



Case Western Reserve Law Review

Volume 18 | Issue 4

1967

Labor Arbitration: The Quest for Industrial Justice

Joseph E. Finley

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Joseph E. Finley, *Labor Arbitration: The Quest for Industrial Justice*, 18 W. Res. L. Rev. 1091 (1967)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol18/iss4/3>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Labor Arbitration: The Quest for Industrial Justice

Joseph E. Finley

Despite the phenomenal recent growth in arbitration of labor disputes, the author asserts that without corrective measures the process is in serious difficulty. Arbitration's greatest weakness, he claims, is in its present inability to correct error wherever found. The conditioning of arbitrators to decide cases for management with enormous frequency, alongside the reality that uncorrected error infuses a certain portion of those awards, may eventually result in the disuse of arbitration by labor unions.

WITHOUT ANY particular awareness on the part of the legal public, labor arbitration has become so prevalent in recent years that it has been called the fourth definitive process in the growth of the law,¹ following rulings by courts, lawmaking by the

THE AUTHOR (B.J., University of Missouri, LL.B., Yale University) is a member of the District of Columbia, Maryland, and Ohio Bars and is admitted to the Supreme Court of the United States. Mr. Finley is presently a partner in a Cleveland law firm specializing in labor relations.

legislatures, and decision-making by administrative tribunals. If labor arbitration has become a distinct institutional element in the law, and there can be little doubt but that it has, one must inquire as to how this system works, what its proper role

in our legal structure is, and whether it in fact dispenses industrial justice.

Critical analysis of the arbitration process is not susceptible to the same scholarship that can study and review court decisions, acts of legislatures, and orders of administrative bodies. Court decisions build up a body of law with binding appellate authority; the legislature's acts are capable of political assessment and court interpretation; and administrative bodies are likewise subjected to judicial review. However, the arbitrator is usually an *ad hoc* adjudicator, literally here today and gone tomorrow, whose ruling is binding on no other arbitrator and whose opinion, in the great majority of cases, will never be exposed to the legal public.² Even the published opinions, because of their diversity and the myriads of different con-

¹ Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 U.C.L.A.L. REV. 675 (1964).

² *Id.* at 692.

tractual provisions involved, do not lend themselves to a definitive evaluation of the development of any particular legal pattern.

Yet, as this writer will endeavor to show, the process itself has become too vast and too important in our scheme of law to remain unstudied and unevaluated. Critics are beginning to have their day;³ arbitrators are turning out their books, even though they may be brief tomes which may reflect only the author's own views;⁴ the academic community involved in the process is making its studies;⁵ and the arbitrators are beginning to reply to the critics.⁶ Because there is no great standard frame of reference or any binding law within the process itself, the analysis and view of the practitioner, as one of the consumers of the product, ought to be added as another voice alongside that of the academician and the arbitrator.

It is the dominant thrust of this article that there is a great, inherent weakness in the labor arbitration process as a system of law which deters it from achieving its promise of rendering a full measure of industrial justice. This defection is possibly so compelling that, unless recognized and corrected, it might well lead to the eventual decline and disuse of labor arbitration. Therefore, drawing upon experience and observation as well as a review of the available literature in the field, this article will seek to identify the problem inherent in the labor arbitration system and will analyze the possible measures that could resolve the problem.

I. HISTORY AND BACKGROUND OF THE PROCESS

Even those intimately involved in the labor-management field might not be aware of the full extent to which labor arbitration has developed. It has been estimated that there are 125,000 or more contracts in existence between employers and labor unions, of which approximately ninety-four percent contain provisions for final and

³ See generally Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019 (1965); Straus, *Labor Arbitration and Its Critics*, 20 ARB. J. (n.s.) 197 (1965).

⁴ See, e.g., FLEMING, *THE LABOR ARBITRATION PROCESS* (1965).

⁵ E.g., Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments*, 62 MICH. L. REV. 1115 (1964) (perhaps the best known of the "practical" studies). Articles in the law reviews have now become quite numerous.

⁶ Saul Wallen, past president of the National Academy of Arbitrators, subjected the criticism of Judge Hays, *supra* note 3, to a slashing counter-attack in an address delivered at the Southwestern Legal Foundation, Oct. 29, 1965, and is quoted extensively in Straus, *supra* note 3. See also *Critical Evaluation of the Arbitration Process*, 55 L.R.R.M. 47 (1964) for a summary of the discussions at the seventeenth annual meeting of the National Academy of Arbitrators held in New York City, Jan. 29-31, 1964.

binding arbitration.⁷ These contracts span practically every state in the nation⁸ and involve practically all important segments of American industry. Not only are the millions of employees covered by these contracts personally affected in their conditions of employment but also industrial enterprises are constantly faced with issues of primary importance to their operation.

Every labor contract contains provisions which are constantly tested in the everyday operation of the industrial government process. The arbitrations that result from claimed breaches of these contracts may determine whether or not a man keeps his job; whether he may be suspended or otherwise disciplined; whether he may be promoted or transferred; whether the money he takes home to his family can be supplemented by overtime work, or incentive rights; whether his seniority entitles him to job benefits and protections; whether he will receive holiday pay, health and welfare, and other fringe benefits; and whether his union contract protects him and his union in hundreds of other untold circumstances.

All this means money, either to him or his employer, and money is still an essential stuff of litigation. His employer, involved with the personal, individual, and group rights of his employees, must also frequently put to the test of adversary combat his right to sub-contract work, install new methods of production, or rearrange schedules and processes under his union contract. The outcome of this arbitral litigation is often vital to his business — so much so that one sometimes wonders if the outcome can be safely trusted to the vagaries of the arbitral process.

Labor arbitration, as some of its scholars have shown, extends back to the nineteenth century and by the turn of the century reached a stage of growth at which it was considered a useful device.⁹ It had gained some established acceptance by 1937 and accelerated into tremendous growth after World War II.¹⁰ Each year since 1956, the number of requests and the number of arbitrator appointments has grown.¹¹ The Federal Mediation and Conciliation Service, which supplies lists of arbitrators to parties for selection in cases, received more than 5,000 requests for arbitrators in fiscal

⁷ Jones, *supra* note 1, at 676.

⁸ 18TH ANNUAL REPORT OF THE FEDERAL MEDIATION AND CONCILIATION SERVICE 64 (1965) [hereinafter cited as 18 F.M.C.S.].

⁹ See, e.g., FLEMING, *op. cit. supra* note 4, at 1-30.

¹⁰ *Ibid.*

¹¹ 18 F.M.C.S. 58, 63.

1965,¹² an increase of 333 percent over the 1,510 requests received in 1956.

The American Arbitration Association, a voluntary agency which also supplies panels of arbitrators from which the parties may choose, made 4,097 actual appointments in 1965 and 3,932 appointments in 1964.¹³ Many labor agreements contain provisions for choosing arbitrators without resort to either of the two major agencies in the field, and numerous parties often choose arbitrators by informal agreement, as has this practitioner on innumerable occasions. Based upon the additional figure of 3,333 actual appointments made by the Federal Mediation Service in 1965,¹⁴ and adding the 4,097 appointments of the American Arbitration Association, there is a record of a total of 7,430 arbitrator appointments in 1965. The actual number of appointments made by the parties themselves is unknown, but experience indicates that even by conservative estimate there would be perhaps as many as the combined FMCS-AAA total. Thus, one may reasonably state that there were more than 10,000 labor arbitrations conducted in the United States in 1965 alone,¹⁵ even though appointments do not always result in arbitrations.¹⁶

Published awards are the best indicators of what is contained in this vast output of decision-making, but publication of particular awards varies widely. Professor Jones, certainly one of the more careful students of labor arbitration, has estimated that only about ten percent of all awards are published,¹⁷ and from available figures and general knowledge, this estimate appears to be reasonably correct.¹⁸ Any critical evaluation of only ten percent of an important

¹² *Id.* at 58.

¹³ Letter from Robert Coulson, Executive Vice President, to the author, Sept. 14, 1966.

