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# Legal and Economic Significance of Labor Arbitration Awards

Walter E. Boles Jr.

# LEGAL AND ECONOMIC SIGNIFICANCE OF LABOR ARBITRATION AWARDS

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VOLUNTARY arbitration offers the best and probably the only hope for survival of collective bargaining and free employer-union relations.[1] Imposition of compulsory arbitration and settlement of labor disputes by government courts or boards is the alternative.[2]

Purpose here is to consider some aspects of one phase of labor arbitration law: that concerning the arbitrator's decision or "award." What are the legal requirements as to form at common law and under arbitration statutes? What is the legal nature of an award? Is it a contract? A judgment? How is it enforced? Under what conditions can an award be challenged successfully at common law? Under statute? Should arbitration awards serve as "precedents" in the industrial relations field? These questions are considered here.

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1 "... [I]n ... [arbitration] lies the major hope of preserving the bargaining process in labor relations, and thus of saving both industry and labor from the evils of domination by officialdom." Frey, *The Logic of Collective Bargaining and Arbitration*, 12 L. & Contemp. Prob. 264, 271 (1947).

2 "... [C]ompulsory arbitration would be a long step toward centralized control of the economy by the federal government. It may be possible in theory for government to control wages without controlling prices and profits, but it would be very difficult to do this in practice.... While in principle a government arbitration board may be exercising authority over unions and managements, in practice both labor and management will be doing their best to control the policies of the board. The history of the National War Labor Board [World War II] provides abundant evidence of this tendency. Government decision of the terms of employment, then, is bound to mean decision based on political pressures and expediency rather than on ideal standards worked out by university professors. One should discard any notion that compulsory arbitration would lead to perfect justice or complete industrial peace. Where labor is politically powerful, it is not feasible simply to 'crack down' on strikes, even though they may violate an established arbitration procedure." REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS (1st ed. 1949) 305, 306.

### 1. Requirements as to Form

At common law no particular form of award is prescribed.[3] It may be written or oral. The parties may, of course, stipulate in the submission agreement[4] that it be in writing and may specify a particular form for it to take. Williston says that at common law, unless the submission agreement expressly or impliedly authorizes a majority to make the award, all members of an arbitration tribunal must concur.[5]

Arbitration statutes usually fix precise requirements concerning the form of the award.[6] The New York statute, for example, provides that an enforceable award must be in writing. The arbitrator or arbitrators must subscribe it. And they must sign it within the time limit if a limit is set in the submission agreement. The award must be "acknowledged" or "proved," and "certified" as if it were a deed to be recorded. Then it must either be filed in the office of the clerk of the appropriate court, or delivered to one of the

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[3] Some arbitrators simply announce their awards in a brief sentence and do not write an opinion explaining how and why they decided as they did. This is bad procedure, indeed. Effective, carefully-drafted opinions explaining and defending awards can become "documents" in the industrial relations field and are absolutely essential if "awards" are to have precedential value in settlement of labor disputes. But at this point we are concerned only with the award itself, which usually is couched in some such language as: "My award is ... that X be reinstated to her job at the Ypsilanti Generator Plant without loss of seniority and with back pay for the time lost between the date of her discharge and her employment at the Bomber Plant, in accordance with Para. 29 (10) (F) of the parties' agreement." Ford Motor Co. and UAWU, CIO, 1 A. L. A. A. § 67,014 (1944). Or, "AWARD. By reason of the clear terms of Para. 'Nineteenth' of the agreement, the Arbitrator finds and awards that the wage rates of the employees involved herein be increased by 6% retroactive to February 2, 1947." Swiss American Watch Hospital, Inc., and Retail and Wholesale Employees' Union, Local 830, CIO, 2 A. L. A. A. § 67,711 (1947).

[4] No special form is required at common law for the "submission agreement" (to arbitrate an existing dispute). If form requirements are set forth in an arbitration statute, they must be followed to the letter. Here is a reasonably typical example of submission agreement: "It is hereby agreed by the parties listed below that the issues described below shall be heard by an Arbitrator to be named by............... The issues to be determined are as follows: ............... The decision of the Arbitrator shall be final and binding upon the parties." (Signature of parties.) Chicago Flexible Shaft Co. and U. E. R. & M. W. of America, 5 C. L. E. § 64,601 (1947).

[5] 6 Williston, Contracts (Rev. Ed. 1938) § 1929.

[6] The Texas statute provides only that the award shall be in writing (Tex. Rev. Civ. Stat. (Vernon, 1948) art. 231) and in triplicate (art. 248). One copy is to be filed in the office of the clerk of the district court in the county where the labor arbitration is held, one goes to the employer and the third is for the employee(s).

parties or to his attorney.[7] Such statutory requirements must be followed very carefully and must be complied with strictly. The importance of this is that if the award is not in the proper form it will not be enforceable under the method provided in the statute. And, since the "statutory" method of enforcement usually is speedier and less complicated and more inexpensive than the "common law" enforcement proceedings, the parties simply cannot afford awards which are improper in form. Williston indicates, however, that if an award rendered under what has purported to be a statutory arbitration fails because it is not in the form prescribed by the statute, it still may be enforceable as a common law award.[8]

### 2. Legal Nature of the Award

Is an arbitration award a contract? A judgment? Updegraff and McCoy say it is neither, though it partakes of the nature of both.[9] It results from a contract—the submission agreement[10]—but it is not itself a contract. Consider an example. In one arbitration the parties agreed in the submission that they would comply with the award, as follows:[11]

> "[The parties] have agreed to submit to you the following issue for final and binding arbitration: Under the contract between the Company and the Union, are employees Jenkins and Steddenbenz entitled to the method of pay they were receiving prior to August 24, 1938? . . . Both parties and the employees involved will accept your decision as final and binding." (Signatures of the parties.)

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[7] N. Y. Civil Practice Act, § 1460.

[8] 6 Williston, *op. cit. supra* note 5, § 1928. In Ferguson vs. Ferguson, 93 S. W. 2d 513, 516 (Tex. Civ. App. 1936) (involving arbitration of controversies arising out of settlement of an estate), Justice Funderburk said that if the award in question could not be held sufficient as a statutory award "then as against the attack made upon it, it was sufficient as a common-law award." He continued, "The award, if the arbitration was statutory, had the effect of a judgment, and if common-law, had the effect of a contract, alike conclusive upon the parties as to all matters of fact and law, in the absence of partiality, fraud, mistake, or gross error, duly pleaded and proved such as would warrant the setting aside of a judgment or a contract."

[9] Updegraff and McCoy, Arbitration of Labor Disputes (1st ed. 1946) 124.

[10] See *supra* note 4.

[11] Nat'l Malleable & Steel Castings Co. and UAW, 3 A. L. A. A. § 68,158 (1949).

Thus the parties contracted to abide by the award, which in this case read as follows:[12]

> "It is awarded that under the current contract between the employer and union herein concerned, the company was entitled to announce and put into effect the changes in the duties, job designation and compensation herein concerned."

