the matter established between the parties that such named man shall be the umpire to settle all disputes between them during the term of the agreement.<sup>11</sup>

Whatever the means of selection, the parties are likely to be seeking certain characteristics of the individual named to decide the dispute. They ask for an impartial, judicial attitude, a quickness of understanding and perception of the underlying as well as the obvious features of the differences between the parties. They hope for an attitude of the umpire which recognizes he has a duty to society as well as a duty to the parties, and that in the discharge of such duties, he will constantly aspire toward the highest ideals of impartiality. The arbitrator must have no dealings with either party which are unknown to the other. He may expect fair compensation for his work, but should be quick to serve without pay where the public welfare requires his services.

### III. CONTRACTS TO ARBITRATE AND SUBMISSION AGREEMENTS

As was previously intimated, *the agreement to arbitrate* a possible future dispute not existing at the time such covenant

---

11. See, Arbitration Provisions in Union Agreements (1944) U. S. Dept. Labor Bull., No. 780; cf. Hill and Hook, *Management at the Bargaining Table* (1945) 73-87 (an employer's view); Labor Arbitration Under State Statutes 2 *et seq.* (U. S. Dept. Labor 1943).

is made, has on numerous occasions and in various places been held to be against public policy. Such decisions, as above indicated, follow the old English decision in *Vynior's* case.<sup>12</sup> Virtually all of the states in the Union have today some type or types of arbitration statutes. Under most of these the agreement to arbitrate future disputes is valid rather than invalid. Such enactments have been held to be supplemental of the common law, rather than in derogation of it.<sup>13</sup> Hence, if some formality required by the statute is not complied with, the arbitration can proceed and its legality can be tested and probably sustained under common law principles. This, however, does not adequately explain the almost complete, tacit assumption to be encountered throughout the United States today that the agreement in an annual labor contract between a company and union providing for arbitration as a final step in a grievance procedure is entirely valid and binding upon the parties. Whether technically this is legally correct or not in the state where the parties are located, most companies and unions proceed regularly and unhesitatingly as if it were. Usually this can be explained by the fact both parties prefer arbitration to strikes or lockouts and hence are constrained to proceed in arbitration whether they are technically bound to do so or not.

*The submission agreement* is a more technical contract than the previously mentioned agreement to arbitrate. The "submission" recognizes the present existence of the dispute. It embodies the formal and carefully phrased agreement of the parties to submit a certain question to arbitration.<sup>14</sup> The feature of this type of document is, in fact, the bargained statement of the exact issue or dispute matters which the arbitrator is authorized jointly by the parties to decide.

Some differences of opinion and practices exist pertaining to the desirability or necessity of working out a formal submission agreement where the parties have a provision for arbitration as a final step of their grievance procedure. Obviously the latter is a contract to arbitrate disputes to arise in the future. Such

---

12. (1609) 4 Co. 81b, Trin. Term, 7 Jac. 1.

13. Updegraff and McCoy, *op. cit. supra* note 5, at 6, 19, 87. See Isaac v. Donegal and Conoy Mutual Fire Ins. Co. (1930) 301 Pa. 351, 152 Atl. 95.

14. *E. g.* In re Arbitration between Victor Klinger *et al.* and J. S. Krum, Inc., (1940) 259 App. Div. 309, 19 N. Y. Supp. (2d) 193; Nutt v. U. S. (1887) 125 U. S. 650, 8 S. Ct. 997; Updegraff and McCoy, *op. cit. supra* note 5, at 43.

