

---

## The Evolution of Labor Arbitration

Morton Gitelman

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Morton Gitelman, *The Evolution of Labor Arbitration*, 9 DePaul L. Rev. 181 (1960)  
Available at: <https://via.library.depaul.edu/law-review/vol9/iss2/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# THE EVOLUTION OF LABOR ARBITRATION

MORTON GITELMAN

Any dispute, claim or grievance arising out of or relating to the interpretation or the application of this agreement shall be submitted to arbitration under the Voluntary Labor Arbitration Rules of the American Arbitration Association. The parties further agree to accept the arbitrator's award as final and binding upon them.<sup>1</sup>

THE HISTORY of labor arbitration, like Gaul, is divided into three parts—the pre-World War II stirrings, the mushrooming of the war years and the postwar period of growth and development. The historical development of labor arbitration is not a mere curiosity for postprandial discourse, but an important consideration in attempting to understand the process as it exists and in evaluating the process as a method of resolving industrial disputes. The process has been constantly evolving and today is quite different when compared with earlier periods of its growth; there are indications that the future will bring definite changes. The purpose of this paper, then, is to examine the factors which have influenced grievance arbitration as we know it today, look at some of the current patterns evolving and project the process into the future.

## EARLY BEGINNINGS OF LABOR ARBITRATION

Recognition of arbitration as a method of resolving disputes between labor and management came as early as 1886. In that year, President Cleveland, in a message to Congress, recommended a national system of voluntary arbitration:

I am satisfied that something may be done under federal authority to prevent the disturbances which so often arise from disputes between the employers and the employed, and which at times threaten the business interests of the country; and in my opinion, the proper theory upon which to proceed is that of voluntary arbitration as a means of settling these difficulties. But I suggest that instead of arbitrators chosen in the heat of conflicting claims there should be created a commission of labor consisting of three members who shall be regular officers of the government, charged, among other duties, with the consideration and settlement, when possible, of all controversies between Capital and Labor.<sup>2</sup>

<sup>1</sup> Standard arbitration clause recommended by the American Arbitration Association.

<sup>2</sup> Lapp, *Labor Arbitration* 5 (New York, 1942).

---

MR. GITELMAN is an instructor at the University of Illinois College of Law and a member of the Illinois Bar.

The President's efforts were, more or less fruitless, for although Congress responded with legislation culminating in the 1898 Erdman Act,<sup>3</sup> no voluntary arbitrations were entered into until 1905.<sup>4</sup>

The first successful test for voluntary arbitration came in the 1903 anthracite coal strike. As a result of that arbitration, a permanent system of arbitrating grievances in the industry was established. Other industries, primarily printing, also began arbitrating in the early years of the twentieth century. The early arbitrations were primarily directed at settling violent strikes and much of what was then called arbitration would today fall in the category of mediation and conciliation. Voluntary arbitration was conceived of as a last resort when all other methods of settling strikes failed.

Grievance arbitration—the settlement of disputes concerning interpretation and application of the terms of collective bargaining agreements—had its origins in the years immediately preceding World War I. The men's clothing industry developed plans for arbitrating such disputes which came to full flower in the twenties. Other garment industries and the full-fashioned hosiery industry followed the lead of the Hart, Schaffner & Marx and Chicago Men's Clothing agreements. In all of these grievance arbitration experiences, however, the arbitrators did as much negotiating and mediating as arbitrating.<sup>5</sup> The real story of grievance arbitration does not begin until the advent of widespread collective bargaining.

With the growth of unionism and collective bargaining after the depression, arbitration took on new meaning. In order to prevent work interruption during the life of collective agreements, provisions for a grievance procedure culminating in reference of unsettled disputes to an arbitrator or an arbitration board were written into the agreements. Arbitration was emerging as a method of interpreting and applying the agreement. This period, between the depression and World War II, was the real beginning of grievance arbitration.

A large factor in popularizing the new concept of grievance arbitration was the entrance into the field by the American Arbitration Association in 1937. At that time, the Association had ten years of experience in handling commercial arbitrations and had earned much

<sup>3</sup> 30 Stat. 424 (1898).