¹⁴ Letter from Morris L. Myers, General Counsel, Federal Mediation and Conciliation Service, to the author, Sept. 9, 1966.

¹⁵ A study of some 1717 collective bargaining agreements, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR BULL. NO. 1425-26, MAJOR COLLECTIVE BARGAINING AGREEMENTS (1966), revealed that approximately forty-three percent had provisions for utilizing the services of the Federal Mediation Service and the American Arbitration Association in the selection of arbitrators. If other sources, such as state mediation bodies, judges, government officials, and others named in contracts, as well as devices of the parties utilized to choose arbitrators were considered, the total number of appointments would likely be sufficient to make that many arbitrations highly probable.

¹⁶ Just as many lawsuits are eventually settled; similarly, after appointments are made, parties frequently settle an issue without its ultimate arbitration. However, since grievance procedures are ostensibly designed to provide full exploration for settlement, arbitration often reflects the inability of the parties to make a settlement.

¹⁷ See Jones, *supra* note 1, at 692.

¹⁸ A count of awards published by Commerce Clearing House, one of the two lead-

product leaves great gaps in one's analytical assessment and forms a major deterrent to the establishment of any secure frame of reference. This is perhaps another reason why experienced practitioners ought to add their acquired knowledge to the study of the arbitration process.

Alongside the sheer physical growth of labor arbitration as an adjudicative force in industrial society has come the far more important legal development of the process, culminating in the renowned Steelworker trilogy of 1960.¹⁹ This was a logical legal aftermath of the Supreme Court's earlier holding in *Textile Workers Union v. Lincoln Mills*,²⁰ which made enforcement of labor contracts and the arbitration process a federally protected right. Mr. Justice Douglas' encomium on the arbitration process in *United Steelworkers v. Warrior & Gulf Nav. Co.*²¹ was perhaps the highwater mark for the intellectual acceptance of the process, and since that time the critics have begun to express their views.²²

A part of this legal acceptance is the fact that resort to arbitration to settle industrial disputes over collective bargaining contracts has become an integral part of American labor policy. Section 203(d) of the Labor-Management Relations Act²³ specifically indicates a preference for dispute-settlement methods agreed upon by the parties — primarily arbitration. As the Supreme Court has said in another context, if methods of settlement agreed upon by the parties were not fully utilized, "responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult."²⁴

ing publishers, shows that in 1965, its volumes contained 837 opinions, and in 1964, some 1275. This is within a reasonable range of the ten-percent publication estimate of awards.

¹⁹ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

²⁰ 353 U.S. 448 (1957).

²¹ 363 U.S. 574, 582 (1960). Mr. Justice Douglas even wrote that the "ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance" as an arbitrator, because he could not be as well informed. *Ibid.*

²² The devastating assault upon labor arbitration by Judge Hays, *supra* note 3, is perhaps the best example.

²³ 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1964) [hereinafter cited as LMRA]. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *Ibid.*

²⁴ *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27 (1962).

The adjudication of ten thousand cases in a year by private tribunals is not only a significant figure but it also relieves the federal courts of intolerable burdens upon their dockets, for under *Lincoln Mills*, each case in which an employer is engaged in commerce (and under present-day standards, almost all employers are) could be brought as suits for violation of contracts in federal courts,²⁵ absent the usual final and binding arbitration clause. This relief of congestion is offset somewhat, however, by the rather extensive scope of section 301²⁶ litigation in the federal courts in actions to compel arbitration or to enforce or vacate arbitration awards.

These decisions, when rendered, are final and binding upon the parties by the terms of their contract. The finality of the award entitles it to judicial enforcement, one of the great strengths of the arbitration process. However, it can likewise be a corresponding weakness, as will be set forth later.²⁷ The law has supported this finality with both statutory and judicial protection. The United States Arbitration Act,²⁸ a general guideline which perhaps codifies the developing law on the subject, provides that an award may be vacated where (1) it was procured by corruption, fraud, or undue means;²⁹ (2) where there was evident partiality or corruption in the arbitrators;³⁰ (3) where the arbitrators were guilty of misconduct or misbehavior by which the rights of any party have been prejudiced;³¹ or (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.³² This federal standard probably accurately states the law not only for section 301 actions in federal court but also in most state courts, either by reason of statutory similarity or court decree.

The difficulty of upsetting any arbitration award in the courts once it is rendered is keenly demonstrated by the fact that few parties even seek to do so. Assuming the figure of ten thousand awards, the number of cases each year challenging these decisions is minuscule. Most of the few that do make the effort are usually doomed

²⁵ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

²⁶ LMRA § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1954).

²⁷ See text accompanying notes 71-79 *infra*.

²⁸ 9 U.S.C. §§ 1-14 (1964).

²⁹ 9 U.S.C. § 10(a) (1964).

³⁰ 9 U.S.C. § 10(b) (1964).

³¹ 9 U.S.C. § 10(c) (1964).

³² 9 U.S.C. § 10(d) (1964).

to failure.³³ For example, an award may not be examined for alleged mistakes of law and erroneous evaluation of evidence,³⁴ the major areas in which arbitrators are most likely to commit error. Although awards are extremely difficult to upset, a number of courts have interpreted the Supreme Court's opinion in *United Steelworkers v. Enterprise Wheel & Car Corp.*,³⁵ as authorizing them to review whether an arbitrator's award has exceeded the limits of his contractual authority.³⁶ Although this one area of law offers some possibilities for imaginative counsel, the grim facts of life for a losing party in an arbitration action are that in most cases there is very little that can be done in the courts to vacate the award.³⁷

In addition to the widespread judicial approval which arbitration has met, the National Labor Relations Board, the principal tribunal adjudicating other labor-management matters outside the courts, has indicated its decisional acceptance of arbitration awards in both unfair labor practice and representation cases,³⁸ and if these awards conform to certain Board standards, they will be accepted as binding in NLRB proceedings.³⁹

There was a time before *Lincoln Mills* and the *Steelworker* trilogy that arbitration was considered, even by one of its most authoritative observers, as a private function serving only the interests of the affected parties.⁴⁰ Professor Jones has persuasively argued that not only has arbitration "gone public" but also arbitrators today

³³ See *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 350 (1854). The law favors arbitration and it has long been an accepted principle of law, with respect to review by a court of an arbitration award, that "every presumption is in favor of validity of the award." *Ibid.*

"The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

³⁴ *Newark Stereotypers Union v. Newark Morning Ledger Co.*, 64 L.R.R.M. 2024 (D.N.J. 1966).

³⁵ 363 U.S. 593 (1960).

³⁶ *Torrington Co. v. Metal Prods. Workers Union*, 62 L.R.R.M. 2495 (2d Cir. 1966); *H. K. Porter Co. v. United Saw, File & Steel Prods. Workers*, 333 F.2d 596 (3d Cir. 1964); *Truck Drivers & Helpers Local 784 v. Uly-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964); *International Ass'n of Machinists v. Hayes Corp.*, 296 F.2d 238 (5th Cir. 1961).

³⁷ Even a claim of fraud is exceedingly difficult to sustain. *Newark Stereotypers Union v. Newark Morning Ledger Co.*, 64 L.R.R.M. 2024 (D.N.J. 1966).

³⁸ *Raley's Supermarkets*, 143 N.L.R.B. 256 (1963); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

³⁹ *Spielberg Mfg. Co.*, *supra* note 38.

⁴⁰ *Shulman, Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955).

"wield federal power in those disputes affecting interstate commerce."⁴¹ Jones further said, "Creatures of the will of collective bargainers, indeed, they also bear responsibilities, once their office exists, both as to national labor policy and to the basic precept of due process."⁴² The growth of arbitration law through the major court rulings, the recognition of the impact of section 203(d) of the National Labor Relations Act,⁴³ the sheer enormity of the decisional output, and the interests affected all add force to the Jones thesis.

