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American Labor Arbitration: The Maturing Years

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AMERICAN LABOR ARBITRATION: THE MATURING YEARS*

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This article is part of a work in progress, a book on labor arbitration to be published by the West Publishing Company under the title AMERICAN LABOR ARBITRATION. An earlier article covering the history of labor arbitration up to 1941, *American Labor Arbitration: The Early Years*, appeared in 35 U. FLA. L. REV. 373 (1983).

INTRODUCTION

American labor arbitration was firmly established by 1941 and had already taken the shape it has today. The concept of arbitration was widely known and appreciated, as were many refinements of that concept.[1] Arbitration was a widespread practice, with arbitration clauses found in two-thirds or more of all collective bargaining agreements. There were a number of experienced arbitrators, especially in industries using permanent impartial umpires such as clothing and coal mining. Participants were familiar with the hearing process, briefs and awards. Scholarly commentators began to treat arbitration as a fit subject for law reviews, and courts began to discard their old hostility to the arbitration process.[2]

The discipline of labor arbitration, however, was not yet mature. Maturation required a much wider degree of acceptance, a sounder theoretical base, and a larger, more experienced body of practitioners. Those requirements were met during and after the Second World War. As a result, arbitration is now the final method of dispute resolution specified in almost every collective bargaining agreement in this country.[3] This article examines the maturation of American labor arbitration and describes its major developments in the last four decades.

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1. Among these refined concepts were the distinction between interest and grievance arbitration, the "just cause" principle, and the relative merits of the "judicial" and "mediator" models of arbitration.

2. Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983) [hereinafter cited as Nolan & Abrams, *Early Years*].

3. The most recent survey found arbitration provisions in 97% of all collective bargaining agreements. The figure was 99% in the manufacturing operations. 96 DAILY LAB. REP. (BNA) E-2 (May 17, 1983).

Most commentators focus on the second National War Labor Board (WLB) as the progenitor of modern labor arbitration.[4] The WLB's impact should not be overstated, given the degree to which arbitration had developed before the Board's existence. The WLB did, however, have lasting influence on labor arbitration. The first part of this article therefore concentrates on the WLB's role in resolving labor disputes during World War II. The second part describes the changed legal environment in which modern labor arbitration operates. The third and fourth parts deal with changes in the theory and practice of labor arbitration since 1945.

I. The Federal Government and Labor Arbitration During World War II

The approach of war and increasing threat of strikes in the early 1940s triggered governmental concern for the peaceful resolution of labor disputes. This concern was justified as the incidence and severity of strikes began to rise in 1941. The number of idle man-days resulting from strikes rose from over 450,000 in December 1940 to more than 1,500,000 in March 1941.[5] Strikes in defense plants were particularly troubling as the nation moved closer to war.[6]

Government involvement in labor disputes in World War II paralleled the pattern of involvement during World War I.[7] As in the First World War, there were three discernible phases. In the first phase, the government relied on cooperation with organized labor and on encouragements to self-restraint. In the second phase, primary reliance was still upon voluntary action, but a greater degree of compulsion was introduced. Government activity was relatively decentralized in these two phases. In the third phase, government control became more centralized and compulsion set the tone of government activity.[8]

The first phase began in mid-1940 and continued until the creation of the National Defense Mediation Board in March of 1941. The second phase was coterminous with the life of that body, and ended with the establishment of the National War Labor Board in January 1942. The WLB, less concerned

4. The first National War Labor Board existed during World War I. *See* Nolan & Abrams, *Early Years, supra* note 2, at 404-07. Commentators writing shortly after the Second World War also focused on the impact of the second National War Labor Board on labor arbitration's modern development. *See, e.g.*, E. Witte, Historical Survey of Labor Arbitration 58 (1952). Those writing more recently have taken the same position. *See, e.g.*, R. Fleming, The Labor Arbitration Process, 15-19 (1965); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 Cal. L. Rev. 663, 746 (1973); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,* 4 Indus. Rel. L.J. 450, 463 (1981); Lynd, *Investment Decisions and the Quid Pro Quo Myth,* 29 Case W. Res. 396, 413-16 (1979); Raffaele, *Lawyers in Labor Arbitration,* 37 Arb. J. (n.s.) 14 (Sept. 1982).

5. A. Richards, War Labor Boards in the Field 17-18 (1953).

6. J. Seidman, American Labor From Defense to Reconversion 42-44 (1953).

7. On the government's activities in labor disputes during the First World War, see Nolan & Abrams, *Early Years, supra* note 2, at 401-08.

8. Chalmers, Derber & McPherson, *Summary and Conclusions,* in U.S. Dept. of Labor, Problems and Policies of Dispute Settlement and Wage Stabilization Duging World War II, at 1, 6 (1950) (Bureau of Labor Statistics Bulletin No. 1009) [hereinafter referred to as *Summary and Conclusions*]. *See also* Chalmers, *Voluntarism and Compulsion in Dispute Settlement, id.* at 26, 35-36 [hereinafter referred to as Chalmers, *Voluntarism and Compulsion*].

with voluntary settlements than its predecessor agencies, reached its highest degree of compulsion when given authority over wage stabilization matters late in 1942.

There were several important differences between the government's actions in the two wars. Most importantly, in the Second World War the government acted much earlier and passed through the first two stages quicker. This response was probably due to the greater warning the government had the second time around.[9] It might also have been due to the fact that policy makers in the Second World War had the advantage of the experience of the First.

Preparation for Wartime Labor Disputes

The WLB exercised a powerful influence on modern American labor arbitration. In turn, the Board was significantly influenced by earlier agencies. It is thus appropriate to review the first and second phases of World War II labor dispute resolutions before examining the WLB itself.

The first major action in preparation for wartime labor disputes was made on May 28, 1940, when President Franklin Roosevelt established the National Defense Advisory Commission (NDAC). The NDAC was composed of "advisors" who were expected to function individually rather than collegially. Sidney Hillman, President of the Amalgamated Clothing Workers, was appointed Advisor on Employment. The dynamic Hillman soon transformed this modest position into the highly visible Labor Division of NDAC. Hillman also organized a Labor Policy Advisory Committee composed of sixteen labor union representatives to act as a liason between the NDAC and organized labor. Because the Department of Labor's Conciliation Service failed to resolve post-depression labor-management disputes, Hillman created a Labor Relations Branch to mediate disputes.[10] The Labor Division and its Labor Relations Branch had no formal power, relying instead on persuasion, co-optation and patriotic appeals. The Labor Division thus functioned as a first phase agency, using cooperative and decentralized tactics rather than compulsion.[11]

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9. American involvement in the war came gradually — between September 1939, and December, 1941. This period of transition permitted a reasonably orderly adaptation of industrial life to the needs of the emergency. Moreover, it allowed the Nation to experiment with new techniques and procedures, such as the National Defense Mediation Board in the field of labor disputes.

Summary and Conclusions, supra note 8, at 2. By comparison, President Wilson had reason to expect American involvement in World War I more than a year before he broke diplomatic relations with Germany but he established no labor dispute adjustment agencies until June of 1917, two months after the formal declaration of war. Nolan & Abrams, *Early Years, supra* note 2, at 401-02.

10. A. RICHARDS, *supra* note 5, at 16; M. JOSEPHSON & S. HILLMAN, STATESMAN OF AMERICAN LABOR 512-14 (1952).

11. Joint advisory committees were established in several industries. Acting either through the advisory committee or independently, Hillman and his staff attempted to prevent or stop strikes. *See* R. PURCELL, LABOR POLICIES OF THE NATIONAL DEFENSE ADVISORY COMMISSION AND THE OFFICE OF PRODUCTION MANAGEMENT, MAY 1940 TO APRIL 1942, at 7-9, 168 (1946) (Historical Reports on War Administration: War Production Board Special Study No. 23); A. RICHARDS, *supra* note 5, at 16-17. Hillman's work with the Advisory Commission

This arrangement lasted until January 1941 when President Roosevelt established the Office of Production Management (OPM) and appointed Hillman as Associate Director General. In March the NDAC's Labor Division was transferred to OPM and given the duty to "assist in the prevention and adjustment of any labor controversies which might retard the defense program. . . ."[12]

Hillman's Labor Relations Branch had few tools available to prevent or resolve strikes. Hillman claimed to have settled 239 out of 241 potential strikes brought to his attention,[13] but his claim should be taken with some skepticism. One thorough post-war study described the work of the Labor Relations Branch in ambivalent terms:

> Without power or defined policy but with good intentions, this Branch sustained organized labor, feuded with the Labor Supply Branch, in which there was little labor impress, and often duplicated the work of the United States Conciliation Service which failed to satisfy labor management or to keep abreast of the growing flow of disputes.[14]

President Roosevelt's advisors pressed for the establishment of a new agency to deal with labor disputes, a body with more power than the Labor Division of OPM. In March 1941, on the recommendations of Hillman and Secretary of Labor Frances Perkins,[15] the President created the National Defense Mediation Board (NDMB).[16] This marked the end of the first, and totally voluntaristic, phase of government involvement in labor relations.[17]

The National Defense Mediation Board

The NDMB was composed of eleven members, four each from labor and management and three representing the general public. While designated as a dispute-resolution agency, the NDMB could act only on those disputes certified by the Secretary of Labor as threatening "to burden or obstruct the production or transportation of equipment or materials essential to the national defense . . . and which cannot be adjusted by the commissioners of conciliation of the Department of Labor. . . ."[18] The NDMB was authorized to investigate

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is described in J. SEIDMAN, *supra* note 6, at 26-30 and in M. JOSEPHSON, *supra* note 10, at 503-28.

12. R. PURCELL, *supra* note 11, at 16-17.

13. *Id.* at 171.

14. *Id.* at 168.

15. *See* G. MARTIN, MADAM SECRETARY, FRANCES PERKINS 449 (1976). Hillman's biographer gives more credit for the creation of the NDMB to Hillman and claims Perkins initially opposed a new agency. M. JOSEPHSON, *supra* note 10, at 541-42.

16. Exec. Order 8716, 3 C.F.R. 914 (1938-43 compilation). *See generally* BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, REPORT ON THE WORK OF THE NATIONAL DEFENSE MEDIATION BOARD, MARCH 19, 1941-JANUARY 12, 1942 (Bureau of Labor Statistics Bulletin 714) [hereinafter NDMB REPORT].

17. Hillman was not appointed to the NDMB, and his Labor Division was neither transferred to the new agency nor abolished. The Division's jurisdiction was curtailed gradually, and Hillman's status in the government steadily deteriorated. R. PURCELL, *supra* note 11, at 29-33.

18. Exec. Order 8716, 3 C.F.R. 914 § 2 (1938-43 compilation).

disputes and make recommendations[19] as well as assist parties in establishing their own methods of dispute resolution.[20] The NDMB was also authorized to designate an impartial arbitrator at the parties' request.[21]

There were now three government agencies, in addition to the National Labor Relations Board, in the labor dispute resolution business: the NDMB, the Conciliation Service of the Department of Labor, and Hillman's Labor Division of OPM. In theory these bodies acted seriatim. Hillman's agents would attempt to resolve any labor dispute in the defense industry coming to the attention of the Labor Division. If they failed, the case would be certified to the Department of Labor and the Conciliation Service would try to obtain a settlement. If no agreement was reached and the dispute threatened defense production, the Secretary of Labor would certify the controversy to the NDMB. If the NDMB failed to settle the dispute, the last step was an appeal to the President to use his emergency powers.[22]

In practice, however, things did not work quite so smoothly. The President's failure to abolish or transfer the Labor Division when the NDMB was created exacerbated the jurisdictional disputes already existing between the Division and the Conciliation Service. This overlap between the groups led to jurisdictional conflicts and confusion.[23]

The NDMB was obliged to act through tripartite divisions. Upon acquiring jurisdiction of a dispute, it was to attempt mediation and if that was fruitless to recommend voluntary arbitration. If the parties rejected voluntary arbitration, the NDMB would hold hearings and make its own recommendations on the merits of the dispute.[24] The Board's ambiguous functions as both peacemaker and judge were a source of difficulty.[25]

In theory the recommendations of the NDMB were not binding, but in practice they were very persuasive. The Board could bring public opinion to bear on the disputants by making public its finding and recommendations. It could also certify the dispute to the President who could and sometimes did use his emergency powers to take over a plant.[26] The possibility of presidential

19. *Id.* § 2(d).

20. *Id.* § 2(a) & (c).

21. *Id.* § 2.

22. R. PURCELL, *supra* note 11, at 179-80.

23. A. RICHARDS, *supra* note 5, at 18-19; J. SEIDMAN, *supra* note 6, at 56. *Cf.* V. BREEN, THE UNITED STATES CONCILIATION SERVICE 87 (1943) (overlap between the OPM's Labor Division and the Conciliation Service cancelled out the efforts of both agencies). The agencies were forced to accommodate one another. For example, rather than trying to decide recognition disputes itself, the NDMB learned to request the NLRA to expedite them. The NDMB also limited its involvement in unfair labor practice cases. F. WITNEY, WARTIME EXPERIENCES OF THE NATIONAL LABOR RELATIONS BOARD 1941-1945, at 105-06 (1949).

24. NDMB REPORT, *supra* note 16, at 1.

25. It is unusual for one individual or one agency to possess the requisite skills for both tasks and attempting to do both creates a certain conflict of interest. Even with the necessary skills, it is almost impossible to maintain the proper relationship with the parties while performing such diverse tasks. J. SEIDMAN, *supra* note 6, at 57.

26. A. RICHARDS, *supra* note 5, at 20. John L. Blackman, Jr., in PRESIDENTIAL SEIZURE IN LABOR DISPUTES 259-60 (1967) [hereinafter referred to as J. BLACKMAN] lists only three instances of plant seizures after violation of an agreement with the NDMB or after noncompliance with an NDMB recommendation: the Inglewood, California, plant of North American

seizure added the first major element of compulsion to the federal government's labor relations policies during World War II. Although seldom used, the mere potential for its use encouraged "voluntary" agreements.[27] The government also had some control over striking employees. Just as some World War I draft boards had threatened to revoke strikers' draft deferments,[28] so in the Second World War the Director of the Selective Service demanded reclassification of defense workers who refused to accept NDMB recommendations.[29] As a result of these powerful but unofficial pressures, the NDMB's "recommendations" took on the force of arbitration awards.[30]

The NDMB encouraged almost-voluntary arbitration even though it engaged in almost-compulsory arbitration. In several decisions, the Board recommended binding arbitration agreements.[31] These recommendations were not always accepted and one subsequent dispute led to presidential seizure.[32] Another case in which the NDMB's recommendation was rejected led to the demise of the NDMB itself.

In that case, titled *Captive Coal Mines*, the NDMB rejected the demand of the United Mine Workers (UMW) for a closed shop.[33] The next day the two NDMB members who represented the Congress of Industrial Organizations (CIO), with which the UMW was affiliated, resigned.[34] Eventually the government acceded to the UMW by sending the dispute to an ad hoc arbitration board whose "neutral" member, the Director of the Conciliation Service, was known to favor the closed shop.[35] Although the Captive Mines dispute was resolved, the CIO members never returned to the NDMB. Without them the Secretary of Labor was reluctant to certify other CIO cases to the Mediation Board. Without a CIO member, the Board had little success in resolving pending CIO cases.[36]

Obviously something had to be done to put the NDMB back on track.[37]

Aviation; Federal Shipbuilding & Dry Dock Co., in Kearny, New Jersey; and Air Associates, Inc., in Bendix, New Jersey.

27. V. BREEN, *supra* note 23, at 91 (the parties to a labor dispute are much more likely to reach agreement if they know that failure to agree will result in compulsory arbitration).

28. Nolan & Abrams, *Early Years*, *supra* note 2, at 405.

29. V. Breen, *supra* note 23, at 101.

30. As one contemporary scholar put it, "[i]n practice the Board's power to investigate and to issue findings and recommendations for settlement was closely akin to compulsory arbitration with compulsory acceptance of the award, though *technically* and *legally* it cannot be so designated." H. KALTENBORN, GOVERNMENTAL ADJUSTMENT OF LABOR DISPUTES 93 (1943). *See also* Chalmers, *Voluntarism and Compulsion*, *supra* note 8, at 40-41.

31. NDMB REPORT, *supra* note 16, at 194, 195; H. KALTENBORN, *supra* note 30, at 97.

32. H. KALTENBORN, *supra* note 30, at 98-99.

33. *Id.* at 101.

34. Philip Murray, President of the CIO and one of the NDMB members who resigned, explained his resignation by stating that the NDMB's Captive Mines decision "has made it impossible for labor to retain any confidence in its future actions." Murray's position was unanimously endorsed by the CIO annual convention. H. KALTENBORN, *supra* note 30, at 102. The story of the CIO walkout is well told in Chalmers, *Voluntarism and Compulsion*, *supra* note 8, at 42-45.

35. G. MARTIN, *supra* note 15, at 450; M. JOSEPHSON, *supra* note 10, at 563-64.

36. H. KALTENBORN, *supra* note 30, at 102; NDMB REPORT, *supra* note 16, at 8.

37. With the NDMB stymied by the CIO walkout, interested parties began to look for

The Japanese attack on Pearl Harbor gave the President an opportunity to resolve the NDMB deadlock. This opportunity gave rise to the National War Labor Board (WLB) and ushered in the third and least voluntary phase of wartime regulation of labor relations.

The Second National War Labor Board

Four days after Pearl Harbor, President Roosevelt invited representatives from business and labor to participate in a Labor-Management Conference.[38] At the end of a week, labor and management agreed on three basic principles: there would be no strikes or lockouts during the war; disputes should be settled by collective bargaining; and the President should establish a new board to make final determinations on those issues not settled in negotiations. The only sticking point was the matter of union security. Labor representatives felt that in return for giving up the right to strike unions should be able to seek the closed shop and other forms of compulsory unionism before the new board if they were unable to obtain them in negotiations. The employer representatives insisted that the union security issue be excluded from the board's jurisdiction. The Conference reached a deadlock, with unions favoring a three-point resolution that would allow the board to resolve "all" labor disputes and employers insisting on a fourth point removing union security matters from the board.[39]

When President Roosevelt was informed of the deadlock, he replied: "We can't expect perfection. I'll accept the three important points they *have* agreed

alternative ways to deal with labor disputes in this critical period. The presidents of the AFL and the CIO, William Green and Philip Murray, publicly called for a labor-management conference and the idea received private support from influential government officials, including Secretary of Labor Perkins and NDMB chairman William Davis. Business leaders were not enthusiastic.

Several congressmen and senators began to introduce legislation to restrict strikes during the emergency. One of these proposals, the Smith Bill, would have made illegal all strikes called without a prior majority vote of the employees concerned and would have imposed a cooling-off period before a strike could begin. The Smith Bill passed the House with almost a two-thirds majority, but Senate consideration was interrupted by the Pearl Harbor bombing on December 7th. The next day the chairman of the Senate Labor Committee, Senator Elbert Thomas of Utah, requested that action on the Bill be postponed to allow labor and management "to agree on a method of voluntary settlement as a substitute for governmental action." In the end the Senate never acted on the Smith Bill. J. SEIDMAN, *supra* note 6, at 72-73; *see also* A. RICHARDS, *supra* note 5, at 23.

38. A. RICHARDS, *supra* note 5, at 22-23. Secretary of Labor Perkins' biographer credits her with the ideas for the Labor-Management Conference and the National War Labor Board which resulted from it:

> As the first board began to crumble, she insisted to representatives of both labor and management: "No matter what you do, another board will be created. It has to be. There is no other way to handle this situation. . . ." [S]he went about creating a new board to serve as a final court of appeals for wartime labor disputes. She planned to have it emerge from a conference of labor and management on wartime labor relations, and in preparing for the conference she met again and again with individuals and groups in an attempt to enlarge the areas of agreement.

G. MARTIN, *supra* note 15, at 450.

39. G. MARTIN, *supra* note 15, at 451; A. RICHARDS, *supra* note 5, at 24.

on with thanks. I'll promise to appoint the board promptly. . . . We'll let the board make its own rules and regulations and determine its jurisdiction."[40] The President then sent a letter to that effect to the conferees. The labor members were delighted, of course, but the employer representatives were shocked because they had made their acceptance of the three points contingent on the fourth. Nevertheless, they formally accepted "the President's direction for the peaceful settlement of disputes and the establishment of a War Labor Board." Employer representatives warned that the battle on union security was not yet over, and urged that the Board adopt the principle they had been fighting for.[41]

The WLB was officially created on January 12, 1942 when President Roosevelt abolished the National Defense Mediation Board and created the WLB in its stead.[42] The WLB consisted of twelve members, four each from labor, management, and the public, plus a number of alternate members. The Board was also authorized to appoint "associate members" to serve as mediators.[43] By May the Board was sufficiently organized to begin recruiting about a thousand part-time appointees to engage in mediation, factfinding and arbitration.[44]

The WLB's jurisdiction extended over "labor disputes which might interrupt work which contributes to the effective prosecution of the war,"[45] but it did not include "labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted."[46] Generally, the WLB would not act until the Secretary of Labor certified the case as not having been resolved through the normal procedures of the Conciliation Service.[47]

Once the WLB assumed jurisdiction over a dispute, it was empowered to "finally determine the dispute" through "mediation, voluntary arbitration, or arbitration under rules provided by the Board."[48] This brief statement reflected the primary formal distinction between the NDMB and the WLB: the

40. Chalmers, *Voluntarism and Compulsion, supra* note 8, at 50; A. RICHARDS, *supra* note 5, at 24.

41. H. KALTENBORN, *supra* note 30, at 113; Chalmers, *Voluntarism and Compulsion, supra* note 8, at 50.

42. Exec. Order 9017, 3 C.F.R. 1075 (1938-43 compilation).

43. Exec. Order 9038, 3 C.F.R. 1082 (1938-43 compilation).

44. H. KALTENBORN, *supra* note 30, at 114-15.

45. Exec. Order 9017, 3 C.F.R. 1075 (1938-43 compilation).

46. *Id.*

47. *Id.* § 3. Unlike the NDMB, however, the WLB could act on its own motion if it so desired. H. KALTENBORN, *supra* note 30, at 118-19. Exec. Order 9250, 3 C.F.R. 1213 (1938-43 compilation), issued on October 3, 1942, broadened the WLB's jurisdiction "to cover all industries and all employees." That Order was primarily concerned with wages and salaries but it extended the WLB's jurisdiction over non-wage disputes as well. A. RICHARDS, *supra* note 5, at 27-28. The WLB was also directed to avoid invading the jurisdiction of the National Labor Relations Board and to refrain from making decisions inconsistent with the National Labor Relations Act. With two government agencies operating in such a limited field there were many jurisdictional conflicts. Most of these were amicably resolved. F. WITNEY, *supra* note 23, at 117-22. On the wartime relationship between the NLRB and WLB, see generally *id.* at 115-50.

48. Exec. Order 9017, 3 C.F.R. 1075 (1938-43 compilation).

WLB was given authority to "finally determine" disputes while the NDMB could only encourage voluntary arbitration and make recommendations.[49] In practice the distinction was not so sharp. The NDMB's recommendations, like the final determinations of the WLB, were backed by the possibility of presidential involvement, including plant seizure. Presidential seizure was seldom required, however, because its mere possibility induced acceptance of WLB decisions.[50] Even so, the replacement of the NDMB by the WLB marked another step toward more government compulsion in preventing and resolving labor disputes.[51]

A major principle that guided the Board throughout its existence was that disputes should be settled by collective bargaining, assisted by government mediation only if necessary. If a third-party decision was required, the parties were encouraged to establish their own procedure for arbitration. Compulsory arbitration was to be used only as a last resort. It is at this point, with the WLB's encouragement of voluntary arbitration and the possibility of compulsory arbitration, that the government's World War II labor relations policies connect with the history of labor arbitration. The two developments were meshed for the rest of the War.

The WLB was initially charged with resolving labor disputes between employers and employees. Soon it received the additional task of administering the government's wage stabilization program. The Emergency Price Control Act stated that government agencies should work toward "a stabilization of prices, fair and equitable wages, and cost of production."[52] The Act stated, however, it should not "be construed to authorize the regulation of . . . compensation paid by an employer to any of his employees."[53]

The WLB had minimal authority over wage disputes between employers and unions. It had even less authority in the case of "voluntary" wage increases. If an employer and a union were in agreement, there was no dispute on which the Board could rule. To close this loophole in stabilization policies, President Roosevelt asked Congress for the authority to control wages.[54] Congress responded by passing the Economic Stabilization Act which authorized the President to issue an appropriate executive order.[55]

The next day, President Roosevelt issued an executive order giving the WLB control over all changes in wage rates.[56] Although the order ritually reaffirmed

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49. H. KALTENBORN, *supra* note 30, at 119 (quoting Exec. Order 9017, 3 C.F.R. 1075 (1938-43 compilation) § 3).

50. There were only six instances of plant seizures during the first year and a half of the WLB's existence. The number increased dramatically after the WLB was given power over wage control matters in 1943. *See* J. BLACKMAN, *supra* note 6, at xv and 261-75.

51. V. BREEN, *supra* note 23, at 102.

52. Pub. L. No. 421, 56 Stat. 23, § 1(a) (1942).

53. *Id.* § 302(c).

54. Douty, *The Development of Wage-Price Policies* in UNITED STATES DEPARTMENT OF LABOR, PROBLEMS AND POLICIES OF DISPUTE SETTLEMENT DURING WORLD WAR II, at 104, 109-33 (1950) (Bureau of Labor Statistics Bulletin No. 1009) [hereinafter referred to as PROBLEMS AND POLICIES].

55. Pub. L. No. 729, 56 Stat. 765 (1942).

56. Exec. Order 9250, 3 C.F.R. 1213 (1938-43 compilation).

the government's commitment to "free collective bargaining",[57] the Board was given power to approve or reject negotiated wage increases. The Board's attempt to limit wages while prices continued to rise was largely unsuccessful. In the most visible challenge to wage stabilization, John L. Lewis and his United Mine Workers union defied the Board in a 1943 wage dispute. They ultimately received most of their demands,[58] but at the price of stirring Congress to pass anti-strike legislation.