<sup>4</sup> In that year several railroad disputes went to arbitration under the Act, and arbitration has remained an important factor in settling railroad disputes.

<sup>5</sup> Witte, *Historical Survey of Labor Arbitration* 36 (Philadelphia, 1952).

respect. During its existence the AAA had received many requests to provide labor arbitrators and in 1937 acceded to the requests and formed its Voluntary Industrial Arbitration Tribunal. The immediate contributions of the AAA were to provide a source of impartial arbitrators and formulate an arbitration procedure designed to provide a fair hearing for both sides. In the first three years of operation the AAA Tribunal handled 400 controversies and practically every one of the awards was complied with.<sup>6</sup> Today, the AAA handles several thousand grievance arbitrations each year and maintains a panel of more than 13,000 arbitrators.

Grievance arbitration was growing side by side with the increase in collective bargaining. It remained, however, for the years of World War II and the National War Labor Board to introduce grievance arbitration as a way of industrial life.

#### THE WAR YEARS AND THE NATIONAL WAR LABOR BOARD

By 1941 some 62 percent of the 1,200 collective bargaining agreements on file with the United States Conciliation Service contained arbitration provisions.<sup>7</sup> The onset of a defense economy and the tremendous increase in defense production in 1940 focused public and governmental attention on the mounting strike rate in "defense" industries. Some sort of government action was deemed necessary to reduce the work stoppages which were threatening to undermine mobilization efforts. Consequently, early in 1941, President Roosevelt created the National Defense Mediation Board (NDMB).<sup>8</sup> The Board was to provide mediation assistance in contract negotiations and provide facilities for voluntary arbitration. In the eight months of its operation, the NDMB was fairly successful in keeping work stoppages at a minimum; its operations however, were primarily in a mediation context.<sup>9</sup>

After Pearl Harbor the need for a wartime production effort unimpaired by work stoppages became acute. The NDMB machinery had

<sup>6</sup> For a report on the first three years of arbitration of labor disputes by the AAA, see 5 *Arb. J.* 65 (1941).

<sup>7</sup> Steelman, *The Work of the United States Conciliation Service in Wartime Labor Disputes*, 9 *Law & Contemp. Prob.* 461, 466 (1942).

<sup>8</sup> Exec. Order No. 8,716, 6 *Fed. Reg.* 1,532 (1941).

<sup>9</sup> For an excellent analysis of the NDMB, see Taylor, *Government Regulation of Industrial Relations* 90 et seq. (New York, 1948).

broken down over a dispute as to union security,<sup>10</sup> and a Labor-Management Conference convened immediately after Pearl Harbor reached agreement only on a no-strike, no-lockout pledge and an approval of voluntary arbitration.<sup>11</sup> In January, 1942, the President established the National War Labor Board (NWLB), a tripartite board consisting of labor, industry and public members.<sup>12</sup> The Board was charged with settling labor disputes which might interfere with the war effort, and was authorized to use a variety of methods to achieve that end.

The procedures for adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war shall be as follows: (a) The parties shall first resort to direct negotiations or to the procedures provided in a collective bargaining agreement. (b) If not settled in this manner, the Commissioners of Conciliation of the Department of Labor shall be notified if they have not already intervened in the dispute. (c) If not promptly settled by conciliation, the Secretary of Labor shall certify the dispute to the Board, provided, however, that the Board in its discretion after consultation with the Secretary may take jurisdiction of the dispute on its own motion. After it takes jurisdiction, the Board shall finally determine the dispute, and for this purpose may use mediation, voluntary arbitration, or arbitration under rules established by the Board.<sup>13</sup>

The bulk of the NWLB work was settling disputes concerning wages and union security. The Board was more concerned with threatened work stoppages during collective bargaining negotiation than with grievance arbitration problems and, in order to keep the case load within realistic proportions, often referred grievances back to the parties.<sup>14</sup> Where the parties had circumvented existing provisions for arbitration in their agreement, the Board was adamant in refusing to decide the dispute. The Board did, however, recognize the importance of grievance machinery and, from the first, encouraged inclusion of arbitration clauses in collective bargaining agreements. On July 1, 1943, the Board issued a statement:

The basis for the national war labor policy in America today is still the voluntary agreement between the responsible leaders of labor and industry that there be no strikes or lockouts for the duration of the war. All labor disputes, including grievances, therefore, must be settled by peaceful means. . . . [T]he grievance

<sup>10</sup> Bull. No. 1009, U.S. Dept. of Labor 42 (1950).