Critics and scholars, already impressed by their own awareness of the place of labor arbitration in the adjudicative process, have begun to ask some of the questions that inevitably arise when a process begins to assume major importance in any system of law. Judge Paul R. Hays of the United States Court of Appeals for the Second Circuit unleashed the most hostile critique in 1965⁴⁴ when he stated that "labor arbitration has fatal shortcomings as a system for the judicial administration of contract violations."⁴⁵ He likewise labeled it as a "thoroughly undesirable system"⁴⁶ adding that it was a "frequently intolerable procedure."⁴⁷ His article brought a strong counterattack from a leading arbitrator⁴⁸ and defenses of the system from other interested sources.⁴⁹ Others have also discussed some of the problems inherent in the process and have sought to raise pertinent questions and seek answers to them.⁵⁰

But the real test of the inherent value of labor arbitration, it would seem, is in whether or not it affords a result that comports with the demands of justice. What the parties want, after all, is an adjudication of their rights — regardless of what tribunal makes the decision — that produces fairness, equity, and a sound, rational ruling. Should one party to a continuing controversy reach the conclusion that his claims are not being fairly judged and correctly decided, that party, if he has it within his capability, will inevitably withdraw from the process that neglects justice, no matter what other virtues it may have.

⁴¹ Jones, *supra* note 1, at 766.

⁴² *Ibid.*

⁴³ 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1964).

⁴⁴ Hays, *supra* note 3.

⁴⁵ *Id.* at 1034.

⁴⁶ *Id.* at 1035.

⁴⁷ *Ibid.*

⁴⁸ Wallen, *supra* note 6, quoted in Straus, *supra* note 3, at 205.

⁴⁹ Straus, *supra* note 3.

⁵⁰ Jones & Smith, *supra* note 5.

Thus, the recurrent question arises, does labor arbitration today produce substantial justice? Are the great mass of cases ruled upon being decided correctly? Are these decisions enforced by reasoning sufficient to command the continued confidence of the parties? Are the methods and procedures of the process sufficient to insure the probability of a just result?

As a means of answering these questions, some of the criticisms of labor arbitration that have been discussed, including the broadside criticism by Judge Hays,⁵¹ ought to be examined to see if they reach the essentials of the process and deal with the validity of the pursuit of industrial justice.

II. EXAMINATION OF THE CRITICISMS

"I am forced to the conclusion, based upon observation during twenty-three years of very active practice in the area of arbitration and as an arbitrator, and from suggestions in the more intelligent literature in this field, that labor arbitration has fatal shortcomings as a system for the judicial administration of contract violations."⁵²

No other commentator has gone quite this far in assailing labor arbitration. The great shortcoming that Judge Hays saw was the incompetence of arbitrators. "In literally thousands of cases every year," he wrote, "decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, intelligence and character."⁵³

A tough cross-examiner might give Judge Hays' conclusions some uncomfortable moments, even without advocating the infallibility of labor arbitration. Where are the suggestions in the "more intelligent" literature? Who made them, and upon what empirical data were they based? Who is to evaluate these arbitrators who are so unfit, who lack such knowledge, skill, and training? Lack of intelligence and character are strong condemnations of men — upon what yardstick is such a claim made? Have the awards of these incompetents been subjected to analysis? Are they replete with error in result, faulty logic, poor draftsmanship, and erratic reasoning? Is there any reasonable method of evaluation, even of the published awards, which could support such a judgment?

In the last analysis, it is probably one man's experience against another's. From a number of years' experience, not much less than

⁵¹ Hays, *supra* note 3.

⁵² *Id.* at 1034.

⁵³ *Id.* at 1035.

that of Judge Hays, and from participating in arbitration hearings in many parts of the United States before many arbitrators who are lawyers, economists, teachers, and full-time professionals, as well as from talking with and questioning scores of attorneys who represent both management and labor, this observer would have to state unequivocally that Judge Hays is simply wrong. Judge Hays thought that judges were far better qualified to resolve controversies over collective bargaining contracts than were arbitrators.⁵⁴ Once again, as a matter of judgment based upon experience, this writer would argue that arbitrators, on the whole, are perhaps better qualified than judges per se. Many arbitrators are more intellectually gifted (especially when compared to elected state judges who use their political strengths to ascend the bench), most are as adept in reasoning as men in robes, and all in all, there are many parties who would far prefer the skill, knowledge, and background of an arbitrator in the specialized field of labor to that of a judge.⁵⁵

As might be expected, the severest rejoinder to the Hays article came from one of the leading professionals in the field, Saul Wallen.⁵⁶ He stated that arbitrators who were chosen in the vast majority of cases met a test no judge was ever called upon to meet — the test of the market place, the judgment of those in a position freely to contract for their services.⁵⁷ Wallen called Judge Hays' assertion that many awards were rendered in a way calculated to encourage the arbitrator's rehire as "arrant nonsense."⁵⁸

There has been no noticeable outcry among the parties which in any manner substantiates Judge Hays' claim of such incompetence as to be a "fatal shortcoming." In fact, most of the available evidence is to the contrary, if one gauges satisfaction and dissatisfaction from the limited reports available. One of the more comprehensive reports on labor arbitration, that done by Jones and Smith, sought to collect information by querying the parties.⁵⁹ When asked whether the participants were generally satisfied with the process, five percent of the management respondents indicated they

⁵⁴ *Id.* at 1034-35.

⁵⁵ One union attorney, who practices in the South, recently told us that judges would be anathema to him and his clients and that in the state where he practices, arbitrators are infinitely preferable to judges in deciding labor controversies.

⁵⁶ Wallen, *supra* note 6, quoted in Straus, *Labor Arbitration and Its Critics*, 20 *ARB. J.* (n.s.) 197, 205 (1965).

⁵⁷ *Ibid.*

⁵⁸ *Id.* at 206.

⁵⁹ Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments*, 62 *MICH. L. REV.* 1115 (1964).

would prefer some other method of dispute adjudication.⁶⁰ Jones and Smith summarized their conclusions:

Yet it remains the fact that many people still want arbitration to remain the informal, inexpensive, expeditious problem-solving process which, perhaps, was its chief claim for support in the past. It probably can still be that if the parties wish it that way. Our guess, however, is that for a variety of reasons, including recent legal developments, the professionalization of the arbitrator and the increased use of attorneys, the trend will be in the direction of greater emphasis upon the quasi-judicial role of the arbitrator, and upon related matters which will make the process more palatable in the light of the present state of the law concerning the finality of the arbitrator's determination.⁶¹

One criticism of labor arbitration discussed by Jones and Smith was the scope of the arbitrator's power, particularly with regard to whether there should be a review procedure.⁶² Donald Straus, president of the American Arbitration Association, in discussing criticisms of arbitration, spoke in similar terms when he listed "appeal from bad decisions" as one of the major problems confronting the development of labor arbitration.⁶³ To this extent, the Jones-Smith analysis and Straus' experience were centered on what this writer considers the most important issue confronting labor arbitration — that the result be right; that justice be done.

The finality of the award, backed by court enforcement, is an awesome thing. Under today's system there is no means of correcting error, despite some attempts at constructing an appellate process.⁶⁴ This goes far deeper than disappointment of the defeated party. Any loser who is sensitive to the issues, and who possesses any real awareness of what is at stake will undoubtedly have some appreciation of what is "right" or "wrong." Even in the judicial system, the number of appeals taken from lower court decisions, even with the absolute right of appeal, is surprisingly small. The loser in court, in evaluating the probability of error, will often forego his appellate right.

There are other complaints concerning arbitration procedures.

⁶⁰ *Id.* at 1116-17. The limited sampling relied upon could only permit a cursory report.

⁶¹ *Id.* at 1153.

⁶² *Id.* at 1119-27.

⁶³ Straus, *supra* note 56, at 200-01. The mere recognition that error in awards was one of the realistic problems confronting the process is of little support to Judge Hays' claim of incompetence without other evidence to support it. Competent men err, too, as most of us readily recognize.

