THE FUTURE OF LABOR ARBITRATION*

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VOLUNTARY labor arbitration, which received a great push from the National War Labor Board, has maintained its position since the war. It is estimated that of the 50,000 collective agreements now in effect in this country fully 95 per cent contain arbitration clauses. While the arbitration system ordinarily proceeds without resort to the courts, such resort occurs sufficiently frequently, and the *in terrorem* results of the existence of a possible resort to the courts is a sufficiently important factor, to raise the question of the extent to which the courts should participate in the arbitration process. Arbitration cannot properly call upon the courts to rubber stamp whatever arbitrators may do. If the processes of the courts are to be available to enforce arbitration, then the courts must examine and pass upon what it is that they are enforcing. As I shall point out, there are a number of aspects of labor arbitration in which the courts should interest themselves. The most important of these is the award itself, when the courts are called upon to enforce it.

The third of the famous *Steelworker* cases of 1960[1] involved the enforcement of an award. Although the Court granted enforcement in *Enterprise Wheel,* it said:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[2]

No great harm is done by applying a liberal rule as to arbitrability, if the court carefully scrutinizes what the arbitrator later decides. Professor Wellington has pointed out the difference between the two procedures, arbitrability and enforcement, and has expressed the hope that the Supreme Court will "reexamine and modify" the position it took in *Enterprise* and give effect to the language I have quoted.[3]

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1. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Here the Court granted enforcement but subject to modification: further arbitration to determine the amount due. The other two were United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

2. *Id.* at 597.

3. Wellington, *Judicial Review of the Promise to Arbitrate,* 37 N.Y.U.L. REV. 471, 483-84 (1962).

The Court of Appeals for the Second Circuit has clearly drawn the distinction between arbitrability, that is, the arbitrator's "jurisdiction" to hear the case, and the subsequent action for enforcement of his award.[4] The court held that certain limiting language in a collective bargaining agreement went not to the arbitrator's "jurisdiction" but to his "authority" to make an award.

> Should his decision or the remedy exceed the bounds of his authority as established by the collective bargaining agreement, that abuse of authority is remediable in an action to vacate the award.[5]

In *United Steelworkers v. American Manufacturing Company*,[6] the first of the 1960 trilogy, the Supreme Court said that even a frivolous claim is arbitrable because of the "therapeutic values"[7] in the processing of all claims. This does not mean, though, that an award based on a frivolous claim is enforceable in the courts. In *New Bedford Defense Products Div. v. Local 1113, UAW*,[8] a First Circuit case which is cited with approval in *American Manufacturing*,[9] the district court held an issue arbitrable although it could be "correctly decided only one way."[10] The appellate court likened the jurisdiction of an arbitrator to that of a court and said:

> If the subject matter of a claim is within the court's jurisdiction, the court does not lose its jurisdiction because of the fact that the proper disposition of the claim may be crystal-clear under the law.[11]

Holding that such an issue is arbitrable does not mean, I think, that an arbitrator's award should be enforced if he decided the issue in favor of the claim. In the words of the Second Circuit, the arbitrator has *jurisdiction* to be wrong. The question is whether he has *authority* to decide issues contrary to the provisions of the contract.

The point I make may be illustrated by supposing a collective bargaining agreement which provides: "The employer shall have unfettered discretion under all circumstances, and as if no collective bargaining agreement existed, to contract out whatever work he chooses." The union raises a grievance concerning the employer's having contracted work out. Under the authorities it appears that the grievance is arbitrable if the union claims that it arises under the agreement. Now let us suppose that the arbitrator awards in favor of the union and writes an award in which he says "I have disregarded the contractual provision because I believe it to be unfair and inequitable. I have preferred to dispense my own brand of industrial justice which appears to me to be superior to the collective bargaining agreement." His award, says

4. Carey v. General Electric Co., 315 F.2d 499 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964).
5. 315 F.2d 499, 508.
6. 363 U.S. 564 (1960).
7. *Id.* at 568.
8. 258 F.2d 522 (1st Cir. 1958).
9. 363 U.S. 564, 568.
10. 160 F. Supp. 103, 112 (D. Mass. 1958).
11. 258 F.2d 522, 526.

the Court, "is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[12] The arbitrator would have *jurisdiction* to *arbitrate* the issue, but no *authority* under the collective agreement to make such an award. Nor can it be that the result depends on what the arbitrator says in his opinion. Suppose instead of announcing that he was disregarding the contractual provision he stated that he read it to prohibit all contracting out. Surely he would be equally faithless to his obligation. Or he might say nothing about the contract provision or even write no opinion. Has he not equally exceeded his authority?