The award, to repeat, results from the submission agreement or contract. And after the award is made the parties are bound by their submission agreement to abide by it. Thus, the award "partakes of the nature of a contract."[13] But the award is the act of the arbitrator and not the parties themselves; so in this respect it differs from a contract.[14]

How does an arbitration award resemble a judgment?[15] "It partakes of the nature of a judgment in that, if it is valid, it is binding upon [the parties] though imposed by an outside source. It is in fact an extrajudicial judgment of a tribunal selected by and given power by the act of the parties."[16] Or, as another source puts it, "... [A]n award of arbitration upon a matter in difference be-

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[12] *Ibid.*

[13] UPDEGRAFF AND McCOY, *op. cit. supra* note 9 at 125.

[14] Professor Alexander H. Frey of the University of Pennsylvania Law School says, "In agreeing to arbitrate, the disputants in effect execute a contract with some blank terms in it; they authorize the arbitrator to fill in the blanks for them, and what he fills in becomes *their* contract. Thus the same morality that recognizes the sanctity of a contract also sustains an arbitration award." Frey, *op. cit. supra* note 1 at 277. Justice Stayton, in Myers v. Easterwood, 60 Tex. 107, 110 (1883), wrote, "The award of the arbitrator is substantially the agreement of the parties, for they each empowered the arbitrator to ascertain and declare the terms of the agreement, and by his award, when fairly made, they ought to be as much bound as though they had made an agreement directly between themselves, embracing the terms of the award."

[15] In Jones v. Frosh, 6 Tex. 202, 204 (1851), Justice Lipscomb stated,

> "...I take it to be an acknowledged rule of law that an award not impeachable with fraud is conclusive of all matters that had been submitted to the arbitrators. It is as much so as a judgment, and in the language of Chief Justice DeGray in the Dutchess [*sic*] of Kingston's case, is as a plea, a bar, or as evidence conclusive between the same parties upon the same matters."

*See* City of San Antonio v. McKenzie Const. Co., 136 Tex. 315, 150 S. W. 2d 989 (1941); 4 TEX. JUR., *Arbitration and Award*, § 22.

[16] UPDEGRAFF AND McCOY, *op. cit. supra* note 9 at 125.

tween parties is regarded as the judgment of a court of last resort for that controversy. . . ."[17]

### 3. Enforcing the Award at Common Law

Suppose neither party has revoked the arbitration agreement, the hearing has been held and the arbitrator has made his award. Assume that the losing party then refuses to abide by the terms of the decision. Williston writes, ". . . [T] common law favored enforcement of arbitration awards; and it was rare for them to be invalidated; in fact, they were accorded almost the protection of a judgment of a court at law."[18] It would appear that in general the award may either be the subject of a suit at law to recover money damages, or a suit in equity to obtain a decree of specific performance.[19]

Specific performance of labor arbitration awards certainly should be decreed when money damages prove inadequate, and it appears that an increasing number of courts are inclined to decree specific enforcement wherever necessary to effectuate such awards. "It is possible," states Teller, "to say today that the maintenance of a management-union relationship under a collective bargaining agreement is a general ground of equity jurisdiction."[20] He argues that a kind of "new jurisprudence" is developing. That is, Teller recognizes that courts of equity have long been disinclined to enforce contracts calling for the rendering of personal services.[21] But he believes that "remedies applicable to collective agreements are viewed entirely differently by the courts from remedies relating to individual employment contracts."[22] Courts,

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[17] 3 Am. Jur., *Arbitration and Award,* § 135.

[18] 6 Williston, *op. cit. supra* note 5, § 1929A.

[19] 3 Am. Jur., *Arbitration and Award,* § 167.

Just why courts generally favor awards but not arbitration agreements is not clear. No good reason has been advanced for this distinction. See Simpson, *Specific Enforcement of Arbitration Contracts,* 83 U. Pa. L. Rev. 162-164 (1934).

[20] Teller, *Specific Remedies in Labor Arbitration,* 3 Arb. J. (N. S.) 176, 179 (1948).

[21] 4 Pomeroy's Equity Jurisprudence (5th ed. 1941) § 1343.

[22] Teller, *op. cit. supra* note 20 at 178. In support of this, Teller might well have

that is, are likely now to order an employer to honor an arbitrator's award under a union contract restoring an employee's job, though the same court would be disinclined to order Mrs. Smith to continue to give employment to the maid she had fired in violation of an individual contract of employment. Teller says that "the Wagner Act (carried forward in the Taft-Hartley Act), authorizing the reinstatement of discriminatorily discharged employees, has served to point up this distinction, and has helped to provide a basis for the new jurisprudence."[23] He concludes that "the cases appear to be tending toward greater recognition of the propriety of specific enforcement [of arbitration awards]."[24]

Since, however, collective bargaining and the reinstatement of employees discharged for union activity have been stressed as public policy in the United States only during the past sixteen years or so, it is probable that the "new jurisprudence" has not yet been embraced by all our courts. Law tends to lag behind market practices, labor market or otherwise, though probably not so far behind as some would have us believe. All we are saying here is that there appears to be a general trend to decree specific performance of arbitration awards, including those ordering reinstatement of employees who have not been discharged "for cause."

### 4. Statutory Enforcement of Awards: States

Consider now enforcement procedure under arbitration statutes. Almost all the general arbitration statutes[25] provide a special

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quoted Mr. Justice Jackson, speaking for the Court in J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 334, 335 (1944):

"Collective bargaining between employer and the representatives of a... union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.... After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings."

23 *Id.* at 178, 179.

24 *Id.* at 180.

25 "General" arbitration statutes—which have been enacted in a majority of the states—were not designed specifically to cover labor arbitration. Their framers had

method of enforcing awards, the objective being to simplify and speed up the procedure and avoid the necessity of a full-fledged suit.[26] That is, such statutes generally provide that awards may be made court judgments on motion of either party or on the mere filing of the award in court. The New York statute, for example, provides that a party may apply to the appropriate court for an order confirming the award; then, unless the other party can attack the award successfully on the grounds set forth in the statute,[27] the court must grant the order and judgment may then be entered on the award.[28] Such a judgment then may be enforced in the same manner as other court judgments.

Under the Texas labor arbitration statute the award "shall go into practical operation" when a copy is filed in the district clerk's office of the county where the arbitration was held, and "judgment

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commercial arbitration in mind. But most of these general statutes are framed in such broad and general terms that they are applicable to labor disputes. The Texas commercial arbitration statute (TEX. REV. CIV. STAT. (Vernon, 1948) arts. 224-238) was passed originally in 1846. Arts. 239-249, enacted originally in 1895, provide specifically for labor arbitration.

For detail on general arbitration laws see the valuable "Analytical Table of General Arbitration Statutes" in LABOR ARBITRATION UNDER STATE STATUTES (U. S. Dept. Labor, 1943) 43-59; Dowell, *Judicial Enforcement of Labor Arbitration Awards in Labor Disputes*, 3 Rutgers U. L. Rev. 9, notes 56, 57, 58 (1949); Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. of Chi. L. Rev. 233 (1950).