⁶⁴ Straus makes reference to some of these efforts. *Ibid.*

Some say there is too much legalism; others say there is not enough. Every lawyer who has made an objection to a question or moved to strike an answer in an arbitration hearing has heard the familiar words from an arbitrator, "I'll take it for what it's worth." Some day, some waggish counsel will undoubtedly offer the Manhattan Telephone Directory "for what it's worth," and based upon past broad experience, it might be received into evidence. The unwillingness to rule on objections, on the theory that anything offered ought to be received, is all too prevalent⁶⁵ and is more than a personal irritant, for it can often affect the quality of the result.

Two other complaints frequently discussed are cost and delay.⁶⁶ These may vary with individual arbitrators, but excluding occasional aberrations, it is doubtful that either complaint is serious enough to pose any substantial threat to the process itself. There may be delays in choosing an arbitrator and delays in obtaining a hearing date and even delays beyond the usual thirty-day norm after submission for rendering an award, but where is the court docket that can supply a result with any degree of speed comparable to an arbitration?⁶⁷ Many arbitrators still charge daily rates which are lower than those of the parties' attorneys.⁶⁸ Costs do grow in involved cases where many days of hearings are required, but court litigation is usually far more expensive.

Another prominent arbitration authority, Chancellor Fleming, in his survey of arbitration, has raised the following questions about the process: does it accord the parties a fair and impartial hearing in the due process sense, is it administratively efficient, is it serving a socially constructive purpose, and is it sufficiently flexible to meet the challenges of the future?⁶⁹ Fleming's conclusion is that "on the record one can, with relatively minor exceptions, answer most of these questions in the affirmative."⁷⁰

If Judge Hays is wrong about "fatal shortcomings," if the Jones-Smith study accurately reflects that, by and large, the parties are satisfied with the process, if such irritants as delay and cost are of

⁶⁵ This has been encountered in case after case by every lawyer with whom this writer has spoken and appears to be equally distasteful to both management and union advocates.

⁶⁶ FLEMING, *THE LABOR ARBITRATION PROCESS* 31-77 (1965).

⁶⁷ See 18 F.M.C.S. 63, where in 1965, there was an average time of 97.2 days between the request for arbitration and the award.

⁶⁸ In 1965, average fees for arbitration were fixed at \$381 per case. *Ibid.*

⁶⁹ Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245, 1272 (1963).

⁷⁰ *Ibid.*

minor significance, and if Chancellor Fleming's affirmative answers to important questions are correct, then is labor arbitration indeed the ideal for the disposition of disputes over collective bargaining contracts? Are there major defects which pose a serious problem in labor arbitration, or are the weaknesses that arise merely reflections of the human conditions that must be accepted as a part of the functioning of a rather noble institution?

III. THE DETERMINATION OF ARBITRATION'S WEAKNESS THROUGH THE COMPARISON OF ADJUDICATIVE PROCESSES

One's own experience in a field of law undoubtedly makes a deep impact upon one's opinions and concepts. An experience gained over many years in innumerable arbitration proceedings before arbitrators in various parts of the United States except the West Coast, combined with frequent conversations with other practitioners, both on the management and the union side, would appear to be as useful for scholarly evaluation as any other approach. This is particularly so where only approximately one tenth of all arbitration awards are published, and where the absence of records and appellate review on published awards leaves very little basis for evaluation.

There are other valuable legal experiences for labor practitioners that may readily be utilized as a comparison to the arbitration process. As counsel for many unions, this writer has estimated that for the past several years, his active practice has been almost equally divided into three portions: one-third court litigation, both state and federal, before judges and juries; one-third National Labor Relations Board proceedings, including unfair labor practice cases as well as representation proceedings; and one-third labor arbitration. In each type of proceeding, there is a final result, a winner and a loser, involving an adjudication process which requires fact-finding and legal analysis.

It is the comparison with processes and results in court and Labor Board cases that reveals what is believed to be the basic weakness in labor arbitration. The work of the Labor Board trial examiner perhaps provides a better yardstick for comparison with an arbitrator than does that of a judge. A trial examiner is a specialist in a particular field of law, just as the arbitrator should be, and he often begins to hear a case with little more knowledge than an arbi-

trator has when he seeks an opening explanation from the parties.⁷¹ The trial examiner conducts his hearing by applying strictly the rules of evidence under the Federal Rules of Civil Procedure;⁷² the arbitrator has no rules, will often admit any kind of evidence, and is guided in his deliberations by the length of the chancellor's foot. The trial examiner makes dispositive rulings on every objection raised during the course of the hearing, just as would any judge, which often alerts the parties to the effect of their legal positions; the arbitrator seldom makes a dispositive ruling, which often leaves parties in the dark as to the thrust of their positions. The trial examiner writes a decision, usually detailed, making findings of fact and conclusions of law, resolving credibility issues, and, in practically all instances, disposing of all the legal elements in the case; the arbitrator also writes a decision, but it includes considerably fewer findings, resolutions of credibility, and disputed issues — often many important findings are excluded because of possible embarrassment to the parties.

The trial examiner's decision is subject to complete and thorough review by the National Labor Relations Board upon the appeal of any party; the arbitrator's decision is final and binding. The trial examiner's decision is also subject to further judicial review, along with the Board's order, should any party seek redress in a United States Court of Appeals; the arbitrator's ruling is still final and binding, revisable by no one.

Without comparing or analyzing any particular decision of a trial examiner or an arbitrator, but based upon participation in and study of both, the conclusion is inescapable that the trial examiner's decisional work product, including the result, is infinitely superior to that of the arbitrator. This is not to say that the arbitrators are ill-qualified, as Judge Hays has stated,⁷³ or that the trial examiners possess greater wisdom and skill than the arbitrator.

Judge Hays argued that judges are better able to decide contract violations than are arbitrators.⁷⁴ Utilizing decisions by judges in various kinds of labor cases for comparison, although it is this writer's best judgment that this is a closer question than with trial

⁷¹ When unfair labor practice cases are scheduled for hearing, a trial examiner is sent from NLRB offices in Washington or San Francisco, if the case arises in the western states, without any more knowledge of the particular case than that provided by the pleadings.

⁷² NLRB Rules and Regulations, 29 C.F.R. § 102.39 (1966) (rules of evidence controlling as far as possible).

⁷³ Hays, *The Future of Labor Arbitration*, 74 *YALE L.J.* 1019 (1965).

⁷⁴ *Id.* at 1027.

examiners, on balance, this writer is compelled to agree with Judge Hays. The decisional work product might not have the same quality as that of the better efforts turned out by some leading arbitrators, but the judge's decision might be correct more often than the arbitrator's ruling.⁷⁵

There is a certain quality of security and predictability for the lawyer in a courtroom. Rules of evidence are familiar, and will be applied. There is a record, and, above all, there is an appellate court, just as the National Labor Relations Board sits above the trial examiner, and United States Courts of Appeals sit above the Labor Board. Moreover, there are guiding court decisions and established rules of law for a trial judge to follow. Appellate guidance may be considerably persuasive to a judge in inducing him to cast aside his personal predilections and inclinations, as much as is possible, and render a decision within an established legal framework. The arbitrator, on the other hand, is confined within no guidelines; because there are no established rules of law on the merits of the case, and because diverse contractual language and myriad facts confront him, his decisional range encompasses enormous possibilities.⁷⁶ Thus, quality and predictability before a judge, at least in northern industrial states, is far more satisfying to a lawyer.

But for quality and predictability, the most pertinent comparison is still that between the work of the NLRB trial examiner and the arbitrator, since both are experts in the labor field, both hear cases in which written, initial decisions are made, and both are supposedly reasonably attuned to the sensitivities of the labor-management world.

By any reasonable standard, the decisional output of the trial examiner ought to be more "accurate," or "right," than that of the arbitrator. The trial examiner is limited by a specific statute,⁷⁷ the arbitrator is not. The trial examiner has prior guidance from literally thousands of National Labor Relations Board and court decisions which he must follow. The arbitrator has none. The trial examiner, when deciding a case and writing his opinion, is aware that the disappointed party has the legal right to specifically chal-

⁷⁵ This conclusion would be limited to federal courts and to state courts in northern industrial states. We are still mindful of what many of our colleagues have told us about inherent hostility of southern state judges to labor unions.