an agreement in several of our American jurisdictions will have but doubtful validity, if any. However, the same factors which cause the parties to enter the contract in the first place are likely to constrain them to go through arbitration without hesitancy, and to perform the award even though they may disagree with it. In fact, it has come to be rather widely the practice in American industry to proceed to arbitral hearing on the assumption that the issue between the parties has been joined on the basis of the statement of grievance by the union and the refusal of the company to allow the same or to compromise it.<sup>15</sup> It must be recognized that in many instances these things furnish a sufficiently definite issue, so that evidence can be taken in respect to it and ultimately an award made and performed. Many employers who join in this practice, however, have sought to protect themselves from any extreme action by an arbitrator by stipulating in the contract that no arbitrator considering a grievance shall have authority to add to, detract from, or otherwise change the agreement negotiated and executed by the parties.<sup>16</sup> On the other hand, a considerable number of employers regularly insist upon a formal submission agreement, even where the annual contract with the union provides for arbitration as the regular, final step in grievance procedure. Their theory appears to be that by bargaining concerning the submission agreement in detail, they can be sure of the greatest extreme of possible action by the arbitrator. They contend also that, in at least some instances, the process of formally and carefully reducing the dispute to writing will lead the parties toward an amicable solution of the question and hence eliminate the need for arbitration.

At this point, emphasis should be given to the distinction between the two great classes of labor disputes likely to proceed to arbitration. They are, on the one hand, the more numerous class of grievances or routine disputes arising under existing labor agreements and, on the other hand, disputes which arise in the process of negotiating a new contract. In the latter type

---

15. See Numerous examples in various Labor Law Service Arbitration Reports, *e. g.*, Commerce Clearing House, Bureau of Nat'l Affairs, and Prentice-Hall.

16. See *Collective Bargaining Contracts*, (B. N. A. 1941) 114 and *Union Agreement Provisions*, U. S. Dept. of Agriculture, B. L. S. Bull. No. 686 (1942) p. 154.

case, it is certainly evident that a carefully drawn submission agreement should always be bargained and executed before the arbitrational hearing. Unless the parties define with careful and proper restrictions what the arbitrator shall have authority to do in relation to the new contract, he may, under broad and general provisions, reach extremes in his award which quite conceivably might shock or outrage one or both of them.

It seems worthy to mention that an important intermediate class of case is that including the discharge questions. Legally, the principal restrictions upon discharges are found in the statutes prohibiting terminations because of union activities or membership. In collective agreements employers often undertake that they will discharge or otherwise discipline only for "good and just cause." In such cases, the arbitrator is sometimes confronted with the difficulty of deciding whether the punishment imposed was "just" or improperly extreme for a given type of offense.<sup>17</sup> He will be, of course, troubled with all of the perplexities which always attend an effort to measure the incommensurable, but it is clearly his duty to decide in such instances whether the punishment has been so severe as to be unjust for the type of offense involved. Obviously, he will also be required at times to judge whether the evidence adequately supported the employer's conclusion of the guilt of the employee. These cases are often complicated by a claim that the breach of rules by the employee was not the reason but only a pretext for a discharge for union activity. The arbitrator is bound to weigh such evidence with care and even will be required at times to compare its details with many other disciplinary actions by the employer.<sup>18</sup>

---

17. *E. g.* the John Deere Waterloo Tractor Works current contract with U.A.W.-C.I.O. Local 838 provides, in Art. IV, Sec. 1, "The Company shall not exercise its right to discipline by reprimand, suspension, or discharge, any employee except for good and just cause."

The General Motors agreement with the U. E. R. and M. W. A.-C. I. O. Locals provides in Sections 43 and 43a for union notification before any disciplined employee shall be "required to leave the plant" and very significantly states in Section 28g, "The Corporation delegates to the Umpire full discretion in cases of violation of shop rules. In cases of violation of the Strikes, Stoppages and Lockouts Section of the Agreement, the Umpire shall have no power to order back pay if he shall find the employee guilty of any of the conduct for which he was disciplined. . . ."

18. See Labor-Management Relations Act (1947) 61 Stat. 146, c. 120, (1948 Supp.) 29 U. S. C. A. §160c which provides against any reinstatement by the N. L. R. B., if the "individual was suspended or discharged for cause."