Larson, *The Legal Status of Arbitration in the Southwest* in SECOND ANNUAL INSTITUTE ON LABOR LAW (Southwestern Legal Foundation, 1950) 84-92, discusses arbitration statutes of Texas, New Mexico, Arkansas, and Louisiana. He points out that Oklahoma has no conventional arbitration statute, common law prevailing there without statutory modification. New Mexico's arbitration statute, enacted in 1859, seems to be aimed primarily at "ordinary civil controversies," but "it would seem that the legislation would apply to labor disputes concerning interpretation and application [but not concerning negotiation] of a collective contract." *Id.* at 86. About the same comment is made concerning the Arkansas arbitration statute (ARK. STAT. 1947 ANN. §§ 34-501, 34-510). *Id.* at 87. Larson discusses at some length the arbitration legislation of Louisiana, which is scattered through the Civil Code, the Code of Practice, and the General Statutes. He summarizes by saying, "... Louisiana law makes agreements to arbitrate present and future labor disputes irrevocable and specifically enforceable. A careful procedure has been worked out to give the arbitration award the status of a judgment which can be enforced." *Id.* at 92.

26 Three general arbitration statutes provide that the only enforcement technique is the common law method of an independent suit on the award: Iowa, Kentucky, Tennessee. Dowell, *op. cit. supra* note 25 at 80, 81, n. 66.

27 These are discussed *infra*.

28 N. Y. CIVIL PRACTICE ACT, § 1461.

shall be entered thereon accordingly, at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent on the record. . . ."[29]

## 5. STATUTORY ENFORCEMENT OF AWARDS: FEDERAL

It is not certain that the Federal Arbitration Act covers arbitration of labor disputes pursuant to a clause in a collective bargaining agreement: federal circuit courts of appeals have held both ways.[30] It will not be amiss, however, to mention enforcement pro-

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29 TEX. REV. CIV. STAT. (Vernon, 1948) art. 248. Some eleven states have enacted special statutes bearing on labor disputes which have had very little effect on development of labor arbitration as a whole. They deal mainly with negotiation disputes, rather than grievances arising from already bargained union-management contracts. They are confined mainly to public utilities or certain public enterprises such as hospitals. And they usually provide for a kind of compulsory arbitration. These special enactments contain fewer references to court appeals and court judgments than do the "general" arbitration statutes. Under most of them the only enforcement technique is the common law method of an independent suit on the award. Dowell, *op. cit. supra* note 25 at 80, 81; Gregory and Orlikoff, *op. cit. supra* note 25 at 244.

Florida, Indiana, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Texas, Virginia and Wisconsin have such laws, according to Gregory and Orlikoff, *op. cit. supra* note 25 at 242, n. 45. But "compulsory investigation" is about all the Texas "special" statute calls for. TEX. REV. CIV. STAT. (Vernon, 1948) arts. 5183-5190. This act created the Texas Industrial Commission in 1920, with one member each for employers and labor and three representing the public. The governor is empowered to refer to this commission labor disputes he considers "of public concern or interest." After public hearings on the controversy, the commission reports, with recommendations, the results of the investigation to the governor and legislature. The 1947 Odessa telephone strike was the most recent occasion for action under this statute.

30 Section 1 of the statute provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. 1946 ed. § 1. Two circuit courts of appeals have held that this provision applies throughout the Act. Gatliff Coal Co. v. Cox, 142 F. 2d 876 (6th Cir. 1944); Internat. Union of United Furn. Workers v. Colonial Hardwood Floor Co., 168 F. 2d 33 (4th Cir. 1948). But another court of equal stature has ruled that this exclusionary language applies only to § 1 and not to the remainder of the statute—that is, that § 1 simply defines the terms "maritime transactions" and "commerce" and that the words "nothing herein contained" mean "contained" in § 1. Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 (3d Cir. 1943); Watkins v. Hudson Coal Co., 151 F. 2d 311 (3d Cir. 1945). Under this interpretation, the Court of Appeals for the Third Circuit has applied § 3 to disputes involving collective bargaining contracts and has ordered suits stayed until arbitrations were held as provided for in the contracts. In United Office & Professional Workers of America, CIO, v. Monumental Life Ins. Co., 88 F. Supp. 602 (E. D. Pa. 1950), the district court applied the Federal Arbitration Act to a dispute arising under a union contract, citing the Third Circuit decisions in the *Donahue* and *Watkins* cases as binding. In 1951 the District Court for the Southern District of New York applied the federal statute to a dispute originating under a collective bargaining agreement. Lewittes & Sons v. United Furniture Workers

cedure under that statute. Like many of the "general" state arbitration laws, the federal Act provides that awards may be confirmed by court order. Federal district courts are given this power. Application for the confirmation order must be made within one year after the award is handed down. Section 9 of the statute seems to say that this procedure is available to the parties only if they specify in their arbitration agreement that they will follow it.[31] The United States Supreme Court, however, has held that this statutory method of enforcing the award is available even though the arbitration agreement does not provide for it where the agreement stipulated that the award should be "final and binding."[32] And the Court of Appeals for the Second Circuit held that *B* impliedly agreed to abide by the result of arbitration and to entry of judgment on the award, even though the submission agreement contained no authorization for entry of judgment, under these facts: *A* sued *B* on a contract containing a provision requiring any dispute arising out of it to be arbitrated; *B* pleaded the arbitration clause as a "defense" and the trial court, in effect, agreed with *B*

of America, CIO, 95 F. Supp. 851. The court asserted: "The agreement in question is a collective labor agreement, and, as such, is not a 'contract of employment.'... The exception in Section 1 [contract of employment] was intended to avoid the specific performance of contracts for personal services in accordance with the traditional judicial reluctance to direct the enforcement of such contracts and it was not intended to apply to collective labor agreements.... Where the parties manifest a purpose to dispose of their disputes by arbitration rather than ... economic force ..., their agreements should be liberally construed with a view toward the encouragement of arbitration.... The Courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.'" *Id.* at 855, 856. See *supra* note 22.

The United States Supreme Court denied certiorari in the *Watkins* case. 327 U. S. 777 (1946). This may mean the Court agrees with the more liberal interpretation of the coverage of the Federal Arbitration Act. But the matter should be settled definitely—and promptly—either by Supreme Court decision or by amendment of the Act. The latter is preferable. Congress should state unequivocally that disputes arising out of the negotiation or interpretation of collective bargaining agreements are covered by the statute.

[31] 9 U. S. C. 1946 ed. § 9. This section reads, "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award... and shall specify the court, then at any time within one year after the award is made any party ... may apply ... for an order confirming the award, and ... the court must grant such an order unless the award is vacated, modified, or corrected as specified in sections 10 and 11...."

[32] Marine Transit Corp. v. Dreyfus, 248 U. S. 263, 276 (1931).

that *A* must submit to arbitration; the arbitration was held and *B* lost; *B* refused to abide by the award; *A* then sought to have the award enforced under the Federal Arbitration Act; elusive *B* then asserted the court could not enter an order confirming the award because the submission agreement had contained no such provision.[33] Despite these two decisions, however, parties to labor arbitration proceedings under the Federal Arbitration Act, when and if it is applicable to labor disputes, will do well to provide in their arbitration agreements that a judgment of a specified court shall be entered upon the award.