⁷⁶ There are frequent discussions in some of the literature about established rules in particular grievance matters. See, e.g., FLEMING, *op. cit. supra* note 66, ch. 6 & 7.

⁷⁷ LMRA § 4(a), 61 Stat. 139 (1947), 29 U.S.C. § 154(a) (1964).

lenge every finding and ruling thought to be erroneous and most likely will do so. The arbitrator is not subject to any such critical analysis. The trial examiner further knows that his work product will be studiously reviewed by members of the National Labor Relations Board and their legal assistants,⁷⁸ whereas the arbitrator's final and binding award will seldom go beyond the immediate parties and, even if published, is not likely to be analyzed because of an absence of any record or factual foundation for a critique.

Thus, professional demands upon a trial examiner for a "correct" ruling are intense. He is compelled to treat his findings and opinions with a kind of painstaking care that an arbitrator is never forced to meet. Accordingly, because of these factors, his rulings, on the whole, are likely to carry a far greater measure of accuracy, or rightness, or justice than those of the labor arbitrator. One's own experience powerfully corroborates the essential logic of this position.

Yet conscientious, careful trial examiners are reversed time and time again by the Board in various particulars of their cases. A cursory study of any National Labor Relations Board case volume will bear this out. A quick analysis of volume 153 of the National Labor Relations Board reports, consisting of reported cases from June 17 to July 23, 1965, reveals that the Board reviewed some 107 unfair labor practice decisions of trial examiners. Because most cases involve numerous issues, on which findings and rulings must be made, an outright reversal of an entire case is rarely made. But there are at least 42 examples of cases in which the Board modified in some substantial respect a ruling of the trial examiner, meaning a reversal on some point in issue. In 65 of the cases, the examiner's ruling was affirmed in its entirety, absent minor and insignificant changes. Thus, in one reported volume alone, trial examiners' rulings were reversed or modified in thirty-nine percent of the cases.⁷⁹

This writer strongly believes that arbitrators commit more "errors" than do trial examiners for all the reasons set forth above and because arbitrators, too, are human. Yet this is error uncorrected — error accumulated, error unredressed, error which must bring painful awareness to any sensitive man's internal feeling for justice.

⁷⁸ *Ibid.*

⁷⁹ An analysis of other volumes may, of course, show different figures, but based on considerable experience in the field, the author seriously doubts that additional perusal of decisional volumes would show any substantial variation from what has been found in Volume 153, the latest one in our library.

IV. A BIASED ARBITRATION

If there is substantial error abounding in arbitration decisions, as it is believed there is, what impact does this have on the process itself? Is this error so evenly distributed on both sides of the coin, with management bearing the brunt of some and labor likewise, that it all evens out in the end?⁸⁰ Is this error within a range of tolerance that must be accepted as a part of the package of speed, reasonableness of cost, and finality of result? Is this error that ought not cause great concern among scholars, practitioners, and parties, or is it a critical factor in the continuing quest for industrial justice under our system of law?

One's search for truth undoubtedly becomes clouded with the outlook of continued long-time advocacy on behalf of one partisan in the field. But this risk must be assumed, the experiences evaluated, and the conclusions weighed — and this leads to the conclusion that in 1967, and for the previous few years, the greater portion of "error" in arbitration cases is being rendered in favor of management and against unions.⁸¹

This writer has undertaken an intensive personal survey among practitioners, both on the management side and the labor side, throughout the past year in order to learn "what's going on" in arbitration decisions. Management lawyers have revealed that, from their experience and observation, management wins eighty percent of all arbitration cases. Many union lawyers have agreed that this is probably correct. The reported cases, for "whatever they are worth," show a usual figure of approximately sixty percent favoring management and forty percent favoring unions.⁸² But these are usually the more significant cases and cannot possibly reflect the hundreds of unreported, routine rulings handed down week after week. More than one arbitrator has privately stated a concern over

⁸⁰ Such a question is a reminder of the apocryphal story of the elderly lawyer who discoursed as follows: "When I was a young lawyer, I lost many cases I should have won; when I became an old lawyer, I won many cases that I should have lost; in this way, justice was evened up."

⁸¹ It would require an advocate for the union side to make such a declaration. Management attorneys, with a satisfying record of achievement in their cases, would hardly be expected to admit that their triumphs were achieved partially through the commission of error. Arbitrators, too, for many of the same reasons, are not likely to admit that a frequency of error would favor one side against the other.

⁸² A count of decisions where there appeared to be a clear-cut finding for one party against the other in volume 66-1 of the CCH Lab. Arb. Awards (1966) revealed 59% of the cases being decided for management. A similar count in volume 45 of the BNA Lab. Arb. revealed 56% of the cases being decided in favor of management. Studies of other recent volumes have shown this figure to be higher.

the repetitive frequency with which cases are being decided in favor of management.

Obviously, a won and lost box score, without more, is scarcely a reliable basis for the broad conclusion that management wins too often or that error is distributed more heavily in favor of management. Most of us who deal with labor arbitration with any degree of regularity, on both the company and union side, recognize that management "ought" to win more than it loses. On the whole, companies are far better qualified to handle a case; they possess superior record keeping, more knowledgeable personnel, men with better education and training than the rank-and-file union shop steward, and a decisional control-device that can settle the "bad" cases and allow the "good" ones to go to arbitration. Management far more often employs a competent, skilled labor attorney to present its case to an arbitrator than do unions, who often must rely upon a business representative, local union officer, or international representative to compete with an able professional on the other side.⁸³

Labor arbitrators today, we submit, are "conditioned" to find for management. More than likely, every conscientious arbitrator in the field will vigorously dispute this conclusion. Vehement denial is expected — but this writer will press each disputant to think carefully and deeply about the trends and developments in the field. There are a number of quite rational factors which explain why arbitrators have become "conditioned" to find for management and which, consciously or not, deeply influence their decisions, cause them to gloss over and ignore important points of law, and lead them, in the human error they commit, to deposit their analytical mistakes more often on the union doorstep.

The better preparation and usually more skilled presentation that management brings to the arbitration hearing have already been mentioned. An arbitrator hearing case after case soon becomes impressed with the efficacy of the management argument and the ineffectiveness of the union cause. His honest intellectual dispositions accordingly begin to become more easily "tuned" to the persuasiveness of good company advocacy, no matter how sincerely he strives to maintain intellectual impartiality.

⁸³ A review of reported cases in 45 Lab. Arb. (1964) revealed that management was represented by an attorney in 65% of the cases, while unions were represented by attorneys in 39% of the cases. As was indicated earlier, the reported cases are more likely to be significant cases and are consequently more likely to show a higher degree of lawyer participation than the great mass of cases which are not reported.

There is a second important factor connected with the "better" case for management. In a grievance procedure, good industrial relations men can screen cases and dispose of those where company error is apparent. The union, on the other hand, is usually compelled to press forward since it has no means of determining the outcome of a disputed grievance other than by dropping it. All of us on the union side recognize the number of unreasonably "bad" cases which unions take to arbitration, many of them for intra-union political reasons. For example, a discharge case where misconduct has been flagrant is often taken to arbitration as a last desperate effort to save a man's job because the membership would desire that every effort be made for all men in the bargaining unit. Arbitrators seldom decide these "bad" cases for unions, but the frequency with which they must rule in these one-sided controversies is a further step in the conditioning process towards the broad acceptance of management advocacy. It becomes habit forming.