A new confrontation between labor arbitrators and the courts is now developing. In conformity with the instructions of the Supreme Court in the famous *Lincoln Mills* case,[13] the federal courts, with assistance from the state courts, are fashioning a new federal law of collective agreements. The judges whom the Supreme Court called upon for this work are the very judges upon whose expertise, as compared with arbitrators, the Court threw so much doubt in the *Steelworker* cases.[14] In cases involving the thousands of collective bargaining agreements which contain no arbitration clause and in other cases where for various reasons no resort is had to arbitration, these judges are now deciding exactly the same issues that the arbitrators are deciding in situations in which arbitration is provided by the collective bargaining agreements. Among the issues decided recently by courts as a matter of federal law are those involving severance pay,[15] right unilaterally to change hours or work,[16] discharges,[17] transfers,[18] compulsory overtime,[19] travel pay,[20] vacation pay,[21] seniority,[22] contracting out,[23] going out of business and leasing

12. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

13. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

14. Note 1 *supra.*

15. Irwin v. Globe-Democrat Publishing Co., 368 S.W.2d 452 (Mo.), *cert. denied,* 375 U.S. 908 (1963); Monterosso v. St. Louis Globe-Democrat Publishing Co., 368 S.W. 2d 481 (Mo.), *cert. denied,* 375 U.S. 908 (1963).

16. Harmon v. Marton Bros., 227 F. Supp. 9 (D. Ore. 1964).

17. *Ibid.*

18. Harmon v. Marton Bros., *supra* note 16.

19. Allied Oil Workers v. Ethyl Corp., 51 CCH Lab. Cas. ¶ 19439 (5th Cir. 1965).

20. Harmon v. Marton Bros., *supra* note 16.

21. United Steelworkers v. Copperweld Steel Co., 230 F. Supp. 383 (W.D. Pa. 1964); Taylor v. Southern Pennsylvania Bus Co., 203 Pa. Super. 229, 199 A.2d 745 (1964).

22. Ries v. Evening News Ass'n, 370 Mich. 614, 122 N.W.2d 663 (1963); Markham v. American Motors Corp., 22 Wis. 2d 680, 126 N.W.2d 753 (1964); Swank v. Amp Inc., 411 Pa. 356, 192 A.2d 225 (1963); Zdonok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied,* 377 U.S. 934 (1964).

23. UAW v. Webster Elec. Co., 299 F.2d 195 (7th Cir. 1962); Local 499, International Bhd. of Elec. Workers v. Iowa Power & Light Co., 224 F. Supp. 731 (S.D. Iowa 1964).

enterprise to employees,[24] effect of decertification on recognition clause,[25] and retroactivity of wage adjustment.[26] These are common garden variety grievances which are also being decided every day by arbitrators. The courts will thus be faced with the anomaly of enforcing in one case the uniform federal law fashioned in the courts and applied throughout the nation, and on the same issue in the next case enforcing awards of arbitrators at variance with that law.

In *Teamsters, Local 174 v. Lucas Flour Co.*,[27] the Supreme Court described the necessity that the federal law fashioned under section 301(a) should be paramount and uniform. While the Court was talking there about the pre-emption of state law, the same considerations would seem to apply to awards of arbitrators. In the *Lucas* case the Court said:

> It was apparently the theory of the Washington Court that, although *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted. The dimensions of section 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,* requiring issues raised in suits of a kind covered by section 301 to be decided according to the precepts of federal labor policy.
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> More important, the subject matter of section 301(a) "is peculiarly one that calls for uniform law." *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U.S. 566, 569, see *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 167-169. The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.[28]