The Railway Labor Act provides an elaborate procedure for the enforcement of arbitration awards involving employees of interstate railroads and common carrier air lines engaged in interstate or foreign commerce. The award of an arbitration board must be filed with the clerk of the federal district court having jurisdiction. Once filed and acknowledged, the award is conclusive as to the merits and facts of the controversy unless, within ten days after the filing, a petition to impeach the award is filed by the other party in the clerk's office. The district court enters judgment on the award if no such petition is filed, and the judgment is final and conclusive on the parties.[34] But suppose one of the parties does try to impeach or contest the award within the ten-day period after the award is filed. The district court will make a decision on the petition to impeach or contest and will enter a final judgment, one way or the other, unless within ten days after its decision on the petition to impeach or contest one of the parties appeals from the decision to the appropriate United States court of appeals. The action taken by the court of appeals in the matter is final.[35]

### 6. CHALLENGING a COMMON LAW ARBITRATION AWARD

Once an award has been made, it is quite difficult to impeach it successfully. It is said that this is because of the "dual or anoma-

[33] Murray Oil Products Co., Inc., v. Mitsui & Co., Ltd., 146 F. 2d 381, 383 (1944).
[34] 45 U. S. C. 1946 ed. § 159 (second).
[35] 45 U. S. C. 1946 ed. § 159 (sixth).

lous nature" of the award. That is, since it is not strictly a judgment, not every valid ground for attack on a judgment is good against an award. And, because the award is not entirely a contract, some of the grounds for relief against performance of a contract fail when raised against an arbitration award. And so, in general, the ground urged against an award must be such as would be good *both* for attack on a judgment and for relief against the terms of a contract.[36]

The general attitude of the common law can be summarized like this: "As a rule . . . an award stipulated by the parties to be final will not be set aside unless it is clearly made to appear that there has been fraud by a party, or the arbitrators have mistaken their authority, departed from the submission [agreement], clearly misconceived their duties, acted upon some fundamental and apparent mistake, or have been moved by fraud or bias."[37]

Fraud or misconduct or other undue means employed by a party to the arbitration will render the award subject to impeachment. For example, suppose an award was obtained because one of the parties testified falsely or suppressed material facts.[38] Parties to arbitration proceedings should be very careful in communicating privately with the arbitrator before the award is made, for courts have set aside awards under such circumstances.[39] That is, the other party should have an opportunity to hear or read all communications to the arbitrator from the opponent. True, it has been held that if there appears to have been no corrupt motive and the award was not influenced thereby, the mere fact that one party talked with or wrote letters to an arbitrator about the case will not necessarily cause the award to be set aside.[40] But such actions are dangerous and certainly should be avoided by the parties.

36 UPDEGRAFF AND McCOY, *op. cit. supra* note 9 at 126.

37 3 AM. JUR., *Arbitration and Award*, § 137.

38 6 C. J. S., *Arbitration and Award*, § 104 (b) (3).

39 See note, 8 A. L. R. 1082, 1088 (1920). The cases cited deal with commercial arbitration awards.

40 6 C. J. S., *Arbitration and Award*, § 104 (b) (4).

Arbitration in some ways is judicial in nature. And if the parties grasp this fact as they should, they will no more think of contacting the arbitrator privately than they would think of making such contact with a judge in whose court their case was being heard. Confusion of the arbitrator's role with that of a "mediator" or "compromiser" is hazardous indeed.[41] Parties to an arbitration proceeding should restrain even their feelings of hospitality and good fellowship toward the arbitrator. "For a party to furnish refreshments or other entertainment to an arbitrator is highly improper and will sometimes justify the setting aside of the award; but in a few cases such relief has been refused, where it did not appear that there was any intention to influence the award, or that it had been so influenced."[42] An arbitrator worthy of the name will refuse to accept private communications and wining and dining, and

[41] Arbitration, looked upon as a second step in collective bargaining, certainly has judicial aspects, being devoted mainly at present to interpretation of clauses and settlement of disputes arising under union-management contracts—such contracts being the end product of the first, or "legislative," step. Management and labor representatives sit down across a table and negotiate a contract in what essentially is a "legislative" process. Disputes inevitably arise about meaning and application of terms and clauses in this contract, just as they do under a statute. And then, much as courts perform a judicial function in resolving disputes under a statute, so do arbitrators function under a collective bargaining agreement. "The function of an arbitrator is to decide disputes. He should, therefore, adhere to such general standards of adjudicatory bodies as require a full, impartial and orderly consideration of evidence and argument. . . ." See pamphlet, *Code of Ethics and Procedural Standards for Labor-Management Arbitration* (Am. Arb. Assn. 1951) 1, 2.

Experienced arbitrator Senator Wayne Morse supports the judicial concept of the arbitration process and insists: "The arbitrator sits as a private judge, called upon to determine the legal rights and economic interests of the parties. . . . The principle of compromise has absolutely no place in arbitration hearings." Morse, *The Scope of Arbitration in Labor Disputes*, Commonwealth Review, March, 1941, p. 6. It can be argued in support of this position that labor arbitration is a terminal step in dispute settlement under grievance procedure of a collective bargaining contract. That is, all the other methods of dispute settlement presumably have been tried and found ineffective. It is too late for mediation or conciliation: they had their day and they failed to bring compromise settlement. (Of course, if *the parties* decide in the course of an arbitration hearing to work out a compromise settlement, then that is well and good and the hearing should be recessed for that purpose.) The point is simply that the arbitrator should not assume the role of compromiser—nor should the parties expect him to assume it. Failure to grasp the judicial nature of the arbitration process is likely to lead parties and arbitrators to jeopardize the effectiveness of this method of labor dispute settlement. And in so doing they jeopardize industrial freedom.

[42] 6 C. J. S., *Arbitration and Award*, § 104 (b) (4).

will avoid compromising situations of all kinds. But the parties cannot always rely on the arbitrator to protect the award from their perhaps well-meant but nonetheless knuckle-headed failure to grasp the essential distinction between arbitration and compromise. He may be a knuckle-head himself.[43]

Consider fraud or misconduct by the arbitrator. Suppose, for instance, he accepts a bribe. Just as such action by a judge would be grounds for setting aside his judgment, so would it invalidate the award of an arbitrator. Or suppose the arbitrator was grossly unfair in conducting the hearing, as by arbitrarily refusing to receive proferred testimony material to the point in issue: his award would be set aside.[44] The authorities agree that awards which are valid on their faces may be set aside in equity for misconduct by the arbitrator.[45] But there is a scarcity of cases defining just what acts, other than those already mentioned in this paragraph, will be held to constitute such misconduct as to warrant interference by a court of equity. This shortage of illustrative cases is especially pronounced as far as labor arbitration is concerned. Here, however, are acts by arbitrators in "commercial" arbitrations which the courts have held misconduct sufficient to impeach an award:[46]

(1) where the arbitrator acted under the direction of one of the parties as an agent instead of an impartial judge;

(2) where the arbitrators adopted a chance or gambling method for reaching their conclusion;[47]

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[43] "We have as yet few competent arbitrators; and the specially-trained arbitrator is a rare individual indeed." Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. Chi. L. Rev. 233, 269 (1950).

[44] 3 AM. JUR., *Arbitration and Award*, § 143.

[45] See 3 AM. JUR., *Arbitration and Award*, § 142.

[46] Cases cited in 3 AM. JUR., *Arbitration and Award*, § 142. Gregory and Orlikoff point out that "by and large the rules formed to govern commercial arbitration constitute the major source of the common law which is today applied to labor arbitrations. . . ." *Op. cit. supra* note 43 at 237.