## IV. PROCEDURE

In a court proceeding, the parties are brought in by original notice or summons and arrive at their issues through technical but well-developed processes of pleading. In arbitration the proceedings are ordinarily initiated by the demand made upon the employer by or on behalf of the employees. The issue will be formed, if the subject is one of original negotiation, by the demands of the union, the refusals of the company, and ultimately the submission agreement will embody an effort to state the question in dispute with exactness. If the dispute arises under contractual grievance procedure, the employee or union will make the demand in "the first step" of the foreman, the foreman will reply to the same, and gradually step by step the dispute will move upward in the rank of union and company officials dealing with the same, until in the fourth or fifth step it passes beyond all such officers and is submitted to arbitration. The issues in such instances are often brought out very clearly and satisfactorily by the minutes of the several "steps" of the grievance procedure. Here, much depends upon the grievance provisions of the contract between the parties and their practice under it.

The grievance procedure should specify that unless the demand made in the first step is granted by the foreman, it must be reduced to writing and taken to the next step within a very short specified period of one to three days. Indeed, it would be better to require that each grievance be written and presented in that form in the first step. It is to be noticed that some parties who have carefully contracted for full and logical procedures have settled for much less in actual practical administration. In one set of forms which I know well, the union instructed its stewards in a printed note to "Set forth the reason for the appeal in detail." For months it has been the invariable practice of the stewards to write as the "reason" only the words, "Reply of company unsatisfactory."

In conclusion upon this point, it will suffice to say that the grievance procedure records, if fully and faithfully kept, can be extremely helpful to the parties in relation to disputes in subsequent years when references are made to them as precedents. Such correctly kept records can also be of great value in arbitral proceedings. I cannot too strongly recommend that



carefully made written records of all grievance matters be maintained and preserved from the earliest possible step until such time as there is no likelihood of the subject coming up again as a precedent or a factor relating to an employee's or plant's record.

The rules which obtained in common law pleading against the "departure" and the "variance," apply in a certain logical sense in arbitrational matters. Certainly if relief is requested on one theory and the evidence established that the relief originally demanded is not deserved, but that some other form of remedy should be allowed, the latter may possibly be subject to an award depending upon the breadth of the submission agreement. However, it is not to be assumed that a party should receive some form of relief, when in an effort to attain one remedy he has been proven not entitled to it, but possibly entitled to something else which under the submission the arbitrator has no authority to order.

In general, the burden of proof falls upon the party whose duty it is to establish the affirmative of the essential issue raised in the dispute.<sup>19</sup> In most instances, this means that the union being the moving party should proceed with its evidence and establish, if it can, the right to relief. In a considerable number of recent discharge cases, arbitrators have ruled that the burden of proof was upon the employer. This conclusion proceeds upon the theory that the employee enjoyed an established legal status up to the time when the employer took action and that it is, therefore, up to the employer to justify the move made. This is consistent with the theory that even the "striking employee" is still an employee and not one who has "quit."<sup>20</sup> In other words, once the fact is established that the relationship of employer and employee having seniority rights exists, it is assumed that the same shall continue until it has been severed by legally sound action based upon the provable right or privilege of the acting party; that is, the employer.<sup>21</sup>

---

19. Wigmore, *Evidence* (3d ed. 1940) 266-286, §§2483-2489.

20. Labor-Management Relations Act (1947) 61 Stat. 137, c. 120, §2(3), (1948 Supp.) 29 U. S. C. A. §152(3).

21. See *In re Bethlehem Steel Company and United Steelworkers of America*, Local No. 2499 (CIO), 2 LA 194 (1945); *In re Watt Car and Wheel Company and International Molders and Foundry Workers Union*, Local 143 (AFL), 4 LA 67 (1946); *In re American Liberty Oil Company and Oil Workers International Union*, Local 471 (CIO), 5 LA 399 (1946);

This view reverses what was the common assumption a few years ago that when the union asked for reinstatement of an employee, it was asking for a change in the *status quo* and was, therefore, to bear the burden of proving that the employee was entitled to return to his employment. It is obvious that this subject is of much more than moot importance. In any case of uncertainty, the decision should be against the one which had the burden of proof and failed successfully to carry it. Thus, if the employer has agreed it will punish by discharge only for just cause, the employer should be required to establish by evidence the relative justice of the extreme penalty of discharge. The burden will not be upon the employee to establish that the discharge was unjustly severe for the offense committed.