On July 25, 1943, Congress passed (over President Roosevelt's veto) the War Labor Disputes Act.[59] The Act gave the WLB its first express statutory existence and then proceeded to restrict strikes. Section 3 authorized the President to take possession of plants when labor disputes hampered the war effort. Section 6 made it a crime to strike a plant operated by the government. In all other plants, the law simply imposed a cooling-off period and required a pre-strike vote of employees on the strike issue to be conducted by the National Labor Relations Board. Congress apparently hoped that patriotic employees would reject strike calls by their union leaders during the War, but the hope proved futile.[60]

The War Labor Disputes Act was a confused measure. Its ostensible purpose was to prevent wartime strikes, yet it implicitly authorized strikes after the cooling-off period and the required vote.[61] Most union leaders attempted to abide by the no-strike pledge given at the War's beginning, but the strike ballot sometimes took matters out of their hands. Among other unintended results, it outraged the very union officials whose support for the War was critical. The War Labor Disputes Act had little impact on the WLB, leaving its composition, powers, policies and procedures largely intact, and it had little discernible impact on the frequency of strikes.[62]

In its first few months of existence the WLB's organization and procedures remained simple. All disputes were initially referred to the Board's standing Committee on New Cases. The Committee could refer a case directly to the full Board, but ordinarily it assigned the case for mediation. If mediation failed, the parties were urged to arbitrate. If one or both of the parties refused arbitration, the mediator submitted a report with recommendations to the Committee on New Cases. The Committee could then refer the matter to

57. *Id.* § 8.

58. F. DULLES, LABOR IN AMERICA 337-39 (3d ed. 1966).

59. Pub. L. No. 89, 57 Stat. 163 (1943). The law was more commonly known as the Smith-Connally Act. It was passed in reaction to a strike by the United Mine Workers that continued even after the government seized the mines. J. SEIDMAN, *supra* note 6, at 137-38.

60. The strike vote provision was, according to all of the evidence, "completely ineffective in preventing strikes, and in fact made it more difficult in some cases for union leaders to restrain their followers." Votes in favor of strikes rose from 68% in 1943 to 72% in 1944 and to 84% in 1945. In most cases, however, work stoppages did not actually take place. "The strike-vote system meant only an expensive detour on the road to settlement of disputes by the processes of collective bargaining or by wartime government determination of issues." Brown, *The NLRB-Wagner Act Through Taft-Hartley Law*, in LABOR IN POSTWAR AMERICA 179, 184-85 (C. Warne, et al., eds. 1949).

61. F. DULLES, *supra* note 58, at 340-41.

62. J. SEIDMAN, *supra* note 6, at 189-90; Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309, 314-15 (1945).

the full Board. The Board in turn could render a decision based on the report, hold hearings, or refer the case back for further investigation.

The Board's increasing work load, particularly after receiving responsibility for wage control matters, made these centralized and relatively informal procedures inadequate. In October of 1942, the Board appointed regional officials and established regional offices,[63] but had no intention of dispersing its power. By January of 1943, the backlog of cases and resulting public criticism forced the Board to decentralize some of its power and administration. Consequently, the Board established twelve regional offices and appointed tripartite regional boards in each region. The regional boards were given the same powers as the national board subject to discretionary intervention by or appeal to the WLB itself. That discretion was rarely exercised.[64]

The procedures followed by the regional boards tracked those of the national board. A regional new case committee initially assigned disputes to part-time, tripartite panels. The panels held hearings and prepared reports which were summarized by a disputes division and presented to the regional board for action.[65]

Enforcement of regional or national board orders was problematic because neither level of the WLB possessed formal enforcement power. The WLB could refer instances of noncompliance in wage cases to the Director of Economic Stabilization or to the President in dispute cases but this rarely happened. Compliance was usually achieved by public pressure and by persuasion, a process aided by the tripartite composition of the boards.[66]

War Labor Board Policies Affecting or Involving Arbitration

The general work of the National War Labor Board is not of direct relevance here, and it has been well described elsewhere.[67] Of immediate importance are the Board's policies and activities which directly and indirectly encouraged the use of arbitration. Several of those activities will be discussed in this section.

The WLB's Pro-Arbitration Policy

The WLB's consistent policy in favor of voluntary arbitration for resolving labor disputes, particularly grievance disputes, was largely a manifestation of its broader preference for collective bargaining.[68] Agreements to arbitrate were

63. 1 NATIONAL WAR LABOR BOARD, THE TERMINATION REPORT OF THE NATIONAL WAR LABOR BOARD 782-84 (1949) [hereinafter referred to as TERM. REP.].

64. *See* H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR 771-72 (1945). For the best account of the regional boards, see generally A. RICHARDS, *supra* note 6. A shorter but still valuable treatment is Orfield, *The Regional War Labor Boards*, 29 IOWA L. REV. 253 (1944).

65. The reports usually reflected only the public member's opinion, even though it might have been cleared with other panel members. Some regional boards used full-time hearing officers in place of the part-time panels, but this practice was uncommon. A. RICHARDS, *supra* note 5, at 203, 209-10.

66. *Id.* at 211-14.

67. *See, e.g.*, PROBLEMS AND POLICIES, *supra* note 54; A. RICHARDS, *supra* note 5, especially chapters VIII-XI; 1 TERM. REP., *supra* note 63, especially Part I, §§ III-V.

68. Witte, *Wartime Handling of Labor Disputes*, 25 HARV. BUS. REV. 169, 177 (Winter, 1947) [hereinafter referred to as Witte, *Wartime Handling*].

much closer to collective bargaining than government determination of the merits of disputes, the only other option when strikes are banned. The Board was following a prewar pattern in its preference for arbitration. The Board's work in this field, its General Counsel wrote toward the end of the War, "has not been innovation; rather, it has extended [to] large segments of industry principles and practices which in actual operation had long proved workable."[69] Its preference for arbitration was pragmatic, for the Board thought arbitration was the best method of avoiding strikes which would impede production.[70]

To some extent the WLB was pushing on an open door so far as arbitration was concerned. Many employers in major industries had either accepted grievance arbitration before the War[71] or were willing to do so without much urging. The automobile industry illustrates both approaches. General Motors had signed arbitration agreements with the United Auto Workers (UAW) in 1937 and 1940.[72] The UAW sought arbitration in its 1942 negotiations with the Ford Motor Company. Despite the WLB's involvement in the negotiations the draft contract did not include an arbitration clause. Union and company negotiators went to the office of Harry Bennett, the Ford official in charge of labor relations, to sign the contract. Richard Leonard, National Ford Director for the UAW, had the following discussion with Bennett, as reported by the chairman of the union's negotiating committee:

> Bennett says, "Well, did you guys get everything you wanted."
> Leonard says, "No."
> "Well, what didn't you get."
> "Well, one thing we wanted was an Umpire."
> "What the hell is an Umpire? Is this a ball game or something?"
> So Leonard explained to Bennett that an Umpire is a guy to whom you refer a grievance that you can't get together on, and he decides which side is right, and that's it.
> Bennett turns around to his negotiators and says "What the hell's wrong with that. How come you guys didn't give them an Umpire. Well, give 'em an Umpire too. . . ."
> So we got an Umpire.[73]

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69. Freidin & Ulman, *supra* note 62, at 341, 344 (1945). *See also* M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 385 (1970) (WLB extended arbitration "to numerous industries where it had been previously rejected").

70. That the Board saw a close connection between arbitration and winning the war, the reason for the Board's existence, was reflected in a policy statement issued in 1943:

> These fundamental American values and aids to successful prosecution of the war can be attained by grievance procedures which provide . . . for the final and binding settlement of all grievances not otherwise resolved. For this purpose, provision should be made for the settlement of grievances by an arbitrator, impartial chairman or umpire under terms and conditions agreed to by the parties.

1 TERM. REP., *supra* note 63, at 66.

Winning the War was not the only factor on the Board's collective mind. The Board recognized that its temporary existence should not impair the voluntary arbitration process available to resolve disputes after the War. *See* Freidin & Ulman, *supra* note 62, at 324.

71. *See* Nolan & Abrams, *Early Years, supra* note 2, at 418-19.

72. *Id.* at 419.

73. G. Heliker, Grievance Arbitration in the Automobile Industry 118-19 (1954) (unpublished Ph.D. dissertation, University of Michigan) (quoting Percy Llewellyn).

WLB Support for Negotiated Arbitration Procedures

The Board's policy preference for arbitration would have been of little importance if it had not been translated into action. Thus, the Board flatly refused to decide any dispute that was subject to existing voluntary arbitration procedures. Moreover, the Board required disputing parties to follow their own arbitration agreement and to abide by any stipulation that the arbitration award be final and binding.[74] This practice represented a conscious break with judicial attitudes toward arbitration:

> The Board has consistently rejected the outmoded common-law view that arbitration is to be regarded with hostility because it ousts the jurisdiction of regular public tribunals. It has accepted instead the modern concept . . . that such agreements are favored and that aid should be given their enforcement.[75]

For the Board's policy preferences to be credible, it had to accept the validity of arbitration awards and to enforce them even in questionable cases. Unrestricted review of the merits would have made arbitration simply another step to be completed before the parties reached the real decisionmaker.[76] The Board's consistent support of private arbitration decisions presaged the deference paid to arbitration today by courts and, to a lesser extent, the National Labor Relations Board.

Throughout its first year the Board considered each case separately. Yet without an intellectual basis for its decisions, Board policies and principles became vague. Although the Board favored arbitration, it failed to clarify either the degree of its preference or the reasons for it. This clarification was finally supplied in 1943 by Board decisions and by adoption of formal policy statements.[77]

The leading decision setting out Board policies was *Smith & Wesson*.[78] In that case, both substantive and procedural objections were raised when the company refused to accept three parts of an arbitrator's award. The case was certified to the WLB following the failure of conciliation efforts. At the same time the company filed suit in state court to set aside the objectionable parts of the award. The company argued that any Board action taken while litigation was pending would violate the requirement that all other settlement procedures

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74. Freidin & Ulman, *supra* note 63, at 315; Witte, *Wartime Handling*, *supra* note 68, at 177-78.

75. Freidin & Ulman, *supra* note 63, at 315.

76. "[E]xcessive or imprudent review would destroy the wartime usefulness of arbitration as an effective instrument for the peaceful settlement of disputes." *Id.* at 324.

77. *Id.* at 317. *See also Statement of Policy Concerning Review of Arbitration Awards* (Sept. 1, 1943), *reprinted in* 2 TERM. REP., *supra* note 63, at 694-95 [hereinafter *Statement of Policy*]; *Arbitration Policy Adopted by NWLB* (Nov. 26, 1943), *reprinted in* 2 TERM. REP., *supra* note 63, at 695-97 [hereinafter *Arbitration Policy*].

78. 10 War Lab. Rep. 148 (July 30, 1943). A few months earlier, in Sullivan Drydock & Repair Corp., 6 War Lab. Rep. 467, 468-69 (Feb. 13, 1943), the Board had refused to review a nonwage award of an arbitrator, but its opinion contained little discussion on point. *Id.* at 468. In the same opinion the Board distinguished wage cases, which the WLB was obliged to review closely because of its wage stabilization responsibilities. *Id.* at 469. *See* 1 TERM. REP., *supra* note 63, at 405-10 (Board review of arbitration decisions concerning wage issues).

be exhausted before the Board assumed jurisdiction.[79] The Board held that the "other available procedures" requirement did not include post-arbitral resort to the courts. It recognized that a court could set aside an arbitrator's award, but until that occurred the Board's directive order enforcing the award would be effective.[80]

The Board emphasized that an arbitrator may not exceed the authority conferred on him by the parties and that any departures from the agreement would be void. Otherwise, when acting within the scope of his authority the arbitrator's decision was to be given every reasonable presumption. The Board refused to reconsider the arbitrator's award in *Smith & Wesson* because it found no proof of "fraud, misconduct, or other equally valid objection."[81] The WLB likewise insisted that the Regional War Labor Boards protect the finality of nonwage arbitration and not substitute their own judgment for that of the arbitrator.[82]

Wage issues were more problematic because the Board had been expressly charged with enforcing wage stabilization regulations. Thus the Board could not readily accept arbitrator's awards without first ensuring compliance with applicable wage stabilization rules. Yet even in these cases the Board generally refused to rehear wage issues or to question the arbitrator's discretion. Wage awards would instead be reviewed "only in terms of whether the amounts granted will have an unstabilizing influence as measured by Board policy."[83] Labor and management quickly perceived that doubtful cases were frequently resolved in accordance with the arbitrator's view. Moreover, arbitrated wage cases were automatically approved unless they were modified within a certain period, and the WLB's large backlog of cases guaranteed that many passed through without review.[84] As a result, parties sometimes sent negotiated wage settlements, which might not be approved if submitted directly to the WLB, to an arbitrator for his signature. These "agreed awards" constituted a deliberate device to avoid the strictures of wage stabilization regulations.[85]

Board-Ordered Arbitration Agreements

In addition to supporting voluntarily negotiated arbitration agreements and resulting awards, the WLB increasingly insisted on the inclusion of arbitration clauses in labor contracts. The process steadily tended toward

79. Exec. Order 9017, 3 C.F.R. 1075 (1938-43 compilation).

80. 10 War Lab. Rep. at 149-56. Similarly, the WLB refused to tailor its decisions to comply with the varying requirements of state arbitration laws because to do so would impose "an intolerable administrative burden" and would "furnish opportunity for dilatory tactics by one who seeks to delay or thwart the effective solution of controversy." Friedin & Ulman, *supra* note 62, at 316.

81. 10 War Lab. Rep. at 153 (quoting Blackstone Valley Gas & Elec. Co. v. Rhode Island Power & Transmission Co., 64 R.I. 204, 222, 12 A.2d 739, 748 (1940)).

82. *E.g.*, Republic Aircraft Products Div., 12 War Lab. Rep. 491 (Nov. 22, 1943); *cf.* Freidin & Ulman, *supra* note 62, at 322-23.

83. New York Herald Tribune, 7 War Lab. Rep. 9, 10-11 (Mar. 10, 1943).

84. NATIONAL ACADEMY OF ARBITRATORS, ORAL HISTORY PROJECT, interview with William E. Simkin, at 46 (1982).

85. Stein, *Labor Arbitration Under Mobilization*, N.Y.U. 4th ANN. CONF. ON LABOR 291, 293 (1951).

more detailed specifications by the Board. For example, in the Board's first year, the WLB refused to order the parties in *Chrysler Corp.*[86] to include an arbitration clause in their agreement. The Board did recommend, however, that they give "earnest consideration" to an impartial umpire system.[87] In other early cases, the Board attempted to encourage voluntary arbitration by directing the parties to include a provision for a "mutually satisfactory form of arbitration" in their contracts.[88] By the time the Chrysler dispute reached the Board again, the Board's attitude had hardened and it flatly ordered arbitration as the final step in all grievances.[89]

General directions to enter arbitration agreements proved inadequate when labor and management could not agree on the arbitration procedure or the scope of the arbitrator's authority. As a result the WLB began to spell out more carefully the arbitration clause to be adopted.[90] The Board usually defined the arbitrator's jurisdiction as covering all grievances or disputes concerning the interpretation or application of the contract.[91] Substantially the same definition is found in most modern collective bargaining agreements.

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86. 3 War Lab. Rep. 447, 452-54 (Oct. 2, 1942).

87. *See* G. Heliker, *supra* note 73, at 130-32.

88. 1 TERM. REP., *supra* note 63, at 131 (citing cases).

89. 10 War Lab. Rep. 551, 555 (Aug. 27, 1943); *cf.* G. Heliker, *supra* note 73, at 134. The parties retained autonomy over the style and details of their arbitration system. When Chrysler and the United Auto Workers implemented the Board's decision, they designed an arbitration system retaining many features of the bipartite appeal board in use since 1939. They made the umpire an adjudicator to be used only after careful investigation by the parties themselves, in contrast to the mediator role filled by the permanent umpire at General Motors. *See* Wolff, Crane & Cole, *The Chrysler-UAW Umpire System,* 11 PROC. NAT'L ACAD. ARB. 111 (1958); 1 TERM. REP., *supra* note 63, at 132-33.

Ford Motor Company, which had included an arbitration clause in its contract with the UAW after WLB-assisted negotiations in 1942, was allowed to adopt a radically different umpire system much closer to the General Motors model. G. Heliker, *supra* note 73, at 120-25. Both Chrysler and Ford selected the WLB officials who had worked with them during negotiations when it came time to select their umpires. *Id.* at 119-21, 135.

90. On July 17, 1945, Region I in Boston adopted the following standard arbitration clause:

> In the event that any grievance arising out of the application or interpretation of this agreement is not resolved under the grievance procedure hereinabove set forth, either party may, within ten (10) days, in written notice to the other, submit such grievance to arbitration. In the event the parties are unable to agree upon a mutually satisfactory arbiter within five (5) days after such notice, either party may request that the Regional War Labor Board, Region I, designate an arbiter, transmitting a copy of such request to the other party. The decision of the arbiter shall be final and binding on both parties. The cost of each arbitration proceeding is to be equally divided between the Company and the Union.
>
> Jurisdiction of the Arbitrator shall be limited to the grievances arising out of the application or interpretation of this agreement.
>
> In the event that either party raises a question as to the arbitrability of a grievance under this section, the Arbitrator shall first determine the arbitrability of the grievance before proceeding to the merits of the grievance.

3 TERM. REP., *supra* note 63, at 65.

91. 1 TERM. REP., *supra* note 63, at 131. The WLB made it clear that the arbitrator could not alter or amend the contract. Freidin & Ulman, *supra* note 62, at 346-47.

This tendency toward greater detail involved the Board in several thorny issues. For instance, the Board was frequently faced with conflicting demands for a permanent or an ad hoc arbitrator. Although it expressed a strong preference for permanent arbitrators, the WLB only ordered such arrangements "where the employer expressed no serious opposition or where exceptional circumstances warranted a permanent arbitrator despite management opposition."[92] Another issue resolved by the Board was the process for selecting an arbitrator. Generally it ordered the parties to try to agree on an arbitrator, but if they failed to agree and their agreement did not provide a mechanism for appointment, the Board ordered its regional boards to appoint an arbitrator.[93]

Arbitration by the WLB

In addition to ordering parties to adopt arbitration agreements, the WLB routinely ordered arbitration of specific disputes. Selection of an arbitrator by the parties was the preferred method, but the Board did not hesitate to designate an arbitrator when necessary.[94] The WLB accorded awards in Board-ordered arbitration cases the same deference given to awards in voluntary arbitrations.[95] In a broader sense, almost all of the WLB's rulings were arbitration awards, albeit of a not-completely-voluntary type.

The Board preferred to avoid treading on the turf of other agencies such as the National Labor Relations Board. Thus it usually refused to rule on jurisdictional disputes between unions. This was not an absolute rule, and the WLB occasionally ordered the disputing unions to proceed to arbitration rather than to the National Labor Relations Board.[96] As a result, arbitration was used by parties who otherwise would not have chosen that method and in disputes which normally would not have been resolved in that fashion.

Given the tripartite composition of the National and Regional War Labor Boards, it is not unreasonable to view them as arbitration panels. The WLB tried to preserve a distinction between its arbitration and non-arbitration activities, but that distinction was difficult to maintain. In *Alaska Salmon Industries*,[97] for example, the five-member regional board transformed itself into

92. 1 TERM. REP., *supra* note 63, at 132; *see also* Witte, *Wartime Handling*, *supra* note 68, at 178.

93. *Statement of Policy*, *supra* note 77, at 694-95; *see also* 1 TERM. REP., *supra* note 63, at 133-34.

94. *Arbitration Policy*, § 2(a), *supra* note 77, at 696.

An award in a Board-ordered arbitration case not involving wages was not reviewable on the merits. *Id.* § 5, at 696-97. Either party, however, could still appeal to the courts. Awards involving wages or salaries were reviewable "in accordance with the Board's wage stabilization policy," but that did not necessarily involve a full review of the merits. The Board or its agent would instead "seek to determine whether the arbitrator has correctly applied all the criteria of the Board's wage stabilization policy to the facts of the case." The case could then be referred back to the arbitrator if it was found that the arbitrator "manifestly erred" in applying the wage stabilization policy. *Id.* § 4(a), at 696.

96. "Due rather to the urgency of quick decision to hasten the installation of machinery for war production than to any theoretical considerations, the Board has actually, though quite unwillingly, required arbitration of several demarcation disputes." Rice, *The Law of the National War Labor Board*, 9 LAW & CONTEMP. PROBS. 470, 486 (1942).

97. 11 War Lab. Rep. 677 (Oct. 19, 1943).

a three-man arbitration board and issued an award. The WLB reversed the decision because the regional board had not clarified the panel's arbitration function. According to the WLB, the regional board should have reduced the alleged submission to writing and explained the nature of the proceedings to the parties. Although the procedural requisites should have been fulfilled, it is doubtful whether there would have been any substantive differences between an award by an arbitration panel and a formal decision by the same people sitting as a Regional War Labor Board.[98]

The major dispute among commentators over the WLB's arbitration function was whether or not it amounted to "compulsory arbitration."[99] On the one hand, the WLB was charged with finally determining a dispute after assuming jurisdiction.[100] Moreover, the parties were compelled to take their disputes before the Board. The Board could act on the Secretary of Labor's certification or on its own motion, regardless of the parties' wishes. Finally, its decisions were effectively binding because they were backed by public opinion, by other government agencies,[101] and ultimately by the possibility of plant seizures.[102]

On the other hand, the Board's decisions were legally only advisory.[103] Plant seizure was indeed a possibility, but it was seldom used. When it was used it did not significantly affect the employer because the same management continued and the government channeled profits to the owner.[104] Surprisingly, no wartime measures outlawed strikes other than those in government controlled plants. The War Labor Disputes Act did impose a thirty-day cooling-off period and did require a secret ballot election among employees on the strike question. Nonetheless, the clear implication was that after an affirmative vote, (which

98. If the various war labor boards may fairly be considered as acting as arbitration boards, they were certainly the busiest and probably the most successful such panels in American history. By one count the boards decided 21,000 cases and those decisions were complied with in all but about 300 instances. E. WITTE, *supra* note 4, at 57. These figures do not include the thousands of wage stabilization cases handled by the WLB.

99. One commentator noted that, "[f]or all that it lacked enforcement powers the War Labor Board in its disputes settlement constituted a gigantic compulsory arbitration board." Stein, *Labor Arbitration, supra* note 85, at 292. The chairman of the WLB, William H. Davis, admitted as much in 1942: "There is no escaping the fact that this framework of collective bargaining erected on the basic no-strike agreement contains an element of forced acceptance. It is in substance arbitration." (quoted in V. BREEN, *supra* note 23, at 90 (footnote omitted)).

100. Executive Order 9017, § 3, 3 C.F.R. 1075 (1938-43 compilation). Section 7 of the War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943), which finally gave the WLB a statutory basis, contained a similar provision ordering the Board, after a hearing to "decide the dispute and provide by order the wages and hours and all other terms and conditions . . . governing the relations between the parties. . . ."

101. Local draft boards, for example, were known to take steps to cancel the draft deferments of strikers, although this was never a fixed policy. Witte, *Wartime Handling, supra* note 68, at 172.

102. There were 51 seizures from the time the WLB was established through the end of the War. J. BLACKMAN, *supra* note 26, at xv and 261-75.

103. Employers Group of Motor Freight Carriers, Inc. v. NWLB, 143 F.2d 145, 148 (D.C. Cir. 1944); NWLB v. Montgomery Ward & Co., 144 F.2d 528, 530 (D.C. Cir. 1944), *cert. denied*, 323 U.S. 774 (1944).

104. Witte, *Wartime Handling, supra* note 68, at 174-75.

was the normal result) a strike was lawful. Indeed, the act did not expressly forbid a strike even after a negative vote.[105]

Perhaps the fairest conclusion is that the WLB functioned as an arbitration board with both voluntary and compulsory elements. Participation before the Board was usually voluntary but occasionally compulsory. Its decisions were in law only advisory but in practice were backed, when necessary, by the full force of government. Because Board orders were usually accepted, either voluntarily or by coercion, full governmental force was seldom needed.

The National War Labor Board and Arbitration: An Evaluation

The reputation of the War Labor Board in the area of arbitration has changed in recent years. Earlier writers asserted, as did Foster Rhea Dulles, that the "full record of the National War Labor Board, for all its difficulties and for all the criticism it aroused, constituted a very real success for this unprecedented experiment in tripartite labor arbitration."[106] Today a practitioner of the WLB period can claim that the Board actually delayed the development of labor relations.[107] Another contemporary writer has criticized the Board for forcing labor organizations into weak "contract unionism" and excluding an alternate view of union activity based on the principles of industrial democracy.[108] Most tellingly, one major study concluded that "the outlines of modern grievance arbitration were clear long before the war" and that the wartime no-strike pledge, rather than the WLB, forced labor and management to rely more heavily on arbitration.[109]

The traditional and revisionist views of the relationship between the WLB and labor arbitration do not conflict as clearly as may first appear. After reviewing the history of labor arbitration, no one could deny that arbitration was solidly established before the Second World War and would have continued to develop even without the WLB.[110] Nor would even the sharpest critics of the War Labor Board deny its boost to the popularity and use of labor arbitration. The contributions of the Board to labor arbitration were chiefly of three types: increases in the number and percentage of labor agreements containing

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105. *Id.* at 181. *See also* War Labor Disputes Act, ch. 144, § 8(a), 57 Stat. 163 (1943).

106. F. DULLES, *supra* note 58, at 344.

107. It is my considered opinion that, if we had not had the NWLB in the 1940s, we might even have advanced sooner toward more sophisticated industrial relations between employers and unions . . . . [I]t became apparent to me . . . that the decisions of the NWLB did nothing but antagonize my clients and make them more resistant to the labor union demands.

Ropella, *A Discussion*, 33 LAB. L.J. 531, 531-32 (1982).

108. Lichtenstein, *Industrial Democracy, Contract Unionism, and the National War Labor Board*, 33 LAB. L.J. 524 (1982).

109. Jacoby & Mitchell, *Development of Contractual Features of the Union-Management Relationship*, 33 LAB. L.J. 512, 516-17 (1982). The authors do admit that the WLB "provided additional pressure and guidance without which arbitration might have grown more slowly." In their view the WLB was only a "contributing influence" on the spread of arbitration, not the "major impetus" for this development. *Id.* at 516-17.

110. Nolan & Abrams, *Early Years*, *supra* note 2.

arbitration clauses; refinement of certain arbitration concepts and rules; and creation of a larger pool of experienced arbitrators.

The exact percentage of contracts with arbitration clauses is difficult to determine because the agreements are not recorded in a central file. By one set of figures, the percentage rose from 62 percent before World War II to 73 percent in 1944.[111] By another set, the percentage grew from 76 percent in the pre-War period to 85 percent in the immediate postwar era.[112] There is agreement on the upward trend, and on the WLB's partial responsibility for it. To the extent the increase can be attributed to the WLB, its impact was notable if not overwhelming.

Some of the Board's refinements of arbitration concepts and rules have already been discussed, such as the limitation of the arbitrator's contractual authority and the presumption of an award's validity on review.[113] As the first major arbitration board of general jurisdiction, the WLB inevitably faced a myriad of issues endemic to every arbitration system. Its resolutions of those issues were often the first recorded decisions on point. Moreover, because WLB decisions were published and widely distributed, they were destined to be influential.[114] Later arbitrators could hardly ignore War Labor Board principles, even though legally they might be free to depart from them.