<sup>11</sup> *Ibid.*, at 49.

<sup>12</sup> Exec. Order 9,017, 7 Fed. Reg. 237 (1942).

<sup>13</sup> *Ibid.*

<sup>14</sup> Bull. No. 1009, U.S. Dept. of Labor 18 (1950).

procedure, whatever be its adaptation to the needs of the plant, should 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.<sup>15</sup>

The Board recommended voluntary grievance machinery and arbitration and even ordered arbitration in given disputes;<sup>16</sup> however, the Board did not go so far as to order arbitration of future grievances where existing contract terms did not so provide.<sup>17</sup> That both labor and management responded to NWLB prodding by contracting for grievance machinery and arbitration is readily understandable in view of the fact that the only peaceful alternative would be direct government intervention in day-to-day plant affairs.

It is obvious that as a result of NWLB policy and decision, grievance arbitration was common during the war years. How prevalent the practice was cannot be ascertained as there was no reporting of grievance arbitration awards during the period. By the end of the war, it was apparent that grievance arbitration was gaining respect as a device for settling disputes in the administration of collective bargaining agreements.

The grievance procedures directed by the Board have by and large received the whole-hearted support of business and labor. . . . The voluntary practice of many parties to provide arbitration as the final step of the grievance procedure has increased during the war. The Board's decisions . . . have helped prove to large segments of industry and labor that arbitration clauses which skilfully define the arbitrator's jurisdiction do not jeopardize the stability of contract provisions or encourage disagreement in the plant.<sup>18</sup>

The question looming on the horizon as the war drew to a close was whether the removal of government control over industry and labor would undo the work of the NWLB. The parties were chafing at the bit of government restrictions, especially in the area of wage controls. With the end of the NWLB and the National Wage Stabilization Board, wholesale industrial warfare and a paralyzing onset of strikes and lockouts were predicted. Would the relative industrial peace of the war years disintegrate?

<sup>15</sup> 1 National War Labor Board Termination Report 65 (Washington, 1947).

<sup>16</sup> Montgomery Ward & Co., 10 War Lab. Rep. 415 (1943).

<sup>17</sup> Aluminum Co. of America, 17 War Lab. Rep. 352 (1944).

<sup>18</sup> Freidin and Ulman, Arbitration and the National War Labor Board, 58 Harv. L. Rev. 309, 360 (1945).

## POSTWAR DEVELOPMENT OF LABOR ARBITRATION

With the end of the war in 1945 came the expiration of the no-strike, no-lockout pledge. Both labor and management were anxious to escape the yoke of the NWLB. Since the Board's authority was founded on the no-strike, no-lockout pledge, and the parties no longer considered the pledge binding, it was inevitable that the Board's work would soon be terminated. Consequently, the NWLB decided to wind up its affairs by January 1, 1946, which it did. In the meantime, the government was faced with the sizeable problem of winning the peace, a cause which required continued industrial peace. One thing was certain; any plan for keeping work stoppages at a minimum had to be voluntary on the part of labor and management.

On November 5, 1945, the President convened a Labor-Management Conference whose goal was to reach agreement on basic post-war policy issues confronting industrial relations.<sup>19</sup> Although there were many areas of disagreement, the Conference was a success in two respects: For the first time, management formally recognized the principle of collective bargaining; the Conference unanimously recommended the use of arbitration to resolve disputes over application of contract terms. Thus the parties agreed that grievance arbitration was desirable. What factors led to agreement on this issue?