On the other hand, there remain a great number of situations in which the union as the moving party must bear the burden of proof. In such instances, when the evidence does not point to a clear conclusion, or if it leaves the mind of the arbitrator in balance as between the contentions of the parties, the decision should go against the union and in favor of the employer.<sup>22</sup>

Occasionally, the correct allocation of the burden of proof becomes important where in effect the attitude of one side is simply to "demur to the evidence" of the opponent. For example, the employer has discharged a certain brick wheeler for placing bats in a car of good brick in violation of working rules. It attempts to support the discharge by showing that a foreman entered the car and found broken or defective brick at a point where he thought the discharged employee was unloading. If the burden of proof is upon the employer, it must go to considerable length in establishing that the foreman did positively identify the defective bats as having been improperly placed in the car by the man or men discharged. In such a case if the company fails to present the evidence required, the union should win, even though it presents not a single witness or denial of the charge against the person who was terminated.

#### V. EVIDENCE — KIND AND QUALITY

It may be generalized that in an arbitrational hearing all of the various kinds of evidence receivable in court may be pre-

---

In re Aviation Maintenance Corporation and International Association of Machinists, Aeronautical Industrial District Lodge 727, 8 LA 261 (1947).

22. 9 Wigmore, *op. cit. supra* note 19, at 278, 300, §§2487, 2495.

sented and in addition to these any information of any kind should be received which might tend to persuade the intelligent business man dealing with the problem concerning his proper course of action.<sup>23</sup> Sometimes both parties rely entirely on hearsay. Sometimes they rely upon a mutual assumption of facts or evidence which one party or both will explain to the arbitrator on the basis of second or third-hand information. In such instances, of course, if a controversy arises, the arbitrator must require the parties to produce and offer evidence which will support a well-reasoned conclusion.

It happens with some frequency that one party or the other may attempt to establish by oral evidence that though the parties have a written contract, it was agreed or understood prior to the signing of the formal writing that some of its provisions should be only partially effective or be treated as mere empty, formal statements. In such instances, the well-informed arbitrator must rely upon the parol evidence rule,<sup>24</sup> and advise the parties that it is legally presumed that people do not write and subscribe to undertakings that have no reality. In other words, though a provision in a written document may be subsequently rescinded by the parties or waived by a party or by both of them or nullified by one of them being estopped to make his claim under the same, it is improper in the eyes of the law to allow proof that an unambiguous, clear undertaking in writing was by reason of prior oral agreement intended to have no reality at the time it was made a part of a written agreement. The parol evidence rule excludes any such conclusion. It has been the practice of the undersigned to accept evidence in violation of the parol evidence rule when it is urgently offered, however, and to examine the record in full to ascertain whether the theory of the party seeking to nullify part of the contract in fact will support a rescission, a waiver or an estoppel occurring subsequently to the execution of the formal agreement.

Writings of various kinds are regularly offered in evidence. Some of these come in as recorded past recollection of the witness. Some of them come in to corroborate the claim of the witness that his present recollection has been revived. Sometimes a written document comes in without direct testimony to sup-

---

23. Updegraff and McCoy, *op. cit. supra* note 5, at 100-103.

24. 9 Wigmore, *op. cit. supra* note 19, at 75, 149, §§2425, 2446.

port it, but is taken by the arbitrator as having some probative value since it appears to have been a record regularly kept and to have emerged from the records of the company in circumstances which tend to indicate its accuracy.<sup>25</sup>

The late and very learned Dean Wigmore coined a technical phrase for another type of evidence frequently tendered to the arbitrator. It was "autoptic proference," that is, "real evidence."<sup>26</sup> With considerable frequency, arbitrators are requested to go from the place of hearing into a plant to view a manufacturing area or operation, to see a poorly ventilated, poorly lighted, or dangerous working place or to view a machine. In all such instances, the arbitrator should resolve every doubt in favor of going to the place requested and observing the same. In doing so, however, he should be accompanied by a limited number of representatives of both sides. He should then give the parties equal opportunities to explain to him the significance of the matters presented for him to view, to hear, or otherwise take into evidence.