The Board prescribed methods for an individual to settle grievances apart from a union as well as the proper use of time limits in a grievance procedure. The Board explored the relative merits of permanent versus ad hoc arbitrators and the possible methods for selecting an arbitrator. To increase voluntary arbitration and decrease management fears of impingement on managerial prerogatives, the WLB carefully defined the arbitrator's jurisdiction and strictly enforced jurisdictional limitations. It also specifically defined grievance arbitration as an adjudicatory process, "limited in jurisdiction and limited to an award based solely on the evidence presented at a hearing."[115] Thus the Board not only encouraged arbitration generally, it established a particular model of arbitration. This was the judicial model rather than a mediatorial one. The Board's establishment of the judicial model during the War was a major factor in that model's postwar domination.[116] Both as to

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111. R. FLEMING, *supra* note 4, at 13, 18.

112. Jacoby & Mitchell, *supra* note 109, at 515. The current percentage is 97%. See *supra* note 3.

113. *See supra* notes 80-85 and accompanying text.

114. For example, the Board found it necessary to clarify the definition of a grievance. Its conclusion was that absent specific language to the contrary, grievances include all complaints over the interpretation or application of the agreement. This became the standard definition of modern arbitration. In this way the Board permanently "sharpened the distinction between 'rights' and 'interests.' Henceforth it would be clear that the commitment of the parties was to grievance arbitration, not to arbitration of the terms of a new agreement or to substantive issues not covered by the contract." R. FLEMING, *supra* note 4, at 19. *See also* M. DERBER, *supra* note 69, at 385-86.

115. B. LANDIS, VALUE JUDGMENTS IN ARBITRATION 5, 6 (1977).

116. A. PRASOW & E. PETERS, ARBITRATION AND COLLECTIVE BARGAINING 13 (3d ed. 1983). This point is established in much greater detail in Harris, "The Snares of Liberalism? Politicians, Bureaucrats, and the Shaping of Federal Labor Relations Policy, ca. 1915-1945" (unpublished paper delivered at the Colloquim on Shop Floor Bargaining and the State in

substance and procedure, then, the Board's role as a leader in labor arbitration was unique.[117]

Perhaps the Board's most important contribution to modern labor arbitration was the development of a body of experienced arbitrators, many of whom remained active after the War. There were few skilled labor arbitrators before the War and few of those viewed arbitration as a profession. Hundreds of new people served as arbitrators during World War II, either on the Board's staff, its disputes panels, or as a result of selection by parties sent to arbitration by the WLB. In addition, the Board created a continuing long-term demand for the arbitration services of these people. Management and labor needed their expertise to operate the labor relations system bequeathed by the WLB.[118] Seven years after the War, Edwin Witte accurately stated that the "great majority of the labor arbitrators of the present day gained their first direct experience in service on the staff of the War Labor Board or on its disputes panels."[119] That remained true for many years thereafter.

Of greater importance than the percentage of WLB alumni among current arbitrators is their quality. The mere listing of WLB staff members who continued in arbitration after the War should impress anyone familiar with arbitration.[120] Truly these men constituted "the hard core of the arbitration profession" up to the present day.[121] Without the experience and expertise of these men, grievance arbitration may not have been so readily accepted.

Any evaluation of the WLB must consider all these effects. Together their impact on labor arbitration was immense. The War Labor Board, it is fair to conclude, was the most important single influence on the maturation of labor arbitration in America.

II. The Changing Legal Environment Since World War Two

The basic structure of modern American labor arbitration was firmly established by the end of World War II. Postwar developments, particularly Su-

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Historical and Comparative Perspective at Kings College Research Center, Cambridge, England, on September, 1982).

The dark side to the Board's establishment of the judicial model was that unions found themselves confined by that model. In contract matters, the union's role became strictly reactive. The merits of the union's position would be determined in legalistic proceedings based on principles of interpretation, rather than on economic power or abstract standards of justice. *See* Harris, *supra*, at 20-21.

117. M. Derber, *supra* note 69, at 386.

118. Harris, *supra* note 116, at 21.

119. E. Witte, *supra* note 4, at 58.

120. The following is a brief sampling drawn from a listing of WLB personnel at 2 Term. Rep., *supra* note 63, at 5-46. Many of the persons listed held two or more posts with the Board. Many others of equal distinction served on arbitration panels without formal staff appointments: Benjamin Aaron, Rev. Leo C. Brown, S. J., David L. Cole, G. Allen Dash, Jr., Carroll R. Daugherty, John T. Dunlop, Samuel Edes, Nathan P. Feinsinger, Sylvester S. Garrett, Jr., Lewis M. Gill, Clark Kerr, Theodore W. Kheel, John Day Larkin, Wayne Morse, Eli Rock, Peter Seitz, Ralph T. Seward, Harry Shulman, William E. Simkin, George W. Taylor, Saul Wallen, W. Willard Wirtz, Edwin E. Witte, and David A. Wolff.

121. R. Fleming, *supra* note 4, at 19.

preme Court decisions interpreting section 301 of the Taft-Hartley Act,[122] have shaped the relationship between arbitration and other institutions without altering that fundamental structure. Indeed, the basic nature of labor arbitration is so well established that radical change is improbable in the foreseeable future.

The factors contributing to the maturation of labor arbitration since 1945 do not lend themselves to a simple chronology and are better analyzed thematically. The three most important themes are: the changing legal environment within which arbitration operates; the development of a coherent theory of labor arbitration; and the professionalization and differentiation of the arbitration process. This section deals with the first of those themes.

The Labor-Management Conference; President Truman's Legislative Requests

Like President Wilson before him, President Truman foresaw that the end of the War could generate considerable labor strife. Millions of demobilized soldiers and sailors needed to be reintegrated into the peacetime economy. Government demand for goods and services would decline precipitously. Pent-up demand for consumer goods, fueled by savings from wartime wages, would explode before industries completed the reconversion process. Unions would attempt to maintain the gross earnings of employees accustomed to overtime work, while trying to restore the purchasing power that employees' hourly wage rates had lost to inflation. Legal restrictions on wages and strikes could not be continued once the reasons for their adoption had disappeared.

President Truman began the transition to normal labor relations by easing wage control restrictions just two days after the Japanese surrender. Wage increases were allowed provided they would not result in higher prices. The President urged both labor and management to continue the no-strike, no-lockout pledge until a labor-management conference later in the year could fashion new machinery to minimize strikes during reconversion. Neither side was receptive to Truman's request. Labor was not willing to renew the no-strike promise, having chafed under the wartime pledge for almost four years, and employers were not eager to follow WLB orders any longer than necessary. Even WLB members realized the agency had completed its mission and were resolved to end its existence by the beginning of 1946.[123]

Moral and patriotic imperatives that limited wartime labor disputes carried little weight after Japan surrendered, and workers embarked upon the greatest wave of strikes in the country's history. Walkouts began while the WLB still existed, and thus were technically illegal. Legal or not, there was no practical way to stop them and strike statistics rose. In September 1945, over four million man-days were lost due to strikes, compared to an average of two million during the War, and the number reached eight million in October. Less than one-tenth of one percent of monthly working time was lost to strikes early in 1945, but by fall more than one percent was lost each month.[124]

122. Taft-Hartley Act of 1947, Pub. L. No. 101, § 301, 61 Stat. 156, 157 (codified as amended at 29 U.S.C. §§ 141-197 (1976)).

123. J. SEIDMAN, *supra* note 6, at 217-18.

124. *Id.* at 221.

The President hoped a national conference could create a mechanism for resolving labor disputes. Truman scheduled a Labor-Management Conference on Industrial Relations to convene in Washington in November of 1945.[125] Like President Wilson's conference twenty-six years earlier,[126] this meeting deadlocked on fundamental issues. The Conference did, however, unanimously approve a committee report on existing collective agreements which strongly endorsed grievance arbitration. The report recommended that the parties agree to resolve disputes through arbitration if settlement could not otherwise be reached. The committee further suggested the arbitrator be authorized only to interpret and apply the agreement's existing provisions to the specific dispute. The report also provided that both parties should agree in advance to be bound by the arbitrator's decision.[127]

The Conference unanimously adopted another report recommending that the Labor Department's Conciliation Service cease providing free arbitration services. This recommendation was designed to maintain a sharp distinction

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125. The best reports of this conference are *Labor-Management Conference on Industrial Relations*, 62 MONTHLY LAB. REV. 37 (Jan. 1946) [hereinafter *Labor-Management Conference*], and H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 306-11 (1950).

126. Nolan & Abrams, *Early Years*, *supra* note 2, at 408-09.

127. *Labor-Management Conference*, *supra* note 125, at 42.

> IV. The parties should provide by mutual agreement for the final determination of any unsettled grievances or disputes involving the interpretation or application of the agreement by an impartial chairman, umpire, arbitrator, or board. In this connection the agreement should provide:
>
> (a) A definite and mutually agreed upon method of selecting the impartial chairman, umpire, arbitrator or board;
>
> (b) That the impartial chairman, umpire, arbitrator, or board should have no power to add to, subtract from, change or modify any provisions of the agreement but should be authorized only to interpret the existing provisions of the agreement and apply them to the specific facts of the grievance or dispute;
>
> (c) That reference of a grievance or dispute to an impartial chairman, umpire, arbitrator, or board should be reserved as the final step in the procedure and should not be resorted to unless the settlement procedures of the earlier steps have been exhausted.
>
> (d) That the decision of the impartial chairman, umpire, arbitrator, or board should be accepted by both parties as final and binding.
>
> (e) That the cost of such impartial chairman, umpire, arbitrator, or board should be shared equally by both parties.

Paragraph V made it clear that arbitration was not expected to be the normal method of resolving interest disputes.

> V. Any questions not involving the application or interpretation of the agreement as then existing but which may properly be raised pursuant to agreement provisions should be subject to negotiation, conciliation, or such other means of settlement as the parties may provide: . . . .

Id. The significant aspect of this paragraph is the omission of any express endorsement of arbitration for such matters.

Paragraph VII expressly rejected a compulsory arbitration system: "Nothing in this report is intended in any way to recommend compulsory arbitration, that is, arbitration not voluntarily agreed to by the parties." *Id.*

between conciliation and arbitration and to prevent premature use of arbitration simply because it cost the parties nothing. Instead, the Conference suggested that the Conciliation Service's Division of Arbitration compile a list of qualified arbitrators to be retained and paid by the parties on a per diem basis.[128] Following these recommendations, the Conciliation Service prepared a national roster of 200 arbitrators and submitted panels of names from this roster on request.[129]

The Conference was unable to agree on a method to prevent work stoppages and resolve disputes,[130] which was the President's main concern. Receiving no help from the Conference and troubled by the increasing frequency and severity of strikes, Truman asked Congress for additional powers over labor disputes affecting the nation. During 1945 and 1946, he unsuccessfully sought authority to order a "cooling-off" period before a strike could begin and to establish factfinding machinery similar to that of the Railway Labor Act.[131] Meanwhile organized labor had grown from ten and a half million members at the start of the War to almost fifteen million at its close, and it continued to attract new members.[132] Labor's economic strength increased proportionately. In time this new strength caused a backlash resulting in restrictive legislation at both the state and federal levels.

State Compulsory Arbitration Legislation

Even under the best circumstances major strikes typically cause some public inconvenience. During wartime almost any strike appears unpatriotic if not actually treasonous. Thus, not surprisingly, several states passed laws to curb strikes during World War II as other states had done during World War I.[133]

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128. *Id.* at 43.

129. Gordon, *Recent Developments in Conciliation and Arbitration,* in LABOR IN POST-WAR AMERICA, *supra* note 60, at 215, 217-18, 227 [hereinafter Gordon, *Recent Developments*]. The Conciliation Service had created a Labor Management Advisory Committee in October of 1945. With the aid of that committee the Service made policy changes such as discontinuing its staff of permanent arbitrators. Free arbitration was eliminated except for hardship circumstances. Warren, *The Conciliation Service: V-J Day to Taft-Hartley,* 1 INDUS. & LAB. REL. REV. 351-62 (1948).

130. In this way, experience vindicated the predictions of an unusually clear-sighted War Labor Board official, Louis Jaffe, that no arrangement would be worked out under which labor would give up the strike weapon and that compulsory arbitration would not long survive the War. Jaffe, *Post-War Labor Relations: The Contributions of the War Labor Board,* 29 IOWA L. REV. 276, 281-83 (1944).

131. Gordon, *Recent Development, supra* note 129, at 217-19. He repeated his requests on January 3rd and January 21, 1946, but to no avail. Even without express statutory authority, Truman established a number of fact-finding boards in 1945 and 1946. On May 25, 1946, Truman again asked Congress for authority to limit strikes, at least those strikes in vital industries under government control. At last Congress began to respond. The House and Senate overwhelmingly passed separate versions of an appropriate bill, but the emergency ebbed — indeed, the railroad strike was settled moments before Truman addressed Congress — and the bill died a quiet death. A different and far more restrictive bill sponsored by Representative Francis Case of South Dakota did pass Congress, but Truman's veto of the bill was upheld in the House by a narrow margin. J. SEIDMAN, *supra* note 6, at 236-37, 256-58.

132. J. SEIDMAN, *supra* note 6, at 195, 248.

133. On labor disputes legislation during the First World War, see Nolan & Abrams,

The real surprise was state legislators' reaction to the great wave of strikes after the War ended. During 1947 state after state passed laws designed to resolve disputes, limit certain economic weapons, or weaken organized labor. The most popular legislative subjects were union security, secondary boycotts, picketing, and pre-strike ballots.[134]

Several of the new laws touched on the compulsory arbitration issue. The great strike wave had affected many businesses, including public utilities. Utility strikes created a risk to the public health and safety which many legislators and a substantial part of the general public considered unacceptable. As a result, much of the 1947 legislation was aimed at controlling the "emergency" strike problem.[135] Legislative provisions typically provided a cooling-off period preceding utility strikes; factfinding or mediation procedures; state seizure of struck utilities combined with a strike ban; and compulsory arbitration of the underlying dispute.

Like other compulsory arbitration laws, these statutes were largely unsuccessful. They interfered with effective collective bargaining and often were applied when no real emergency existed.[136] Two occurrences mooted the dispute over the wisdom of these state laws. First, the postwar strike wave receded and diminished the need for such legislation. Second, the Supreme Court proclaimed Wisconsin's Public Utility Anti-Strike Law[137] unconstitutional because it conflicted with the Taft-Hartley Act of 1947.[138] From that point, most state compulsory arbitration laws ceased to cover federally regulated industries.[139]

Early Years, supra note 2, at 407-08. States enacting "curb labor" laws or amendments during the Second World War included Alabama, Arkansas, California, Colorado, Florida, Idaho, Kansas, Minnesota and Wisconsin. A complete summary of state labor relations to legislation from 1939 through 1947 is given as an appendix to Sutherland, *The Constitutionality of the Taft-Hartley Law,* 1 INDUS. & LAB. REL. REV. 177, 196-205 (1948) [hereinafter referred to as Sutherland, *Appendix*].

134. One troubled pro-labor observer provided this talley in 1949:

> The year 1947 saw the countermarch [in labor legislation] sweep across the country. Sixteen states proclaimed a "right to work" or outlawed closed-shop contracts; 21 states required strike notices and a cooling-off period or banned strikes under certain conditions; 11 restricted picketing; 12 prohibited secondary boycotts; 10 directed unions to file an accounting of their finances, or otherwise regulated internal union affairs. Similar action was taken in most other fields of labor legislation.

Ziskind, *Countermarch in Labor Legislation,* in LABOR IN POST-WAR AMERICA, *supra* note 60, at 313, 317 (footnotes omitted). Ziskind provides a detailed analysis of those laws. *Id.* at 661-706. *See also* Sutherland, *Appendix, supra* note 133.

135. H. NORTHRUP, COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES: AN ANALYSIS OF EXPERIENCE 24 (1966).

136. Northrup & Rowan, *Arbitration and Collective Bargaining: An Analysis of State Experience,* 14 LAB. L.J. 178, 190 (1963) ("It would be difficult indeed to find a single instance in which a state arbitration law has been invoked where great peril actually was threatening a community.").

137. WIS. STAT. §§ 111.50-.65 (1949).

138. Amalgated Ass'n of St., Elec. Ry. & Motor Coach Empl. Div. 998 v. Wisconsin Empl. Rel. Bd., 340 U.S. 383 (1951).

139. Northup & Rowan, *supra* note 136, at 189.

The Taft-Hartley Act and Labor Arbitration

Although the term "arbitration" is scarcely mentioned in the Taft-Hartley Act,[140] several of its provisions have had a profound effect on labor arbitration. Most of the provisions relevant to arbitration are in Title II of the Act. Three early sections state a national policy favoring voluntary arbitration to resolve labor disputes. Section 201(b),[141] which deals with interest disputes, declares that the United States' policy is to advance collective bargaining by providing government facilities "for conciliation, mediation, and voluntary arbitration." Section 203(c) orders the Director of the Federal Mediation and Conciliation Services (FMCS) to encourage dispute settlement alternatives if he cannot resolve a dispute by conciliation.[142] Section 203(d)[143] deals with grievance disputes and euphemistically indicates a preference for arbitration. This section states that "[f]inal adjustment by a method agreed upon the parties" is "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

It is unclear why the endorsements of arbitration, particularly grievance arbitration, were so half-hearted. The original Senate version of section 203(c) expressly directed the FMCS to encourage and facilitate arbitration if mediation or conciliation was unsuccessful.[144] For unknown reasons this express reference to arbitration was replaced with euphemisms during the legislative process.[145] These early provisions of the Taft-Hartley Act endorsed labor arbitration as a dispute resolution mechanism, but only in a peculiarly subtle manner.[146]

Other provisions of the Act deliberately avoided express references to arbitration. Congress was troubled by the same 1945-46 strike wave that caused many states to adopt compulsory arbitration laws. As a result, Congress included a series of sections in the Taft-Hartley Act under the title "National Emergencies."[147] Like some state laws, the federal law provided for a cooling-off period during which a factfinding board could operate. The federal law, however, did not provide for compulsory arbitration. If the emergency dispute remains unsettled after the cooling-off period, the parties are free to resort to economic pressure.

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140. The Taft-Hartley Act is officially known as the Labor Management Relations Act, 1947 [hereinafter LMRA] and is codified at 29 U.S.C. §§ 141-197 (1976).

141. 29 U.S.C. § 171(b) (1976).

142. *Id.* § 173(c). The only specific means mentioned for peaceful dispute resolution is a secret ballot on the employer's last offer. *Id.*

143. *Id.* § 173(d).

144. S.1126, 80th Cong., 1st Sess. § 203(c) (1947), as reported by the Committee on Labor and Public Welfare, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 99, 142-43 (1948) [hereinafter LEGIS. HIST.].

145. H. MILLIS & E. BROWN, *supra* note 125, at 572.

146. In the area of conciliation, the Taft-Hartley Act created the Federal Mediation and Conciliation Service, or rather the Act revived the Labor Department's Conciliation Service as an independent new agency. LMRA, §§ 202-204, 29 U.S.C. §§ 172-174 (1976). The proponents of this change asserted that a conciliation service should be impartial and the Labor Department represented the interests of labor. See, for example, the statement of Senator Taft, 2 LEGIS. HIST., *supra* note 144, at 1015. In any case, the inter-agency shift did not have much impact on the arbitration functions of the conciliation service.

147. LMRA §§ 206-210, 29 U.S.C. §§ 176-180 (1976).

Even section 301, the Act's most important section relating to arbitration, fails to mention arbitration. Because of its importance in later cases, section 301 is quoted in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgement against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member of his assets.[148]

The omission of any reference to arbitration in a section providing for court enforcement of collective bargaining agreements does not indicate an intent to exclude arbitration from the section's scope. Rather, Congress simply was not concerned about judicial enforcement of arbitration clauses under section 301 despite the almost universal adoption of arbitration provisions in existing collective bargaining agreements. The Act's legislative history contains little comment on this point, though both the House and Senate draft bills provided that breach of an arbitration agreement would be an unfair labor practice.[149] The primary debate over section 301 focused on whether collective bargaining agreements generally should be legally enforceable by and against unions.[150] Hence, enforcement of arbitration provisions was not regarded as a distinct issue.

Nor does the legislative history provide much insight as to the intended meaning of section 301. The only guidance legislative history provides is that unions could sue or be sued in federal courts for violations of collective bargaining agreements. The statute did not indicate what law courts should apply, how collective bargaining agreements should be interpreted, or what relationship would exist between the court, the NLRB and the agreement's arbitration

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148. *Id.* § 301(a), (b), 29 U.S.C. § 185(a), (b) (1976).

149. H.R. 3020, 80th Cong., 1st Sess. § 2(11)(A) (1947), *reprinted in* 1 LEGIS. HIST., *supra* note 144, at 36-37; S.1126, 80th Cong., 1st Sess. §§ 8(a)(6), (b)(4) (1947), *reprinted* in 1 LEGIS. HIST., *supra* note 144, at 111-12, 114. Opponents did recognize, however, that these provisions combined with the enforceability of arbitration agreements under § 301 would give rise to a jurisdictional conflict between the National Labor Relations Board and the federal courts. S. MINORITY REP. No. 105 on S.1126, 80th Cong., 1st Sess. Part 2, 12-13 (1947), *reprinted in* 1 LEGIS. HIST., *supra* note 144, at 474-75. This potential conflict was eliminated in conference in favor of court action for alleged breaches because of a belief that collective bargaining contracts should be enforced by the usual legal processes and not by the National Labor Relations Board. H. CONF. REP. No. 510 on H.R. 3020, 80th Cong., 1st Sess. 41-42 (1947), *reprinted in* 1 LEGIS. HIST., *supra* note 144, at 474-75.

150. *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. Part 2, 15-18 (1947), *reprinted in* 1 LEGIS. HIST., *supra* note 144, at 421-24.

procedures. These questions, among others, were left for the courts to answer on a case-by-case basis.[151]

Judicial Expansion of Section 301: Lincoln Mills *and the* Steelworkers Trilogy

As section 301 began to be widely used, courts were forced to give it concrete content. It would have been disarmingly simple for courts to interpret this section as purely jurisdictional, that is, merely as a Congressional attempt to eliminate the common law procedural roadblocks to suits based on collective agreements. At common law, for example, unincorporated associations such as unions were not legal "persons" with the right to sue or be sued. Collective bargaining agreements often were not regarded as legally-binding contracts and courts were not receptive to arbitration clauses.[152] The legislative history of the Taft-Hartley Act indicates Congress intended to remove these procedural roadblocks when it enacted section 301.[153] In addition, the Supreme Court initially interpreted the scope of section 301 as purely jurisdictional.[154]

In the first major case interpreting the section, a fragmented Supreme Court gave section 301 a very narrow reading. *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*[155] raised the issue of whether section 301 gave federal courts jurisdiction over a suit brought by a union on behalf of employees. The union sued the employer for refusing to pay accrued wages, claiming violation of a collective bargaining agreement. Six Justices in three separate opinions held the section did not confer jurisdiction. Justice Frankfurter's plurality opinion held that section 301 merely directed federal courts to treat a labor union as a legal person.[156] This holding was, in short, that section 301 was purely procedural and provided no new substantive law to the federal courts. Justice Frankfurter's interpretation raised two potential problems for enforcing collective agreements. One was that a purely procedural statute might extend the federal courts' jurisdiction beyond constitutional limits.[157] The second was that state law would govern all such suits if no

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151. So great was the lack of understanding of the section that two otherwise perspicacious contemporary experts made one of the most inaccurate predictions in labor relations history. Referring to sections 301 and 303, Harry Millis, former Chairman of the NLRB, and Emily Clark Brown, an operating analyst for the NLRB and later a Vassar professor, wrote in 1949:

> We doubt very much whether these more ready and extended suability provisions would be of great importance, even to those lawyers who devote much of their time to practicing labor law. No doubt Section 301 could mean much in some concrete cases, but it was not likely to be resorted to widely or for long.

H. MILLIS & E. BROWN, *supra* note 125, at 509.

152. C. GREGORY & H. KATZ, LABOR AND THE LAW 476-97 (3d ed. 1979) [hereinafter LABOR AND THE LAW].

153. *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. Part 2, 15-18 (1947), *reprinted in* 1 LEGIS. HIST., *supra* note 144, at 421-24.

154. Association of Westinghouse Salaried Empl. v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

155. *Id.*

156. *Id.* at 443-49.

157. *Id.* at 449-52.

federal substantive law existed.[158] State law was ill-equipped for such cases because of the common law's traditional hostility to arbitration.[159]

These difficulties must have been immediately apparent to the Court, for two years later it reversed itself. In *Textile Workers Union of America v. Lincoln Mills of Alabama*,[160] the Court reexamined section 301 and held the provision was both procedural and substantive. Justice Douglas pointed out that because section 301(b) expressly granted jurisdiction, section 301(a) must have been meant to supplement that grant.[161] The legislative history, though cloudy, demonstrated a Congressional policy which supported sanctions behind agreements to arbitrate grievance disputes. Thus a purely jurisdictional reading of section 301 would undermine that Congressional policy.[162]

The Court determined that federal substantive law under section 301(a) must be fashioned by the courts from the policies of existing national labor laws.[163] By this decision Justice Douglas eliminated both problems engendered by *Westinghouse*. If Congress legislated substantively in section 301, no constitutional problem arose by extending federal judicial power to such cases.[164]

158. *Id.* at 448-49.

159. On the problems with using state law to enforce collective bargaining, see LABOR AND THE LAW, *supra* note 152, at 486-87.

160. 353 U.S. 448 (1957).

161. *Id.* at 451-52.

162. *Id.* at 456 (footnote omitted).

163. *Id.* at 456-57. Justice Douglas' opinion gave the federal courts broad scope for creativity in fashioning the new common law of the collective agreement:

> We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws . . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of the federal law will govern, not state law. . . . But state law may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Id. (citations omitted).

Professor Gregory's analysis of Justice Douglas' opinion is too pointed to paraphrase and must be quoted verbatim:

> This position is enough to make the legal profession hold onto their hats. What it amounts to is this: Congress in Section 301, in lieu of its power to write out a set of substantive rules to govern the enforcement of collective agreements and not wishing to have the matter covered by common law or state law, simply gave the federal courts carte blanche to make up a patchwork of law themselves, as long as it turned out to be consistent with the policies reflected in existing federal labor statutes. It is unlikely that so much has ever been read into so little before by the Supreme Court. It is reminiscent of the extraordinarily varied administrative powers turned over by Congress to the NLRB in the original Wagner Act, although there the grant of power was backed up by a fairly detailed statute and there was no question that Congress had intended to have the board do much the sort of things it did do.

LABOR AND THE LAW, *supra* note 152, at 486-87.