[47] Luther v. Medbury, 18 R. I. 141, 26 Atl. 37 (1893). In this case the arbitrators were unable to agree on the amount of a money award. They then agreed that each would mark on a piece of paper the sum he thought should be awarded. These sums then were added and the result was divided by the number of arbitrators to obtain the award ($750). One arbitrator, who marked his estimate $500, testified that he would have

(3) where an arbitrator was drunk while testimony was being heard;

(4) where an arbitrator allowed one of the parties to "treat" him to intoxicating liquor and the other party was not present.

It is said that partiality on the part of an arbitrator is a well-recognized ground for setting aside an award. "It is not necessary, in order to warrant the intervention of equity, that the partiality be evidenced by an unjust award. It is sufficient that the relationship between the arbitrators and one of the parties is of such a nature as to give clear grounds for suspicion of their proceedings and render it unlikely that they constituted the fair and impartial tribunal to which the other party is entitled."[48] Awards have been impeached,[49] for instance,

(5) where the arbitrator had a material interest in the outcome of the arbitration and the other party had not waived this objection to the partiality of the arbitrator (of course, it is generally held that one who consents to the appointment of a person partial to his opponent, with full knowledge of the facts upon which the interest or bias of the appointee is based, may not later object to the proceedings on the ground that such partiality exists);

(6) where, after his appointment, and before the hearing, the arbitrator expressed an opinion clearly and firmly adverse to one of the parties;

(7) where the arbitrator made his award as the result of a private conversation with one of the parties.

The important point is that an arbitrator who understands the judicial nature[50] of his function will remain aloof from the parties during the hearing, lest he suggest partiality or bias. Conferences with one party without the presence of the other, written communi-

adhered to that amount, since that was his judgment, had it not been for the agreement to average the sums. The court held the award void and said, "The parties to a submission are entitled, under it, to the judgment of the arbitrators; and, if the method pursued by them precludes the exercise of their judgment [by substituting chance], the parties do not get that for which they have stipulated." 26 Atl. at 37, 38.

[48] 3 AM. JUR., *Arbitration and Award,* § 145.

[49] *Ibid.* The cases cited are commercial arbitration decisions.

[50] See *supra* note 41.

cations from one without copies to the other and opportunity to reply, even a friendly jaunt to the nearest coffee pot with one of the parties: the prudent arbitrator, at the very least, should avoid these actions.

Timely objection must be made by an aggrieved arbitration party as soon as he learns of the facts which indicate partiality or bias. Otherwise he will be deemed to have waived the matter. A court then will not disturb the award.

The extent of the arbitrator's jurisdiction normally is established by the submission agreement. The importance of careful and precise draftmanship of this agreement cannot be stressed too highly. If the parties agree to submit to arbitration the question of whether or not "the discharges of Elmer McDonald and Francis Pauly on September 28, 1948, for . . . 'instigating and participating in a work stoppage' shall be sustained or reversed,"[51] the arbitrator has power to decide this question and nothing more. If he exceeds the jurisdiction conferred on him in the submission agreement, his award is void. Or if he acts after his power has expired, the award is void. ". . . [A]ny violation of, or exercise of powers inconsistent with, the terms of submission renders an award invalid."[52]

Consider an example which occurred in a recent arbitration.[53] The submission agreement provided simply that the arbitrator should determine whether or not Miss *X* had been fired "for cause," and, if not, whether she should be reinstated with or without back pay. (The company contended that Miss *X* was disrespectful and rebellious toward supervisory personnel.) The arbitrator held that Miss *X* had not been fired "for cause," and he ordered that she receive back pay. But it seemed evident to him from the testi-

[51] Fox Co. and Local 68, Polishers, Buffers, and Platers, 3 A. L. A. A. § 68,194 (1949).

[52] 3 AM. JUR., *Arbitration and Award*, § 123; 4 TEX. JUR., *Arbitration and Award*, § 20. It was held in Owens v. Withee, 3 Tex. 161, 166 (1848), that an award "was bad" both at common law and by statute when rendered by five arbitrators under a submission agreement which provided for the decision of six.

[53] This was an unreported 1949 Dallas arbitration.

mony that Miss *X* was a chronic "trouble maker" among her fellow workers; and so, in the interest of future industrial relations in the firm, he ruled that Miss *X* should not be reinstated. He reasoned that an arbitrator should make an award which not only would settle the immediate controversy but also would be conducive to continuing happier relations between the disputants.[54]

But the union's representative protested vigorously. He argued that the award was inconsistent with the submission agreement and that the arbitrator had exceeded his authority. He contended that under the submission agreement the only power the arbitrator had was (1) to hold that Miss *X* was discharged for cause, in which case she should not be reinstated, with or without back pay; or (2) to hold that she was not discharged for cause, in which case she would be reinstated with back pay, or without it, as the arbitrator should determine.

In other words, the union representative asserted that if the arbitrator held Miss *X* had not been discharged for cause, then he had to order her reinstated. He insisted that his union, and unions in general, would become reluctant to resort to arbitration if they came to fear that arbitrators could not be depended upon to confine themselves to the issues as spelled out in the submission agreement. The union threatened to challenge the award in court on the grounds that the arbitrator had exceeded the power the parties had conferred upon him.[55]

On the other hand, an award may be attacked successfully because it is not comprehensive enough—that is, because the arbitrator did not exercise enough power! It is essential that an award dispose finally of all the issues submitted in the arbitration agreement. "In order to be valid, an award must be full and final on

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[54] This is, of course, a sound approach to arbitration, but an arbitrator, like a judge, should not attempt to exercise jurisdiction he does not possess. That is, correctly drafted submission agreements certainly afford arbitrators sufficient jurisdiction to hand down awards the parties "can live together" under. But an arbitrator does arbitration a disservice when he exceeds the terms laid down in the submission agreement, be it ever so poorly drawn.

[55] No record has been found that the challenge actually was made, however.

all points submitted. . . ."[56] The rationale of this is that the object of an arbitration proceding is to prevent future dispute *on the issues raised in the submission agreement,* and an award which leaves some of the issues undealt with simply is not final and cannot be sustained.

If an award requires a party to do or refrain from doing an act in violation of public policy, the award will not be enforced. For an illustration, in 1942 President Roosevelt ordered that no premium wage should be paid for work on any holidays except six he listed. An arbitrator's award ordering "overtime" on an unlisted holiday could not have been enforced because it would have been contrary to a national policy which, Mr. Roosevelt asserted, was ". . . desirable and necessary in the prosecution of the war. . . ."[57]

Such, then, are the usual grounds on which an award may be attacked successfully at common law. If arbitrators and arbitration parties will grasp the judicial nature of the arbitration process and will not mix it with mediation and compromise, most of these grounds will never be established.

It should be reemphasized that most courts are reluctant to disturb arbitrators' awards.