Moreover, it has become more "fashionable" to decide for management. Again, vehement opposition from the arbitrators might be expected regarding this assertion, but it is supported by political and sociological facts. In the immediate post-war years when arbitration was developing rapidly, the liberal, intellectual public could think of unions as the "good guys" and management as the "bad guys." While this is obviously a crude oversimplification, there is enough of the "beauty and the beast" caricature in it that anyone sensitive to the political development of the past few decades must recognize that it has some validity. The discharged worker of 1947, who may have been the subject of anti-union hostility, evoked sympathy, as did workers' claims for seniority and job security in factories everywhere. But management was learning, too, and errors of the past were being corrected by intelligent, decent men in executive positions. With the social decline of "liberal" trade unionism and the corresponding growth in management humility, awareness, and humane and industrial perspective, the "good guys — bad guys" characterization has evaporated. Ruling for management no longer disturbs the conscience of any socially aware labor arbitrator.

An additional factor is inherent in the process but is nonetheless an influence on the decisional output. Each case that goes to arbitration (except in the unusual situation where management is the grievant) involves a challenge to a managerial decision, where the union seeks to attain something which has been denied it. Many arbitrators reflect upon whether they should substitute their judg-

ment for that of the company.⁸⁴ The arbitrator is often placed in the same position as that of an appellate court affirming a "reasonable" ruling of a lower tribunal, and with this comes a natural hesitancy to reject or set aside a managerial decision made in good faith.

It is sometimes difficult to translate these intangibles into specific situations. But again, there must be some degree of acceptance of one's experience in the field. It is far more difficult to win an arbitration case for labor today than it was ten years ago. Cases which could be won ten years ago are being lost today. This is the experience of every lawyer on the union side with whom this writer has spoken⁸⁵ and the arbitrators surely must not overlook this cardinal fact of life.

Unfortunately, it is the "close" case or the "big" case that appears to be going uniformly for management today. Cases still exist wherein management is egregiously and demonstrably wrong, and arbitrators have no difficulty in holding for unions in such situations. Similarly, there still exist a certain number of "bad" cases, wherein this writer would indeed be puzzled if an honest and conscientious arbitrator, and it must be reiterated that almost every man who sits in these cases falls into this category, would decide for labor. This is one's internal sense of justice at work, easily attuned.

However, it is the unusual argument, or the new concept, that is not meeting with acceptance. A creative new tack in advocacy is sometimes the joy of a lawyer's work, but historically it meets with little acceptance at the initial decisional-level.⁸⁶ And yet it is in the close case, often with cogent arguments on both sides so that the reasonably prudent arbitrator may decide either way without being intellectually corrupt, that the intangibles at work, the distribution of error, and the disposition to find for management, all impose upon the decisional process and result in what this writer thinks is now a decisional imbalance in favor of management and against labor.

This goes beyond the disconsolation of a loser. One must adhere again to the most meaningful intangible — the sense of justice. Basically, if this sense gets out of balance, it will ultimately

⁸⁴ *Trans World Airlines, Inc.*, 41 Lab. Arb. 142 (1963).

⁸⁵ As representative of several unions, we have frequently attended conferences of union attorneys in the past year as well as bar association meetings, in addition to having general encounters in the field. This view is strongly and almost unanimously held by a great many union lawyers.

⁸⁶ This is particularly true in the courts where lower tribunals are notoriously reluctant to embrace new concepts of law. Practically all of the creative decision-making must therefore be made at the appellate level.

result in action of some consequence by the affected party. If unions, as a major force in the labor-management relationship, reach the conclusion that industrial justice is not being done in the arbitration process, whether that sense be right, wrong, distorted, or not, there will be a search for other and better solutions. As counsel for two international unions and many local unions, we are not alone as a voice in the union crowd, in counseling that perhaps the time of imbalance has arrived — to the serious detriment of the social force for which we have become advocates.

V. IMPROVING THE QUALITY OF LABOR ARBITRATION

A. *Selection of the Arbitrator by the Parties — An Inadequate Approach*

The great control device over error in the judicial process is appellate review. This is the dominant force over the work of the trial examiner of the National Labor Relations Board which compels an unusually high quality in his work output. The only control device over error in labor arbitration, as Saul Wallen recognized when he made his "test of the market place" rejoinder⁸⁷ to Judge Hays, is selection by the parties.

If an arbitrator's output is replete with continued error, theory would have it that the party aggrieved by those mistakes would soon eliminate him by declining to choose him in future cases, an operation of a classical theory of "survival by excellence" which operates to drive "bad" arbitrators out of business and keep "good" ones constantly at work.

But, like many classical theories, the control device of "survival by excellence" does not meet the test of reality. Unions today have no practical alternative to arbitration. Since the contract gives the union and its members certain rights in the employment relationship which they would not enjoy in the absence of that contract, any claimed breach of the agreement involves an attempt to secure some right or benefit to be wrested from managerial control. When a party seeks to obtain something which it would not otherwise possess, and which will be denied the party unless it can be won in an adversary contest, that party has literally little to lose and a great deal to gain by entering the arena.

In order to attain such gains, for most unions it is either strike or arbitrate. Unless a union possesses unusual power and mem-

⁸⁷ Straus, *supra* note 56, at 205.

bership solidarity, it can hardly look forward to the prospect of calling its members out on strike as a final means of resolving every unsettled grievance. This is too costly and hazardous a prospect, and even too ultimately chaotic. Even some of the unions with which this writer is intimately acquainted, which disdain arbitration and use the strike as the ultimate weapon must allow many meritorious grievances to go unsettled because of an unwillingness to call a strike except in matters of great concern.⁸⁸ When strikes do occur, accumulated bitterness often results in a long and costly struggle for both sides.⁸⁹

Thus, arbitration has become the only practical alternative for resolving disputes over labor contracts. Most unions simply must rely upon arbitration as the only peaceful and reasonable means of having its claims resolved. The employer, on the other hand, who possesses the decisional power to grant a grievance or deny it, and who does not yield an issue unless it is won from him, is not dependent upon arbitration at all to achieve anything for his benefit. There is always, of course, a recognition of the process as a mechanism for dealing with union and employee grievances — a kind of safety valve theory.

If nearly all unions are compelled by the realities of contract administration to arbitrate their claims for contractual benefits or rights, they must choose arbitrators. How is this process accomplished? A study of some 1,717 contracts by the Bureau of Labor Statistics of the United States Department of Labor⁹⁰ reveals that in forty-three percent of the contracts studied, arbitrators were obtained from the Federal Mediation and Conciliation Service and the American Arbitration Association in approximately equal numbers.⁹¹ Even when contracts do not specify the means of obtaining

⁸⁸ Many grievances, while embracing sound claims of contract violation, simply are not momentous enough to warrant calling an entire bargaining unit off the job. One man's claim to a promotion, where his skill and ability are weighed as relatively equal to that of another employee with less seniority, is a typical kind of grievance that might possess a great deal of individual merit but ought not involve every employee in a loss of earnings. On the other hand, if a union possesses sufficient economic strength, it might, through use of the strike threat, settle almost every grievance favorable to it; this practice can likewise imperil long-range prospects for industrial peace in the plant.

⁸⁹ One party or the other, accustomed to yielding to the strike alternative, may frequently choose to "fight it out" when the strike finally does occur, which may prolong the strike far beyond what might be considered a normal period for the kind of issue involved. This writer is personally familiar with a number of situations where this has actually happened.

⁹⁰ U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR BULL. NO. 1425-26, MAJOR COLLECTIVE BARGAINING AGREEMENTS 4 (1966).

⁹¹ *Id.* at 37.

an arbitrator, resort is often made to one of these agencies for a panel of available men. State mediation bodies, judges, government officials, and other individuals were named as sources in some of the other contracts.⁹²

Most arbitrators whose names are submitted to parties by both the Mediation Service and the American Arbitration Association are usually men of some experience in the field.⁹³ No matter how frequently these men decide cases for one party or the other, their names go out. It has been our experience that unions ordinarily try to make a choice from among the five or seven names that are submitted on the usual panel. This is so even when none of the names on the list commend themselves as "pro-union," according to whatever information sources the union may have. An arbitrator who has a past record of deciding an occasional case for the union may be chosen because he has at least demonstrated that he *can* decide for labor in some situations.