164. *Lincoln Mills*, 353 U.S. at 457.

Furthermore, federal courts could avoid the inadequacies of state common law by fashioning a new federal common law.

Thus under *Lincoln Mills,* courts were instructed to create a federal common law of collective bargaining agreements. Because almost all agreements contained arbitration clauses, numerous actions were brought in federal court to compel or avoid arbitration, or to enforce or vacate an arbitrator's award. The federal common law of the collective bargaining agreement, stemming from *Lincoln Mills,* was largely composed of the federal common law of labor arbitration.

Fashioning this new common law inevitably required more detailed Supreme Court guidance. The Court set forth the definitive guideposts three years after *Lincoln Mills* in a trio of cases brought by the United Steelworkers of America. These cases, collectively referred to as the *Steelworkers Trilogy,* were *United Steelworkers of America v. American Manufacturing Co.,*[165] *United Steelworkers of America v. Warrior & Gulf Navigation Co.,*[166] and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*[167] The first two involved suits to enforce arbitration agreements and the third was a suit to enforce an arbitration award. In each case the circuit court had ruled against the petitioning union and in each case the Supreme Court reversed in an opinion by Justice Douglas. In the process, the Court firmly established a preference for arbitration. Perhaps responding to decades of judicial hostility towards arbitration,[168] Justice Douglas may have overstated his position in these opinions. Nevertheless, his fundamental principles remain embedded in the law.

The contract in *American Manufacturing* contained a standard arbitration clause covering all disputes "as to the meaning, interpretation and application of the provisions of this agreement." An employee left work because of an injury and received compensation benefits for a permanent disability. When he sought to return to work, the employer refused, citing the disability. The employee filed a grievance under the collective bargaining agreement, but the employer refused to submit the dispute to arbitration. The union then sued to compel the employer to arbitrate. The Court of Appeals for the Sixth Circuit affirmed the district court's grant of summary judgment for the employer because the grievance was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement."[169]

The Supreme Court reversed, holding that the national policy favoring grievance arbitration enunciated in section 203(d) of the Taft-Hartley Act required that the dispute resolution system agreed upon by the parties be given "full play." The parties' agreement was to submit *all* grievances to arbitration, not merely those a court may deem meritorious.[170] The court's role in such a

165. 363 U.S. 564 (1960).

166. *Id.* at 574.

167. *Id.* at 593.

168. *E.g.,* International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd,* 297 N.Y. 519, 74 N.E.2d 464 (1947) (refusing to order arbitration because the court believed the union's case on the issue sought to be arbitrated was not meritorious).

169. 264 F.2d 624, 628 (6th Cir. 1959).

170. 363 U.S. at 566-67.

situation is limited to ascertaining whether the grievant's claim is governed on its face by the contract.[171] The district court should require arbitration even of claims it believes to be frivolous because the processing of such claims "may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[172]

The second case, *Warrior & Gulf*, involved a similar arbitration clause covering differences about the agreement's meaning and application. In contrast to *American Manufacturing*, this agreement expressly excluded from arbitration "matters which are strictly a function of management." The employer laid off several employees because it began subcontracting work previously done by its employees. The company refused to arbitrate the union's charge that the subcontracting violated the contract, and the union then brought suit in federal court to compel arbitration. The district court dismissed the complaint,[173] and the Court of Appeals for the Fifth Circuit affirmed the dismissal.[174] Both courts found that subcontracting was strictly a management function and therefore not arbitrable.

The Supreme Court in *American Manufacturing* had broadly considered the district court's role in a suit to compel arbitration and determined the district court should order arbitration of a claim that on its face is governed by the contract. *Warrior & Gulf* posed two narrower questions: what is the court's role when faced with an express exclusion from arbitration; and how should such an exclusion be interpreted?

Citing the national policy favoring grievance arbitration, the Court distinguished commercial arbitration cases which read arbitration agreements narrowly. The Court reasoned that arbitration in commercial cases replaced litigation whereas labor arbitration replaced industrial strife. Distinguishing the commercial situation further, the Court commented that arbitration under labor agreements was part of the collective bargaining process itself.[175] Collective bargaining should lead to industrial self-government and ultimately should regulate "all aspects of the employment relationship."[176] Not every problem can be foreseen, of course. Arbitration solves the unforeseeable by creating a system of private law that will consider the parties' varying interests. The parties choose a trusted arbitrator to understand their needs and to examine considerations not expressed in the contract. Judges do not have the same experience or information, so they lack that special competence.[177]

171. The Court stated:

> [The district court's function] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

Id. at 568.

172. *Id.*

173. 168 F. Supp. 702, 703 (S.D. Ala. 1958).

174. 269 F.2d 633 (5th Cir. 1959).

175. 363 U.S. at 578.

176. *Id.* at 580.

177. *Id.* at 581-82.

In response to the first question, Justice Douglas emphasized that apart from matters the parties specifically exclude, all other disputed issues come within an arbitration provision's scope. Hence, a court should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes."[178]

In response to the second question, Justice Douglas' answer was equally unequivocal. Exclusion clauses should be read narrowly and doubts should be resolved in favor of arbitration.[179] One reason for this deliberate bias is that the employer's agreement to arbitrate is the quid pro quo for the union's agreement not to strike during the term of the contract.[180] If the contract includes, as this one did, an "absolute" no-strike clause, then "in a very real sense" every employer action is subject to the agreement and thus to arbitration.[181]

Applying this presumption of arbitrability to the exclusion clause at issue, Justice Douglas concluded the phrase "strictly a function of management" referred only to those items which the agreement gave to management's "complete control and unfettered discretion." The Court found the agreement in *Warrior & Gulf* did not expressly give management such control over subcontracting. The Court further stated that absent an express provision excluding the particular grievance from arbitration, overwhelming evidence of a purpose to exclude the claim is required.[182]

The first two trilogy cases also address the important issue of whether the court or the arbitrator should decide arbitrability questions. Taken to the fullest extent, Justice Douglas' opinions might demand the arbitrator determine arbitrability because that question requires interpretation of the contract and the parties bargained for the arbitrator's judgment rather than that of the court.[183] In the two cases, however, Justice Douglas decided that the courts should determine arbitrability. A party asserting that the arbitrator should decide arbitrability must clearly demonstrate that was the parties' intent.[184] To support this position, Justice Douglas relied on an article by Professor Archibald Cox, *Reflections Upon Labor Arbitration*.[185] Because that article does not fully support the Court's actions in the first two trilogy cases and because Justice Douglas' position could result in a "no man's land" of contract interpretation, the issue deserves discussion.

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178. *Id.* at 582-83.

179. *Id.* at 583.

180. *Lincoln Mills*, 353 U.S. at 455. Justice Douglas' quid pro quo assertion was made without citation of legal or empirical authority, but that did not keep him from using it in the *Trilogy* as if it were an unquestionable fact.

181. 363 U.S. at 583.

182. Moreover, the court should "view with suspicion" any attempt to persuade it to find a purpose to exclude the claim from arbitration because an attempt to find such a purpose would necessarily involve the court in the merits of the case. *Id.* at 584-85. Justice Douglas' preference for arbitration was vindicated by the ultimate arbitration award in the case. Arbitrator J. Fred Holly agreed the dispute was arbitrable and found that the employer had violated the contract by the challenged subcontracting. Warrior & Gulf Navigation Co., 36 Lab. Arb. (BNA) 695 (1961).

183. *Cf.* United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 568 (1960).

184. 363 U.S. at 583 n.7.

185. 72 HARV. L. REV. 1482 (1959).

The Cox article concluded that where an arbitration clause covers only disputes about the "interpretation or application" of the contract, the court should decide arbitrability. Cox reasoned that the choice of such a clause, rather than a broad clause covering any dispute between the parties, indicates a desire to confine the arbitrator's power. The parties' intent would be defeated if the arbitrator himself was given "unlimited power to determine his own jurisdiction."[186] This conclusion does not justify the Supreme Court's position. Cox presumed that *some* authority had power to investigate the contract thoroughly before determining which issues the parties agreed to arbitrate. The only question Cox addressed in the cited passage was which authority, court or arbitrator, would make that investigation.

Under the Supreme Court's view, the district court should not thoroughly investigate the arbitrability issue. Rather, the court is limited to determining whether the grievance is "on its face" governed by the contract. In other words, the district court is confined to conducting a superficial investigation. Such a limited inquiry is inconsistent with the Cox analysis which presumes that a full investigation will be conducted. If the court must determine an arbitrability issue because it is too important to leave to the arbitrator, then surely that issue is too important to be resolved by the court on a facial analysis.

American Manufacturing and *Warrior & Gulf* can be read in two ways, giving different answers to whether the court or the arbitrator has the decisive voice on substantive arbitrability issues. The first reading takes Justice Douglas at his literal word that "the question of arbitrability is for the courts to decide."[187] Under this approach, once a court has spoken, the arbitrator can make no contrary determination. Although this reading better comports with the language of the two decisions, it is undesirable because it would create an area of the agreement which cannot receive a full and unbiased interpretation. The arbitrator may not conduct a full investigation if substantive arbitrability is a question solely for the district court. The district court may not do so either because it is instructed to resolve this issue facially with a disposition favoring arbitration. At least three members of the Court recognized this dilemma and indicated that the district court should make a broader inquiry if an exclusion exists.[188] That is not the holding of the cases, however, and the no man's land problem remains.

An alternative reading of the two cases would eliminate the no man's land problem by treating the district court's role as a preliminary one. Under this approach, the court's task is to determine whether the matter raised in the grievance is "arguably arbitrable"; that is, whether it falls within the general class of issues that the parties have agreed to arbitrate. If the district court finds the dispute *arguably* arbitrable, the arbitrator himself must decide if the matter is *in fact* arbitrable. Because the arbitrator may review the question de novo, the no man's land problem is eliminated. This second reading is less faithful to Justice Douglas' words, but it more closely reflects his general approach in the *Trilogy*.[189]

186. *Id.* at 1508-10.

187. 363 U.S. at 583.

188. *Id.* at 571-72 (Brennan, J., concurring, joined by Harlan and Frankfurter, JJ.).

189. Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 104-

The third trilogy case, *Enterprise Wheel,* concerned judicial review of an arbitrator's award. The underlying issue was whether courts have more freedom to interpret a contract after the arbitrator has spoken than before. The dispute prompting arbitration in *Enterprise Wheel* arose when several employees were discharged. An arbitrator found the discharges breached the agreement and ordered reinstatement with back pay. The collective bargaining agreement had expired before the arbitration award was issued, and the employer refused to comply with the award. The union successfully petitioned the district court to enforce the award.[190] On appeal, the Court of Appeals for the Fourth Circuit held that the reinstatement order was unenforceable because the agreement had expired and that back pay could not be required for the post-expiration period.[191]

The Supreme Court reversed, holding in effect that courts should defer to arbitration after issuance of the award as well as before. The Court asserted that judicial review of the merits of an award would undermine the federal policy of resolving labor disputes by arbitration. Arbitrators have peculiar talents, especially in formulating remedies, and the courts should therefore avoid undue interference.[192]

Justice Douglas recognized that an arbitrator must not exceed his authority by dispensing "his own brand of industrial justice." Instead, the arbitrator is limited to interpreting and applying the collective bargaining agreement.[193] Justice Douglas' application of those limitations in *Enterprise Wheel,* however, reflects a presumption of validity of the arbitrator's award. Although the arbitrator's award at issue was ambiguous and might have been based upon legislation rather than upon the contract, Justice Douglas refused to overturn it:

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement.[194]

Lincoln Mills and the *Steelworkers Trilogy* unquestionably expanded section 301 far beyond the simple meaning of its words. The statutory provision could have been read simply as granting authority to federal courts to enforce and interpret collective bargaining agreements. As interpreted by Justice Douglas, that section instead became a charter to create

05 (1977), suggests an interpretation of the Trilogy that would support this second reading. Feller argues that the district court must avoid any ruling on the merits of a grievance because it is "incapable" of doing so. He analogizes the situation to the courts of one jurisdiction attempting to review another jurisdiction's determination. It follows that the arbitrator should have final authority over matters arguably subject to his jurisdiction.

190. 168 F. Supp. 308, 309 (S.D. W. Va. 1958).

191. 269 F.2d 327 (4th Cir. 1959).

192. 363 U.S. at 596-97.

193. *Id.*

194. *Id.* at 598 (footnote omitted).

a new federal common law applicable only to such agreements. The common law Justice Douglas created was especially designed to foster grievance arbitration and to insulate the arbitration system from judicial intervention. By this interpretation of section 301, the Supreme Court radically changed the legal environment within which arbitration operated, and made arbitration stronger, more independent, and more mature. With very few exceptions, the fundamental doctrines of the *Trilogy* have been fully accepted by the lower federal courts. In short, the Supreme Court achieved what it set out to do, and in that sense the *Trilogy* has been an almost unqualified success.[195]

*Judicial Expansion of Section 301: Post-*Trilogy *Cases*

With *Lincoln Mills* and the *Steelworkers Trilogy*, the Supreme Court drew collective bargaining irrevocably into the web of the law. Prior to the Wagner Act of 1935, courts seldom dealt with collective bargaining agreements. Even under the Wagner Act's contractualist philosophy, the legal system's role was largely limited to ensuring that parties negotiate in good faith over mandatory subjects. The resulting agreements were of little official concern to the government. Judicial expansion of section 301 resulted in an increased involvement by the courts in enforcing and occasionally interpreting collective agreements.[196]

Many relevant post-*Trilogy* decisions concern the relationships between the National Labor Relations Board and the arbitration system, and between labor unions and employees bound by arbitration clauses. These topics will be discussed in succeeding sections. This section addresses the major decisions that either extended the reach of arbitration agreements or increased their impact. The reach of arbitration agreements was extended during the 1960s and 1970s both in terms of the parties covered and the time period during which the parties remained subject to the agreement. The first aspect involves "successorship" and the second involves "termination." The two aspects are not entirely distinct but can profitably be discussed in turn.

The typical successorship case involves one employer transferring to another, by sale or merger, all or part of a bargaining unit. In the leading successorship case, *John Wiley & Sons, Inc. v. Livingston*,[197] Interscience Encyclopedia was party to a collective bargaining agreement with District 65 of the Retail, Wholesale and Department Store Union. Interscience subsequently merged with Wiley and ceased to do business as a separate entity. The Interscience employees were employed by the much larger, and nonunion, Wiley firm. The Union claimed that despite the merger it continued to represent the former Interscience employees. The Union also demanded Wiley

195. Morris, *Twenty Years of Trilogy: A Celebration*, 33 PROC. NAT'L ACAD. ARB. 331 (1981).

196. This process is described in highly critical tones in Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981), and in the work of several other practitioners of "critical labor law," a movement described in Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981). A more favorable view is presented in Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). The relative merits of these positions is a fascinating topic, but goes far beyond the scope of this article and will have to wait for another day.

197. 376 U.S. 543 (1964).

recognize certain vested rights of those employees, including seniority and severance pay. Wiley refused to recognize the Union as a bargaining agent and the Union filed suit under section 301 to compel arbitration of its claims.

The Supreme Court first declared that the court, not the arbitrator, should decide whether the arbitration clause of the agreement survived the merger.[198] The Court then held the arbitration clause survived the merger and bound the successor employer. The basis for the Court's decision is not entirely clear. The agreement said nothing about successors and Wiley had never agreed to arbitrate. State law provided that no "claim or demand for any cause" would be extinguished by a consolidation, but federal law controlled the issue. The Court concluded that policy considerations favoring arbitration should not be defeated simply because Wiley did not sign the contract in question.[199] The Court was careful to qualify its decision by stating that the duty to arbitrate did not always survive a change in corporate structure. For instance, the Court noted the arbitration duty would not survive where no "substantial continuity of identity in the business enterprise" existed or where the union might be said to have abandoned its arbitration rights.[200]

Six years later the dispute finally went to arbitration where the arbitrator was to decide whether there had been a "substantial continuity of identity in the business enterprise." Three months after the merger, Interscience employees had been dispersed throughout the Wiley organization and commingled with other Wiley employees. Under the substantial continuity test, the arbitrator held that, at the time of employee commingling, Interscience's separate identity ceased to exist and the Interscience contract ceased to bind Wiley.[201] Federal courts applying *Wiley*'s substantial continuity test in other situations have examined the portion of the predecessor's assets acquired, the percentage of the predecessor's employees retained, and whether the acquired business operated as a distinct entity.[202]

Later Supreme Court successorship cases caused some confusion about the arbitrability issue. In *NLRB v. Burns International Security Services, Inc.*,[203]

198. *Id.* at 545-47. The Court held that questions of *procedural* arbitrability, as opposed to those involving substantive arbitrability, should be left to the arbitrator. *Id.* at 557.

199. *Id.* at 550. The Court also mentioned that the employers' right to rearrange their businesses must be "balanced by some protection to the employees from a sudden change in the employment relationship." *Id.* at 549. The Court cited no authority for this proposition, however, except for a quick bow to *Warrior & Gulf* which had emphasized the benefits of substituting arbitration for economic pressure. This bit of dicta was not again referred to in the decision.

200. *Id.* at 551.

201. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210, 218 (1970) (Roberts, Arb.). Roberts did apply a part of the Interscience contract to Wiley for the period from the merger until the dispersion took place. *Id.* at 225. In light of the Supreme Court's later decision in NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272 (1972), Roberts' decision to apply the Interscience contract appears erroneous. In *Burns*, the Court held a successor employer is not as a matter of labor law bound by its predecessor's contract. Neither labor law nor contract law principles support the imposition of such a burden on the successor.

202. *See, e.g.*, United Steelworkers of Am. v. United States Gypsum Co., 492 F.2d 713, 722 (5th Cir. 1974). *See generally* Note, *The Successor Employer's Duty to Arbitrate: A Reconsideration of* John Wiley & Sons, Inc. v. Livingston, 82 HARV. L. REV. 418 (1968).

203. 406 U.S. 272 (1972).

the Supreme Court required a successor employer to bargain with the union representing the predecessor's employees if those employees constituted a majority of the new work force. The Court noted, however, that the successor was not bound by the terms of the predecessor's collective bargaining agreement. Despite the Court's attempt to distinguish *Wiley* as a section 301 case and *Burns* as an unfair labor practice case,[204] *Burns* cast doubt on the *Wiley* holding. The *Burns* holding that a successor is not bound by a predecessor's contract is inconsistent with the holding in *Wiley* that a successor is bound by at least one very significant provision of the contract if substantial continuity of identity exists. *Burns* also conflicts with *Wiley*'s implication that an arbitrator could find the successor bound by any or all terms of the agreement.[205]

The Court's distinction between section 301 cases and unfair labor practice cases was plausible at the time it was made, but the Court subsequently ignored that distinction in *Howard Johnson Co. v. Hotel & Restaurant Employees.*[206] Howard Johnson purchased a motel and restaurant in which the predecessor's employees constituted only a small part of the new work force. As in *Wiley* the union brought a section 301 action to compel arbitration. Nevertheless, the Supreme Court held that *Burns* must be considered even in a section 301 case. Emphasizing that Howard Johnson had not hired a majority of the predecessor's employees, the Court concluded no substantial continuity of identity existed and thus no duty to arbitrate arose.[207]

Although *Burns* and *Howard Johnson* leave the *Wiley* holding in existence, they have virtually destroyed the basis for the holding. The Court's decision in *Wiley* that the arbitration clause survived the merger rested on the assumption that at least *some* of the substantive rights created by the contract could survive a merger. The later cases demonstrate that the contract ceases to exist when a successor employer takes over. The practical result is that a successor may be required to engage in a pointless arbitration proceeding. For example, the arbitrator could find the substantive rights of the contract did not survive the merger because a substantial continuity identity between the businesses was lacking. Even if the requisite continuity existed, the substantive rights might be unenforceable if as a matter of law the successor is not bound by his predecessor's agreement.

Wiley involved a second issue that received far less attention at the time but which has since become of more concern. The union in *Wiley* brought suit to compel arbitration a week before the collective bargaining agreement expired, but it sought a remedy which would extend beyond the termination date.[208] This issue concerns the effect of contract termination on arbitration. In fact, a series of issues are involved, including whether arbitration must be initiated before termination; whether the substance of the dispute must involve rights arguably accrued before termination; and whether the arbitrator

204. *Id.* at 285.

205. D. NOLAN, LABOR ARBITRATION LAW AND PRACTICE IN A NUTSHELL 195-96 (1979); F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 211 (1977).

206. 417 U.S. 249 (1974).

207. *Id.* at 259-60, 264-65.

208. Several of the issues the union sought to arbitrate, as set out in the complaint, posed questions about rights "now and after January 30, 1962." 376 U.S. at 552.

may issue an award continuing contractual rights beyond the termination date.[209]

The *Wiley* Court perfunctorily disposed of the termination issue by treating the dispute solely as one over accrual of rights. The union, however, sought *continuation* of rights and not merely enforcement of already accrued rights.[210] Because the union's claims were arbitrable, the arbitrator had to decide whether the parties had in fact agreed to the accrual of the claimed rights. The arbitrator took a restricted view of the parties' intentions, and held that the substantive rights did not survive the termination of the contract.[211]

The Supreme Court again considered post-termination arbitration[212] in *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers Union*.[213] The parties had entered into a collective bargaining agreement containing a provision for severance pay. The employer closed the plant after the contract expired and refused to arbitrate subsequent claims for severance pay. The Court held the dispute arbitrable notwithstanding the expiration of the contract. The Supreme Court recognized in dicta that courts should not compel arbitration of disputes that a party has not agreed to arbitrate. Nevertheless, the Court applied the *Steelworkers Trilogy* test that an order to arbitrate should not be denied absent clear evidence that the arbitration agreement was not intended to cover the dispute.[214] The result is consistent with a strong presumption of arbitrability to strengthen the arbitration system and to save the federal judiciary from involvement in numerous minor disputes.[215]

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209. For an illuminating discussion of several problems in this area, see Goetz, *Arbitration After Termination of a Collective Bargaining Agreement*, 63 VA. L. REV. 693 (1977). *See also* Stulberg, *Survival of the Agreement to Arbitrate: How Long?*, N.Y.U. 36TH ANN. CONF. ON LAB. at 10-1 (1983).

210. 376 U.S. at 552. The Court stated:

> It is reasonable to read the claims as based solely on the Union's construction of the Interscience agreement in such a way that, had there been no merger, Interscience would have been required to discharge certain obligations notwithstanding the expiration of the agreement. We see no reason why parties could not, if they so chose, agree to the accrual of rights during the term of an agreement and their realization after the agreement had expired.

Id. at 555.

211. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210 (1970) (Roberts, Arb.). According to the arbitrator, the agreement terminated on January 12, 1961, when the predecessor's employees were commingled with the successor's employees, rather than on the stated expiration date of the agreement. *Id.* at 218.

212. *See also* Piano & Musical Instrument Workers Local 2549 v. W. W. Kimball Co., 379 U.S. 357 (1964) (per curiam), *rev'g*, 333 F.2d 761 (7th Cir. 1964). The Circuit Court held inarbitrable a claim for reinstatement of laid off employees that arose after the termination of the contract. 333 F.2d at 765. Citing *American Manufacturing* and *Wiley*, the Supreme Court reversed without explanation. The Supreme Court later interpreted *Kimball* as rejecting any distinction between cases arising before and those arising after termination, so long as they at least arise *under* the contract. Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 249, 252, *reh. denied*, 430 U.S. 988 (1977); *cf.* Goetz, *supra* note 209, at 704-05.

213. 430 U.S. 243, *reh. denied*, 430 U.S. 988 (1977).

214. 430 U.S. at 252-55; Goetz, *supra* note 209, at 704-05.

215. Goetz, *supra* note 209, at 729. The termination issue continues to stimulate litigation.

While the *Wiley* line of cases extended the *reach* of arbitration agreements, a second line of post-*Trilogy* cases increased the *impact* of arbitration agreements. Beginning with *Teamsters Local 174 v. Lucas Flour Co.*,[216] the Supreme Court increased the significance of arbitration agreements by giving them consequences the parties may not have considered or foreseen. *Lucas Flour* held that a no-strike clause will be implied from an agreement to arbitrate. Thus a union choosing to strike over a dispute it had agreed to arbitrate would be liable for damages caused by the strike. Alternatively, the availability of arbitration will deprive an employer of its statutory right to sue for damages for breach of a collective bargaining agreement; if the contract allows the employer to refer a claim to arbitration, a court will stay a section 301 damage suit pending arbitration.[217]

The most significant decision in this second line of cases is *Boys Markets, Inc. v. Retail Clerks Local 770*.[218] *Boys Markets* alleviated an anomalous situation that was caused by three inconsistent Supreme Court decisions. In *Sinclair Refining Co. v. Atkinson,* the Supreme Court held that the anti-injunction provisions of the Norris-LaGuardia Act[219] prohibited a federal district court from enjoining a strike in breach of a collective bargaining agreement.[220] Later that year, the Court in *Dowd Box v. Courtney* held that state courts had concurrent jurisdiction with federal courts over section 301 suits.[221] State courts had to apply federal law but presumably retained their own procedural and remedial law. One difficulty with concurrent jurisdiction was that state courts were not directly limited by the Norris-LaGuardia Act[222] and some states allowed specific enforcement of no-strike agreements. In other words, state courts, exercising jurisdiction under a federal statute and applying federal substantive law, could enjoin strikes even though federal courts were prohibited from doing the same.

This approach, although impractical, would have been logical but for one complicating factor. Under *Avco Corp. v. IAM Lodge 735*,[223] a union sued in a state court for breaching a no-strike clause could avoid an injunction by removing the case to the federal courts. The combination of the *Sinclair, Dowd Box* and *Avco* decisions created an untenable situation. The Court in *Dowd Box* held that Congress intended section 301 to supplement rather than displace state court jurisdiction in collective bargaining agreement cases. Yet, in *Avco* and *Sinclair,* the Court permitted a de facto displacement of state injunctive power by allowing unlimited removal to federal courts.[224]

The NLRB recently heard oral arguments on a case in which the employer argued that *Nolde Bros.* applied only to accrued or vested rights and did not require arbitration of disputes first arising after expiration of the contract. 237 Daily Lab. Rep. (BNA) A-1 (Dec. 8, 1983).

216. 369 U.S. 95 (1962).
217. Drake Bakeries, Inc. v. Bakery Workers Local 50, 370 U.S. 254, 264 (1972).
218. 398 U.S. 235 (1970).
219. 29 U.S.C. §§ 101-115 (1970).
220. 370 U.S. 195 (1962).
221. 368 U.S. 502 (1962).
222. 29 U.S.C. §§ 101-115 (1976).
223. 390 U.S. 557 (1968).
224. D. NOLAN, *supra* note 205, at 54-55 (1979).