> ". . . [C]ertain . . . grounds that would be sufficient in an appeal from a judgment would not be grounds for impeaching an award, for the reason that the contractual element is present in the award. Thus, the fact that the arbitrator made erroneous rulings[58] during the hearing, or reached erroneous findings of fact from the evidence, is no ground for setting aside the award, *because the parties have agreed that he should be the judge of the facts. Even his erroneous view of the law would be binding, for the parties have agreed to accept his view of the law.*[59]

Of course, the submission agreement may be so drafted that the parties require the arbitrator to govern his award by "strictly

[56] 3 AM. JUR., *Arbitration and Award,* § 128.
[57] Exec. Order No. 9240, 3 C. F. R. (Cum. Supp.) 1207 (1942).
[58] To be distinguished from gross unfairness in the conduct of the hearings.
[59] UPDEGRAFF AND MCCOY, *op. cit. supra* note 9 at 127. Emphasis added.

legal rules." In such a case the court will review the award and set it aside if the arbitrator mistakes the law.[60] But this is a matter of how the submission agreement is drafted, and the basic principle remains that if the courts were to step in and overturn awards because of arbitrators' errors of fact or law, "arbitration would fail of its chief purpose; [and] instead of being a substitute for litigation it would merely be the beginning of litigation."[61] Or, as another authority puts it, "This is the reasonable view, for a contrary holding would mean that arbitration proceedings, instead of being a quick and easy mode of obtaining justice, would be merely an unnecessary step in the course of litigation, causing delay and expense, but settling nothing finally."[62]

Of course, if an arbitrator's error of law resulted in an award which would require one or both of the parties to commit a crime it would be void. But an example of the kind of error of law in point here might involve an arbitrator's misconception or misapplication of the parol evidence rule in a dispute arising under a union contract. Such an error probably would not cause a court to disturb his award.

## 7. Challenging an Award Under an Arbitration Statute

Up to now the discussion has stressed the challenging of an award at common law. Arbitration statutes "generally adopt these favorable common-law rules, and an award within the terms of the [submission] agreement will be vacated only where it was procured by corruption, fraud, or undue influence, or where there was evident partiality or corruption in the arbitrators, or misbehavior on their part by which the rights of the parties have been prejudiced."[63] The New York arbitration statute, for example, "codi-

[60] 3 Am. Jur., *Arbitration and Award*, § 149.

[61] Updegraff and McCoy, *op. cit. supra* note 9 at 127.

[62] 3 Am. Jur., *Arbitration and Award*, § 147.

[63] 6 Williston, Contracts (Rev. Ed. 1938) § 1929A.

fies" the common law discussed in the preceding section, and provides that the court must vacate the award:[64]

(1) where the award was procured by corruption, fraud or undue means;

(2) where there was evident partiality or corruption in the arbitrators "or either of them;"

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing on sufficient evidence shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party were prejudiced;

(4) where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made;

(5) if there was no valid submission agreement and the aggrieved party made timely and proper objection to that effect.

## 8. Extent of Litigation Involving Labor Arbitration Awards

After this extended discussion of litigation arising from the enforcement or challenge of arbitration awards, it may seem anticlimatic to say that up to now parties to labor arbitration proceedings have gone to court very infrequently. Larson writes: "Perhaps ninety or ninety-five percent of all cases of labor arbitration arise over unsettled grievances calling into question the interpretation and application of a collective [bargaining] contract [and] in practically all of these cases . . . there is no thought of avoiding the arbitrator's award . . . and there is no necessity for the award to be made the subject of a judgment."[65] In so far as arbitration statutes are concerned, Larson points out that labor disputants certainly have not shown any tendency to use them. "This is not to

[64] N. Y. Civil Practice Act, § 1462. The Texas labor arbitration statute provides that judgment shall be entered on the award ten days after a copy is filed in the district clerk's office "unless within such ten days either party shall file exceptions thereto *for matter of law apparent on the record. . . .*" Tex. Rev. Civ. Stat. (Vernon, 1948) art. 248. (Emphasis added.)

[65] Larson, *The Legal Status of Arbitration in the Southwest in* Second Annual Institute on Labor Law (Southwestern Legal Foundation, 1950) 92, 93.

say that the statutes are undesirable or worthless. . . . [But] the necessity for even the most perfunctory report to the court seems to frighten or disturb the parties in the usual case, and they simply do not want to be involved in court proceedings. . . . [C]ommon law arbitration is overwhelmingly preferred over statutory arbitration by labor disputants."[66]

It should be recalled, however, that labor arbitration is relatively new and undeveloped. Its greatest use thus far has been in industries with long, mature collective bargaining experience. The fact that in the past few awards have been challenged in such industries does not necessarily mean that the increasingly widespread use of arbitration in new industrial arenas will not see more frequent resort to the courts by parties to arbitration proceedings. Gregory and Orlikoff have written:

> ". . . [I]t cannot be reasonably expected that contractual commitments which may be broken with impunity will very long continue to be rigorously observed. And in view of the greatly increased use of arbitration, largely due to the impetus furnished by wartime measures encouraging the peaceful settlement of industrial disputes, the extent to which these promises will be broken is bound to increase. Such breaches of good faith are likely to imperil the whole arbitral process. As more and more awards and agreements to arbitrate are ignored with impunity, the more arbitration will become just another way-station to, rather than a rescue-station from, industrial conflict."[67]

In other words, arbitration statutes, even though parties up to now generally have ignored them, should be perfected and simplified so that arbitration agreements and awards may be enforced, and so that awards in appropirate instances may be challenged, with a minimum of red tape and technicality. Larson would agree:

> "Even though common law arbitration is preferred in most cases, it is desirable to have statutory procedures available if the parties wish

[66] *Id.* at 93. UPDEGRAFF AND McCOY, *op. cit. supra* note 9 at 125, says, "The [statutory] procedure for converting an award into a judgment is often followed in commercial arbitrations, but is practically never used in labor arbitrations, first, because the parties are anxious to avoid the courts. . . ."

[67] *Op. cit. supra* note 25 at 235.

their arbitration to be under the supervision of a court and to result in a final judgment.... [A]ny legislative device which strengthens and encourages the use of [arbitration] should be viewed in a favorable light."[68]

## 9. Arbitrator's Awards as Precedents

Should labor arbitrators consider past awards in deciding a dispute? To what extent, if any, should past awards be binding or serve as precedents?

Some people are opposed even to the idea of publishing arbitrators' awards and opinions. It is said that publication might discourage the use of arbitration because business data perhaps would be revealed to competitors.[69] One brave and dauntless spirit has written:

> "The fact of publication itself creates the atmosphere of precedent. The arbitrators in each subsequent dispute are submitted to the continuous and frequently unconscious pressure to conform. A bad award ... will have the effect of stimulating other bad ones; a good one, by the weight of precedent, may be applied where the subtleties of fact should urge a different award."[70]

He has further written,

> "The criticism and pressure that would flow from the publication of their awards could not help but deter [the] willingness [of arbitrators] to serve...."[71]

This seemingly serious contention, boiled down, is: (1) do not let arbitrators find out what other arbitrators are doing, because they may be led astray;[72] and (2) do not publish arbitrators' awards lest their tender sensibilities be wounded past all endurance by comments readers might make about their decisions and opinion. (The slandered ostrich does not actually bury his head in the sand: he leaves this for men to do.)

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[68] Larson, *op. cit. supra* note 65 at 93.

