

## Book Review

**Labor Arbitration: A Practical Guide for Advocates**  
(M. Zimney, W. Dolson, & C. Barreca eds.,  
Washington, D.C.: BNA 1990)

Reviewed by Ronald C. Brown\*

Grievance arbitration makes important contributions to labor-management stability in the United States and the over 50,000 decisions a year have profound effects on the lives of the individual winners and losers under this process. Recognizing this fact, the editors and contributors of *Labor Arbitration: A Practical Guide For Advocates*<sup>1</sup> compiled materials that seek to improve the process by increasing the understanding and capabilities of those involved in the arbitration process. The material in the book was initially developed as the core resource for the academic phase of a labor arbitration advocacy training program in 1987, developed under the auspices of the American Bar Association Section of Labor and Employment Law and its Committee on Labor Arbitration and the Law of Collective Bargaining Agreements.

The aim of the materials in this book is to train new advocates and to reinforce the experienced advocates' "understanding of the unique nature and place of labor arbitration in dispute resolution."<sup>2</sup> The Contributors, a rich collection by the real experts in labor arbitration -- including leading arbitrators, union and management advocates, and academics -- provide insights and data on the institutional aspects of the labor arbitration process: what it is, how to make it work, and its relationship to the other related processes involving collective bargaining, the National Labor Relations Board (NLRB) and the courts. The book's clear emphasis, and proffered value, is its explanations and insights into the process of labor arbitration, rather than any detailed information on substantive issues of labor arbitration decided under that process, which are covered in other standard publications such as *How Arbitration Works* by Frank and Edna Asper Elkouri.<sup>3</sup> Furthermore,

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1. LABOR ARBITRATION: A PRACTICAL GUIDE FOR ADVOCATES (M. Zimney, W. Dolson, C. Barreca eds. 1990) [hereinafter LABOR ARBITRATION].

2. *Id.* at xvii.

3. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985). This 1985 text however seeks also to include the labor arbitration process, *see, e.g., id.* at chapters 1-10.

this book is more up-to-date, albeit less systematic, than Owen Fairweather's often-cited work of 1973, *Practice and Procedure in Labor Arbitration*.<sup>4</sup>

As one who has practiced labor law, now teaches labor arbitration and is presently an arbitrator, the book comes as a welcome collection of the many practical aspects of the labor arbitration process, and its legal implications. While most of the material in the book is available in small pieces and greater depth in a wide variety of sources, this single book can serve as a training or "refreshing" tool. It fills a needed niche by collecting relatively up-to-date insights and practical guidelines -- both anecdotal and legally supported -- to provide the reader with a very usable background reference work on the process of labor arbitration, the advocate's role and some of the legal pitfalls along the path.

The book is organized into eight parts, commencing with foundations of labor arbitration and logically progressing to the judicial review of arbitration awards. The eight parts, each divided into four or five sub-chapters, include: foundations of labor arbitration (I), the nature of collective bargaining relationships (II), arbitration practices and procedures (III), preparation for the arbitration hearing (IV), advocacy skills (V), internal law of arbitration (VI), the impact of external law (VII), and labor arbitration: an overview (VIII). The choice of organization and the varying points of view in the supporting chapters of each part, on balance, provide a usable blend of information in a flow that is easy to understand, making it a useful tool to teach and learn the process of labor arbitration.

Part I, providing the foundations of labor arbitration, first takes the reader through a historical survey of arbitration's development, touching roots in ancient Egypt from the 4th dynasty in 2500 B.C. and quickly coming to the 19th century, covering the significant legal and historical milestone events that shaped labor arbitration as we know it today. Professor Charles Morris skillfully provides just enough historical detail to give the reader a frame of reference and insight into the "modern" approaches, which as this exposition points out may not be so "modern" after all.<sup>5</sup>

The next two chapters sketch out the legal framework in both the private and public sectors. Professor St. Antoine's treatment of the private sector provides information understandable and useful for both lawyers and laymen, and at times provides insight and critical analysis on particular legal issues

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4. O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* (1973). Of course detailed information on the substantive issues of arbitration are available in a number of books; in addition to ELKOURI & ELKOURI, *supra* note 3, others, often broken into particular issues, include M. HILL & A. SINICROPI, *REMEDIES IN ARBITRATION* (1981); M. HILL & A. SINICROPI, *EVIDENCE IN ARBITRATION* (1980).