In addition, there are many arbitrators to choose from in any given geographical area, despite the general claims of scarcity in the field. The great majority of unions do not submit to arbitration with such a degree of frequency that they are likely to exhaust the names on the lists that are submitted to them. The arbitrator who renders a "bad" decision can be discarded for the next case and a chance taken with a different arbitrator the next time. This kind of arbitrator-shopping goes on constantly in union ranks, with the supply almost surely to outlast the individual union demand. Moreover, Union *A*'s dissatisfaction with a "bad" decision of Arbitrator *X* may not be communicated to Union *B*, who will choose him, especially if the unions are constituents of different international unions.⁹⁴

Thus, the control device of selection by the parties, while it would obviously have some influence in rejecting some arbitrators, is simply unmanageable as a meaningful mechanism to prevent error. Certainly it cannot compare with appellate review's exacting

⁹² *Ibid.*

⁹³ Many of these arbitrators have records of service that extend back to War Labor Board days. Accumulation of published awards affords some stature to arbitrators. There is also a well-known reluctance of parties to choose unknown persons as arbitrators, where there is a corresponding willingness to "take a chance" on someone who has had experience.

⁹⁴ Some international unions, as has been recognized, maintain data on different arbitrators which is available to their own local unions. But, in our range of intra-union knowledge, it is rare indeed when one international union exchanges information on arbitrators with another, primarily because the information is rarely sought.

standards. The arbitrator who finds it "fashionable" to decide for management in close cases is not likely to have his employment sources terminated for more years than he is likely to survive in the business. Something a great deal more effective than selection by the parties is required to improve the quality of labor arbitration — to bring to it necessary standards of quality and predictability in order that better or "correct" decisions may be made in more cases or that the probability of error be reduced to the lowest possible minimum in a system of adjudication where one ruling is forever final and binding on the parties.

B. Three Means of Insuring Quality

There are basically three areas in which one may search for improvements in the arbitration process. The first is within the parties themselves, for there are undoubtedly many things they can do to aid the conscientious arbitrator in searching for the "right" decision. The second area, equally obvious, is with the arbitrators, in that they can raise their own performance to a higher level, particularly when the responsibility for the final and binding award is thrust upon them.

But these two areas are bootstrap operations, where only exhortation and do-better resolutions are involved. Ostensibly, both the parties and the arbitrators can improve their product without any great degree of self-improvement suggestions from any particular source. If parties wish to utilize pre-hearing briefs to help frame the issues and enlighten an arbitrator beforehand, they are probably free to do so.⁹⁵ If they desire to spend more time in order to better prepare for a case, that is not merely their prerogative, but perhaps their duty. Most parties should have learned by now to make better use of the various steps in the grievance procedure so as to fully explore issues, facts, and positions.

Arbitrators, too, hardly need encouragement from the sidelines to search for better means to insure quality in their work. Most are sincere and conscientious enough and have sufficient professional pride to explore and question, as most do, the techniques and procedures they follow. While it is urgently wished that more attention be given the rules of evidence as means of ascertaining the existence of facts rather than treating such procedures as strange technicalities to be avoided at all costs,⁹⁶ and while it is likewise

⁹⁵ Straus, *supra* note 56, at 210.

⁹⁶ Many arbitrators, some of whom are teachers of law, appear not to recognize

thought that more meaningful colloquies during hearings will help all parties in exploring issues, it would be difficult to maintain that hearings are so poorly conducted that they need drastic overhauling.

The only important area in which one may search for meaningful improvement in labor arbitration is in the system itself. Are there control devices more meaningful than selection by the parties which will lead toward a better decisional product, thus benefiting not only labor unions but management as well? Are these practical and workable enough, and will they possess sufficient acceptability so as to constitute a significant step toward a better brand of industrial justice in contract administration?

There are at least three devices or areas of improvement which this writer believes will contribute to a substantial upgrading in labor arbitration and contract adjudication. If it is the system that is improved, both management and labor stand to benefit, for it is still basically a higher quality of adjudication we seek, not a better grade in the box score for one party against another.

(1) *Greater Use of the Tripartite Panel.*—One of the most meaningful devices for improving the quality of labor arbitration has been available to the parties for years, but has been passing into an unfortunate decline. The tripartite panel, with one member representing labor, one member representing management, and the public member acting as impartial chairman, was an outgrowth of War Labor Board procedure, and is readily adaptable to present-day grievance arbitration. Many contracts have provided for inclusion of the three-member boards, although the 1966 Bureau of Labor Statistics study revealed a significant decline in the contractual use of this mechanism.⁹⁷

Both the parties and the arbitrators have aided in the decline

that rules of evidence are fundamentally rules of reason and have been devised and tested in a thousand courtrooms as a more objective method of seeking truth than are conjecture, hearsay, conclusions, assumptions, beliefs, and a hundred other frailties of human perception. Some arbitrators defend their hostility to applying these rules of reason on the grounds that union representatives who so often present cases are not lawyers, and to apply more formal procedures would be a disservice to them. Perhaps these arbitrators ought not hold so low an opinion of most full-time union representatives who, while they may not have attained the educational levels of a company lawyer across the table, are reasonably willing to learn and to understand what relevance means if given an opportunity. This writer thinks this is a "junkheap" theory, and the sooner it is discarded, the better for the whole arbitration process. See also *id.* at 202-03.

⁹⁷ U.S. BUREAU OF LABOR STATISTICS, *op. cit. supra* note 90, at 36. Contracts studied in 1952 showed that 46% provided for tripartite arbitration boards. Ten years later, the percentage had declined to 39%. We have observed that in most cases, even the inclusion of the tripartite panel has meant very little because of the lack of actual utilization of anyone other than the impartial chairman.

of the tripartite board by their conduct in recent years. All too frequently management designates a second-rank personnel official and the union selects a silent business representative to sit alongside an experienced arbitrator who is expected to run things his own way. Many arbitrators, when confronted with a tripartite panel, will hear a case, hold a brief executive session at the close of the hearing, informing the other two supposed participants that he will draft an award and circulate it to each of them before issuance for their concurrence or dissent. The winning party invariably concurs and the losing party invariably dissents, usually in words of no more than that, and, as a consequence, the tripartite panel, or board, as a functional device, has become almost useless, or perhaps more appropriately a farcical charade. As counsel in many cases over the past years where tripartite panels were provided by contract, we have made our own unfortunate contribution to the decline of the usefulness of the three-man board by politely and quietly accepting the "facts of life" about the one-man decision, or either going so far as to waive the three-man board and vest everything in the hands of the impartial chairman.

But this does not have to be. In the past year, in an attempt to give this device a better testing, we have sought to use the tripartite panel wherever it has been provided for, and to do it in ways which we think are meaningful. The union representative should no longer be a mute appendage but should make every effort to contribute something meaningful to the hearing. Executive sessions of the arbitration board should be hard give-and-take exchanges of ideas and positions instead of a one-minute exchange of pleasantries and a curt notice from the chairman of later circulation of his opinion.

If the chairman ignores significant points in the case, errs in assembling the facts, or uses faulty judgment in weighing one factor over another, there should be more than the two-word, "I dissent," added to the three-man opinion. A thoughtful, analytical dissenting opinion, stating the facts and issues in detail, pointing out the error of the chairman, should be provided in every case where there is a departure from substantial justice. This dissenting opinion should be published alongside the opinion of the chairman in every case that is published in the arbitration reports. This will provide at least some better standards for evaluating the work of the chairman. Even in the great majority of cases where there is no publication, a powerful dissent is bound to have its impact upon

any conscientious arbitrator. Any arbitrator who knows that, whatever his ruling, there is likely to be an answer or opposition view alongside, will undoubtedly strive for higher standards. While this control device is hardly as demanding as that which is imposed upon the work of an NLRB trial examiner, it is nonetheless an important stride in the right direction.