To resolve this dilemma, the Court in *Boys Markets* reversed *Sinclair*, subject to certain limitations. The Court held that where the parties provided for mandatory grievance arbitration, federal courts could enjoin a strike in breach of a no-strike clause if employees were striking over a grievance that "both parties are contractually bound to arbitrate"; the employer was willing to arbitrate; normal equity requirements for issuing an injunction were met; and the employer was required to arbitrate as a condition for obtaining the injunction.[225]

Subsequent cases have both broadened and limited the impact of *Boys Markets*. *Gateway Coal Co. v. UMW*[226] represents the broadest reach of the *Boys Markets* doctrine. The collective bargaining agreement in that case contained a mandatory arbitration clause but not an express no-strike clause. In *Lucas Flour*, the Supreme Court held that a no-strike clause would be implied from a mandatory arbitration clause and breach of the implied no-strike clause would make a union liable for damages.[227] *Gateway Coal* extended this holding to injunction actions. Henceforth, a union agreeing to a mandatory arbitration clause would be held to have agreed impliedly not to strike over matters subject to that clause. Strikes in violation of that implied agreement could be enjoined.

Unions have extended the reach of *Boys Markets* by seeking to enjoin employers from changing contractual terms prior to arbitration. Unions have enjoyed considerable success in such "reverse *Boys Markets*" or "status quo injunction" cases, especially in plant closure or removal situations, and when employers have attempted to change work rules unilaterally.[228] This union success has redressed some of the unfairness resulting from the resurrection of the labor injunction. The success, however, has also reduced the possibility that *Boys Market* might be overruled or legislatively changed.

The Supreme Court placed additional limits on the *Boys Markets* doctrine in *Buffalo Forge Co. v. United Steelworkers of America*.[229] An employer sought

225. 398 U.S. at 253-54.

226. 414 U.S. 368 (1974).

227. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962). *See supra* notes 216-17.

228. *See, e.g.*, IAM Local Lodge 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981) (employer enjoined from selling assets pending arbitration of a union grievance over a successorship clause); United Steelworkers of Am. v. Fort Pitt Steel Casting, 598 F.2d 1273 (3d Cir. 1979) (employers enjoined from terminating insurance coverage); Teamsters Local 71 v. Akers Motor Lines, Inc., 582 F.2d 1336 (4th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979) (employer enjoined from further encumbering capital assets during partial liquidation). *See generally* Kratzke, *Enjoining Employers Pending Arbitration: Some Misconceptions and Clarifications*, 24 ST. LOUIS U.L.J. 92 (1979); Payne, *Enjoining Employers Pending Arbitration — From* M-K-T *to* Greyhound *and Beyond*, 3 INDUS. REL. L.J. 169 (1979); Gould, *On Labor Injunctions Pending Arbitration: Recasting* Buffalo Forge, 30 STAN. L. REV. 533, 552-61 (1978).

Despite the apparent equity of allowing unions as well as employers to have access to the injunction remedy, a strong argument can be made that the theory behind *Boys Markets* does not work in reverse. *See* Kratzke, *supra*. This doubt about the validity of "reverse Boys Markets" injunctions is confirmed by the Supreme Court's decision in Buffalo Forge v. United Steelworkers of Am., 428 U.S. 397 (1976). That case held that an injunction may be issued only to enforce the promise to arbitrate because other clauses are not specifically enforceable. If that is so it may be inappropriate to grant a "status quo" injunction even as a form of interim relief.

229. 428 U.S. 397 (1976).

to enjoin a union from ordering members of two bargaining units to honor the picket lines of a third bargaining unit which was negotiating a new contract with the employer. The sympathy strike itself violated the collective bargaining agreement and thus was subject to arbitration; however, the underlying cause of the strike, the third bargaining unit's failure to achieve its objectives in negotiations, was not subject to arbitration. In a five-to-four decision, the Court ruled that *Boys Markets* did not authorize injunctions against sympathy strikes because such strikes were not "over" an arbitrable issue. Sympathy strikes would neither frustrate the arbitration process nor deprive the employer of the benefit of his bargain, which was to secure the union's promise not to strike over arbitrable disputes.

Boys Markets and *Buffalo Forge* may appear to be inconsistent.[230] The same policies that led the Supreme Court in *Boys Markets* to create an exception to the Norris-LaGuardia Act, promoting arbitration and protecting an employer's contractual right to be free from strikes, also support injunctions against sympathy strikes. In a broader sense, though, *Buffalo Forge* reinforces the essence of *Boys Markets,* that injunctions are available to protect an agreed arbitration process but not to enforce contract provisions generally. When the union cannot bring the underlying dispute to arbitration, there is no persuasive reason to override the express language of the Norris-LaGuardia Act. Moreover, *Buffalo Forge* places some rational limits on the issuance of *Boys Markets* injunctions. These limits prevent overuse of the labor injunction and make the *Boys Markets* decision less vulnerable to attack.

Overall, the post-*Trilogy* cases have vastly extended the reach of *Lincoln Mills* and the *Trilogy*. Paradoxically, the web of the law has wrapped tighter around labor arbitration agreements, yet it has given them unprecedented strength. Intentionally or unintentionally, the courts put the completing touches on a system of grievance resolution fostered, but barely envisioned, by Congress when it enacted section 301 in 1947.

The Duty of Fair Representation

Congress passed the National Labor Relations Act (NLRA)[231] in 1935 largely to give employees more bargaining leverage with their employers.[232] Accordingly, the NLRA protected employees' right to organize and to bargain collectively. The Act also embodied a fundamental characteristic of American labor law, the "exclusivity principle." Under this principle, a union selected by a majority of employees in an appropriate bargaining unit becomes the exclusive representative for all employees in the unit.[233] Exclusivity was thought

230. D. NOLAN, *supra* note 205, at 59-60.

231. Ch. 372, 49 Stat. 449 (1935) (also known as the Wagner Act) [codified as amended as the Labor Management Relations Act at 29 U.S.C. §§ 151-68 (1976)].

232. Ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1976)).

233. Ch. 372 § 9(a), 49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 159 (1976)). The NLRA was not the first law to embody the exclusivity principle. Several 19th century state arbitration laws contained "majority preference" provisions reflecting the same desire to strengthen the bargaining position of the designated representative. *See* Nolan & Abrams, *Early Years, supra* note 2, at 381 n.40; Schreiber, *Majority Preference Provisions in Early State Labor Arbitration Statutes—1880-1900,* 15 AM. J. LEGAL HIST. 186 (1971). The Rail-

necessary to enable workers to speak to employers with a single, powerful voice. This grant of exclusive authority, however, deprived individual employees of the right to bargain through other representatives or even to negotiate individual employment contracts.[234]

If labor relations involved only a single conflict between the competing interests of an employer and all his employees, the unqualified exclusivity principle makes excellent sense. The concept is less satisfactory when different interests arise between workers or when the union's interests as an entity diverge from those of some or all of the employees. These differences inevitably occur because bargaining units are not homogeneous and because hierarchical unions often seek objectives that do not always coincide with the interests of their members.[235]

The federal courts attempted to resolve this tension between exclusivity and individualism by requiring those with the right of exclusive representation to exercise that right fairly.[236] Without this duty an exclusive representative could discriminate against disfavored employees and, because exclusivity results from a governmental grant of power, such discrimination would raise serious constitutional questions. The Supreme Court addressed the problem of discrimination by an exclusive representative in *Steele v. Louisville & Nashville Railroad.*[237] The Court interpreted the labor laws as imposing a duty on the bargaining representative to protect employees' interests in the same manner as the Constitution imposes a duty upon a legislature to give equal protection to its constituents' interests.

The *Steele* controversy stemmed from contract negotiations by the Brotherhood of Locomotive Firemen and Enginemen. The Brotherhood, the duly certified representative of all the railroad's firemen, refused to admit any black members and negotiated to exclude black firemen from employment. The Court interpreted the Railway Labor Act as obligating the exclusive representative to "represent non-union or minority union members of the craft *without hostile discrimination, fairly, impartially, and in good faith.*"[238]

The *Steele* Court expressly recognized that unions lawfully may choose among policies that affect employees differently, but concluded that unions

way Labor Act of 1926 contained language similar to that of the NLRA. Ch. 691, § 2, 48 Stat. 1186 (current version at 45 U.S.C. § 152 (1976)).

234. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

235. Levine & Hollander, *The Union's Duty of Fair Representation in Contract Administration,* 7 EMPL. REL. L.J. 193, 194 (1981). *See generally* Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?,* 123 U. PA. L. REV. 897 (1975).

236. Levine & Hollander, *supra* note 235, at 194.

237. Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944).

238. 323 U.S. at 204 (emphasis added). This case was decided on the basis of the Railway Labor Act, 45 U.S.C. § 151 (1976), but the same principle was quickly applied to cases arising under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 (1976). *See* Syres v. Oil Workers Int'l Union Local 23, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1952). All of these cases involved private suits for damages. In 1962, the National Labor Relations Board held that breach of the duty of fair representation also constituted an unfair labor practice. NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied,* 326 F.2d 172 (2d Cir. 1963). *Accord* Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

could not act on the basis of irrelevant or invidiously hostile considerations.[239] Eight years later the Court found a union did not violate the fair representation duty when it negotiated a seniority provision benefiting new employees at the expense of previously hired employees.[240] The Court held that representatives must be permitted a "wide range of reasonableness" provided they act in good faith and with honesty of purpose.[241]

Early fair representation cases involved contract negotiation and emphasized protection of union discretion absent a showing of bad faith or discrimination. Increasingly in the last two decades, the fair representation duty has been applied to contract administration and to arbitration. In the process, many federal courts shifted the standard of fair representation from avoidance of bad faith to avoidance of arbitrary or negligent conduct. This shift may have increased pressures on unions to arbitrate more grievances and to conduct arbitrations in a more formal fashion.

In the landmark case of *Vaca v. Sipes*,[242] the Supreme Court ruled that the duty of fair representation in contract administration was inherent in the Labor Management Relations Act (LMRA). The Court found that a union did not breach its duty by declining to pursue a dubious grievance to arbitration. Speaking for the Court, Justice White wrote that an individual employee has no absolute right to have his grievance arbitrated. Repeating the standard formulation that a breach occurs only when the union's conduct is "arbitrary, discriminatory, or in bad faith," he added another term to the formulation: "We accept the proposition that a union may not arbitrarily ignore a meritorious grievance or *process it in a perfunctory fashion*."[243]

Although finding no breach of duty in the case, Justice White discussed the appropriate damages if the union had breached the duty. He concluded the employer would be liable initially for damages for breach of contract. The union, however, would be liable for any increase in damages caused by the union's breach of its duty of fair representation. The significance of this dicta was not fully apparent until *Bowen v. United States Postal Service*.[244] The

239. 323 U.S. at 202-03.

240. Ford Motor Co. v. Huffman, 345 U.S. 330 (1952). The collective agreement gave new employees seniority credit for time spent in the armed forces. As a result, some newly-hired veterans received greater seniority than some employees hired during the War. *Id.* at 334.

241. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1952). *See also* Humphrey v. Moore, 375 U.S. 335, 350 (1964) (Court upheld an agreement dovetailing seniority lists even though some employees were laid off as a result).

242. 386 U.S. 171 (1967). The Supreme Court first applied the duty of fair representation to grievance processing in Conley v. Gibson, 355 U.S. 41 (1957), a Railway Labor Act case. In *Conley*, discharged black employees vainly appealed to their union for assistance. The Court stated the duty to represent all workers fairly "does not come to an abrupt end . . . with the making of an agreement between union and the employer." *Id.* at 46. The Court held the union could not lawfully discriminate in carrying over its grievance functions any more than in negotiating a contract.

243. 386 U.S. at 190-91 (emphasis added). The Supreme Court had hinted that the perfunctory handling of a grievance would breach the duty of fair representation when it suggested in dicta that an employee might sue an employer directly without using the contractual procedures where "the union refuses to press or only perfunctorily presses the individual's claim. . . ." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

244. 103 S. Ct. 588 (1983).

Court in *Bowen* interpreted *Vaca* as meaning the breaching union would be responsible for damages from the time the employer's breach would have been corrected had the union not breached its duty of fair representation. This interpretation could effectively shift the bulk of damages in a given case onto the union.

More subtle problems occur when the alleged breach of duty consists not of overt discrimination, as in *Steele,* or of a failure to act, as in *Bowen,* but of a failure to perform competently. For example, in *Hines v. Anchor Motor Freight*[245] the defendant union took the grievances of certain discharged employees to a bipartite committee which functioned as an arbitration board. Because the union had not fully investigated the facts, critical information never reached the committee. The committee upheld the discharges and the employees sued both the union and the company. Reasoning that the employer had acted in good faith, the district court dismissed the action and the court of appeals affirmed.

On appeal, the Supreme Court reversed and held that a union's breach of its fair representation duty in processing a grievance removes the bar of finality to which the arbitrator's decision is otherwise entitled.[246] Unfortunately, the Court provided little guidance concerning the standards for a union's quality of performance.[247] The Court repeatedly referred to the *Steele* standard which prohibits only discrimination and bad faith representation.[248] The Court also recognized that grievance processes "cannot be expected to be error-free,"[249] but it approvingly cited the broader standard of *Vaca,* which finds a breach if the union ignored the complaint or processed it in a "perfunctory" manner.[250]

Lower courts have experienced difficulty applying these vague and potentially inconsistent standards.[251] Before analyzing the standards applied by federal courts in defining a union's duty, one preliminary distinction should be noted. Honest mistakes of judgment are more readily pardoned than acts of negligence. A union will not be held in breach of its duty if, after reviewing

245. 424 U.S. 554 (1976).

246. *Id.* at 556.

247. In fact, the Court did not reach the question of whether or not the Union's performance in this case passed muster. *Id.* at 572-73.

248. *E.g., id.* at 570, 571 (referring to the union's duty to represent employees "honestly and in good faith and without invidious discrimination or arbitrary conduct").

249. *Id.* at 571.

250. *Id.* at 569. This broad phrasing seemingly eliminated an earlier suggestion that positive discrimination is a necessary element in proving a breach of the duty of fair representation. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Empl. v. Lockridge, 403 U.S. 274, 301 (1971).

251. For the purposes of this article, it is sufficient to sketch out the trend of federal court cases and to indicate the parameters of the duty as applied to arbitration. Supreme Court guidance is needed to resolve the lingering issues. The reader interested in more detail will not lack for sources. *E.g.,* T. BOYCE, FAIR REPRESENTATION, THE NLRB, AND THE COURTS (1978); THE DUTY OF FAIR REPRESENTATION (J. McKelvey, ed. 1977); Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases,* 24 B.C.L. REV. 1 (1982); Rabin, *The Impact of the Duty of Fair Representation Upon Labor Arbitration,* 29 SYRACUSE L. REV. 851 (1978); Vandervelde, *A Fair Process Model for the Union's Fair Representation Duty,* 67 MINN. L. REV. 1079 (1983).

the facts of a grievance, it declines to take a dubious case to arbitration.[252] If the union simply neglects to demand arbitration within the contractual period, however, liability may attach.[253] The same distinction applies to conduct within an arbitration. Choosing a weak line of argument would not violate the duty,[254] but failure to investigate alternative approaches may well do so.[255] The reason for this distinction is apparent: while the union must be granted a "wide range of reasonableness" in representing a bargaining unit,[256] errors caused by neglect are not within the zone of reasonableness.

In general terms, only three possible standards are applicable to the duty of fair representation. A union could be liable for breach due to negligence, gross negligence, or bad faith and actual discrimination. Most federal courts have chosen the middle path and demand a showing of more than ordinary negligence but not proof of actual bad faith. This position most nearly reflects the Supreme Court's views and best accords with the realities of a union's role.

A few courts have indicated that unions may be liable to employees for negligent errors in processing grievances. The leading example of this interpretation is *Ruzicka v. General Motors Corp.* [*Ruzicka I*].[257] In that case, the Sixth Circuit stated that a union's "negligent" failure to comply with a contractual time limit constituted arbitrary handling of a grievance in breach of the union's duty.[258] This approach conflicts with the spirit of the Supreme Court's fair representation decisions. Those decisions describe breach of fair representation in terms more serious than simple negligence, such as hostile discrimination and bad faith. The decisions also emphasize the union's need for a wide zone of reasonableness in which to exercise its representation functions[259] and caution that a breach must involve more than mere errors of judgment.[260]

In addition to conflicting with Supreme Court rulings, the *Ruzicka I* approach is also unrealistic. Unions operate through thousands of agents, most of them part-time, unpaid, and untrained. Unions use a grievance and arbitration system designed to avoid the formality and rigidity of the courts.[261] To

252. Vaca v. Sipes, 386 U.S. 171, 191-92 (1967).

253. *E.g.*, Foust v. International Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978), *modified*, 442 U.S. 42 (1979).

254. Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972).

255. Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

256. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1952).

257. 523 F.2d 306 (6th Cir. 1975).

258. *Id.* at 310. *See also* Milstead v. International Bhd. of Teamsters Local 957, 580 F.2d 232 (6th Cir. 1978) (duty could be breached by failing to check the applicability of a contract provision); *cf.* Connally v. Transcon Lines, 583 F.2d 199 (5th Cir. 1978) (negligent conduct may in some circumstances breach the duty). This approach has received only slight scholarly support. *See, e.g.*, Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence*, 65 CORNELL L. REV. 634 (1980).

259. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1952); Foust v. International Bhd. of Elec. Workers, 442 U.S. 42, 51 ("union discretion is essential to the proper functioning of the collective bargaining-system").

260. Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 (1976).

261. On the other hand, the arbitration process must be fundamentally fair in order to

demand or expect error-free grievance processing is unreasonable and impractical.[262] For these reasons almost all recent decisions have rejected the simple negligence approach,[263] and even the Sixth Circuit has retreated.[264]

At the opposite extreme, a few other courts have demanded proof of bad faith before finding a union in breach of its duty.[265] This approach also conflicts with previous Supreme Court expressions. The Supreme Court, while often speaking in terms of bad faith, has repeatedly used less demanding terms such as "arbitrary" conduct and "perfunctory" processing of grievances. Moreover, the bad faith standard places an unreasonable burden on plaintiffs because workers usually depend on their bargaining representative to process grievances competently. Requiring workers to prove a union's bad faith in order to maintain a suit for damages would immunize the most egregious union errors as long as the union does not overtly discriminate. For these reasons, most federal courts allow proof of a breach without evidence of actual bad faith.[266]

As a result, most courts apply the middle standard with a test approximating gross negligence. In grievance handling, the union's conduct must not be "arbitrary" or "perfunctory." Although employing varying terms,[267] the

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warrant its special status under national labor policy. *See* Abrams, *The Integrity of the Arbitral Process,* 76 MICH. L. REV. 231 (1977).

262. 424 U.S. at 571 (the grievance process "cannot be expected to be error-free"). *See also* St. Antoine, *Judicial Review of Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* 75 MICH. L. REV. 1137 (1977). Professor St. Antoine warned that the principle "can hardly be faulted as an abstract proposition," but the results "could be mischievous if the courts become too quick to equate a halting, inexpert arbitration presentation by a lay union representative with 'bad faith' or 'perfunctoriness.' " *Id.* at 1155.

263. 2 THE DEVELOPING LABOR LAW 1325 (C. Morris, 2d ed. 1983). For example, the Eighth Circuit in 1980 held flatly that "[m]ere negligence, poor judgment or ineptitude" will not establish a breach of the union's duty. NLRB v. American Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980).

264. Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 (6th Cir. 1981) (*"Ruzicka II"*). The retreat has not been a rout, however. In Ruzicka v. General Motors Corp., 707 F.2d 259, 260 (6th Cir. 1983) (*"Ruzicka III"*), the court upheld dismissal of the fair representation suit but cited *Ruzicka I* for the proposition that "good faith errors" do not insulate unions from liability in § 301 cases.

265. *See* Medlin v. Boeing Vertol Co., 620 F.2d 957 (3d Cir. 1980). "To violate the duty . . . it is necessary that the union act with a bad faith motive. . . . In order to state a claim for breach of this duty, it is essential that plaintiffs allege a bad faith motive on the part of the union." *Id.* at 961. *See also* Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983) (requiring proof of intentional misconduct to show union violated its duty of fair representation). Other cases are cited at 2 THE DEVELOPING LABOR LAW, *supra* note 263, at 1323 n.180.

266. T. BOYCE, *supra* note 251, at 34-54.

267. The Fourth Circuit stated that a union representative breaches the duty of fair representation when he is "so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members that the conduct could be equated with arbitrary action." Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980). The Ninth Circuit finds a breach by unintentional conduct if it is "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary," or if the conduct amounts to "reckless disregard for the rights of the individual employee," Robesky v. Qantas Empire Airways, 573 F.2d 1082, 1090 (9th Cir. 1978), or if it is "irrational, intentional, or egregiously unfair," Price v.

courts are reasonably consistent in granting the union wide discretion provided it exercises reasonable judgment.[268] The union's discretion includes decisions to file or not to file a grievance, or to take or not to take a grievance to arbitration. The union's discretion also encompasses the choice of bringing a grievance advantageous to one employee or group, even if it would be disadvantageous to another employee or group. On the other hand, failure to pursue a grievance for discriminatory reasons, or for no reason at all, will breach the duty.[269]

Less obvious are the guideposts regarding the quality of the union's representation in arbitration. A blatant failure to investigate a matter in dispute is likely to constitute a breach,[270] but the union need not conduct a fully professional investigation.[271] The union need not find and use all possible arguments,[272] but ignorance of a crucial contract provision[273] or failure to raise critical points[274] could easily amount to arbitrary or perfunctory conduct. In any case, even perfunctory handling of a grievance will not violate the duty unless it contributed to an erroneous outcome.[275]

The union's duty of fair representation continues even after the arbitration's conclusion, but in a weakened form. The NLRB has held that a negligent failure to seek enforcement of a favorable arbitration award did not breach the duty of fair representation.[276] A district court held a union is not obliged to seek vacation of an unfavorable award because that was not one of the contractual remedies to which the employee had a right.[277] In a very questionable decision, another district court found that a union breached

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Southern Pac. Transp. Co., 586 F.2d 750, 754 (9th Cir. 1978). Similarly, the Fifth Circuit requires conduct which is "so poor as to deprive the plaintiffs of a fair hearing." Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978).

268. *E.g.*, Vaca v. Sipes, 386 U.S. 171 (1967) (conflicting medical information); King v. Space Carriers, Inc., 608 F.2d 283 (8th Cir. 1979) (earlier arbitration award resolved the matter); Buchanan v. NLRB, 597 F.2d 388 (4th Cir. 1979) (lack of merit). *See generally* 2 THE DEVELOPING LABOR LAW, *supra* note 263, at 1328-30.

269. 2 THE DEVELOPING LABOR LAW, *supra* note 263, at 1331-32. *See also* Foust v. International Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978), *modified*, 442 U.S. 42 (1979); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Griffin v. International Union, United Auto., 469 F.2d 181, 183 (4th Cir. 1972).

270. *E.g.*, Hines v. Anchor Motor Freight, 424 U.S. 554 (1976); Tatum v. Frisco Transp. Co., 626 F.2d 55 (8th Cir. 1980); Beverly Manor Convalescent Center, 229 N.L.R.B. 692 (1977).

271. San Francisco Web Pressmen & Platemakers Union No. 4, 249 N.L.R.B. 88 (1980) (union need not get explanations from every grievant); Washington-Baltimore Newspaper Guild Local 35, 239 N.L.R.B. 1321 (1979) (no investigation necessary in light of the union's reasonable interpretation of the contract).

272. Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975); Jensen v. Farrell Lines, Inc., 477 F. Supp. 335 (S.D.N.Y. 1979), *rev'd on other grounds*, 625 F.2d 379 (2d Cir. 1980), *cert. denied*, 450 U.S. 916 (1981).

273. Milstead v. International Bhd. of Teamsters Local 957, 580 F.2d 232 (6th Cir. 1978).

274. Miller v. Gateway Transp. Co., 616 F.2d 272 (7th Cir 1980); Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980); Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

275. Hardee v. North Carolina Allstate Serv., 537 F.2d 1255 (4th Cir. 1976).

276. Truck Drivers Union Local 407, 249 N.L.R.B. 59 (1980).

277. Sears v. Cadillac Auto Co., 501 F. Supp. 1350 (D. Mass. 1980).

its duty by misinterpreting an arbitration award and negotiating a new contract provision based on that misinterpretation.[278]

Only a small proportion of fair representation suits are won by plaintiffs, but the possibility of large damage judgments is enough to affect union behavior. Many commentators firmly believe that unions now take weak cases to arbitration that in prior years would have been dropped.[279] The risk of liability may also cause unions to conduct arbitrations more formally even though there is no legal obligation to provide an attorney or a transcript.[280] The result of applying the duty of fair representation in arbitration proceedings may be to render arbitrations more frequent and more legalistic. This result is not altogether desirable. If arbitration is to continue serving as a viable alternative to the judicial resolution of disputes, it must not be transformed into a duplicate of the judicial system. The difficult task facing arbitrators and courts alike is to balance the rights of individuals and parties without sacrificing either to the other. In short, arbitration must simultaneously be efficient, informal, and fair.

Arbitration and the NLRB

The willingness of federal courts to defer to privately negotiated dispute resolution systems has increased immeasurably the importance of labor arbitration. The National Labor Relations Board has adopted a similar though less comprehensive policy and also has contributed to the growth of labor arbitration. Through enforcement of arbitration awards, the courts have discouraged resort to their own processes and encouraged resort to arbitration. By accepting certain arbitral decisions as conclusive of, or influential on, the legal issues before it, the NLRB has indirectly accomplished this objective.[281]

278. Local 4076, United Steelworkers of Am. v. United Steelworkers, 338 F. Supp. 1154 (W.D. Pa. 1972).

279. The best available study of the impact of the fair representation cases on arbitration is Rabin, *supra* note 251, but even that is a bit dated. On arbitral opinion, *see, e.g.*, NATIONAL ACADEMY OF ARBITRATORS, *supra* note 84, interview with G. Allen Dash, Jr., at 45, 49; interview with William E. Simkin, at 23.

280. *Cf.* Del Casal v. Eastern Air Lines, 465 F. Supp. 1254 (S.D. 1979), *aff'd*, 634 F.2d 295 (5th Cir. 1981) (attorney); *but see* Grovner v. Georgia-Pacific Corp., 625 F.2d 1289 (5th Cir. 1980) (transcript); Curtis v. United Transp. Union, 102 L.R.R.M. (E.D. Ark. 1979) (union obliged to provide an "expert" to represent the grievant when technical issues are in dispute).

281. A few examples illustrate the overlap. Employers must bargain in good faith with the union before changing terms or conditions of employment. The union, however, may grant an employer the right to make certain changes without bargaining. Whether a proposed subcontracting plan would violate the employer's obligation to bargain in good faith may therefore depend on interpretation of a contract's management rights clause. In such a case the contractual issue will be determinative of the statutory issue.