The war increased greatly the number of collective bargaining agreements, especially in the large manufacturing industries. One of the natural developments of collective bargaining was the development of a grievance procedure to administer the agreement. Experience with arbitration during NWLB days generally proved to be a satisfactory manner of resolving industrial disputes. Management and labor, due to the tripartite approach during the war, came to repose more confidence in each other's abilities; responsible leadership was evident on both sides. Also, the war period developed a large number of persons qualified in the arena of industrial dispute. These individuals were able to appreciate the problems of labor and management; they were impartial and expert in many areas of industrial life. Immediately after the war, there was a desire to return to an industrial co-existence relieved of government intervention. Leaders on both sides realized that unless a voluntary method of resolving dis-

<sup>19</sup> For a report on this conference, see Bull. No. 77, U.S. Dept of Labor, Div of Lab. Standards (1946).

putes without extended use of economic warfare was agreed upon, government intervention might result. Voluntary arbitration as the final step in a grievance procedure was tried and tested, and undoubtedly the best alternative to work stoppage as a means of resolving differences.

Labor, not willing to risk adverse public opinion and desiring to avoid government intervention, was willing to place in abeyance the right to strike, provided a fair and impartial means for being heard was provided for in the collective bargaining agreement. The public acceptance of arbitration, the large number of qualified arbitrators being available, and the fact that labor unionism and collective bargaining were firmly entrenched in industrial life probably all contributed to the general acceptance by labor of grievance arbitration as a means of resolving the day-to-day differences in administration and interpretation of agreements.

Management expressed the fear that labor would use the defense efforts and wartime experience to consolidate its interests and make new gains. However, after the war, it was obvious that collective bargaining was here to stay and that the entire future of industrial relations was inextricably bound up with collective bargaining. Although management was probably still wary of the efficacy of arbitration and afraid of future inroads on areas always considered management prerogatives, the fact that the Administration was regarded as being pro-labor, coupled with the fact that labor was willing to substitute arbitration for work stoppage, prompted management to accept the proposition of grievance arbitration.

Since 1945, grievance arbitration has become a routine way of life under collective bargaining agreements, while arbitration in connection with negotiation of new agreements has, more or less, fallen by the wayside. As agreements have become more complex and expanded into new areas of industrial life, so has arbitration expanded. Additional impetus was provided by National Labor Relations Board decisions to the effect that in grievances which also constitute unfair labor practices, the NLRB will not, as a rule, take jurisdiction if arbitration is provided for in the agreement.<sup>20</sup>

Today, grievance arbitration is a big business.<sup>21</sup> Both the Federal

<sup>20</sup> *Timken Roller Bearing Co. v. N.L.R.B.*, 161 F.2d 949 (C.A. 6th, 1947).

<sup>21</sup> While exact figures are not available regarding the number of arbitrations held throughout the country, the following statistics are indicative of a widespread accept-

Mediation and Conciliation Service and the American Arbitration Association provide procedures and arbitrators for interested parties. Arbitrators have come to be recognized as a professional group; in 1947 the National Academy of Arbitrators was founded. Arbitration literature, including reports of awards, constitutes a sizeable portion of professional libraries. Grievance arbitration is still growing and, what is more important, evolving. Examination of some of the current features and patterns of this process indicates that grievance arbitration has not yet settled into a permanent niche of industrial relations. It is time now to turn to these current problems and see how they will affect the future of the process.

#### PATTERNS OF LABOR ARBITRATION

Grievance arbitration is a comparatively young device for the settlement of industrial disputes. Even though the vast majority of collective bargaining agreements contains arbitration provisions,<sup>22</sup> it is difficult to discern many clear, general principles applicable to grievance arbitration as a whole. There are several factors which account for this lack of general concepts.

Until recent years, there was no satisfactory reporting system for arbitration awards.<sup>23</sup> Even today, the bulk of awards are not published. Grievance arbitration, after all, is a device of the parties to the bargaining agreement, and the parties must authorize publication of the awards. Thus, in many areas of dispute and geographic locales, what the arbitrators are in fact doing is not available for study. This is not to suggest that there is a paucity of reported awards; however, the drawing of general conclusions is rendered more difficult by the incomplete and selective reporting process.