For the last proposition the Court cites Professor Wellington's article, *Labor and the Federal System,* in which he says:

> Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity. The

24. United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir. 1959).
25. Retail Clerks Ass'n v. Montgomery Ward & Co., 316 F.2d 754 (7th Cir. 1963).
26. Retail Clerks Union v. Alfred M. Lewis, Inc., 327 F.2d 442 (9th Cir. 1964).
27. 369 U.S. 95 (1962).
28. *Id.* at 103-04.

existence of two bodies of law which cannot be accommodated by any conflict-of-laws rule, however, is calculated to aggravate rather than to alleviate the situation.[29]

I shall content myself with citing observations by two commentators on this problem. The first is by Katz:

> To say that federal substantive law "is not controlling in an arbitration proceeding," does not dispose of the problem any more than the fact that courts do not vacate arbitration awards because of mistakes of law should not result in license to ignore the law. Even if one assumes, *arguendo*, that an arbitrator is not *required* in interpreting collective bargaining agreements to follow substantive law the question still remains as to whether the arbitrator *should* do so as a matter of good conscience and wisdom. An undesirable, potentially dangerous situation results if the parties to a labor contract are made to understand that grievances would be resolved differently, and by a different kind of law, depending on the forum — one result if by arbitration, another if enforced through the courts. Such a result is abhorrent to a well ordered legal system, yet it is the certain effect of the *United Packers* rationale. Does it make any sense for parties to have to abandon arbitration clauses in order to enjoy the benefits of uniform substantive law relating to collective bargaining agreements?[30]

Smith says:

> If, for example, a *Webster*-type case concerning the question of the existence of an implied restriction on subcontracting should reach the Supreme Court, and the Court should construe the "union shop" clause as did the Seventh Circuit (as giving rise to an implied prohibition on subcontracting), could such a decision properly be disregarded by an arbitrator even though he disagrees with it? If one regards such a decision by the Court only as indicating its view of the implications deriving from some clause in the labor agreement — that is, that the Court, like the arbitrator, is simply interpreting the agreement which is before it — the clear answer is that the arbitrator can disagree, and should disagree, if some other interpretation seems to him to be proper.
>
> If, on the other hand, one regards such a decision by the Court as meaning that a provision or provisions of the labor agreement have certain meanings and implications as a matter of federal substantive law, or as controlling indications of the parties' intent, the ultimate question in terms of the arbitration process is whether an arbitrator is bound to accept and apply such views in order to render an award which is not subject to being set aside. Orthodox analysis would indicate a negative answer, since it is assumed the arbitrator has the power to make an incorrect as well as a correct decision, even on a question of law. But I suggest that we are here involved in an area of special difficulty in view of the ultimate control which the federal judiciary has over the arbitration process, the role ascribed to it in developing a federal law concerning the labor agreement, and the disposition of the Supreme

29. 26 U. CHI. L. REV. 542, 557 (1959).

30. Katz, *Discussion of Feinberg, Do Contract Rights Vest?*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 192, 230-31 (1963); see also Jay, *Arbitration and the Federal Common Law of Collective Agreements*, 37 N.Y.U.L. REV. 448 (1962).

> Court, evident in areas such as the delineation of federal and state authority, to regard as desirable a pattern of national uniformity of labor law.[31]

At another point there is an even sharper clash between the arbitration process and the courts. It can be illustrated by reference to *Local 721, United Packing House Workers v. Needham Packing Co.*,[32] decided last year by the Supreme Court. In that case the union sued to compel arbitration of its claims for the reinstatement and back pay of striking employees. The employer counterclaimed for damages arising from the strike. The Court held that the parties must proceed with the arbitration while the employer pursues his damage suit in court. What will be the result if the arbitrator and the court reach different conclusions? The Supreme Court expressly refused to pass upon what it called the "effect, if any, factual or legal determination of an arbitrator would have on a related action in the courts," referring to its footnote in *Atkinson v. Sinclair*,[33] in which it put aside, as unnecessary to reach, the question "whether the underlying factual or legal determination, made by an arbitrator in the process of awarding or denying reimbursement to 14 employees, would bind either the union or the company in the latter's action for damages against the union in the district court." One must first remark about these footnotes that the Court says nothing of any questions which might be raised if the *district court* should decide the damage action first. It is hard to believe that the failure to mention this possibility means that a district court's holding that the union is liable in damages for breach of the collective agreement would be voided by an arbitrator's subsequent holding that the strike was not a breach of the agreement. Perhaps it is so clear that an arbitrator would be bound by such a determination that the Supreme Court found it unnecessary to mention it. But the suggestion that an arbitrator's determination might be res judicata with respect to a subsequent court action raises a number of questions. It is at least clear that if such a doctrine were to be adopted, courts would be obligated to scrutinize arbitration awards much more closely.