These incidents are particularly likely to arise in relation to time studies, machine operations, and manufacturing steps. If the arbitrator does not fully understand the operations called to his attention, he should ask questions and study them until he is fully confident of his complete understanding of the controverted matter, or he should recommend to the parties that they call in an industrial engineer to view it, study it and testify about it before the arbitrator at a later hearing.<sup>27</sup> Nothing can more clearly discountenance an arbitrator, and bring arbitration as a whole into disrepute, than a transparent, blundering effort to decide a matter of technical import which the arbitrator patently did not understand.

Cross-examination of witnesses must be the subject of some comment. It should be remembered at all times that failure to cross-examine does not by implication admit the verity of the testimony given by the witness. I state this apparently obvious fact because one otherwise well-informed man who frequently appeared before me during the war gave as his reason for ap-

---

25. 5 Wigmore, *op. cit. supra* note 19, at 347-394, §§1517-1533.

26. 4 Wigmore, *op. cit. supra* note 19, at 237-243, §§1150-1152.

27. Consider here Louden, *Wage Incentives* (1944) 1-6, 82-93; Barnes, *Motion and Time Study* 1-22; Cooke and Murray, *Organized Labor and Production* (1946), c. 1.

parently aimless, time-consuming cross-examination the belief that unless he cross-examined he would be thought to have admitted the truth of the hostile witness' statements. When assured he was wrong in this belief, he desisted from his former tedious practice and saved much of his own time and that of others.

Parties contemplating cross-examination should always remember that the questioning of a hostile witness often gives him an opportunity to repeat, sometimes with increasing clarity and emphasis, the damaging testimony he came there to give.<sup>28</sup> In many instances well-advised counsel will say, "No cross-examination." One expert in the field of evidence said, "My best advice to the young attorney on the subject of cross-examination is, 'Don't.'" Another commentator stated, "There are but two situations in which one should cross-examine. They are (1) where he is certain of the answer he is going to get, and (2) where he doesn't care." Obviously, counsel usually should "care" that hostile testimony be not repeatedly asserted with emphasis against the interests of the party he is there to represent.

The writer of an excellent handbook on labor arbitrations which recently appeared has, after many years of experience, reached some interesting, self-taught conclusions about cross-examination.<sup>29</sup> He asserts that unless two conditions clearly exist no cross-examination should be undertaken. These are first, the examiner should be absolutely sure the witness will tell the truth; and second, he should be sure of the answer he will receive. In the absence of these two concurring factors, that author advised that all cross-examination be waived.

After the evidence has all been presented at the hearing, the parties should be given reasonable opportunities to present oral arguments or to "sum up." This does not mean "altercation." The arbitrator should see that the spokesman of the side having the burden of proof is given a full and uninterrupted opportunity to summarize its evidence and arguments if he wishes to do so. It should then be required that the opposition have an equal opportunity, likewise without interruptions.

The concept of a "fair hearing" seems to entitle the parties to

---

28. See Weiss, *How To Try A Case* (1930) 73 et seq.; Wellman, *The Art of Cross Examination*, c. 2; Cornelius, *Cross Examination of Witnesses* (1929) 1-41.

29. Torrence, *Tested Techniques In Labor Arbitration* (1948) 130, 143.

file written briefs and reply briefs if they request the opportunity to do so. It is the practice of the undersigned to grant to the parties either a mutually agreed time, or in cases of dispute, ten days to two weeks for the filing of briefs following the receipt of transcript where one is made or following the hearing if no transcript is provided. In some instances the parties are given a brief additional period for the purpose of furnishing reply briefs, if they have agreed upon such privilege. If there is a difference of opinion upon these matters, practical suggestions usually will help the parties to reach an understanding acceptable to both.