Practices and problems vary from industry to industry, and even among plants in any one industry. A satisfactory principle which has evolved in the context, for example, of the construction industry

---

ance of the arbitral process: In 1958, the Federal Mediation and Conciliation Service received 2,326 requests for arbitrators. Report of Federal Mediation and Conciliation Service, 1958, 81 Monthly Labor Rev. 408 (1959); in 1956, the American Arbitration Association reported a case load of 2,175 cases. Third Man Grows in Importance, Business Week 174 (Sept. 7, 1957); the New York State Board of Mediation, most active of the state agencies, handled 1,792 arbitration cases in 1956. *Ibid.*

<sup>22</sup> Various estimated at 90 to 95 per cent of the some 100,000 collective bargaining agreements in force today.

<sup>23</sup> E.g., the Bureau of National Affairs began publishing labor arbitration awards in 1946.

may be completely unsuited for application to the oil industry. Similarly, the problems of a New England textile mill may vary considerably from those of a Southern mill. The attitudes and experience of the arbitrator may also retard the formulation of general principles. An arbitrator versed in the regional economic problems of New England industry might find it impossible to accommodate his experience to a dispute in the California aircraft industry. Although many individuals arbitrate on a nationwide or multi-regional basis,<sup>24</sup> general principles which apply to all areas and all industries are very few, if any.

There is also a divergence of opinion as to what the arbitrator's function is in relation to grievance settlement. Some arbitrators feel that a "labor relations" approach is necessary in resolving grievances; the award must be palatable and enhance the future bargaining of the parties. These arbitrators tend to mediate and negotiate with the parties and look askance at any who would suggest that arbitration is a quasi-judicial process concerned only with interpretation of the agreement. The opposing school of arbitrators feel that arbitration is the resolution of a dispute; this dispute should be resolved in relation to the terms of the bargaining agreement; the process is quasi-judicial and does not allow for mediation or negotiation. This disagreement over the arbitrator's function militates against a conceptual jurisprudence of grievance arbitration.

All of these factors—haphazard reporting, varying industrial practices, varying attitudes and experience among arbitrators, and the dispute of the arbitrators over their function—when combined with the relative youth of grievance arbitration lead to the conclusion that labor arbitration is an intensely casuistic process. Any two disputes, ostensibly involving the same factual situation, may be resolved differently, each solution correct when viewed in the context of its background. This casuistic, case by case approach can be compared with the development of equity in the English common law. Equity also began as an intense casuistic system, but by the nineteenth century had hardened into a rigid set of concepts which, in a number of ways, resulted in harshness and hardships equivalent to those of the common law. This comparison suggests that if grievance arbitration is to be moulded into a systematic, conceptual system of indus-

<sup>24</sup> Arbitration and the Law 190 (Proceedings of the Twelfth Annual Meeting, Nat'l Academy of Arbitrators, Washington, 1959).

trial jurisprudence, the most desirable aspects of the process, *i.e.*, fluidness, adaptability and "custom tailored" awards, will be lost. The desirability of a "custom tailored" award cannot be overemphasized. Most collective bargaining agreements run for one or more years. Any arbitration award during the life of the agreement necessarily affects the continuing relationship of the parties under the agreement. An arbitrator is always faced with the problem of whether the parties can subsequently "live with the award." If a rigid set of arbitration principles were to evolve, the continuing relationship of the parties could suffer and awards might conceivably engender more disputes than they would resolve.

The inability to formulate general concepts of grievance arbitration by no means disparages the process. As pointed out above, conceptualism could destroy the efficacy of arbitration as a means of resolving industrial disputes. A case by case approach is, perhaps, a major reason for the widespread acceptance of arbitration by industry and labor. Granting the premise that it is not desirable to state general principles applicable to grievance arbitration today, there are certain areas, patterns if you will, which are evolving and may affect the future directions and ultimate fate of the arbitral process. Some of these patterns, which indicate a trend toward positivistic conceptualism, are the involvement of the legal profession with arbitration, the use of precedent in the arbitral process and judicial intervention in labor arbitration.