5. See *LABOR ARBITRATION*, *supra* note 1, at 5. Morris, for example, discusses primitive societies, Greek societies (B.C.), and 18th century Quakers, all of which used some form of arbitration.

arising from the interplay of law and arbitration, such as the NLRB's deferral policy, treated in more detail elsewhere in the book.<sup>6</sup> As required, Jerome Lefkowitz first discusses the public sector's legal framework by generally chronicling the obvious differences with the private sector, albeit too cursorily, but then usefully goes on to provide illustrative cases and issues, such as the well-known *Liverpool* case dealing with arbitrability, and the issue of interest arbitration, a process used primarily in the public sector.<sup>7</sup>

The final chapter in Part I deals with mediation and conciliation. While informative and insightful, it unfortunately limits its discussion to mediation's role in the collective bargaining process rather than in the labor arbitration process; and no mention is made of "med-arb" or other mediation-related innovative approaches to dispute resolution that can and do raise legal and practical issues in the arbitration process.<sup>8</sup>

As Robert Coulson, President of the American Arbitration Association has observed: "The arbitrator is free to suggest settlement or, in appropriate cases, to attempt to mediate. The Code of Professional Responsibility is flexible in this regard. Few labor awards are challenged because a labor arbitrator has attempted to mediate."<sup>9</sup> Although the mediation process is often dealt with under the role of the arbitrator, it also describes a process that increasingly receives attention of its own. Perhaps this is only a criticism of "curricular" emphasis rather than an obvious deficiency in content, but nevertheless it exposes an editorial choice; and, one might argue, an introduction to a labor arbitration process might benefit from some minimal perspective on alternative combinations of dispute resolution techniques, some of which might be usable in labor arbitration. Part I is typical in that each chapter may not be uniformly supportive of the book's goal to provide an understanding of the "place of labor arbitration in dispute resolution."<sup>10</sup>

Part II provides background material on the nature of collective bargaining and how grievance arbitration provisions are both born from this process and implanted into the agreement. The two chapters explaining management and

6. *Id.* at 27. This subject is a chapter in Part IV, addressed by NLRB former general counsel, Rosemary Collyer. *Id.* at 304.

7. *Id.* at 32, 35-38.

8. *See, e.g.*, discussion in F. ELKOURI & E. ELKOURI, *supra* note 3, at 127-29. *See also* Note, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DIS. RES. 385 (1988). Of course its wider applicability is in grievance arbitration disputes.

9. F. ELKOURI & E. ELKOURI, *supra* note 3, at 272 n.207 (citing Coulson, *Certification and Training of Labor Arbitrators: Should Arbitrators Be Certified?* 1979 PROCEEDINGS OF THE 30TH ANNUAL MEETING OF NAA 173, 182).

10. LABOR ARBITRATION, *supra* note 1, at xvii.

union perspectives give some understanding about the following two chapters' treatment of what each side hopes to gain in its drafting and administration of the negotiated grievance arbitration provisions. Some useful illustrations and insights into the nuances of grievance language are provided by B. Frank Flaherty, as well as some practical guidelines in drafting and using the provisions.<sup>11</sup> Apparently, the book's management contributor was more impressed than the union representative with the possible alternatives, as the subsequent union chapter's three pages dealt with conclusory comments that attempted to more certainly "nail down" what was grievable by inclusion of appropriate collective bargaining clauses.<sup>12</sup>

Following the first two Parts, which provide background into the setting of labor arbitration, Part III sets forth arbitration practice and procedures in a somewhat typical fashion, laying out the usual issues regarding arbitrator selection, labor arbitration rules and legal considerations, and the required "anatomy" of an arbitration hearing. The material, though done elsewhere,<sup>13</sup> is necessary as educational material and it succeeds, in a succinct way, by introducing the reader to the normal stages and issues in the labor arbitration process, at times providing memorable anecdotes from well experienced presenters.

Part IV, dealing with preparing for the arbitration hearing, is a very useful overview and offers some practical advice. For example, the chapter dealing with selection, preparation and examination of witnesses by Herbert Segal provides general guidelines and techniques that the novice will find continually usable and even the experienced practitioner will appreciate the reminders provided. This part of the book, as good as it is, is necessarily general, and other books on the market delve into the details much more extensively.<sup>14</sup> Still, as a learning guide, the text provides the necessary core information and as a possible reference book it does have many "re-usable" portions.