Employers are prohibited from discharging employees because of their union membership or activities. A collective bargaining agreement may prohibit similar conduct, or it may simply require "just cause" for a discharge. The contractual issue may not be determinative of the statutory issue, but it may be influential.

The Board is charged with determining which union, if any, represents certain employees. A contract, however, may require assignment of certain work to a particular category of employee, or may define the scope of a union's representation by reference to work or to

In these areas of overlap, it may appear that the LMRA's substantive grant of authority to the Board in contract interpretation cases conflicts with the Act's stated preference for privately negotiated grievance resolution systems. The Supreme Court in a series of cases held that Congress intended the statutory and private systems to overlap. In *NLRB v. C & C Plywood Corp.*,[282] for example, the Court affirmed the Board's power to interpret contract terms, even though Congress had not made breaches of contracts unfair labor practices. Even where parties had agreed to a mandatory arbitration clause, the Court refused to subject the Board to the mandatory deferral policy of the *Steelworkers Trilogy*.[283] Just as parties to an arbitration agreement may use arbitration notwithstanding the Board's availability to resolve a dispute, so the Board may interpret and enforce a collective agreement even if arbitration is available.[284] While stating a preference for arbitration, Congress expressly provided that the Board's power "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."[285] Thus the Board's jurisdiction cannot be supplanted by the parties to a collective agreement.

The Board has some discretion in deciding when to exercise its jurisdiction, however, and it may therefore voluntarily defer to arbitration. The strongest case for deferral arises when an arbitrator has already ruled. A weaker case exists when the injured party has voluntarily invoked the grievance and arbitration process but the arbitrator has not yet ruled. The weakest case for deferral is when the grievance process has not been invoked. The Board has adopted deferral rules for each of these situations.

In a seminal decision on post-arbitral deferral, *Spielberg Manufacturing Co.*,[286] the Board deferred to the decision of an arbitration panel which had denied reinstatement to four strikers accused of picket-line misconduct. The Board formulated three criteria which must be met before deferral would be appropriate: the proceedings must be fair and regular; all parties must agree to be bound by the award; and the decision must not be repugnant to the purposes and policies of the Act.[287] The Board explained that this deferral

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categories of workers. Disputes relative to the second situation—which union represents the workers—are representation disputes subject the Board's jurisdiction. The former type—which employees are entitled to do the work—are work-assignment disputes subject to the collective agreement. Lines between these categories are frequently difficult to draw. As a result, the contractual issue may be determinative of the legal issue, or may only be influential in resolving the legal issue, or may be irrelevant to the legal issue. *See also* 1 THE DEVELOPING LABOR LAW, *supra* note 263, at 910-13 (discussion of the types of cases in which the Board may be concerned with interpretation of collective agreements).

282. 385 U.S. 421 (1967). *C & C Plywood* did not involve an arbitration clause, but a companion case did and was resolved in the same way. NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

283. 385 U.S. at 436.

284. *Compare* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) *with* NLRB v. Strong Roofing & Insulating Co., 393 U.S. 357 (1969).

285. LMRA, § 10(a), 39 U.S.C. § 160(a) (1976).

286. 112 N.L.R.B. 1080 (1955).

287. Subsequent to *Spielberg*, the Board added a fourth criterion: the issue involved in an unfair labor practice case must have been presented to and considered by the arbitrator. Raytheon Co., 140 N.L.R.B. 883 (1963), *enforcement denied on other grounds*, 326 F.2d 471

policy would facilitate the national labor policy of promoting industrial peace by encouraging collective bargaining. Arbitration is "part and parcel of the collective bargaining process itself," said the Board, and awards should be respected unless the arbitration proceedings were tainted or the result was repugnant to the Act.[288]

The Supreme Court has indicated approval of the *Spielberg* policy,[289] and in general the federal appellate courts also have been supportive. Some courts have imposed additional requirements before approving deferral. For example, several courts have insisted that the arbitral tribunal must "clearly decide" the issue to which the Board is urged to give deference and the issue must be one within the tribunal's competence.[290] As the Board subsumed these new criteria as its own,[291] its deferral policy became so embedded that courts now actually require the Board to defer in some cases.[292]

When a charging party voluntarily submits a matter to a grievance procedure and the case is not suitable for pre-arbitral deferral, the Board will usually defer decision on the unfair labor practice charge pending completion of the grievance process.[293] This policy forces an aggrieved person into an early choice. If a worker actively pursues a grievance, the Board will defer action pending issuance of an arbitration award. If the worker would rather have a Board determination, he must forego use of the grievance machinery or withdraw the grievance already filed. If he opts for the Board and the charge is not considered meritorious, he may be left with no remedy at all.[294]

The Board has struggled most with pre-arbitral deferral. Until 1971, the Board did not require use of a grievance procedure before filing an unfair labor practice charge; in other words, failure to exhaust contractual remedies

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(1st Cir. 1964). Recently the Board has indicated that a general presentation of the facts necessary to resolve the statutory issue will suffice. Olin Corp., 268 N.L.R.B. No. 86, 115 L.R.R.M. (BNA) 1056 (1984).

288. International Harvester Co., 138 N.L.R.B. 923, 926-27 (1962), *enforced sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied,* 377 U.S. 1003 (1964).

289. Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 271 (1964).

290. Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974). *See also* NLRB v. Magnetics Int'l, 699 F.2d 806, (6th Cir. 1983); Stephenson v. NLRB, 550 F.2d 535, 536 (9th Cir. 1977) (arbitrator must specifically deal with the statutory issue).

291. In Suburban Motor Freight, 247 N.L.R.B. 146 (1980), and Propoco, Inc., 263 N.L.R.B. 1136 (1982), the Board stated that it would defer only when the statutory issue had been presented to and considered by the arbitrator. *See supra* note 287.

292. *E.g.,* NLRB v. Pincus Brothers Inc. — Maxwell, 620 F.2d 367 (3d Cir. 1980); NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir. 1979) (Board must defer to some of the factual issues decided by the arbitral tribunal); Douglas Aircraft v. NLRB, 609 F.2d 352 (9th Cir. 1979); American Freight System v. NLRB, 722 F.2d 828 (D.C. Cir. 1983) (NLRB abused its discretion by not deferring to arbitration award where the statutory issue was subsumed by the contractual issue).

293. This policy was announced in Dubo Mfg. Corp., 142 N.L.R.B. 431 (1963). Ironically the arbitration award in *Dubo* was later disregarded by the Board because the arbitration panel had not considered the statutory issue. Dubo Mfg. Corp., 148 N.L.R.B. 1114 (1964), *enforced,* 353 F.2d 157 (6th Cir. 1965).

294. *See* NLRB Gen. Counsel Memos. Nos. 79-36 (May 14, 1979) and 81-39 (July 17, 1981); 1 THE DEVELOPING LABOR LAW, *supra* note 263, at 936-37.

would not necessarily bar Board action.[295] *Collyer Insulated Wire*[296] dramatically changed that situation. A slim majority of the NLRB deferred action on a union's charge of a failure to bargain. Referring to the congressional preference for private dispute resolution and to arbitrators' special skills in deciding matters arising under established bargaining relationships,[297] the Board stated that pre-arbitral deferral would be appropriate where the dispute arose "within the confines of a long and productive relationship" and there was no claim of anti-union animus; the charged party indicated willingness to arbitrate under an arbitration clause broad enough to cover the dispute before the Board; and the meaning of the contract was central to the statutory dispute. The Board would retain jurisdiction in case the dispute was not settled or submitted to arbitration, or if the final arbitration award did not meet the *Spielberg* standards.[298] The next year, another slim majority of the Board extended *Collyer* from refusal-to-bargain cases to cases involving interference with protected individual rights.[299] Further extensions followed in the next few years.[300]

Reviewing courts generally approved the *Collyer* doctrine.[301] A few courts have been cautious in granting approval, however. The District of Columbia Circuit Court of Appeals indicated, for example, that deferral would be inappropriate when arbitration would impose a severe financial burden on a party or when arbitration might prevent an orderly resolution of the legal issue.[302]

During the Carter administration and in the early years of the Reagan administration, the NLRB took a much less favorable view of arbitration. The Board refused to defer to an arbitration award unless the party advocating deferral demonstrated that the statutory issue had been presented to and clearly decided by the arbitrator.[303] In addition, the Board restricted pre-arbitral deferral to refusal-to-bargain cases.[304] Members Fanning and Jenkins, the most forceful opponents of deferral, have since left the Board and the newly constituted majority appointed by President Reagan has taken an aggressively pro-deferral stance. Recent decisions have once again extended *Collyer* to

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295. 1 THE DEVELOPING LABOR LAW, *supra* note 263, at 926.

296. 192 N.L.R.B. 937 (1971).

297. *Id.* at 839.

298. *Id.* at 842-43. Members Fanning and Jenkins dissented vigorously and continued their opposition to pre-arbitral deferral until they left the Board.

299. The rights originate from §§ 8(a)(1), (3), 8(b)(1)(A), (2) of the LMRA, National Radio Co., 198 N.L.R.B. 527 (1972).

300. 1 THE DEVELOPING LABOR LAW, *supra* note 263, at 932-33.

301. Even the Supreme Court endorsed it, albeit in dictum. William E. Arnold Co. v. Carpenters Dist. Council, 417 U.S. 12, 16 (1974). *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 263, at 933-34.

302. Local 2188, Int'l Bhd. of Elec. Workers v. NLRB, 494 F.2d 1087 (D.C. Cir.), *cert. denied*, 419 U.S. 835 (1974).

303. Suburban Motor Freight, Inc., 247 N.L.R.B. 146 (1980); Propoco, Inc., 263 N.L.R.B. 1136 (1982).

304. General American Transp. Corp., 228 N.L.R.B. 808 (1977), overruling *National Radio Co., supra* note 299.

individual rights cases,[305] and have deferred to arbitration awards even when the statutory issue was not expressly presented to or decided by the arbitrator.[306]

The Board's shifting policies demonstrate the strength of the arguments for and against deferral. On the one hand, Congress and the Supreme Court have repeatedly endorsed grievance arbitration as the preferred method of settling labor disputes. On the other hand, the NLRA establishes public rights and obligates the NLRB to protect those rights. Thus the Board should not ignore arbitration nor should it abdicate its own responsibilities to a private dispute resolution system. What is required, and what the Board is struggling to find, is a policy which fosters arbitration of contractual matters while reserving to the Board statutory matters beyond the special expertise of arbitrators.

Arbitration Statutes

As arbitration gained popularity throughout the country, lack of uniform statutory protection for the arbitration process became more troubling. Some states had no arbitration laws; others had laws inadequate for the needs of the contracting parties. In virtually all states, some of the traditional judicial hostility to arbitration lingered. In the early 1920s, the National Conference of Commissioners on Uniform Laws attempted to draft a uniform arbitration act to cure these ills. Because so many judges and lawyers regarded arbitration as an unwelcome competitor with the judicial system, the final draft did not cover agreements to arbitrate future disputes. This limitation rendered the proposed law worthless and the Conference quickly withdrew it. New York, New Jersey, and about fifteen other states adopted some form of arbitration statute during this period, but few state laws were satisfactory.[307]

In the 1950s the Conference revisited the subject and adopted a model "Act Relating to Arbitration and to Make Uniform the Law with Reference Thereto." The draft was approved by the House of Delegates of the American Bar Association and was amended in 1956. Since then, more than forty states have enacted laws substantially similar to the Uniform Arbitration Act (UAA).[308]

The UAA is relatively simple in purpose and procedure. It emphasizes the validity of arbitration agreements, including those between employers and

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305. United Technologies Corp., 268 N.L.R.B. No. 83, 115 L.R.R.M. (BNA) 1049 (1984), overruling *Suburban Motor Freight* and *Propoco*.

306. In Olin Corp., 268 N.L.R.B. No. 86, 115 L.R.R.M. (BNA) 1056 (1984), the Board stated that it would be sufficient for the contractual and statutory issues to be factually parallel and presented generally to the arbitrator. The Board also increased the burden on the party opposing deferral to show that the award was clearly repugnant to the Act.

307. *The Proposed Uniform Arbitration Act: A Panel Discussion,* 10 PROC. NAT'L ACAD. ARB. 112, 115-16 (1957) (remarks of Dean Maynard Pirsig). Only four states adopted the proposed act. Lerner, *The Uniform Arbitration Act: 25-Year Retrospective,* 186 N.Y.L.J. No. 6, at 1 (July 9, 1981).

308. *See* Lerner, *supra* note 307. The text of the amended act is *reprinted in* 10 PROC. NAT'L ACAD. ARB. 195-200 (1957). The 1956 amendments significantly limited the bases on which a reviewing court could vacate an arbitration award. *Id.* at 203-04.

unions. The UAA authorizes courts to compel compliance with such agreements and to appoint arbitrators if the parties fail to do so. Other sections detail hearing procedures and itemize arbitrators' powers. The Act also provides for issuance of an award by the arbitrators and for confirmation, vacation, or modification of the award by the appropriate court.

The UAA draft was endorsed by the American Arbitration Association, an organization which promotes both commercial and labor arbitration.[309] The proposal received a much frostier reception from the National Academy of Arbitrators (NAA), a professional association of labor arbitrators. In January 1956, the Academy voted to oppose the new act insofar as it would apply to labor arbitration.[310] The Academy's main objection was that under the UAA courts would be granted far too much discretion in vacating arbitration awards.[311] In response to this criticism, the Commissioners amended the draft to limit the courts' power to vacate awards. The Academy considered the amendments insufficient, so it continued its opposition.[312]

The impact of state arbitration laws on labor arbitration is difficult to evaluate because of the diversity in the states' approaches. Some state arbitration statutes exclude labor arbitration agreements,[313] while most others simply do not address issues peculiar to labor arbitration. Nevertheless, state statutes can and do provide a supportive background. The Supreme Court in *Lincoln Mills* stated that courts could look to state law for guidance in resolving contract interpretation questions. The Court specified, however, that any state law used would be absorbed into federal law and would not provide an independent source of rights.[314] States statutes therefore should be applied to labor cases only if they do not conflict with federal labor policy.[315] State arbitration laws are useful in many areas. For example, state laws may grant

309. *Editorial,* 9 ARB. J. (n.s.) 113 (1954).

310. 9 PROC. NAT'L ACAD. ARB. 216-17 (1956). Some of the perceived defects may have been due to the failure of the Academy to express its views to the Commissioners before the act was drafted. The Academy had directed its Committee on Law and Legislation to communicate with the Commissioners and the Commissioners invited comments from that committee but none were forthcoming. The Chairman of the committee, Russell Smith, later explained: "The Chairman feels that he was derelict in failing to move to take advantage of this opportunity and can offer only the plea of an overcrowded schedule." *Id.* at 202 n.4.

311. *Id.* at 211-14, 216.

312. The Academy voted at the same time to begin work on a federal law that would apply only to labor arbitration. The Academy's Committee on Law and Legislation did prepare a draft "United States Labor Arbitration Act," which provided only very limited grounds for judicial review, but Congress has shown no interest in the measure. The text of the Committee's third draft is printed at 13 PROC. NAT'L ACAD. ARB. 159-68 (1960), and an Academy policy statement on the proposed United States Labor Arbitration Act is reprinted at 34 Lab. Arb. (BNA) 941 (1961).

313. *See, e.g.,* 1981 Miss. Laws 1397-1405 (which applies only to construction contracts); S.C. CODE ANN. § 15-48-10(b)(2) (Law. Co-op Supp. 1982) ("notwithstanding any other provisions of law, employers and employees or their respective representatives may not agree that . . . collective bargaining disputes shall be subject to [the South Carolina version of the UAA] and any such provisions so agreed upon shall be null and void"). *See generally* Comment, *The Applicability of State Arbitration Statutes to Proceedings Subject to LMRA Section 301,* 27 OHIO ST. L.J. 692, 703 (1966).

314. 353 U.S. at 457.

315. *See generally,* Comment, *supra* note 313.

arbitrators subpoena power as well as provide for orders to compel or stay arbitration, to appoint arbitrators, or to vacate or modify arbitration awards. Thus state laws "flesh out" the usually terse statement of arbitration rights set forth in the collective bargaining agreement.

Federal law, notably the United States Arbitration Act (USAA),[316] can be used in a similar fashion. Despite early doubts about the applicability of the USAA to collective bargaining agreements, courts since *Lincoln Mills* and the *Steelworkers Trilogy* increasingly have looked to the USAA for guidance.[317] After *Lincoln Mills* no doubt remains that Congress intended section 301 to provide for enforcement of arbitration clauses in collective bargaining agreements. It is appropriate to apply the USAA in such cases, but the courts have not yet agreed whether the law is to be applied in its entirety in a section 301 action, or whether only those sections which are clearly compatible with a section 301 action should be applied.[318] The Supreme Court has indicated the USAA should be used cautiously as a "guiding analogy" to a section 301 action.[319]

Courts in section 301 actions are thus able to take an eclectic approach, applying state and federal arbitration laws, either directly or by analogy, to resolve questions left unanswered by the collective bargaining agreement. Laws providing a supportive legal environment have measurably contributed to the success of labor arbitration since World War II.

A Summary

Prior to World War II, the legal system, both statutory and judicial, had been at best indifferent to labor arbitration and at worst openly hostile to it. During the War much of that hostility eased as Congress enacted legislation encouraging voluntary arbitration and requiring complusory arbitration in certain cases. This pro-arbitration policy constituted a major departure from previous policy, and once the emergency passed, it would have been easy to resume pre-War policies.

Just the opposite happened. Congress and courts enthusiastically embraced labor arbitration. Congress passed the Taft-Hartley Act, thereby establishing a national labor policy favoring negotiated grievance systems. More importantly, section 301 of the Act provided for court enforcement of arbitration agreements and awards. The United States Arbitration Act and state arbitration statutes provided ancillary support. Led by the Supreme Court's *Lincoln Mills* and *Steelworkers Trilogy* decisions, the federal courts have given broad scope to section 301. Courts have deferred their own processes pending arbitration, have ordered reluctant parties to arbitrate, and have refused to

316. 9 U.S.C. §§ 1-14 (1982).

317. *See* Nolan & Abrams, *Early Years*, *supra* note 2, at 416-17.

318. Dunau, *Scope of Judicial Review of Labor Arbitration Awards*, N.Y.U. 24th ANN. CONF. ON LABOR 175, 181-82 (1972).

319. General Elec. Co. v. Local 205, United Elec. Workers, 353 U.S. 547 (1957). The Court embraced the procedural aspects of the USAA as a "guiding analogy" to a section 301 action. *Id.* at 548. In a companion case, Goodall-Sanford, Inc. v. United Textile Workers Local 1802, 353 U.S. 550 (1957), the Court indicated the analogy should not be taken too far.

overturn arbitration awards except in extreme circumstances.[320] The National Labor Relations Board has also lent its support by generally deferring to arbitral decisions.

These congressional, judicial and administrative actions have channeled more disputes to arbitration and have made arbitration the final step in most grievance disputes. The virtual unreviewability of the arbitrator's decision has forced parties and arbitrators to treat the arbitration process more seriously. Even the duty of fair representation has contributed to the strength and acceptability of labor arbitration. The possibility that breach of the union's duty may strip an arbitration award of its finality and the attendant risk of liability pressure unions to arbitrate more cases and to handle them competently. The ultimate results of these developments have been a more competent presentation of cases to arbitrators, and a demand for more professional arbitrators.

III. Toward a Theory of Labor Arbitration

The second major factor shaping labor arbitration since World War II has been the pattern of debate, criticism and response within the arbitration community about the theory and practice of labor arbitration. These discussions have resolved some fundamental questions, laid the basis for judicial support of arbitration, and exposed some of arbitration's shortcomings. Five relatively distinct topics can be gleaned from these discussions and will be examined in this section. Four of these were largely internal discussions within the arbitration community: a debate beginning in the late 1940s on the nature of the arbitral enterprise; a conflict in the 1950s concerning the relationship between the external legal system and labor arbitration; a related and still unresolved argument about the use of external law by arbitrators; and a bitter dispute in the 1960s on the quality of arbitrators. The fifth topic was a continuing barrage of external criticism about the costs, delays, and legalism of labor arbitration.

The Nature of the Arbitral Enterprise

Shortly after the War, two eminent figures in labor arbitration engaged in a prolonged and prolific debate over the nature of the arbitral process. Arguing that arbitrators are free-wheeling mediators and "agreement-makers" was former War Labor Board Chairman George Taylor.[321] His earliest opponent was J. Noble Braden, Tribunals Vice President of the American

320. Morris, *supra* note 195, at 331.

321. Taylor expressed his views in *The Arbitration of Labor Disputes,* 1 Arb. J. (n.s.) 409 (1946); *Effectuating the Labor Contract Through Arbitration,* The Profession of Labor Arbitration 20 (J. McKelvey ed. 1957) (an address delivered before the Second Annual Meeting of the National Academy of Arbitrators on January 14, 1949); and *Further Remarks on Grievance Arbitration,* 4 Arb. J. (n.s.) 92 (1949). Professor Taylor was a distinguished professor at the Wharton School of the University of Pennsylvania and an active arbitrator. On Taylor's life and work, see E. Shils, W. Gershenfeld, B. Ingster & W. Weinberger, Industrial Peacemaker: George W. Taylor's Contributions to Collective Bargaining (1979) [hereinafter E. Shils].

Arbitration Association, who viewed arbitrators as private judges employed by the parties solely to interpret the collective agreement.[322]

Taylor's position undoubtedly was influenced by his experience as a permanent chairman in the hosiery industry and under the General Motors-United Automobile Workers contract. With the consent of those parties, Taylor freely mediated disputes and sought to educate the parties rather than simply interpret the agreement. Taylor's "educational" tactics would astound modern arbitrators. Such tactics included softening his opinions to mollify General Motors,[323] submitting drafts of opinions to the parties for discussion before disseminating them,[324] and assisting struggling parties in presenting their cases.[325]

Taylor believed that most labor agreements are merely "skeletons" of contracts.[326] Rarely could grievances be resolved simply by reference to the written terms of the agreement. Thus grievance arbitration, an extension of the collective bargaining relationship, is necessarily an exercise in "agreement making" and not just "agreement administration." Taylor contended that every arbitrator ought to help the parties flesh out the skeleton rather than rule "legalistically" on the written contract and other evidence presented. A mediated agreement is the ideal, but should the arbitrator's task require an imposed decision, Taylor felt the arbitrator should ensure that the decision would be acceptable to all parties.[327] Taylor was confident that as collective bargaining matured, cooperative relationships would replace arm's length dealings and that permanent, impartial chairmen would replace ad hoc umpires.

Braden could not have disagreed more. Although he conceded that Taylor's "skeleton" idea had some validity in earlier years, Braden emphasized the trend toward detailed contracts. Moreover, the parties themselves had been opting for a judicial model of arbitration by inserting in their contracts strict limitations on the arbitrator's authority. This reflected a belief that contract terms should be *interpreted* by the arbitrator, not made or modified by him. For Braden an arbitrator should behave as a judge, not "a sort of labor relations psychiatrist."[328] Braden believed that legal standards and principles should

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322. Braden wrote numerous articles on the subject, *see, e.g., Problems in Labor Arbitration,* 13 Mo. L. Rev. 143 (1948); *Arbitration and Arbitration Provisions,* N.Y.U. 2nd Ann. Conf. on Labor 355 (1949); *Current Problems in Labor-Management Arbitration,* 6 Arb. J. (n.s.) 91 (1951).

323. G. Heliker, *supra* note 73, at 104-05. Such things were not at all uncommon in the early days of arbitration. Harry Shulman, who held the post of umpire at Ford Motor Co., held hundreds of cases for years rather than issue controversial decisions. National Academy of Arbitrators, *supra* note 84; interview with Harry H. Platt, at 7; interview with Ralph Seward, at 24. Taylor's arbitration practice is described in Gershenfeld, *Early Years: Grievance Arbitration,* in E. Shils, *supra* note 321, at 29.

324. National Academy of Arbitrators, *supra* note 84, interview with Ralph Seward, at 21.

325. *Id.* at 5.

326. This was oftentimes true in the early days of arbitration. *Id.* at 10-11.

327. William Simkin, a colleague of Taylor's, emphasized this point in his monograph Acceptability as a Factor in Arbitration Under an Existing Agreement (1952).

328. Braden, *Problems in Labor Arbitration, supra* note 322, at 147. *Cf.* Fuller, *Collective*

apply to grievance disputes, thus making arbitration clearly distinguishable from collective bargaining. While Taylor found legal intervention in arbitration offensive, Braden welcomed it to enforce "good arbitration practice and procedure."[329] Braden supported ad hoc arbitration, as opposed to permanent chairman relationships, as the best way to foster the judicial model. Braden admitted that Taylor's "impartial chairman" approach worked in some cases, but he insisted that "to call it arbitration is a misnomer."[330]

In the end, the Braden approach triumphed. Several arbitrators of Taylor's school of thought nonetheless continue to use mediation in arbitration,[331] but most arbitrators have adopted the quasi-judicial model, applying established rules and evaluating evidence to resolve collective bargaining disputes.[332] Parties to collective agreements have made the same choice by placing contractual limitations on the arbitrator's authority and by selecting ad hoc arbitration as opposed to impartial chairmen.[333]

Bargaining and the Arbitrator, 1963 WIS. L. REV. 3, 4 (referring to the non-judicial arbitrator as a "labor relations physician").

329. Braden, *Problems in Labor Arbitration, supra* note 322, at 146.

330. Braden, *Arbitration and Arbitration Provisions, supra* note 322, at 359. Both Taylor and Braden exercised great influence on arbitrators. Taylor did so mainly by training other arbitrators. Braden used his position as Tribunals Vice President of the American Arbitration Association (AAA) to insist that arbitrators follow the judicial model. G. Allen Dash, Jr. recently recounted how in the mid-forties he tried to bring about a settlement in an AAA case. At the time an AAA representative told him "You shouldn't do this. This is not the way we approach it in AAA." Later he received a call from the AAA informing him this was the AAA philosophy of arbitration, and that "it was hoped I would not follow such an approach as a usual thing." NATIONAL ACADEMY OF ARBITRATORS, *supra* note 84, interview with G. Allan Dash, Jr., at 38.

The Taylor/Braden debate was not an entirely novel one. William Leiserson vigorously supported the judicial model in the 1920s, while the early clothing industry arbitrators distinctly favored the mediator model. *See* Nolan & Abrams, *Early Years, supra* note 2, at 395-95. The debate struck sensitive nerves in the early postwar years, though, because labor arbitration was at a crossroads. Conferences of arbitrators were held around the country to discuss this fundamental question while others offered their opinions in print. Eastman, *Labor Arbitrators Conference,* 4 ARB. J. (n.s.) 125 (1949). Many of the articles written in this debate are cited in Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments,* 62 MICH. L. REV. 1115, 1147-48 n.38 (1964).