On the issue of the possible res judicata effect of an arbitration award on a subsequent suit for damages for strikes in breach of contract, the reluctance of arbitrators to become involved in such damage suits should be considered. Professor Aaron says:

> [D]etermination whether there has been a strike or stoppage of work proscribed by the no-strike clause, and, if so, whether any legal justification for such strike or work stoppage exists, can hardly be said to be "not normal" or "foreign to the competence" of the courts. Indeed, even when that determination is intrusted to an arbitrator, his "source of law," like that of the courts, is likely to be "confined to the express provisions of the contract." . . . Of course, if the arbitration provision

31. Smith, *Arbitrators and Arbitrability*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 75, 93 (1963).

32. 376 U.S. 247, 253 & n.5 (1964).

33. 370 U.S. 238, 245 & n.5 (1962).

> broadly includes "all grievances," and if the employer, as in the *Drake Bakeries* case, is expressly given the right to file grievances and appeal them to arbitration, it may be argued that his claim that the union has violated the no-strike clause should be handled in the same manner as any other grievance . . . . But that argument overlooks several important considerations. First, the assessment of damages for breach of contract is not a normal function of arbitrators and is only rarely provided for in collective agreements . . . . Thus, in the usual case, the arbitrator would lack the authority — to say nothing of the informed judgment — to determine the measure of damages, even though he found that the union had violated the no-strike clause . . . . Second, the arbitrator's award is not self-enforcing. The employer would thus be put to the additional trouble of securing his damages by court action after he had won his case on the merits in arbitration . . . . Therefore, absent specific language in the agreement giving the arbitrator jurisdiction over claims that the no-strike clause had been violated, it would seem that considerations of fairness and common sense favor determination of that issue and the getting of appropriate relief in the nature of damages by the courts.[34]

And Professor Fleming says:

> Even when punitive damages are not sought arbitrators may do well to decline, when the absence of specific authorizing language permits, to enter the field of damage actions traditionally reserved for the courts. In a 1958 case, for instance, Baldwin-Lima-Hamilton Corporation sought through arbitration to re-claim expenses which it was obliged to carry through an alleged illegal strike. Arbitrator Crawford found that the union did violate the no-strike clause but he declined to award damages on the theory that the contract did not expressly authorize damages and in the absence of such authorization damage suits were for the courts. [Baldwin-Lima-Hamilton Corp., 30 Lab. Arb. 1061 (1958). "The contemplated and normally effective contractual remedy available to the Company is discharge of the leaders of the wildcat strike," said Crawford. (*Id.* at 1064).] If and when the damage issue arises in the *Drake Bakeries* arbitration the arbitrator will presumably be free to take the same position: that the parties did not contemplate damage claims before the arbitrator, and that such suits are for the courts. There would appear to be no reason why the company could not then reinstitute its court suit. If such a position could be established before arbitrators, it would mean that damages typically associated in the past with court suits would be sought from arbitartors only when it was clear that the contract intended to authorize such actions. Runaway shop cases, which do seem to call for a damage remedy at the hands of the arbitrator, would still be taken care of by specific authorizations. . . . Otherwise, policy considerations suggest that arbitrators will be wise to involve themselves as little as possible in the court-type damage actions.[35]

Smith has been franker as to the motive of the arbitrators' reluctance to pass upon the issue of the strike in breach of a collective agreement:

> Some arbitrators seem to feel that their "life expectancy" in terms of future acceptability would be jeopardized by performing their inevitable

34. Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360, 366-67 (1962).

35. Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1221 (1962).

> duty, if jurisdiction is assumed, of imposing what might be very heavy monetary penalties upon their good union customers. They would prefer to leave this distasteful task to the courts. . . .[36]

It has been held that when a union delays unduly its motion to stay a damage action for a strike in breach of contract pending arbitration, it waives its right to have the issue arbitrated.[37]

Another procedure by which it has been suggested that the courts may limit arbitration is the declaratory judgment.[38] The great weight of authority holds that declaratory judgments may be secured under section 301.[39] If one party to a collective bargaining agreement seeks a declaratory judgment, it may be that the other party will be unable to secure a stay pending arbitration, because the activity complained of has not yet ripened into a grievance under the contract. Thus it would be possible to secure a declaratory judgment with respect to a violation of the agreement which might be binding on the parties, regardless of arbitration, if a violation subsequently occurred.

Aside from the area of actions under section 301 there are a number of other situations in which courts are called upon to pass on violations of collective bargaining agreements. For example, it has been held that by review de novo the courts have the power of final determination with respect to grievances under contracts which are covered by the Railway Labor Act and decided by the National Railroad Adjustment Board.[40] Moreover, cases of wrongful discharge under Railway Labor Act contracts in which the employee elects to accept the discharge and seek damages are tried by the courts in the first instance.[41] The federal courts also review orders of the Interstate Commerce Commission with respect to seniority.[42] And, where any employer is in bankruptcy, it has been held that the court rather than an arbitrator will determine claims arising under the collective bargaining agreement.[43]

While the National Labor Relations Board pays great deference to arbitration awards, there are situations in which the Board will not honor the award because it is "repugnant to the purposes and policies of the [National

36. Smith, *Arbitrators and Arbitrability*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 75, 95 (1963).

37. E. T. Simonds Constr. Co. v. Local 1330, Int'l Hod Carriers Union, 315 F.2d 291 (7th Cir. 1963).

38. See Fleming, *Some Observations on Contract Grievances Before Courts and Arbitrators*, 15 STAN. L. REV. 595, 601-03 (1963), citing Local 408, UAW v. Crescent Brass & Pin Co., 46 L.R.R.M. 2975, 41 CCH Lab. Cas. ¶ 16760 (E.D. Mich. 1960).

39. See Jay, *Arbitration and the Federal Common Law of Collective Bargaining Agreements*, 37 N.Y.U.L. REV. 448, 452-53 n.20 (1962).

40. Brotherhood of R.R. Trainmen v. Louisville & N.R.R., 334 F.2d 79 (5th Cir. 1964); Jones v. Central of Ga. Ry., 331 F.2d 649 (5th Cir. 1964).

41. Martin v. Southern Ry., 136 S.E.2d 907 (S.C. 1964).

42. Brotherhood of Locomotive Eng'rs v. Chicago & N.W. Ry., 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

43. Muskegon Motor Specialities Co. v. Davis, 313 F.2d 841 (6th Cir. 1963). It is not clear whether the court *must* determine claims or whether it can, at its discretion, allow arbitration to assume this responsibility. See the last paragraph (*Id.* at 843), which favors the view advanced in the text

Labor Relations] Act."[44] For example, the Board refused to defer to an award which upheld the discharge of certain employees for having caused a work stoppage in violation of a collective agreement; the Board found that the activities of the employees were protected activities under the Act.[45] In two other cases the Board refused to defer to awards because it found that the charges on the basis of which the employees involved were discharged were a "pretext" covering a discharge for union activity, and that the arbitrator had not considered that issue.[46]

It is possible for the courts to enter such cases in either of two ways. The party who is not satisfied with the results of the arbitration may go to the courts, rather than to the Board, to have the award set aside. It would seem to me to be the duty of the court to set aside any award to which the Board would not defer. Second, a case in which the Board honored an arbitration award may come to the court for review after having been passed upon by the Board. The court would then, I believe, have the duty of carefully examining the award to see to it that the result reached by the Board was in accord with the federal law.

In addition to the limited power of the courts to intervene on the issue of arbitrability and, as is suggested, their somewhat broader power on the issue of the arbitrator's authority, there are a number of other points at which the courts may be called upon to enter the arbitration process.