#### THE LEGAL PROFESSION AND LABOR ARBITRATION

One of the distinguishing characteristics of labor arbitration as compared with commercial arbitration is the large role of the lawyer in the arbitral process. In commercial arbitration the lawyer is the exception rather than the rule. Rarely are lawyers called upon to act as commercial arbitrators and rarely are the parties to a commercial arbitration represented by counsel. Commercial arbitration has developed apart from the law and legal profession and legal and judicial concepts are studiously avoided. The brief history of labor arbitration, on the other hand, has involved a much greater participation by the legal profession. A large percentage of the country's arbitrators are lawyers or law professors. The recent history of grievance arbitration shows an increasing representation of parties by lawyers at arbitration hearings. An American Arbitration Association study of

1,183 labor arbitrations in 1954 indicated that in more than 34 percent of the cases, practicing attorneys arbitrated; 20 percent of the arbitrators who listed educator as their occupation were law professors.<sup>25</sup> In over 63 percent of the cases studied, attorneys represented one or both parties.<sup>26</sup> The significant percentage of law-oriented people involved in labor arbitration is reflected in the increasing practice of taking transcripts at hearings and filing post-hearing briefs.<sup>27</sup>

The growing use of lawyers and the attendant multiplication of transcripts and briefs naturally result in delay and increased costs.<sup>28</sup> However, this is but a surface symptom of what some consider a more serious problem. The appellation coined to describe this problem is "creeping legalism."<sup>29</sup> Professor Stein, in a 1958 speech, stated:

A frustrating kind of legalism has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation. . . . What has happened is that a device almost ideally suited for the resolution of a handful of troublesome questions has been blown up into a gigantic kind of business which the parties have tended to make a central feature of industrial relations.<sup>30</sup>

The criticism implies that not only formalism (transcripts, briefs, formalized hearings) but legal concepts of contract interpretation are undermining the collective bargaining process and may eventually smother the process. The dire picture portrayed by "creeping legalism" has been attacked by Benjamin Aaron:

If the parties elect to limit the arbitrator's duties to the "judicial determination of disputes," why should we denigrate their decision by characterizing it as "creeping legalism"? . . . In any case, formality v. informality is not, or should not be, the issue: The important question is whether the procedure adopted effectuates the purposes of the arbitration.<sup>31</sup>

The various arguments against lawyers and legalism in labor arbitration tend to overlook the fact that labor arbitration, more than any other process, is a device completely controlled by the parties.

<sup>25</sup> 12 Arb. J. n.s. 67, 71 (1957).

<sup>26</sup> *Ibid.*, at 72.

<sup>27</sup> In the same study, it was indicated that transcripts were taken in more than 22 per cent of the cases and briefs filed in almost 42 per cent. *Ibid.*, at 75, 76.

<sup>28</sup> Ross, *The Well-Aged Arbitration Case*, 11 *Ind. & Lab. Rel. Rev.* 262 (1958).

<sup>29</sup> 13 Arb. J. n.s. 129 (1958).

<sup>30</sup> Stein, *Arbitration and Industrial Jurisprudence*, 81 *Monthly Lab. Rev.* 866 (1958).

<sup>31</sup> Aaron, *Labor Arbitration and Its Critics*, 10 *Lab. L. J.* 605, 606, 607 (1959).

The parties select the arbitrator; the parties present the case; the parties request the transcript; the parties decide whether to file briefs. The conclusion is inescapable that the parties desire the participation of the legal profession and legalism. Although the increase in cost and delay causes some apprehension, the increase still does not remotely approach the costs and delays of the judicial process. That legalism has aroused comment,<sup>32</sup> in itself suggests that this pattern is noteworthy. Whether the parties are finding themselves trapped in a legal cage or whether they actually desire legalism does not affect the conclusion that this pattern is shaping the future of grievance arbitration.

#### USE OF PRECEDENT IN THE ARBITRAL PROCESS

One pattern developing in labor arbitration which causes some concern is the increasing citation of authority in post-hearing briefs and arbitration awards. There has probably not been a great deal of *reliance* placed on authority by the arbitrators, but there is a great deal of citation of authority which confronts the arbitrator after the hearing. Due to the widespread divergence of practices and problems among industries and individual plants, it would indeed stultify the arbitral process if reliance on precedent becomes acceptable. However, counterbalancing the undesirability of rigidifying the process through use of precedent is the considerable benefit of promoting uniformity and stability in any one plant or industry. This is most obvious in those industries employing a permanent umpireship form of arbitration. Here, if the Umpire can introduce some semblance of uniformity by relying on his previous decisions, the ultimate decrease in the number of similar grievances could be very gratifying. In the *ad hoc* type of arbitration there is little opportunity for establishing uniformity through use of precedent since the arbitrator is generally unaware of previous experiences of the parties.