331. *See, e.g.,* NATIONAL ACADEMY OF ARBITRATORS, *supra* note 84, interview with William E. Simkin, at 26-27 (citing himself, Sam Kagel, Allan Dash and others). A few still denigrate the idea that there is a "common law" of the collective bargaining agreement which should guide the exercise of arbitral discretion. *See, e.g.,* Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse),* 38 ARB. J. (n.s.) Dec. 1983, at 58.

332. *See* Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration,* 14 U.C.D.L. REV. 551, 564-72 (1981); Fuller *Collective Bargaining and the Arbitrator,* 1963 WIS. L. REV. 3, 23-24 ("The morality of arbitration lies in a decision according to the law of the contract."); Prasow & Peters, *The Development of Judicial Arbitration in Labor-Management Disputes,* 9 CAL. MGMT. REV. 7 (1967); Weiler, *The Role of the Labour Arbitrator: Alternative Versions,* 19 U. TORONTO L.J. 16 (1969).

333. One recent study found that only 12% of collective bargaining agreements specifying the means of selecting an arbitrator provide for a permanent arbitrator, arbitration board or panel of arbitrators, while 68% provided for ad hoc arbitrators. Seventy-nine percent of the agreements studied placed restrictions on arbitrators. *Basic Patterns in Grievance and Arbitration Provisions,* 96 DAILY LAB. REP. (BNA) E-1 (5-17-83).

The Relationship Between Arbitration and the External Legal System

The second debate within the arbitration community was over the relationship between the external legal system and labor arbitration, in particular the use of courts to enforce arbitration agreements and review arbitration awards. The strongest statement opposing the legal system's intervention in the labor arbitration process was made in 1955 by Harry Shulman, Dean of Yale Law School.[334] Shulman described the "autonomous rule of law" created by labor and management in collective bargaining and the arbitrators' roles in that system, and urged that arbitration be left alone by the law.[335] In effect, Shulman doubted judges' ability to understand the complex workings of industrial self-government, and felt that unskilled judicial intrusion might injure the system rather than aid it.

Professor Archibald Cox of Harvard was less pessimistic about judicial activity.[336] He was just as conscious as Shulman of arbitration's role in the system of industrial self-government, and recognized the harm that clumsy judicial intervention could cause. Unlike Shulman, however, he believed the legal system could strengthen arbitration "by putting the force of law behind the arbitration clause and the ultimate award."[337] Cox felt that labor lawyers should teach the courts to understand labor relations principles so they could bolster arbitration rather than hinder it.[338]

The *Steelworkers Trilogy* ended this dispute for all practical purposes by limiting judicial intervention into the substance of arbitration decisions while

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334. Shulman's Oliver Wendell Holmes Lecture at Harvard Law School dealt with more than this point, but it is best remembered for his brief comments on the issue.

335. The arbitration is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for the employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of labor disputes rather than to court actions on the contract or on the arbitration award? I suggest that the law stay out — but, mind you, not the lawyers.

Shulman, *Reason, Contract, and Law in Labor Relations,* 68 HARV. L. REV. 999, 1024 (1955). *See also id.* at 1001-02.

336. *See* Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956) [hereinafter cited as Cox, *Rights*]; Cox, *Reflections Upon Labor Arbitration,* 72 HARV. L. REV. 1482 (1959) [hereinafter cited as Cox, *Reflections*].

337. Cox, *Reflections, supra* note 336, at 1487; *see also* Cox, *Rights, supra* note 336, at 604-05.

338. The scholar's object was to devise "a coherent description not merely of the trappings of arbitration but of its inner logic in terms related to the construction of other legal instruments" — and to use this understanding to "pave the way to a wiser definition of the proper roles of the court and the arbitration. . . ." Cox, *Reflections, supra* note 336, at 1489. *See also* Cox, *Rights, supra* note 336, at 604-05.

placing the full support of the federal judiciary behind the arbitration process. In the *Trilogy,* the Court cited Shulman on the autonomous nature of the collective bargaining process, and used Shulman's authority to buttress holdings which he would have abhorred had he lived to see them.[339] The Court also cited Cox's writings, perhaps claiming more support from them than they really offered.[340] Yet, insofar as the Shulman/Cox debate was concerned, the Court emerged a firm proponent of the theories espoused by Cox.

The Use of External Law by Arbitrators

The third of the internal debates over the nature of labor arbitration began in 1967 when Professor Bernard Meltzer of the University of Chicago and Robert Howlett, then Chairman of the Michigan Labor Mediation Board, spoke at the Twentieth Annual Meeting of the National Academy of Arbitrators. Both men addressed the question of whether arbitrators should attempt to apply external law in arbitration proceedings.

The scope of the question is actually narrower than may first appear. Virtually all students of arbitration agree that an arbitrator could use statutory law as an interpretive aid, and could deal with legal issues when both parties clearly authorize him to do so. The dispute begins when one party requests that an arbitrator apply external law *rather than* the terms of the collective agreement.[341]

Professor Meltzer argued that arbitrators in such situations "should respect the agreement and ignore the law."[342] He believed that arbitrators generally lack both the competence and the consent of the parties to apply external law. As to their competence, Meltzer pointed out that many arbitrators have no legal training and those that do are not necessarily knowledgeable about all the relevant legal authorities. As to the parties' consent, Meltzer claimed that the arbitrator is asked "to construe and not to destroy their agreement." A decision based on the arbitrator's view of statutory authority would thus exceed the scope of his power.[343]

Meltzer recognized that his approach might result in an award requiring an illegal act or one leading to a second and overlapping judicial proceeding, but he was not deterred. The arbitrator, he thought, is "the proctor of the agreement and not of the statutes."[344] Accordingly, the contract and the law should be viewed as entirely separate and the arbitrator should not apply them together unless the parties expressly ask him to do so.[345]

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339. United Steelworkers of Am. v. Warriors & Gulf Nav. Co., 363 U.S. 574, 578, 580, 581 (1960).

340. *Id.* at 579, 583.

341. Sovern, *When Should Arbitrators Follow Federal Law?,* 23 PROC. NAT'L ACAD. ARB. 29, 30 (1970).

342. Meltzer, *Ruminations About Ideology Law and Labor Arbitration,* 20 PROC. NAT'L ACAD. ARB. 1, 16 (1967).

343. *Id.* at 16-17. *Cf.* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

344. Meltzer, *supra* note 342, at 18-19.

345. Meltzer, *The Role of Law in Arbitration: Rejoinders,* 21 PROC. NAT'L ACAD. ARB. 58, 60-63 (1968) [hereinafter Meltzer, *Rejoinders*]; Meltzer, *supra* note 342, at 16 n.37.

Howlett disagreed totally. He felt that arbitrators should consider fully all legal questions affecting the grievance, even those which the parties have not clearly presented to him.[346] Addressing the argument that parties only authorize an arbitrator to interpret the contract, Howlett asserted that "[a]ll contracts are subject to statute and common law; and each contract includes all applicable law." Even a clause prohibiting the arbitrator from modifying the contract should not prevent him from applying positive law because "all contracts are made within, not outside the law."[347]

Howlett had little patience for the argument that non-lawyer arbitrators lacked the competence to interpret legal provisions. The law does not require members of the National Labor Relations Board to be lawyers, he responded, and the Board's non-lawyer members have not hesitated to participate in decisions on legal questions.[348] Howlett later argued that non-lawyer arbitrators may actually be more knowledgeable about labor law than are circuit court judges. Arbitrators who are lawyers are not only competent, they have a *duty* as officers of the court to "administer the law."[349] Moreover, Howlett suggested that if the arbitrator ignored the law, his award might result in error and eventually force the grievant into a second legal proceeding. Thus it would be more efficient for the arbitrator to render a decision based on both contract language and the law in a single proceeding.[350]

In the wealth of discussion following the opening guns of the debate, virtually no one seconded Howlett. One of the few who did was Professor Charles Morris. Morris argued that it was simply too late "to turn the clock back to the collective agreement of an earlier day," because it is "an inescapable fact that the agreement is no longer the exclusive province of the immediate parties." External law shapes the contours of the agreement and specifies the role arbitration is to play in the national labor policy. Arbitrators may ignore that external law, but to the extent that they do, "arbitration will surely lose its relevance."[351] He agreed with Howlett that many arbitrators had developed or could develop the necessary competence to deal with statutory questions, or would decline cases they could not handle. While he anticipated some hard problems, he felt that the courts might even extend the *Enterprise Wheel* decision to limit judicial review of an arbitrator's application of statutory law, at least in areas where the courts had primary jurisdiction.[352]

Curiously, the next closest position to Howlett's was first introduced in a devastating attack on Howlett's premises. In a 1968 address to the National

346. Howlett, *The Arbitrator, the NLRB, and the Courts,* 20 PROC. NAT'L ACAD. ARB. 67, 83-93 (1967).

347. *Id.* at 83, 88. Howlett later elaborated on the issue of the arbitrator's authority to interpret the law. He rejected any distinction between "public" and "private" rights in the collective bargaining area because public policy made collective bargaining agreements enforceable and because arbitrators have been authorized and requested by the NLRB and the courts to decide questions of statutory interpretation. Howlett, *A Reprise,* 21 PROC. NAT'L ACAD. ARB. 64, 66-67 (1968).

348. Howlett, *supra* note 346, at 105.

349. Howlett, *supra* note 347, at 68.

350. *Id.* at 83.

351. Morris, *Comment,* 24 PROC. NAT'L ACAD. ARB. 65, 71-72 (1971).

352. *Id.* at 74-75.

Academy of Arbitrators, Richard Mittenthal flatly rejected Howlett's claim that all laws are automatically incorporated in all contracts.[353] That theory rests on the "fictions" that everyone knows the law and makes his contracts with reference to it. Mittenthal also observed that the incorporation theory is rejected as untenable by the most eminent authorities in contract law.[354] Arbitrators derive their authority from the contract, not from external law. Neither the NLRB nor the courts can give an arbitrator authority beyond that which the parties confer on him. The Board and the courts generally defer to arbitrators' decisions regarding *contract* questions. Such deference could not be expected to continue if arbitrators ruled on questions of law.[355]

In a few cases, however, Mittenthal would allow the arbitrator to follow the law rather than the contract. He emphasized that some arbitrators do possess the ability to interpret the law as well as the contract, and parties can choose a legally competent arbitrator if they know the grievance will involve a legal question. If a contract seems to require unlawful conduct the arbitrator should decline to order such conduct. The frequent use of "separability" or "savings" clauses indicate the parties did not intend the arbitrator to require illegal conduct.[356] Clauses providing that the arbitrator's award will be "final and binding" should also warn the arbitrator against ordering illegalities: if he does so, he invites noncompliance and judicial intervention, which would frustrate the parties' desire that the award be final. Mittenthal concluded that "although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract."[357]

Mittenthal's distinction between awards permitting and those requiring illegal conduct is inherently appealing, but it contains new problems.[358] If one rejects Howlett's automatic incorporation theory, then the arbitrator should follow the contract rather than the law regardless of whether he is asked to require or merely tolerate illegal conduct. For example, consider the case of a seniority provision which violates Title VII of the Civil Rights Act of 1964.[359] If an employer follows the contract and lays off black employees, they may bring a grievance demanding compliance with the law rather than

353. Mittenthal, *The Role of Law in Arbitration,* 21 PROC. NAT'L ACAD. ARB. 42 (1968).

354. *Id.* at 44-45.

355. According to Mittenthal, Howlett's position is supported neither by statute, nor by the common law of contracts, nor by national labor policy. *Id.* at 45-46, 52-54.

356. Mittenthal's point was recently supported by a Ninth Circuit decision which held a "General Savings Clause" indicated that the parties intended to give the arbitrator authority to look to external law for guidance. Day Constr. Co. v. Carpenters Local 354, 722 F.2d 1471, (9th Cir. 1984). The court stated that it would defer to the arbitrator's award even if he misinterpreted the law, so long as there is no "manifest disregard of the law" and the award does not violate the law or any well-defined public policy. *Id.* at 2463.

Second Look at Enterprise Wheel *and Its Progeny,* 75 MICH. L. REV. 1137, 1142 (1977);

357. Mittenthal, *supra* note 353, at 48-50.

358. *See, e.g.,* Meltzer, *Rejoinders, supra* note 345, at 59-60; St. Antoine, 21 PROC. NAT'L ACAD. ARB. 75, 77-79 (1968); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* 75 MICH. L. REV. 1137, 1142 (1977); Sovern, *supra* note 341, at 33.

359. 42 U.S.C. § 2000e (1976).

the contract. If the employer follows the law and lays off white employees, they may bring a grievance demanding compliance with the contract rather than the law. Mittenthal would have the arbitrator deny the grievances in both cases. Under this approach, though, "the role accorded to law would depend on how an employer resolved a controversy and not on its essential character or the function properly delegated to different adjudicative agencies. . . . [S]uch an approach transforms an accidental consideration into a decisive one."[360]

Other scholars more nearly agreed with Meltzer.[361] In the most sophisticated treatment of the question, Professor David Feller argued that even though the parties may authorize the arbitrator to decide legal questions, arbitration suffers if they do so. Feller's main concern was for arbitration's *institutional competence* rather than arbitrators' individual ability. Courts defer to arbitrators on contract questions because they believe arbitration is not merely a substitute for judicial interpretation but is rather "the capstone of an entirely different process of industrial self-government."[362] Deference to the arbitration process will be impossible to maintain if arbitrators step out of that role and seek to interpret or apply statutes. Arbitral autonomy can therefore be preserved only if arbitrators abjure any authority to decide disputed questions of external law.[363] The abstentionist position is difficult to maintain in extreme cases, however, and even Feller would make an exception when it is clear and undisputed that a challenged employer action was required by external law.[364]

While the weight of scholarly authority is on Meltzer's end of the spectrum, even those nearest to him recognize that arbitrators cannot simply ignore external law in all cases. Cases involving claims of employment discrimination

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360. Meltzer, *Rejoinders*, *supra* note 345, at 60; Sovern, *supra* note 341, at 33. The only other prominent writer willing to grant the arbitrator any authority to favor the law over the contract was Michael Sovern. Sovern felt that some arbitrators were sufficiently competent to decide legal issues and that it is not unequivocally clear that parties intend to prohibit arbitrators from applying positive law. Sovern believed that a competent arbitrator would act within his authority by ruling on a contention that the law immunizes or requires conduct violating the contract, but only when the courts lack primary jurisdiction over the question of law. Sovern, *supra* note 341, at 38-45.

361. Theodore St. Antoine of the University of Michigan insisted that an arbitrator could decide legal issues only when authorized to do so by the parties. Unlike Meltzer, St. Antoine recognized that authority can be either express or implied; a contract clause which "plainly tracks certain statutory language," for example, suggests that "the parties intended their agreement to be construed in accordance with the statute." St. Antoine, *supra* note 358, at 1143.

362. Feller, *Arbitration: The Days of Its Glory are Numbered*, 2 INDUS. REL. L.J. 97, 110 (1977); *cf.* Meltzer, *Labor Arbitration and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 34 (1972).

363. "[U]nless unmistakably directed otherwise by the parties, arbitrators best serve the interests of the parties, and of the process as a whole, if they make it crystal clear that they are interpreting the agreement, not the external law, even where the agreement provisions parallel those of the external law." *The Impact of External Law Upon Arbitration*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 83, 111 (J. Correge, V. Hughes, & M. Stone, eds., 1976).

364. *Id.* at 111.

have proven especially troublesome, and generally constitute the bulk of cases where an arbitrator is asked to apply positive law.

Parties and arbitrators alike were given an incentive to design special arbitration procedures for employment discrimination cases by the Supreme Court in 1974. In *Alexander v. Gardner-Denver*,[365] the Court held that an employee had a statutory right to a trial *de novo* in federal court under Title VII of the Civil Rights Act of 1964 even if his claim had previously been submitted to arbitration. The Court's holding denied to arbitration awards in discrimination cases the conclusive effect the NLRB gives to awards where contract interpretation questions are relevant to statutory issues. Awards in employment discrimination cases are also denied the deference the Court itself gives to arbitration of nondiscrimination issues. The Court stated that because arbitration's purposes, sources of authority and procedures differed from those established by Title VII, an arbitration award should not foreclose access to the courts.

The Court did direct district courts to consider the award and give it appropriate weight, using such factors as the existence of contract provisions conforming to Title VII, the degree of procedural fairness in the arbitration, the adequacy of the record on the discrimination issue, and the special competence of the arbitrator.[366] It seemed as if the Court was openly inviting parties to construct arbitration arrangements so that the judiciary would give substantial weight to the resulting awards.

Few arbitrators were equipped to meet the higher standards suggested by the Supreme Court. A survey of the most experienced arbitrators showed that barely one out of two regularly read advance sheets to keep abreast of Title VII developments, and only one out of seven professed ability to define accurately basic terms of discrimination law.[367] These limitations did not keep parties from selecting these arbitrators for discrimination cases, nor did it discourage arbitrators from accepting the assignments. Fully half of those who stated they did not feel professionally competent to decide legal issues of this sort had in fact decided such cases in the preceding year.[368]

The *Alexander* Court's invitation was eagerly accepted, at least in print. Most proposals involved a greater degree of formality, including use of a transcript, a right of individual counsel for the grievant and a requirement of written findings of fact and conclusions of law.[369] Although greater formality was inevitable if arbitrations were to meet the *Alexander* standards, that very

365. 415 U.S. 36 (1974).

366. *Id.* at 60.

367. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, 28 PROC. NAT'L ACAD. ARB. 59, 71-72 (1975). The evidence seemed to bear out Justice Story's dictum that arbitrators are "not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has been said that the judgment of arbitrators is but rusticum judicium." Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

368. Edwards, *supra* note 367, at 73-74.

369. *E.g.*, Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265, 274-75 (1976); Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims*, 28 PROC. NAT'L ACAD. ARB. 36, 37-38 (1975).

formality carried a steep price. The resulting arbitration procedure might be more valuable for dealing with discrimination cases, but it might be less valuable as arbitration — less simple, less speedy, and less economical.[370]

A more modest proposal placed less weight on meeting all of the *Alexander* standards and more on preserving the essence of traditional arbitration: it simply asked the arbitrator to address each of the *Alexander* standards in his opinion.[371] If the arbitrator would specify the provisions of the contract relied upon, describe the procedural aspects of the arbitration, comment on the evidence submitted, and spell out more clearly the facts and conclusions of law, he would "set the stage for a court proceeding where the weight to be given to his or her opinion can be properly assessed." This type of procedure would fulfill the intent of the Supreme Court and protect individual rights, while preserving important values of the arbitral process.[372]

The critics of the mingling of contract and law remained unconvinced. Professor Meltzer, for instance, insisted that arbitrators "lack the institutional credentials that give moral authority to the decisions of the federal judiciary" and feared that arbitration itself would not work well when the supporting factors present in purely contractual disputes were removed.[373]

Despite the divisions among the scholarly disputants, there is today widespread acceptance of some fundamental points. First, it is now well established that an arbitrator is not obliged to consider legal questions raised by one party if the contract is silent on those issues.[374] Second, arbitrators almost unanimously deplore the impact of external law on arbitration, some even predicting that it will bring to an end arbitration's "Golden Age."[375] Meltzer's concerns about arbitrators' lack of competence and consent to decide legal questions are widely shared, if not consistently put into practice. Finally, and despite the first two points of agreement, most arbitrators stand ready to favor external law over the contract when the employer can show that the challenged action was required by law.[376] While this consensus follows Richard

370. As the Supreme Court suggested in *Alexander*, the very things that make arbitration desirable as a private dispute-resolution system make it unsuitable as an instrument for implementing public policy. 415 U.S. at 57-58.

371. Williams, *A Modest Proposal for the Immediate Future*, 29 PROC. NAT'L ACAD. ARB. 34, 44-45 (1976).

372. *Id.* at 45.

373. Meltzer, *The Parties' Process and the Public's Purposes*, 29 PROC. NAT'L ACAD. 46, 52-53 (1976).

374. In W.R. Grace & Co. v. Rubber Workers Local 759, 103 S. Ct. 2177 (1983), the Supreme Court upheld the enforcement of an award based solely on the collective bargaining agreement, even though the employer had strenuously argued that the challenged action was required by a conciliation agreement with the Equal Employment Opportunity Commission. The arbitrator held that he had no authority to consider extra-contractual authorities, and the Supreme Court ruled that a federal court could not "second-guess" an arbitrator's interpretation of what authority the contract gave him. *Id.* at 2644.

375. Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. NAT'L ACAD. ARB. 97 (1976). *But see* Edwards, *Labor Arbitration at the Crossroads: The "Common Law of the Shop" v. External Law*, 32 ARB. J. (n.s.) 65 (1977). Edwards argues that the negative impact of external law is not so great as Feller suggests, and that it is possible for arbitration to expand to deal with issues of public law.

376. Meltzer, *supra* note 373, at 57-58.

Mittenthal's suggestion, given the theoretical problems with his approach, it is unlikely that this consensus developed by force of logic. It would be more plausible to treat this result as a product of circumstance: arbitrators might prefer to follow the contract rather than the law, but they simply cannot bring themselves to order a party to violate the law. At that point, arbitrators reject the abstentionist theory along with consistency. Perhaps by doing so, however, they more nearly reflect the true intentions of the parties to the collective agreement.

The Quality of Arbitrators

The last of the internal debates occurred in the mid-to-late 1960s. The debate was initiated by a distinguished former arbitrator, Judge Paul Hays of the United States Court of Appeals for the Second Circuit. In his 1964 Storrs lectures at Yale Law School, Hays blasted the arbitration system, concentrating his criticism on the quality of arbitrators.[377] Much of Hays' speech was well within the realm of permissible academic debate on arbitration. He criticized arbitration's costs and delays[378] and agreed with Shulman that the legal system should not enforce arbitration agreements or awards.[379] The controversy arose from Hays' attacks on the competence and ethics of labor arbitrators. Hays argued that most arbitrators had none of the special expertise the Supreme Court believed them to have.[380] Hays also asserted that many, if not most, arbitrators were unethical. They issued compromise awards to perpetuate themselves in office and rigged awards to disguise an unpopular agreement between labor and management.[381] In sum, Hays viewed labor

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377. The lectures were published two years later as LABOR ARBITRATION: A DISSENTING VIEW. The force of his charges was increased by the fact that he had been a member of the club, so to speak. Perhaps their effect was even greater because arbitrators had basked in the praise given them by Justice Douglas in the *Trilogy*. *E.g.*, United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960) ("The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance" as a labor arbitrator).

378. P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 66 (1966).

379. *Id.* at 114-15.

380. The most that Hays would admit was that arbitrators varied widely in quality, yet even the least of them was given almost unreviewable authority by the courts. At the worst, many are incompetent. *Id.* at 52-59, 111-12.

381. *Id.* at 59-62, 93-94 (compromise awards); *id.* at 62-66 (rigged awards).
Hays' strongest language, however, came at the end of his lectures:

> There are only a handful of arbitrators who, like Shulman and Cox, have the knowledge, training, skill, and character to make them good judges and therefore good arbitrators. In literally thousands of cases every year, decisions are made by arbitrators who are wholly unfitted for their jobs—who do not have the requisite knowledge, training, skill, intelligence, and character.
>
> A proportion of arbitration awards, no one knows how large a proportion, are decided not on the basis of the evidence or of the contract or other proper considerations, but in a way which in the arbitrator's opinion makes it likely that he will be hired for other arbitration cases. . . .
>
> Another proportion of awards is rigged awards, rendered by arbitrators who are the creatures of those who hire them for the purpose of misleading others, usually

arbitration as "a usually undesirable and frequently intolerable procedure."[382]

To put it mildly, Hays' assertions were not well received in the arbitration community. Reactions were uniformly negative and frequently bitter.[383] Not surprisingly, one reaction was to challenge the accuracy of Hays' charges. Saul Wallen, a former president of the National Academy of Arbitrators, took Hays to task,[384] arguing that labor arbitration is in fact a distinct specialty, well mastered by experienced arbitrators. He emphasized that many arbitrators serve the same parties repeatedly. Even when the parties are new to the arbitrator, "his background enables him to quickly grasp and comprehend what often would be obscure to someone not previously exposed."[385] Arbitrators' abilities are demonstrated by "a test no judge is ever called upon to meet — the test of the market place — the judgment of those in a position freely to contract for their services."[386]

Wallen also rejected Hays' allegation that many arbitration awards are calculated to encourage use of the arbitrator in future cases, describing the charge as "arrant nonsense." Wallen reasoned that "the surest way for an arbitrator not to be hired for other arbitration cases by at least one of the same parties is to render a decision without regard to the evidence of the contract." Wallen further argued that if an arbitrator compromises an award to avoid offending either party, "his cowardice becomes immediately apparent to both, and he courts the likelihood that both will axe him."[387] More generally, Wallen felt it unjust to categorize arbitrators as venal and craven: "It may surprise Judge Hays to learn that there are some men in this world who think that to meet the challenge to act honorably and decide fairly is more important than the possible loss of future income and that not all such men are judges."[388]

> the union membership, about the conduct of their representatives. . . . We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion — we do not know how large but are permitted by the circumstances to suspect that it is quite large — is rendered on the basis of what award might be best for the arbitrator's future. We know there is another group of cases . . . in which the arbitrator has rendered a rigged award.

Id. at 112-13.

382. *Id.* at 114.

383. Participants in the Hays debate used book reviews as a common medium. *See,* Aaron, Book Review, 42 WASH. L. REV. 976 (1967). Aaron referred to the main chapter discussed here as "an ill-tempered, rather gossipy tirade, replete with unwarranted references and unfair accusations supported by inferences from relatively few sources and by quotations frequently cited out of context." *Id.* at 977. *See also* Meltzer, Book Review, 34 U. CHI. L. REV. 211 (1966); Shieber, Book Review, 41 TUL. L. REV. 743 (1967). For a good review of the controversy stirred up by Hays' lectures, see Getman, *The Debate Over the Caliber of Arbitrators: Judge Hays and His Critics,* 44 IND. L.J. (1969).

384. Wallen, *Arbitrators and Judges — Dispelling the Hays Haze,* 9 CAL. MGMT. REV. 17 (1967). *See also* Wallen, Book Review, 81 HARV. L. REV. 507 (1967).

385. Wallen, *Arbitrators and Judges, supra* note 384, at 20. In this respect arbitrators have an advantage over judges. Fuller, *Collective Bargaining and the Arbitrator,* 1963 WIS. L. REV. 3, 11-12.