#### VI. THE ARBITRATOR AND THE JUDGE

To a much greater extent than is the case with a trial judge, the arbitrator is dependent upon himself, his own good sense and tact, in making a hearing successful and satisfactory. Whereas the judge may rely upon the formality of the official court room and the usual public respect and awe for the judiciary, the arbitrator may hold his hearing in a conference room, a hotel room, an office, or a work room. Whereas the order of the court is obviously guarded and to be maintained by a bailiff or other officer, the arbitrator in case of disorder must depend upon himself and the finality of his rulings, as well as his manner of stating them to maintain decorum and assure proper progress of the hearing.

These requirements mean that the arbitrator must couple dignity with informality and keep the parties assured of his intelligence, impartiality, and integrity. In the end, his award must rest upon reason and will not have the authoritarian prestige which will maintain the decree of the judge. Without doubt it is true that most judges could be, if necessary, successful umpires or arbitrators. Those who have succeeded, however, at the more informal type of procedure involved in arbitration report they have often found it necessary to adopt different attitudes and methods of approach and different tones in respect to rulings than are entirely acceptable, logical and suitable in the more formal atmosphere of the court room.

## VII. CONCLUSIONS

Detailed statistics upon the point are lacking, but I believe it is correct to say there has been a great expansion of the scope and number of instances of labor arbitration in recent years.<sup>30</sup> Much of such impetus was, no doubt, received during the War Labor Board days in connection with which it must be recalled that such Board and its subdivisions constituted a temporary nation-wide, semi-official arbitrational system. It has been proposed from time to time that arbitration of labor disputes should be made compulsory. I do not agree with this. If labor arbitration were to be made compulsory, then the rights of the parties in arbitration would have to be predetermined by numerous rules, principles, standards and conceptions, most of which must of necessity originate in statutes. Upon this subject, I am sure capital and labor agree. They do not want to be strait-jacketed by legislative action, but prefer the possibly less scientific but more natural course of growth summed up in the "trial and error" method or otherwise designated the "American method of free competition."

There is no magic by which any party can be assured that arbitration will inevitably lead to the most sensible and just result. If the arbitrator has been carefully selected and is worthy of his job, and if the contentions of the parties are well presented, an intelligent, just and workable award should follow. Without doubt, high-skilled, painstaking preparation will give any party a greater likelihood of winning an arbitration than will hasty half-measures. But it cannot be confidently stated that the most careful and skilled representative after the most thorough and complete preparation will always win, even where justly entitled to do so. When all is said and done, arbitration is at most but a helpful and useful procedure for the solution of labor disputes. It is not a panacea. With all its dependence upon human frailties, however, it is infinitely a better way than the economic pressure methods of strikes and lockouts of deciding labor disputes.

---

30. See Labor Arbitration Under State Statutes (U. S. Dept. of Labor 1943); Plock, *Methods Adopted By States For Settlement Of Labor Disputes* (1949) 34 Iowa L. Rev. 430; Kellor, *American Arbitration* (1948) c. 11; and Updegraff and McCoy, *op. cit. supra* note 5, at 8-9.

# WASHINGTON UNIVERSITY LAW QUARTERLY

---

Volume 1949

FALL, 1949

Number 1

---

Edited by the Undergraduates of Washington University School of Law,  
St. Louis. Published in the Winter, Spring, Summer and Fall at  
Washington University, St. Louis, Mo.