Advocacy skills are the subject of Part V, which deals with direct and cross examination, opening and closing statements and preparation of briefs. The material provides some very useful practical advice and whether the reader is an arbitrator, advocate or student, there should be benefit gained from having read this section, which succeeds in academically explaining a practical skill.

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11. *Id.* at 66-86.

12. *Id.* at 87-90.

13. See ARBITRATION IN PRACTICE (A. Zach ed. 1984); O. FAIRWEATHER, *supra* note 4; F. ELKOURI & E. ELKOURI, *supra* note 3.

14. See, e.g., M. HILL & A. SINICROPI, *supra* note 4.

Part VI directs the reader into and through some of the milestone areas of the "internal law of arbitration." In very practical terms, this section explains the role of the collective bargaining agreement, which provides the general framework of the labor arbitration process, followed by an introduction to the "law of the shop" and how it permeates the substantive areas of labor arbitration. The next chapter, while having a ponderous title,<sup>15</sup> artfully describes some of the philosophical and/or policy rationales underpinning several of the major concepts in labor arbitration, such as "finality" and "stare decisis" (or lack of it) and explains them in many diverse bargaining settings from the airline to sports industries.

One of the more vexing problems of labor arbitration is the impact external law and judicial involvement has had on labor arbitration, the subject of several chapters in Parts VII and VIII of the book. An inordinate amount of law seems to follow a process which the U.S. Supreme Court in its famous *Steelworkers Trilogy* decided some 30 years ago said it should stay out of.<sup>16</sup> In Part VII, the late Robert Howlett begins by presenting a substantively useful compilation of material introducing the issue of arbitrators' use of external law by explaining why arbitrators apply external law. Through well-cited illustrations, he systematically sets up the areas of issues and provides the reader with a real feel for the controversy. This is followed by a chapter entitled "Why Arbitrators do not Apply External Law," which in effect seeks to rebut what is already happening in the external law arena, as explained by Howlett, and to argue the inappropriateness of using external law in the arbitration process. The benefit to the reader is that he or she understands the issue, and therein lies much of the value of this book. While it does not provide all of the answers or many of the details of the answers it does provide, it does give the reader sufficient background and understanding of the issues in the labor arbitration process. Thus, the goal of the book is met by improving the understanding of labor arbitration by those involved or becoming involved in the process.

The next chapter in this part introduces the duty of fair representation. It is certainly not comprehensive coverage of the subject, but it effectively raises fresh and practical issues with which one in the labor arbitration process must be acquainted. It explains union pressures in the process and also important liability issues, not only for the union but also the employer.

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15. Schmertz, *The Uniqueness of the American Labor-Management Arbitration Process and Its Role as a Stabilizing Influence in Labor-Management Relations*, in LABOR ARBITRATION, *supra* note 1 at 239.

16. *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See also St. Antoine, *The Supreme Court and Labor Arbitrator: The Emerging Federal Law*, 63 MICH. L. REV. 751 (1965).

For example, drawing on the law, David Feller asks whether it is really wise for an employer to insist on procedural non-arbitrability where there is a fair representation issue. As Feller points out, the liability monkey may end up on the employer's back to a greater extent than had he waived the right to the arbitration hearing on the merits in the first instance.<sup>17</sup>

The final chapter of Part VII is a treatment of NLRB deferral to arbitration, written by Rosemary Collyer, who as former General Counsel for the NLRB had to make that often difficult decision whether or not to defer. Her observations regarding how the arbitration must proceed and what it should cover provide useful guidelines. The deferral issue inevitably arises in arbitration and provides a real risk that an arbitration decision can be overturned by the Board, unless the Board guidelines (explained by Collyer) are followed.

The final section, Part VIII, entitled "Arbitration: An Overview," seems to be a potpourri of useful aspects of the labor arbitration process, though likely several of the chapters could have been placed in closer proximity to other earlier chapters. For example, the strictly legal discussions of "individual rights in arbitration" and the chapter on "judicial review of labor arbitration awards" might have been paired with "duty of fair representation," "legal framework," or "use of external law" and provided the book with a separate "legal section" that contained the many legal issues implicated by the labor arbitration process. Also, "duty of fair representation" might usefully have been coupled with "preparation for the arbitration hearing" in Part IV and several of the included chapters. However, the information in Part VIII is quite good, notwithstanding its placement in the same section with "virtues of labor arbitration" and discussion of "expedited arbitration." And, to be fair, there is a certain appropriateness of integrating the primarily legal sections into the areas of logical progression of the labor arbitration process.