[69] Levenstein, *Some Obstacles to Reporting Labor Arbitrations*, 1 Arb. J. (N. S.) 425, 428 (1946).

[70] Cherne, *Should Arbitration Awards Be Published?* 1 Arb. J. (N. S.) 75 (1946).

[71] *Id.* at 76.

[72] "Hear no evil, see no evil, speak no evil."

On the other hand, it is contended that "the days of the hush-hush period in labor-management relations" began to disappear when the National Labor Relations Board under the Wagner Act "laid bare for all to see many thousands of labor disputes of a type which had previously been considered private . . . disputes relating to union activities."[73] Then World War II "brought about the greatest advance of all in the pooling of every kind of information on the day-to-day conduct of labor relations. . . ."[74] Even wage discussions "were staged as in a fish bowl" in the arbitrations before the War Labor Board.[75] Furthermore, "labor arbitration stems from the desire to avoid strikes, which from their nature affect the public interest. Accordingly, the secrecy which properly surrounds commercial arbitration has no place in respect to labor arbitration. On the contrary, publicity of labor arbitration awards can, if properly handled, be of the greatest service both in early settlement of disputes that might otherwise go to arbitration and in facilitating sound judgment in the awards when resort is made to arbitration."[76]

These arguments are persuasive: arbitration awards and opinions certainly should be published. The regrettable thing is that they have long lain buried in private files and that only recently a body of arbitration "case law" has begun to become available.[77]

Whether or not one favors the use of arbitration awards and opinions as "precedents" depends a great deal on his conception of what that term means. It has been argued (1) that the use of awards as "precedents" would bring inflexibility and formality into what should be a growing and adaptable process, thus sacrificing "justice and progress" for uniformity of decisions; (2) that "the arbitrator searches for a rule of reason which will render

[73] Taylor, *Reporting of Labor Arbitration: Pro and Con,* 1 Arb. J. (N. S.) 420 (1946).

[74] *Ibid.*

[75] *Ibid.*

[76] *Id.* at 421.

[77] Prentice-Hall began to publish selected arbitration awards in 1946 (A. L. A. A. series); a Bureau of National Affairs series got under way in 1948.

justice and at the same time permit the parties to continue 'living together;' " and (3) that each case must be decided on its own because the "rule of reason" is "determined in part by the character of the disputants—by their economic position, their strength or weakness, their importance to the community, the history of their past relationships, and their objectives in taking their present stand."[78]

That is all well and good if the only use of awards as precedents is simply a slavish following and mechanical application of decisions in past arbitrations. But that simply is not a common-sense conception of the precedential value of awards. It is reminiscent of heated denunciations of the doctrine of *stare decisis* which have been voiced out of misunderstanding of that doctrine's true significance in the law. This doctrine under our common law system "has not the inexorable action with which many persons carelessly endow it."[79] The degree of control given to a prior decision varies with the particular case.

If the rule of *stare decisis* demanded unvarying and rigid adherence to precedents "then there might be good ground for the persistence among the uninformed of the erroneous idea [that certainty in law is preferable to reason and correct legal principles], but the proper American conception comprehends *stare decisis* as a flexible doctrine, under which the degree of control to be allowed a prior judicial determination depends largely on the nature of the question at issue, the circumstances attending its decision, and, perhaps, somewhat on the attitude of individual participating judges."[80] Furthermore, "except in [certain classes of cases], when a court is faced with an ancient decision, rendered under conditions of society radically different from those of today, and when it is sought to have this ancient decision control

[78] Levenstein, *op. cit. supra* note 69 at 426.

[79] Elkouri, *The Precedential Force of Labor Arbitration Awards*, 3 Okla. L. Rev. 260 (1950).

[80] Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 414, 415 (1924).

present-day conditions, even though the attending facts in the two controversies be alike, still there is nothing in the doctrine of *stare decisis* to prevent a departure from the earlier decision and [in the absence of legislative enactment covering the matter] the restatement of the governing rule there laid down, or acted on, to meet the change in the life of the people to serve whose best interests it was originally invoked."[81]

Chamberlain has summarized the American doctrine of *stare decisis* by saying,

> "A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where '*the very point*' is again in controversy; *but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible.*"[82]

Even in the law, then, it is not advocated that past decisions be followed blindly. And certainly no one would urge an inexorable doctrine of *stare decisis* for labor arbitration. If it appears that the arbitrator in an apparent "precedent" used obviously bad judgment, or made serious errors in fact or law, the prior award should be ignored. Or if there is an indication that a prior award was made without full disclosure of all pertinent facts or without a fair hearing, the earlier award should not be followed. Perhaps new conditions have arisen which make it inadvisable to follow an earlier award. And quite frequently alleged "precedents" simply are not "on all fours" with the dispute at hand, and the fact situations differ. In such cases the earlier award can be distinguished from the controversy at hand, and certainly should

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[81] *Id.* at 418.

[82] CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS (1885) 19; quoted in von Moschzisker, *op. cit. supra* note 80 at 409; emphasis added.

not be followed. Indeed, many entirely "new" industrial relations disputes arise every day, and for them there simply is no precedent.

But, subject to these qualifications, where a "prior decision involves the interpretation of the identical contract provision between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision."[83] That is, under these conditions it would seem that the prior decision should be a *controlling* precedent. (Indeed, some collective bargaining contracts provide that arbitrators' rulings interpreting clauses of the agreement shall become part of the contract.)[84]

Inflexibility in labor-management relations there certainly must not be. But the meaning of collective bargaining contract clauses as established by valid arbitration proceedings must be in large measure certain if management and unions are to make prompt and effective day-to-day decisions. If one party feels it can challenge past awards at any time with a good chance of overturning them, then the judicial function of arbitration has not been realized. Permanent umpires probably recognize this stabilizing effect of following precedent in arbitration awards more keenly than do *ad hoc* arbitrators, and "there is a tendency for permanent umpires to publish their awards for the guidance of both unions and management, and to decline to accept cases which do not present issues or involve situations different from those previously considered."[85] But *ad hoc* arbitrators, too, should study very carefully

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[83] Pan American Refining Corp., 2 A. L. A. A. § 67,937 (1948), Whitley P. McCoy, Arbitrator.

[84] On the other hand, consider these collective agreement clauses:

"(d) Each case shall be considered on its merits and the collective agreement shall constitute the basis upon which decisions shall be rendered, and no decision need necessarily constitute a precedent for any subsequent case." Eastern Women's Headwear Ass'n and United Hatters, Cap & Military Workers Union.

"Each case shall be considered on its merits and the collective agreement shall continue the basis upon which decisions shall be rendered. No decision shall be used as a precedent for any other subsequent case." Nat'l Dress Mfgrs' Ass'n and Joint Board Dress & Waistmakers Union of Greater N. Y. & ILGWU. See 5 C. L. E. § 64,214.

[85] Elkouri, *op. cit. supra* note 79 at 263.

the awards of other arbitrators under the particular contract in question. And in the absence of compelling reasons for ignoring earlier awards on closely similar fact situations, they should be bound thereby.