---

Subscription Price \$4.00

Single Copies, \$1.00

---

## THE BOARD OF EDITORS

REXFORD H. CARUTHERS, *Editor-in-Chief*

HAROLD B. BAMBURG, *Associate Editor*

H. JACKSON DANIEL  
*Note Editor*

KENNETH BECK,  
*Comment Editor*

ROBERT G. MCCLINTOCK,  
*Book Review Editor*

SIDNEY RUBIN, *Business Manager*

## STAFF

CHARLES C. ALLEN III  
RICHARD C. ALLEN  
ROBERT S. ALLEN  
LESLIE BRYAN

WILLIAM HIRSCH  
OTTO A. JOHNSON  
HARRISON KING  
LUDWIG MAYER

RICHARD PIER  
WALLACE N. SPRINGER, JR.  
McCORMICK V. WILSON

## FACULTY ADVISOR

FRANK W. MILLER

---

## ADVISORY BOARD

ROBERT L. ARONSON  
FRANK P. ASCHMEYER  
G. A. BUDER, JR.  
RICHARD S. BULL  
JOHN CASKIE COLLETT  
DAVE L. CORNFELD  
JAMES M. DOUGLAS  
SAM ELSON

ARTHUR J. FREUND  
JOSEPH J. GRAVELY  
JOHN RAEBURN GREEN  
FORREST M. HEMKER  
HARRY W. KROEGER  
FRED L. KUHLMANN  
DAVID L. MILLAR  
RALPH R. NEUHOFF

NORMAN C. PARKER  
CHRISTIAN B. PEPPER  
EDWIN M. SCHAEFER, JR.  
GEORGE W. SIMPKINS  
KARL P. SPENCER  
MAURICE L. STEWART  
JOHN R. STOCKHAM  
WAYNE B. WRIGHT

---



## CONTRIBUTORS TO THIS ISSUE

**CHARLES O. GREGORY**—Professor of Law, University of Chicago Law School, A.B. 1924, Yale University; LL.B. 1926, Yale Law School; Faculty, University of Wisconsin Law School, 1928-1930; University of Chicago Law School, 1930-.....; Solicitor of Labor, U. S. Dept. of Labor, Washington, D.C., 1936-37; Author of "Legislative Loss Distribution in Negligence Actions" (1936); co-editor of "Social Change and Labor Law" (1939); co-editor of Cases and Other Materials on Torts; co-editor of "Labor Law: Cases, Materials and Comments" (1948); author of "Labor and the Law" (1946); editor, Illinois Annotations to the Restatement of the Law of Torts, 1 & 2; permanent arbitrator for Swift & Co. and United Packinghouse Workers (CIO), 1943-47; Amalgamated Meat Cutters & Butcher Workmen (AFL), 1943-.....; and National Brotherhood of Packinghouse Workers (CUA), April 1, 1943-.....

**EDWIN E. WITTE**—Professor of Economics and Chairman Department of Economics, University of Wisconsin. B.A. 1909, Ph.D. 1927, University of Wisconsin; Secretary, Industrial Commission of Wisconsin, 1917-1922; member, Wisconsin Labor Relations Board, 1937-39; chairman, Eleventh Regional War Labor Board, 1943-44; public member, National War Labor Board, 1944-45; author of "The Government in Labor Disputes" (1932), and articles in economic and legal periodicals concerning labor relations, labor legislation and social security.

**WILLIAM F. WHITE**—District Representative of the Federal Mediation and Conciliation Service for this District, which embraces the five Regions of the Middle West. Mr. White was a Commissioner of Conciliation in the United States Conciliation Service for fifteen years and formerly served as Regional Director of the United States Conciliation Service, Region 5.

**CLARENCE M. UPDEGRAFF**—Professor of Law, College of Law, State University of Iowa. LL.B. 1916, State University of Iowa; A.B. 1922, George Washington University; S.J.D. 1925, Harvard Law School; Faculty, George Washington University Law School, Cornell Law School, Vanderbilt Law School and Iowa Law School; Special Asst. Atty. General for the Iowa State Board of Education, 1933-37; published "Iowa Cases on Constitutional Law," "Regulation of Public Utilities in Iowa"; co-author of "Arbitration of Labor Disputes," and numerous articles in various legal periodicals; panel chairmen, hearing officer, and arbitrator for National War Labor Board during war; Permanent Umpire for John Deere & Co. and United Automobile Workers of America (CIO), 1946-.....