The second chapter in Part VIII, Professor Clyde Summer's discussion of individual rights in arbitration, provides a very clear legal background of the scope of the law as it affects individual rights in the labor arbitration process. He combines that, in an easy to understand fashion, with some very practical suggestions as to reasonable interpretation and application of the law that is particularly useful for those unfamiliar with the legal issues and their implications.

The other legal chapter in Part VIII explains the role of courts in judicial review of labor arbitration decisions. While much detail could be fleshed out on this subject, Professor William Gould very incisively lays out the basic rule of court deferral and the three primary variations on it -- taking an area of the law that can be complex at its edges with the multiple applications of the rules by various federal courts, and making it understandable both to the

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17. LABOR ARBITRATION, *supra* note 1, at 301.

novice and the experienced advocate.<sup>18</sup> Once again, this illustrates the possible value of this book, which provides usable core information, rather than detailed material, albeit more comprehensive, to instruct the reader about the labor arbitration process.

*Labor Arbitration: A Practical Guide for Advocates* has much to offer a reader interested in better understanding the labor arbitration process. The book succeeds in providing an introduction (with many in-depth views along the way) of the process of labor arbitration, suggestions on how to make it work, and discussions of some of the legal pitfalls besetting the process and its participants. It is not written in the form of a reference book, but rather as a resource or teaching tool -- its initial purpose. It fails to provide direct or reference information on the substantive aspects of labor arbitration, but again that was not its intention. It does offer to help the reader understand the labor arbitration process and on that it succeeds.

As to the organization of the book, the eight parts generally follow a logical approach of taking the reader through the stages of arbitration. However, as discussed, some of the subject matters of the various chapters under the eight parts might have been redistributed or in some cases omitted to give better continuity and integrated treatment of a particular topic. For example, the chapters on duty of fair representation and individual rights and the three chapters on judicial review and use of external law might have been realigned, or at least cross-referenced. This would have given more focus to the particular issues under discussion and instructed the reader as to their inter-relationship, namely legal rights and duties flowing from the arbitration process (fair representation and individual rights) and bases for overturning arbitration decisions (exceptions to finality, excess of authority cases, and use of external law). Board deferral to arbitration is also not unrelated to the finality issue. Many of these same subjects relate to the ultimate issue of "enforceability" of the labor arbitration award, and a reader, especially a novice, might hope for more editorial connecting of common areas or issues by location or textual reference.

As to what the book might have excluded or included, such a critique is often too subjective. However, with that caveat, it might be noted the chapters were not uniformly strong, though the stronger chapters clearly predominated and one can always opine why more variations on arbitration were not explored (such as med-arb) and why greater treatment was not given to the limits on the arbitrator's authority.

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18. However the interested reader is provided further sources that discuss the more complex and detailed issues. *Id.* at 336 n. 2 (citing Gould, *Judicial Review of Labor Arbitration Awards -- Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464 (1989)).

However, there are many highlights in the book to be emphasized. Much useful and useable information is provided. Lawyers will enjoy the technical issues of the duty of fair representation and union leaders will also appreciate its implications and resulting practical demands. Advocates can appreciate the practical information given on how to select and prepare witnesses. And insight is often provided by significant observations on real issues by the true experts, such as the discussion relating to NLRB deferral to arbitration.

The strength of this book can also be seen as its weakness. It is necessarily general, though thorough, and introductory, rather than comprehensively detailed, in its treatment of subjects.

The goal of this book was to promote understanding by presenting "core information" on the labor arbitration process. This it does and does well. In fact many of the non-skills subjects touched on, particularly legal issues, are constantly changing and materials constantly need updating. This book, by introducing the areas and issues in the labor arbitration process, provides what is necessary to understand the process by presenting insights into the labor arbitration process, the issues it raises, and the ways of making it work.

It is for the most part easy to read, informational and filled with relevant anecdotes, as well as legal citations. It will give those entering the waters of arbitration a feeling of comfort that they have been introduced and acquainted to the labor arbitration process. In sum, it provides a core understanding of the process, and should be used as a beginning resource, not the final one. Further instruction will come either from actual experience or other reference sources.



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