Suppose Firm *A* and Union *B* carry a dispute to arbitration and, though it has never come up between them before, very similar awards are available involving other companies and their employees. Should such awards be controlling on Firm *A* and Union *B*, or should they be merely "persuasive?" It certainly can be argued that such awards should not be as controlling as would prior awards under the Firm *A*-Union *B* contract. But they should be considered carefully by *A* and *B* in preparing their "cases," and by the arbitrator in making his award and writing his opinion.

It almost always is helpful to see how someone else has dealt with one's own immediate problem. Sometimes one benefits simply by noting how the other fellow fouled up the situation—an object lesson in what not to do. Most often the value lies in observing deft touches in the prior handling. Pertinent angles and slants are suggested which otherwise might have escaped unnoticed. As Taylor points out, awards and opinions from other firms on closely similar fact situations should help Firm *A* and Union *B* because:

> "... [O]ne party at least has a ready-made argument to support his case. The other party may find a contrary precedent. Both may profit from the way in which the issue was formulated for the arbitrator."[86]

Firm *A* and Union *B* should not hesitate in citing such prior awards from other companies in their arguments to their own arbitrator.[87] This will tend to keep the arbitrator on his toes. And "few arbitrators would object to obtaining hints in deciding a

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[86] Taylor, *op. cit. supra* note 73 at 422.

[87] Note that this statement refers to awards arising under contracts other than their own. It is assumed that they certainly would cite "precedents" arising under their own bargaining agreement.

doubtful issue from other awards which appeared to be thoughtfully and fairly reasoned."[88] That is, such awards, though not necessarily controlling, might be persuasive. "The considered judgment of one arbitrator cannot be dismissed lightly or ignored, especially if he is a seasoned observer of industrial relations, or if he is a widely known and respected authority."[89]

Under some conditions, then, prior arbitration awards may be *controlling* in a given situation; under other conditions, earlier awards may merely be persuasive. Their force and weight are a matter of degree reflecting the times and conditions in a given arbitration. They do not offer an arbitrator a quick and unquestionable "answer" to the dispute he has just heard. But if he studies carefully prior awards and opinions in closely similar fact situations, he in all probability will come up with a better award and opinion of his own than he otherwise would have turned out.

## 10. Summary and Conclusions

The award is the actual decision of the arbitrator. It may or may not be accompanied by an opinion, though an opinion certainly is highly desirable. At common law no particular form of award is prescribed. Arbitration statutes, however, usually fix precise requirements as to form, and these must be complied with strictly if the award is to be enforceable under such an enactment. Possibly, however, as in Texas, an award defective in form under a statute still may be enforceable at common law.

The award is neither a contract nor a judgment, though it partakes of the nature of both. It results from a contract—the submission agreement—but it is not itself a contract, since it is the act of the arbitrator and not of the parties themselves. It is like a judgment in that, if it is valid, it is binding upon the parties though imposed by an outside force. It is an extra-judicial judg-

[88] Taylor, *op. cit. supra* note 73 at 422.
[89] Elkouri, *op. cit. supra* note 79 at 266.

ment of a tribunal selected by the parties and given power by their act.

In contrast to its attitude toward submission agreements, the common law favors the enforcement of arbitration awards. It appears that in general the award may be either the subject of a suit at law to recover money damages, or a suit in equity to obtain a decree of specific performance. Teller suggests that a "new jurisprudence" is developing in that "remedies applicable to collective agreements are viewed entirely different by the courts from remedies relating to individual employment contracts," [90] which courts traditionally have been disinclined to enforce specifically. He believes that today the maintenance of a management-union relationship under a collective bargaining agreement is a general ground of equity jurisdiction, and that the cases seem to be tending toward greater recognition of the propriety of specific enforcement of arbitration awards.

Almost all the general arbitration statutes provide that awards may be made court judgments on motion of either party or on the mere filing of the award in court. The New York statute is a good example.

Though it is not certain that the Federal Arbitration Act applies to arbitration of labor disputes pursuant to a clause in a collective bargaining agreement, the federal Act, like many of the general state arbitration statutes, provides that awards may be confirmed by court order. The Railway Labor Act provides an elaborate procedure for enforcing arbitration awards involving employees of interstate railroads and common carrier airlines engaged in interstate or foreign commerce.

It is quite difficult to impeach an award successfully. In general, an award stipulated by the parties to be final will not be set aside "unless it is clearly made to appear that there has been fraud by a party, or the arbitrators have mistaken their authority, departed from the submission, clearly misconceived their duties,

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[90] Teller, *Specific Remedies in Labor Arbitration,* 3 Arb. J. (N. S.) 178 (1948).

acted upon some fundamental and apparent mistake, or have been moved by fraud or bias."[91] In general, the courts are quite reluctant to set aside an award because the arbitrator made an error of fact or law. The reasoning is that the parties agreed that the arbitrator should be the judge of the facts and that they would accept his view of the law: in other words, they agreed that arbitration would be a *substitute* for litigation, not just an unnecessary step in the course of litigation. It is, of course, possible for an arbitrator to make such serious errors of law that a court will have no choice but to set aside the award.

The arbitration statutes generally adopt these common law rules governing the challenging of an award. The New York statute, for instance, merely codifies the common law discussed in the preceding paragraph.

Up to now parties to labor arbitration proceedings have gone to court very infrequently. In general there has been no thought of avoiding the arbitrator's award. And labor disputants have shown little tendency to use the arbitration statutes, common law arbitration being overwhelmingly preferred. It should be recalled, however, that labor arbitration is relatively new and undeveloped. And its greatest use thus far has been in industries with long and mature collective bargaining experience. As the use of arbitration increases in industrial areas which are relatively new to collective bargaining, there is likely to be more frequent resort to the courts by arbitration parties. It follows that arbitration statutes should be perfected and simplified in every state so that awards may be enforced or challenged with a minimum of red tape and technicality. It is suggested, too, that the excellent Federal Arbitration Act be amended to make its applicability to labor disputes beyond question. Knowledge by management and unions that awards and arbitration agreements cannot be ignored with impunity will contribute to the continued growth of arbitration as a dispute-settling process.

[91] 3 AM. JUR., *Arbitration and Award*, § 137.

Arbitrators' opinions and awards are fruitful documents and should be published and made available to arbitrators, management, and unions. But it has been only within the last four or five years that significant publication has begun. The extent to which prior awards should serve as "precedents" depends on the facts and conditions in a given arbitration situation. Inflexibility in labor-management relations certainly must be avoided. But if a "prior decision involves the interpretation of the identical contract provision between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision."[92] That is, under these conditions it may be that the prior award should be a *controlling* precedent.

Under other conditions it certainly is admitted that prior awards may simply be more or less *persuasive.* Earlier awards and opinions admittedly do not offer an arbitrator a quick and unquestionable answer to a dispute he has just heard. But if he studies prior awards and opinions in closely similar fact situations, even if they concern parties other than the immediate ones, he in all probability will come up with a better solution than he otherwise would have turned out. The study of arbitration awards by the parties should help them in preparing their cases. If they cite prior awards in their arguments and briefs the arbitrator will be kept on his toes—and, since skilled and able arbitrators are still the exception rather than the rule, it may not be at all unusual to find one with a tendency to slog along through the arbitration process on the very flattest part of his feet.

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[92] Pan American Refining Corp., 2 A. L. A. A. § 67,937 (1948).