Where tripartite panels are used as they should be, or can be, the results are apparently gratifying. Our own recent experiences strongly confirm this. In one jurisdiction, Connecticut, where the three-man tribunal is widely used, the reports are likewise encouraging. Hearings of the state's Board of Mediation and Arbitration are ordinarily held before three members, even though the statute permits the parties to choose a single public member.⁹⁸ Rev. Daniel E. Johnson, acting chairman of the Board in 1966,⁹⁹ has said that in executive sessions prior to the decision, the two representatives from the parties are urged to evaluate the case, contrary to the usual practice with the "dis-use" panel.¹⁰⁰ "Their evaluation produces a three-sided discussion which I, as a public member, have found extremely beneficial," said Rev. Johnson.¹⁰¹ At the hearing these representatives frequently participate in questioning, which aids in exploring the issues. Dissenting opinions are often filed. Rev. Johnson, in strongly supporting the tripartite panel, believes there will be a continued reliance upon it in Connecticut.¹⁰²

The strongest argument for re-evaluation of the tripartite panel and a return to its meaningful use, is that it is potentially a useful control against error. Arbitrators may have to learn to live with contentious partisans sharing in the decision-making process, and the parties may have to learn anew how to use it, but it presents perhaps the best and most practical device at hand for any immediate improvement in the arbitration process. The tripartite panel is already provided for in many contracts, and even in those where it is not, the parties may want to include it as a part of their submission. New contract proposals can include it in the future once parties learn that it can be equally beneficial to both sides, and if given a proper chance and used as it should be, it can result in a substantial improvement in the quality of labor arbitration.

(2) *The Appellate Panel.*—The one-shot, final and binding

⁹⁸ CONN. GEN. STAT. REV. §§ 31-93 (1960).

⁹⁹ Letter from Rev. Daniel E. Johnson to author, Sept. 6, 1966.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

concept is thoroughly imbedded in the arbitration process. Yet, our judicial experience has taught all of us in the law that appellate review is perhaps the best control device to protect against error. One of the great arguments against appellate review in arbitration is the consumption of time and the added cost that it would entail. Furthermore, it is an assault upon the "final and binding" concept of the one-shot hearing, where each side lays it on the line and willingly abides by the result.

But it is quality that is being sought, not speed and economy. The concept of justice or correctness is still a compelling one. There are too many situations in which it is far more important that a just decision be rendered than merely a speedy, inexpensive one. The flip of a coin or the roll of the dice could both accomplish a result with speed and no cost at all. There are enough delays now in the process: extensions of time requested by the parties throughout the grievance procedure, delay in selecting an arbitrator, a further spread of time in finding a hearing date satisfactory to all, frequent necessary postponements, extensions for filing of briefs, and even delayed awards — all these make speed suspect as an invariably important factor.¹⁰³

As Donald Straus, president of the American Arbitration Association, has recognized, there is a recurrent theme in the "literature" which demonstrates a yearning for an appellate procedure.¹⁰⁴ There has been little reported or experimental evidence of its use,¹⁰⁵ but rules could be readily devised, especially by the American Arbitration Association, as Straus has indicated.¹⁰⁶ An appellate procedure could be established that, for example, could require an appeal to be filed within one week, submitted on whatever briefs or arguments and record were available to the initial tribunal, argued orally within another week or so, and an opinion rendered within the

¹⁰³ We participated in an arbitration hearing on February 8, 1967, in which the original grievance was filed January 13, 1966, almost thirteen months earlier. This, unfortunately, is not entirely uncommon. Briefs in the case were to be filed, and an arbitration award was not rendered at the time of this writing. We have had dozens of experiences similar to this over the years.

¹⁰⁴ Straus, *supra* note 56, at 201.

¹⁰⁵ Straus mentioned a "contract between the American Newspaper Publishers' Association and the International Printing Pressman's Union" which "permits either party to appeal a decision to the International Board of Arbitration, which consists of three members of the union's board of directors, three members of a special committee of the ANPA, and a seventh, or neutral, member chosen from a pre-selected panel of ten impartial arbitrators." *Id.* at 200. This writer has not been provided with any further information as to how the process works or how successful it has been.

¹⁰⁶ *Id.* at 200.

usual thirty-day period thereafter. The American Arbitration Association could establish a national board of appellate arbitrators, from which it could appoint three whenever a case was noticed for appeal. Of course, there would be an additional cost for the parties, which is always a factor. But as for delay, it is unlikely that time would be a factor of any great significance in view of the numerous lags already encountered.

The difficulty with an appellate process is that the parties would have to provide for it in their contracts. This would be a startling innovation for most bargainers. The normal inertia with which most new proposals are met would detract from its acceptance. Even should the American Arbitration Association announce an appellate tribunal, which this writer thinks it ought to do, there may not be any great rush to include provisions for appeal of arbitration rulings in many contracts. But the device is worthy of a real test. Once the parties, or once most unions, know that an appellate tribunal is available and realize that it can serve an impressively useful purpose, it might be accorded a substantial reception. If the unions reach a determined conclusion, as is likely, that the frequency of error is no longer tolerable, the use of some form of appellate process may be inevitable.

(3) *The Court Trial.*—The use of the courts as an alternative to arbitration as a means of adjudicating labor contract disputes may be pleasing only to lawyers. But if a case is truly important to the parties, its outcome might be worth the time which litigation would consume. In cases where employers resist arbitration on the grounds that a dispute is not arbitrable and a Section 301 suit becomes necessary to compel arbitration, a direct suit for enforcement would be equally fast. In situations where monetary awards are involved, jury trials may be extremely important, especially where there are compelling equities favoring employees.

But how can court trials, even if desirable, become a meaningful alternative when arbitration is final and binding in so many labor contracts? Once again, the negotiators would have to experiment with contractual proposals that would permit litigation as an alternative to arbitration. Contractual alternatives might provide that a submission to arbitration within a certain period of time would make use of that procedure final and binding, and that a notice of litigation is a prerequisite to utilizing the courts. Minor grievances where speed and low cost are vital could be heard in arbitration, and important issues could be reserved for the courts.

This proposal is unlikely to be warmly received by many of the parties, most of the arbitrators, and probably all of the overworked federal judges who might hear of it. Yet, in recent years, we have been involved in several arbitrations that have been as costly and time-consuming as court litigation, and where we would have advised our clients in good conscience that their fate would be far more secure in a courtroom than before almost any arbitrator. Thus, it is not suggested that court litigation be substituted for arbitration but only that there be an alternative left open to litigate the "big" case of truly vast importance.

If greater use of the tripartite panel would prove its worth as a control device, and if the occasional use of an arbitration appellate tribunal would be possible, then perhaps court litigation as an alternative would be unnecessary. But recalcitrant employers ought to be given fair warning that when arbitration is resisted on the grounds that the dispute is non-arbitrable, and where money is involved, and where it will be necessary to sue to compel arbitration, a direct action on the contract may have to be brought, including a demand for a jury trial.

VI. CONCLUSION

Arbitration, even to those of us who have become disappointed in its recent performance, has been of enormous value over the past few decades in providing a viable forum for the adjudication of collective bargaining contractual disputes. Its potentiality for meeting the needs of the parties is still as great as ever. Arbitrators, on the whole, despite the belief of Judge Hays, are able, sincere men reasonably qualified to perform the function assigned to them. But entrusting every important decision to their "final and binding" adjudication where there are no realistic control devices to guard against error that is bound to invade the best of human effort is not only a careless gamble with a client's best interests in many cases but also is often a reduction of the professional standards of an adjudicative process.

The "law" of arbitration ought to be better than it is. When one party is more beholden to the process than the other, as seems to be the case with the great mass of American labor unions, that party can be subjected to a great deal of injustice without any means of basic correction. If, in some not-too-distant day, it becomes "fashionable" again to find more often for unions, then management might face the same plight that confronts American labor to-

day. But it is essential quality that all participants ought to desire intensely. The quest for industrial justice ought not be a one-sided thing; it ought to be as intrinsically sound as legal creativity can make it. The measures which have been set forth herein, perhaps comparatively mild as palliatives, are worthy of a thorough trial by all partisans in the hope of improving the labor arbitration process itself.