Although the benefits and detriments resulting from the use of precedent are fairly obvious, the question still remains, what is the arbitrator to do when confronted with briefs heavily sprinkled with citation of authority?

After all, an arbitrator who receives from either or both parties a voluminous brief, crammed with citations to judicial decisions and arbitration awards, runs certain risks: If he neglects to check such citations and to mention them in his

<sup>32</sup> Platt, *Current Criticisms of Labor Arbitration*, in *Arbitration and the Law* vii (Proceedings of the Twelfth Annual Meeting, Nat'l Academy of Arbitrators, 1959).

opinion, he may be accused of carelessness or arrogance; if he takes the opposite course, he is likely to be charged with making a tiresome show of useless knowledge and of padding his fee as well.<sup>33</sup>

There is, of course, no one-word solution to this problem. It seems, however, that this particular pattern will evolve in the direction of looking to authority for persuasive reasoning rather than binding precedent. Citation of authority will increase and it is likely that the future will see much more discussion of authority, especially in light of the pattern of judicial intervention in the arbitral process.

#### JUDICIAL INTERVENTION IN LABOR ARBITRATION

*Textile Workers Union v. Lincoln Mills of Alabama*,<sup>34</sup> represents a turning point in the development of grievance arbitration. In that case, the Supreme Court held that § 301 of the Labor-Management Relations Act<sup>35</sup> requires the courts to develop a federal substantive law of collective bargaining agreements; since an arbitration clause is part of the collective agreement, the agreement to arbitrate is binding and enforceable by a decree of specific performance. The effect of the holding is to provide a federal district court forum for resisting or compelling arbitration and resisting or compelling enforcement of an arbitration award. One of the immediate implications of the decision is a renewal of the question of whether the arbitrator or the court should determine if a dispute is arbitrable under the particular arbitration clause in question.<sup>36</sup> The full impact of the *Lincoln Mills* case lies in the area of the fundamental relationship between arbitration and the courts; which of the two processes is to have the primary responsibility of interpreting collective agreements? Some arbitrators are concerned that federal court interpretation and construction of collective bargaining agreements will emasculate grievance arbitration. The other extreme would take the position that since arbitrators are not bound by the law, they can blithely ignore judicial pronouncements regarding interpretation of agreements. Perhaps the best

<sup>33</sup> Aaron, *op. cit.* supra note 30 at 608.

<sup>34</sup> 353 U.S. 448 (1957).

<sup>35</sup> 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952): "(a) Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ."

<sup>36</sup> For a discussion of who determines arbitrability, see Elkouri, *How Arbitration Works* 36 (Washington, 1952).

analysis of the future relationship between arbitration and the law is expressed by Professor Cox:

Some interaction between arbitration and federal law is inevitable simply because section 301 provides a forum in which to bring suits upon collective bargaining agreements. The volume of litigation seems likely to increase. The resulting rules of decision will affect later arbitration awards even though arbitrators are not required to follow the law. All arbitrators occasionally use court decisions as precedents. Those who are lawyers will be influenced by legal analysis. So will the attorneys who represent companies and labor unions. When experienced bargainers negotiate a contract, they do not ignore settled legal doctrines. Upon an application to compel or stay arbitration or to enforce or vacate an award the court's attitude is bound to be affected by any prior judicial rulings upon any issue tendered for the arbitrator's decision. Even though the thought projects us some distance into the future, does it not seem likely also that the willingness to arbitrate will be affected by any sharp differences between the attitudes of arbitrators and the doctrines which would prevail in a judicial forum?<sup>87</sup>

Many arbitrators are of the opinion that judicial interpretation of collective bargaining agreements bodes ill for industrial relations. There is feeling that collective bargaining agreements are not like other contracts and that application of legal canons of contract interpretation will result in unrealistic decisions detrimental to the bargaining process. The implication is that courts are not equipped with the expertise necessary to deal with collective agreements.<sup>88</sup>