386. Wallen, *Arbitrators and Judges, supra* note 384, at 21.

387. Wallen, Book Review, *supra* note 384, at 511.

388. Wallen, *Arbitrators and Judges, supra* note 384, at 22.

A second reaction by the arbitration community to Hays' criticism was more constructive. More attention began to be paid to arbitrators' shortcomings and even the National Academy of Arbitrators sought ways to remedy them.[389] Arbitration agencies screened panel applicants more carefully, and there were even suggestions that arbitrators should be certified by some authority.[390]

The Hays controversy had faded by the 1970s. In part, this demise was due to the lack of evidence offered by Hays and the lack of public support his criticisms received. In addition, parties to collective bargaining agreements apparently were not alarmed by Hays' claims. The percentage of agreements containing arbitration clauses continued to grow, and eventually exceeded ninety-five percent. Moreover, new pragmatic criticisms of arbitration were arising outside the arbitration community, attacking the efficiency of the arbitration process itself.

The Efficiency of the Labor Arbitration Process

While arbitrators were engaging in these internal disputes, a steady stream of complaints flowed from outside the profession centering on the costs, delays, and "legalism" of labor arbitration. Indeed, such complaints have been common throughout the postwar era.[391] Yet this criticism has been accompanied by wider acceptance of arbitration in practice.[392] For all its faults, arbitration must be preferable to available alternatives.

Critics point out that arbitration gained initial favor because it was faster, cheaper and less formal than litigation. They then note that arbitration has increasingly become a slower, more expensive and more formal process. This concern could be substantiated simply by observing that in 1981 the

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389. M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965, at 504 (1970).

390. Two-thirds of the lawyer respondents to a 1977 poll of the ABA's Section on Labor Relations Law thought that the ABA itself should certify arbitrators and an even higher percentage felt that arbitrators should be required to pass an examination. *See* Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified? Dead Horse Rides Again,* 30 PROC. NAT'L ACAD. ARB. 173, 175-76 (1977).

391. Such complaints have been common throughout the postwar era. The literature on this subject is vast. A sampling of the last few decades includes: Aaron, *Labor Arbitration and Its Critics,* 10 LAB. L.J. 605 (1959); Bartlett, *Labor Arbitration: The Problem of Legalism,* 62 OR. L. REV. 195 (1983); Davey, *What's Right and What's Wrong with Grievance Arbitration: The Practitioners Air Their Views,* 28 ARB. J. (n.s.) 209 (1973); Iserman, *The Arbitrator in Grievance Procedures: Is Arbitration the Way to Settle Labor Disputes?,* 35 A.B.A. J. 987 (1949); Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments,* 62 MICH. L. REV. 1115 (1964); Newman & Wilson, *Promise and Performance of Arbitration from Union Point of View,* DAILY LAB. REP. (BNA) No. 106, at D-1 (June 1, 1983); Raffaele, *Needed: A Fourth Party in Industrial Relations,* 13 LAB. L.J. 230 (1962); Seitz, *Delay: The Asp in the Bosom of Arbitration,* 36 ARB. J. (n.s.) 29 (1981); Straus, *Labor Arbitration and Its Critics,* 20 ARB. J. (n.s.) 197 (1965); Veglahn, *Arbitration Costs/Time: Labor and Management Views,* 30 LAB. L.J. 49 (1979).

392. As Robben Fleming put it some years ago, "[t]wo clearly identifiable trends in labor arbitration are discernible in the postwar years. One is the increasing use and popularity of the process, and the other, interestingly enough, is the increasing criticism of it." Fleming, *The Labor Arbitration Process: 1943-1963,* 52 KY L.J. 817, 817 (1964).

average grievance took 247 days from inception to issuance of the arbitration award, with average arbitrator's charges for fees and expenses of $1,132.31.[393]

One response to these criticisms is that external factors have contributed to the costs and delays of arbitration. For example, the only part of the cost problem exclusively within the arbitrator's control, his own fee, has not increased by an inordinate amount. Available statistics suggest that arbitrators' fees have not increased any faster than manufacturing earnings.[394] Similarly, although the average length of time from grievance to award has lengthened since World War II, most of this increase has been at the pre-hearing stage, over which arbitrators have relatively little control. More recently, the post-hearing time required has *dropped* more than a quarter.[395] Moreover, much of the time delay after hearing is due to the increased use of transcripts and briefs by the parties themselves.[396]

The parties thus exercise a great deal of influence over both costs and time. If they choose to use lawyers, have a transcript taken, and file briefs, both time and costs will inevitably increase. In fact, virtually every commentator on these issues has recommended that labor and management follow simplified procedures to reduce delays and expenses.[397]

The charge of "legalism" is closely related to the problems of delay and expense. Surely, arbitration is more formal today than previously, but formality follows when the parties themselves elect to hire an attorney, have a written transcript recorded and submit posthearing briefs. External forces, such as the NLRB's and the courts' deference to arbitration awards, the duty of fair representation, and employment discrimination legislation, also influence the arbitrator and the parties to conduct more formalistic proceedings.[398] Additionally, the deliberate movement of labor and management away from Taylor's free-wheeling mediator model of an arbitrator to the judicial model urged by J. Noble Braden has increased the level of formality.

IV. PROFESSIONALIZATION AND DIFFERENTIATION

The Professionalization of Labor Arbitrators

At the beginning of World War II there were relatively few experienced

393. Newman & Wilson, *supra* note 391, at D-2 (citing FMCS statistics for Fiscal Year 1981).

394. One study of earlier complaints found that fees "do not appear to have increased disproportionately to such standards as average hourly wages in manufacturing." R. FLEMING, THE LABOR ARBITRATION PROCESS 54 (1965). Per diem fees climbed from $130.55 to $299.62 (130%) and total fees from $378.61 to $988.76 (161%) from 1965 through 1981. *Compare* Federal Mediation and Conciliation Service, 19th Annual Report 43 (1966) *with* 34th Annual Report 37 (1981). During that same period, the average annual wage in manufacturing rose 199%, from $6,566 to $19,647. STATISTICAL ABSTRACT OF THE UNITED STATES 400 (1982-83).

395. FMCS, 34th Annual Report 39 (1981) (prehearing time increased from 195.1 in 1972 days to 196.7; post-hearing phase dropped from 46.4 days to 33.56 days).

396. One study covering the 30 years between 1942 and 1972 concluded that in non-briefed cases arbitrators were taking no more time to decide cases at the end of that period than they were at the start. Davis & Pati, *Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972*, 29 ARB. J. (n.s.) 15 (1974).

397. *See* R. FLEMING, *supra* note 394, at 53-55, 76-77; Davis & Pati, *supra* note 396, at 26-27; Newman & Wilson, *supra* note 393, at D-2 to D-6; Veglahn, *supra* note 391.

398. Bartlett, *supra* note 391, at 210-25.

labor arbitrators, and very few of these arbitrated on a professional, full-time basis. By the War's end, more arbitrators had gained experience and were beginning to devote their professional energies to arbitration. Because of their mutual interests, a pre-professional culture of arbitrators began to develop: a coterie of people distinguished by work in peculiar endeavors which required specialized skills. Within twenty years, labor arbitrators organized a professional association, adopted an ethical code, fostered programs of training and apprenticeships for novices, adopted positions on legislation affecting their interests, and in many other ways acted as a profession rather than as an informal group.

The first major step toward this professional development was undertaken for purposes unrelated to promoting arbitration. In 1946 the Bureau of National Affairs (BNA) published the first volume of its *Labor Arbitration Reports*. Intended as a successor to the *War Labor Reports*, the series' stated purpose was simply to "collect and classify awards handed down by arbitrators,"[399] for practitioners' benefit. The unintended effect was the fostering of arbitral professionalization by designating arbitration as a separate field of labor relations and by making it possible to identify the leading persons in the field. The reports also provided the raw material out of which a common law of labor agreements could be fashioned.

The next step was a deliberate one toward promoting professionalization. In 1947, a small group of arbitrators, most of them alumni of the War Labor Board (WLB), spearheaded the organization of the National Academy of Arbitrators.[400] There were several motivations behind the formation of the Academy. Some arbitrators were dissatisfied with certain policies of the American Arbitration Association,[401] while others were concerned about the increasing criticism of arbitration as a process. Most felt that arbitration could be preserved "only if it were kept in professional hands and away from the amateurs and the shysters."[402] The Academy's founders realized that decisional standards were required to assure that arbitrators were not ruling on the basis of their personal preferences.

Although some of the early members viewed the group as a way of continuing WLB friendships, chief promoter Alfred Colby stressed the concept of a learned society.[403] Colby's learned society faction was dominant, as the Academy's constitutional provisions make clear.[404] One of the Academy's

399. 1 Lab. Arb. (BNA) ii (1946).

400. Following an informal gathering in Washington, D.C. in the summer of 1947, the Academy was officially created at a meeting in Chicago in September of that year. This description is pieced together from the recollections of some of the early members. Not all of the recollections are consistent. NATIONAL ACADEMY OF ARBITRATORS, *supra* note 84, interview with G. Allan Dash, Jr., at 56-58, 66; interview with John Day Larkin, at 5-6; interview with Ralph T. Seward, at 5, 86-88; interview with William E. Simkin, at 40-41; McDermott, *Some Developments in the History of the National Academy of Arbitrators*, 25 PROC. NAT'L ACAD. ARB. 27 (1972).

401. E. WITTE, *supra* note 4, at 52-53.

402. Larkin, *Introduction: The First Decade*, 10 PROC. NAT'L ACAD. ARB. viii, x (1957).

403. Colby and some others favored a small, elite group, almost a "union shop," while others were more eager to open the doors to younger arbitrators.

404. To establish and foster the highest standards of integrity, competence, honor,

earliest and most significant projects was the drafting of a "Code of Ethics and Procedural Standards for Labor-Management Relations." The Code was formulated in conjunction with representatives of the American Arbitration Association and the Federal Mediation and Conciliation Service. The Code was published in 1951[405] and revised in 1974.[406]

With over six hundred members, the Academy's activities are clearly those of a professional organization. The annual meetings provide a forum for scholarly papers and practical discussion, and the *Proceedings* are published annually by the Bureau of National Affairs. The Academy has sponsored programs for the training and development of new arbitrators in order to ease the perceived shortage of acceptable arbitrators.[407] The Academy has also attempted to influence certain legislative proposals which may affect arbitrators.[408] The Academy, quite commendably, has not restricted entry to the profession by endorsing certification proposals.[409]

Differentiation in the Practice of Labor Arbitration

The actual practice of labor arbitration has undergone significant changes in the last forty years. Some changes are simply variations in traditional grievance arbitration, but others constitute new forms of arbitration. The first category, adjustments in the traditional model, includes the adoption of the quasi-judicial arbitrator in place of the mediatorial arbitrator; the concurrent preference for single, ad hoc arbitrators instead of permanent tripartite panels; and the evolution of more formal hearing procedures. All of these changes are attributable to the rough consensus that emerged from the internal debates discussed above.

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and character among those engaged in the arbitration of industrial disputes on a professional basis; to adopt and encourage the acceptance of an adherence to canons of ethics to govern the conduct of arbitrators; to promote the study and understanding of the arbitration of industrial disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions, and learned societies interested in industrial relations; and to do any and all things which shall be appropriate in the furtherance of these purposes.

NAA CONST., art. II, § 1, *quoted in* McKelvey, *Preface* to THE PROFESSION OF LABOR ARBITRATION, *supra* note 321, at v. This section was amended in 1975 to make reference to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

405. *Reprinted in* THE PROFESSION OF LABOR ARBITRATION, *supra* note 321, at 151 and *also reprinted in* 15 Lab. Arb. (BNA) 961 (1951).

406. The revised code now bears the title "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes." It has been reprinted many places, among them 15 LAB. ARB. (BNA) at 51 and D. NOLAN, *supra* note 205, at 290.

407. The reports of the Academy's Committee on the Development of Arbitrators are published in the Proceedings, 33 PROC. NAT'L ACAD. ARB. 452 (1981).

408. *See supra* notes 309-312.

409. Despite recommendations from outside the profession that arbitrators should be certified, *supra* note 390, arbitrators themselves have opposed the idea. *Survey of the Arbitration Profession in 1969*, 24 PROC. NAT'L ACAD. ARB. 275, 180 (1971) (85% opposed to standardized entrance requirements); *see also* Aaron, *Should Arbitrators Be Licensed or "Professionalized"?*, 29 PROC. NAT'L ACAD. ARB. 152 (1976); Coulson, *supra* note 390, at 202; 30 PROC. NAT'L ACAD. ARB. 202 (1977) (remarks of arbitrator Marcia L. Greenbaum).

The rejection of Taylor's mediator model was almost complete by the time Taylor wrote. The alternative quasi-judicial model was fostered by the War Labor Board and expressly endorsed after the War by President Truman's Labor-Management Conference on Industrial Relations.[410] One inescapable difficulty with Taylor's approach was that in order to work successfully, it required one person to act as both mediator and arbitrator and few people possessed both talents.[411] Apparently more people could successfully handle the single assignment of a quasi-judicial arbitrator; in any case, that was what the parties came to prefer. As they began to make their contracts more and more detailed, parties indicated they were seeking a judgment interpreting the agreement, not an unbounded opinion from a wise counselor.[412]

The permanent chairman arrangement was most suited for Taylor's brand of arbitration, while ad hoc arbitrators adapted most easily to the quasi-judicial model. Consequently, the shift to the adjudicatory style triggered an increase in the use of ad hoc arbitrators, contrary to Taylor's predictions. The same factors explain much of the increased formality of modern labor arbitration. The essence of the judicial role is a decision based on the contract and the evidence presented at the hearing. Therefore, the hearing must be conducted in an orderly fashion, relevant evidence must be gathered and presented effectively, and testimony must be examined critically.[413] In many cases, it also seems necessary to the parties that a transcript be made and briefs filed. Because most lawyers have the necessary skills to effectuate these procedures and many lay persons do not (or think they do not), there is a tendency to use lawyers more frequently. Lawyers, in turn, are likely to proceed more formally and to expect the arbitrator to conduct the hearing in a similar fashion. External pressures, such as the increased significance of the duty of fair representation, have reinforced this tendency toward formality.[414]

The transformation of traditional arbitration procedures was largely complete twenty years ago. Since then, however, many innovations have developed outside the traditional format. One striking innovation does away with one party — or rather, it substitutes the individual employee for the union. Traditional arbitration arises from a contract between an employer and a union, even though the contract is intended to benefit individual employees. As the exclusive representative of the employees, the union typically controls

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410. *See supra* note 130 and accompanying text; *see also* B. LANDIS, VALUE JUDGMENTS IN ARBITRATION 6 (1977).

411. Harold Davey wrote shortly after Taylor's death: "Only a gifted minority of arbitrators can handle the delicate dual assignment of functioning as mediator-arbitrators . . . there are very few arbitrators who can function effectively in the George Taylor manner." Davey, *Labor Arbitration: A Current Appraisal*, 9 INDUS. & LAB. REL. REV. 85, 88 (1955).

412. This became particularly true after 1947 when Congress made collective agreements enforceable in federal courts, and even more so as published arbitration awards marked out principles of interpretation — the common law of the labor agreement. Abrams, *supra* note 332; Prasow & Peters, *supra* note 332, at 10-14.

413. *See generally* Abrams, *supra* note 332.

414. Barreca, *Arbitration — Recent Trends and Developments*, in LABOR LAW DEVELOPMENTS 1982 at 381 (proceedings of the Twenty-Eighth Annual Institute on Labor Law of the Southwestern Legal Foundation).

the processing of grievances through arbitration.[415] Because the unrepresented employee is left to the mercies of the employment-at-will doctrine, many scholars have called for the provision of arbitration to all employees by statute or by individual employment contracts.[416] A number of employers have instituted arbitration plans even in the absence of unionization, so far with only mixed success.[417] It may prove difficult for traditional arbitration to work successfully without a union.[418]

The remaining innovations have occurred in the context of a typical unionized work force. The most widespread innovation has been the development of expedited arbitration arrangements. To reduce costs and speed up arbitration awards, many unions and employers have agreed to a simplified arbitration process, especially for minor disputes. Typically these agreements specify the arbitrator will be selected in rotation from a predesignated panel, the hearing will be within a stated period of the demand for arbitration, it will be informal, without transcript or briefs, and the arbitrator will render an award at the end of the hearing or immediately thereafter. By and large, expedited arbitration plans have worked well and the parties to them have been quite satisfied.[419]

A less widespread but equally significant innovation has been the voluntary use of interest arbitration in the private sector. Mandatory interest arbitration has long been used during wartime, in industries providing essential services, and in the public sector. In recent years, the practice has grown somewhat in the private sector. In 1973, for example, the steel industry adopted the Experimental Negotiating Agreement (ENA) as a way of minimizing the risk of strikes. The ENA provided that if the parties were unable to resolve an issue of national significance in their next round of negotiations, the issue would be submitted to an arbitration panel for a final, binding determination.[420] The steel agreement did encourage a few other employers and

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415. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 724 (1973).

416. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J. OF L. REFORM 249 (1983); Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 ARB. J. (n.s.) Sept. 1978 at 23; Coulson; *Arbitration for the Individual Employee*, 5 EMPL. REL. L.J. 406 (1979-80); Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

417. *See generally* PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 4-20 (J. Steiber & J. Blackburn eds. 1983).

418. *See* Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 934 (1979). "In the absence of a union the goals of obedience, availability, finality, neutrality, and efficiency would be difficult to achieve without considerable restructuring of the process."

419. Several such plans have been recently discussed in Barreca, *supra* note 414, at 385-87; Frost, *Expedited Arbitration Experience in the U.S. Postal Service*, 29 LAB. L.J. 465 (1978); Hoellering, *Recent Development at the American Arbitration Association*, 29 LAB. L.J. 477, 479-80 (1978); Murray & Griffin, *Expedited Arbitration of Discharge Cases*, 31 ARB. J. (n.s.) 263 (1976); Sandver, Blaine & Wayar, *Time and Cost Savings Through Expedited Arbitration Procedures*, 36 ARB. J. (n.s.) Dec. 1981 at 11.

420. D. NOLAN, *supra* note 205, at 226-28; *see also* Fischer, *Significance of the Steel No-Strike Agreement*, N.Y.U. 26TH ANN. CONF. ON LAB. 93 (1973). Interest arbitration had been used in a few smaller industries before adoption of the ENA. *See, e.g.*, Platt, *Arbitration of*

unions to adopt interest arbitration, but so far scholars have had more concern with the topic than have parties to collective bargaining relationships.[421]

One of the surest signs that labor arbitration remains a viable, responsive institution is that parties to collective agreements are able to tailor their grievance and arbitration systems to their particular circumstances.[422] Several years ago, for example, the United Mine Workers and the bituminous coal mining companies redesigned their ineffective grievance system, with generally positive results.[423] More recently, miners have been experimenting with mediation of grievances before a formal arbitration hearing is held.[424] As successful as traditional labor arbitration has been, its machinery can nonetheless be altered to make it more efficient, and individual circumstances may make alterations essential.

CONCLUSION

American labor arbitration was well established by 1941, but it has changed so much in the last four decades that its early practitioners would find it strange. Before World War II, the concept of arbitration was poorly defined and lacked a unified theory. Wise counsellors selected by the parties were permitted to decide issues of great magnitude on little more basis than their own sense of justice and acceptability. In its mature form, labor arbitration is far more structured. Collective bargaining agreements carefully define the role of arbitration in the labor-management relationship. Four decades of scholarship and practice have created a conceptual basis for arbitration which has been accepted by practitioners, neutrals, and the courts. In place of the free-wheeling expert, the modern arbitrator sits almost as a judge, trying to determine the intentions of the parties from the document they signed and the ways they have conducted themselves under that agreement.

The first and greatest impulse in this transformation was the War Labor Board. The WLB extended the use of arbitration to companies and entire industries that had previously resisted it; the experience of those companies was sufficiently positive that they voluntarily retained arbitration agreements after the War. The Board thus moved arbitration from a widespread system of dispute resolution to a universal one. The WLB also played a major role in es-

Interest Disputes in the Local Transit and Newspaper Publishing Industries, 26 PROC. NAT'L ACAD. ARB. 8 (1974).

421. *E.g.,* Morris, *The Role of Interest Arbitration in a Collective Bargaining System,* in THE FUTURE OF LABOR ARBITRATION IN AMERICA 197, 266-82 (1976); Scharman, *Interest Arbitration in the Private Sector,* 36 ARB. J. (n.s.) Sept. 1981 at 14.

422. Mittenthal, *Making Arbitration Work—Alternatives in Designing the Machinery,* 36 ARB. J. (n.s.) Sept. 1981 at 28; *The Fine Art of Engineering an Arbitration System to Fit the Needs of the Parties,* 32 PROC. NAT'L ACAD. ARB. 167 (1979).

423. Selby, *The United Mine Workers and Bituminous Coal Operators' Association* 32 PROC. NAT'L ACAD. ARB. 181 (1979); Valtin, *The Bituminous Coal Experiment,* 29 LAB. L.J. 465 (1978).

424. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration,* 77 NW. U. L. REV. 270 (1982). Similar tailored arrangements have been designed in steel manufacturing and in brewing. Fischer, *The Steelworkers Union and the Steel Companies,* 32 PROC. NAT'L ACAD. ARB. 198 (1979); Meyer, *The Teamsters and Anheuser-Busch, id.* at 174.

tablishing the dominant judicial model of arbitration by narrowly defining grievance arbitration and by strictly enforcing jurisdictional limitations. Other WLB decisions on principles of arbitration were also influential, notably those on the enforceability of arbitration agreements and on the presumptive validity of awards, but none were more so than those defining the preferred model. Finally, the WLB provided the private sector with a large body of experienced arbitrators. The availability of skilled neutrals eased the fears of labor and management about turning over their disputes to outsiders for resolution.

The changing legal environment was the second transforming force. The enactment in 1947 of section 301 of the Labor-Management Relations Act, and its subsequent explication and expansion by the Supreme Court, provided a private system and the official support it needed to survive the periods of labor unrest. After *Lincoln Mills* and the *Steelworkers Trilogy,* parties were on notice that arbitration agreements and arbitration awards were backed by the full strength of the federal courts. Quite possibly those decisions went overboard in their praise of and bias toward labor arbitration, but that wholehearted endorsement gave arbitration a credibility it could not otherwise have achieved.

The key to the positive results of court support has been the maintenance of a clear distinction between process and substance. The courts have been unflinching in their assistance to the arbitration process, but, with few exceptions, they have been unconcerned with the substantive decisions made by arbitrators. By maintaining this distinction, the courts have avoided becoming entangled in the merits of particular awards. Had they not done so, arbitration would have served only as a detour on the way to the courts — a detour labor and management would have soon learned to avoid.

The creation by the courts of the duty of fair representation and their application of that duty to arbitration may mark a departure from the courts' traditional abstention. By reviewing arbitrations for "arbitrary" or "perfunctory" conduct, the courts may demand more than a system designed for informality can deliver. If the courts apply a standard within the capabilities of parties and arbitrators, however, the duty of fair representation may improve the quality of union representation, and thus further strengthen the labor arbitration process.

Other parts of the legal system have also contributed to the maturation of labor arbitration. The NLRB's *Spielberg* and *Collyer* decisions may be questionable interpretations of labor law, but they undoubtedly have effectively shifted authority in many disputes from a single government body to a myriad of private ones. Arbitration statutes, chiefly the United States Arbitration Act and the Uniform Arbitration Act, have likewise shifted some power over the interpretation of contracts from the courts to labor arbitrators. These statutes have also provided arbitration with tools which can make it more efficient and more effective. Here, too, there is a risk. Their provisions for judicial review of arbitration awards invite more involvement with the merits of disputes than is advisable, but as long as the *Trilogy* principles are respected the statutes should benefit labor arbitration more than they harm it.

The third impetus to the transformation of American labor arbitration

has been largely internal. Over a period of forty years, arbitrators and others debated about arbitration — the nature of the enterprise, its relationship with other legal authorities and with external law, the quality of its practitioners, and the efficiency of the process. Out of these debates grew the rudiments of a theory of labor arbitration.

For example, the outcome of the debate between J. Noble Braden and George Taylor was a strong consensus that grievance arbitrators should serve as contract interpreters, not as mediators or contract makers. The response of Professor Cox to Dean Shulman on the relationship between arbitration and the courts marked out a path followed by the Supreme Court in *Lincoln Mills* and the *Trilogy*. The ongoing controversy over the use of external law by arbitrators sparked by Bernard Meltzer and Robert Howlett has produced a general agreement that arbitrators should refer to positive law only rarely, and then cautiously. Judge Hays' criticisms of the quality of labor arbitrators may have won him few friends, but they did serve to focus attention on the necessity of ensuring that those who held themselves out as arbitrators possessed the requisite skills and training. The numerous recent programs by arbitration agencies designed to identify talented individuals and to provide them with "hands-on" experience stem in part from the concerns he raised. Similarly, post-war criticisms of the costs and delays of arbitration exposed real problems and led some parties to modify their arbitration agreements to provide a faster and less expensive method of resolving grievances.

The fourth major cause of the post-war development of American labor arbitration was the contemporaneous professionalization of labor arbitrators and differentiation in the practice of arbitration. Arbitrators began to see themselves as practitioners of a learned trade, and accordingly they established a professional body complete with entrance requirements, a code of ethics, and educational programs. Their perceptions of themselves as professionals served to distance them even more from the parties before them, and reinforced the growing tendency toward the quasi-judicial mode. During the same period, labor and management showed a new creativity by taking standard forms of arbitration and tailoring them to meet their special needs. These innovations have made it possible for arbitration to deal with a range of new issues as well as more effectively respond to the traditional issues.

Without stretching the metaphor too far, it can be said that on the eve of World War II labor arbitration was in its late adolescence. Its size, appearance and personality were marked but incomplete. By 1983, arbitration has reached full maturity. Its potential has been fulfilled, and it has played a critical role in American industrial relations. Haphazard practices have been replaced with an almost scientific experimentation, and there have even been attempts to order disparate approaches by developing a unified philosophy.

Despite its strikingly successful recent past, the future of American labor arbitration is by no means secure. Recent demonstrations of the flexibility of labor arbitration suggest that there is still room for growth in the arbitral process, but there are some troubling signs. The courts are no longer expanding the area of deference to arbitration, and the labor movement which makes arbitration both needed and possible faces difficult times. The danger

is not that arbitration will be abandoned by parties to collective bargaining agreements or that it will retreat from its present position. The danger is, rather, that it will cease to expand and improve. If its development slows, it may in time be replaced by more responsive mechanisms of dispute resolution. Pessimism is unwarranted, but concern is justified. Arbitration has fulfilled its promise because it has been a dynamic process, shaped by the needs of labor and management. If it maintains this essential characteristic, American labor arbitration will be as successful in the future as it has been in the past.