As yet there has been no great rush to the courts in the wake of the *Lincoln Mills* case. However, if one side or the other discovers a tactical advantage is to be gained by resort to the courts, the volume of litigation will undoubtedly increase. It is obvious that even if litigiousness increases, the federal courts will not put the arbitrators out of business. However, the problem still remains, to what degree will the courts impose legal conceptualism upon grievance arbitration? That some imposition is inevitable cannot be questioned. If the arbitrators are to prevent rampant judicial intervention and an ultimate shriveling of the arbitral process, Cox warns that the arbitrators must develop a "philosophy of grievance arbitration in terms which are familiar to the courts."<sup>89</sup> Whether there will be a great struggle between

<sup>87</sup> Cox, *Reflections Upon Labor Arbitration in the Light of the Lincoln Mills Case, in Arbitration and the Law* 24, 29 (Proceedings of the Twelfth Annual Meeting, Nat'l Academy of Arbitrators, 1959).

<sup>88</sup> One case consistently singled out for attack illustrates the conflict between the judicial and arbitral conception of the scope of the arbitrator's function. See, *Local 402, Int. Ass'n of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67, N.Y.S.2d 317 (1947), *aff'd* 297 N.Y. 519, 74 N.E.2d 464 (1947).

<sup>89</sup> Cox, *op. cit.* supra note 36 at 32.

the arbitrators and courts for jurisdiction to interpret collective bargaining agreements remains to be seen. In any event, it appears that the pattern of judicial intervention is likely to usher in an era of conceptualism.

#### A LOOK AHEAD

The evolution of labor arbitration as a method of resolving industrial disputes is the most dynamic force in labor-management relations today. Less than two decades of age, the device has had a profound effect on collective bargaining and industrial relations as a whole. It would seem that as the relationship between union and management matures, disputes should decrease, the lower steps of the grievance procedure should be more effective, and the necessity for arbitration diminish. However, grievance arbitration is growing. Whether this indicates a relative immaturity in the relationship or is an indication that arbitration is more than a method of resolving grievances cannot be easily determined. Perhaps, as Stein suggests, arbitration is becoming an adjunct to the bargaining process and is really a method of avoiding troublesome problems in negotiating agreements.<sup>40</sup>

The general patterns of labor arbitration which are presently evolving suggest that the ultimate role of arbitration in a system of industrial jurisprudence has not yet been determined. The patterns of legalism and judicial intervention indicate that labor arbitration is moving from casuistry to some form of positivism, historical or systematic. It is likely that the parties, the courts and the arbitrators themselves will demand some form of ideological unity in the arbitral process. Whether this unity will be imposed by the arbitrators or the courts is an area still in the embryonic stage of development. That a positivistic approach will eventually rigidify the process seems an historic certainty. Right now, rigidity appears remote (after all, it took more than a hundred years for English equity to solidify). Although the future of grievance arbitration may be uncertain, it can safely be said to remain as the most effective current method of resolving industrial disputes.

<sup>40</sup> Stein, *op. cit.* supra note 29 at 867.

# DE PAUL LAW REVIEW

---

Volume IX

SPRING-SUMMER 1960

Number 2

---

## BOARD OF EDITORS

*Editor-in-Chief*

GERALD M. SHERIDAN, JR.

---

BURTON F. BRODY

PAUL R. HOFFMAN

JOHN P. CROWLEY

BARBARA A. SENA

FRANCES G. SOWA

## ASSOCIATE EDITORS

DOUGLAS BROWN

GARY GRIFFIN

BURTON ROSS

## STAFF

HUGH ARNOLD

FRANK MILOS

EDWIN BUCKLEY

DOMINIC RIZZI

IRWIN COHEN

SPENCER SCHWARTZ

RONALD COHEN

ROBERT SEMRAD

FRANCIS GIBBONS

MURRAY SIMPSON

NICHOLAS KARRIS

MICHAEL SPAK

GARLAND WATT

## BUSINESS STAFF

JACK MARCUS, *Manager*

ALLAN ZOLOTO, *Assistant*

## FACULTY DIRECTOR

FRANCIS J. SEITER

*Member, National Conference of Law Reviews*