The basic validity of the collective bargaining agreement is surely an issue for the courts, not for arbitrators.[47] Thus courts can deny a petition to enforce an award or an agreement to arbitrate on the grounds, for example, of fraud, or of duress in the making of the basic agreement. Obviously, however expert arbitrators may be thought to be with respect to the substantive provisions of collective agreements, there is no reason to ascribe to them any special expertise on ordinary and usual contract issues which are handled by the courts in their regular course. Not only is it for courts rather than arbitrators to decide whether there is a valid agreement to arbitrate, but it is also the courts' function to decide whether there was a subsequent agreement withdrawing an issue from arbitration.[48]

Certain types of claims, such as claims arising under pension agreements and insurance claims, have been held not to be covered by the arbitration provisions of the collective bargaining agreement.[49] When it is said that

44. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

45. Ford Motor Co., 131 N.L.R.B. 1462 (1961).

46. Monsanto Chemical Co., 130 N.L.R.B. 1097 (1961); Raytheon Co., 140 N.L.R.B. 883 (1963), *rev'd on other grounds*, 326 F.2d 471 (1st Cir. 1964).

47. Smith, *Arbitrators and Arbitrability*, in LABOR ARBITRATION AND INDUSTRIAL CHANGE 75 (1963).

48. Local 149, Boot Workers v. Faith Shoe Co., 47 CCH Lab. Cas. ¶ 18260 (M.D. Pa. 1963).

49. See, *e.g.*, American Bosch Arma Corp. v. Stewart, 20 App. Div. 2d 576, 246 N.Y.S.2d 103 (1963), *leave to appeal granted*, 14 N.Y.2d 485, 200 N.E.2d 220, 251 N.Y.S.2d 1026 (1964).

something is not subject to the arbitration clause, what we ordinarily mean is that the subject matter is within the power of management and that the union has no right to question it. However, when we say that pension and insurance claims are not subject to arbitration clause, we mean here that they are subject to action in the courts. A number of recent cases have been concerned with such claims.[50] Clearly this is another area in which arbitrators can have no claim to superior expertise.

In two recent cases the meaning of clauses excluding certain matters from arbitration has been carefully examined by the respective courts, both of which came to the conclusion that the unions' claims were intended to be excluded.[51] In *Collins Radio Co.* the Fifth Circuit said:

> That which the parties have committed to the arbiter is for the arbiter alone, not the Court. Courts must assure that. But it is equally important to assure that neither party — through one guise or another — may obtain the intervention of an arbiter when the contract clearly excludes it from the reach of the grievance machinery.[52]

It has also been held that awards are not enforceable when they cover items not included in the submission agreement.[53] In *Local 784, Truck Drivers Union v. Ulry-Talbert Co.*[54] the Eighth Circuit gave effect to a contract clause prohibiting the arbitrator from substituting his judgment for that of management. The court held that the arbitrator exceeded his authority in reducing the penalty of discharge to suspension without pay.[55]

While *United Steelworkers v. Warrior & Gulf Navigation Co.*[56] may be read as requiring arbitration even when the issue to be arbitrated is not mentioned in the collective agreement, at least three recent cases, two of them cases involving, as did *Warrior,* contracting out,[57] have held the contrary. In one of these cases the court said:

50. See Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 964 (1964) (pension eligibility); UAW v. Textron Inc., 312 F.2d 688 (6th Cir. 1963) (employees' rights in a pension fund); Hudson v. John Hancock Mut. Life Ins. Co., 314 F.2d 16 (8th Cir. 1963) (rights to credits on books of insurance company).

51. Communications Workers v. New York Tel. Co., 327 F.2d 94 (2d Cir. 1964); Local 787, Int'l Union of Elec. Workers v. Collins Radio Co., 317 F.2d 214 (5th Cir. 1963).

52. 317 F.2d at 220.

53. *In re* Local 295, Int'l Union of Operating Eng'rs, 149 N.Y.L.J., April 1, 1963, p. 16 (Sup. Ct. N.Y. 1963); Kansas City Luggage Workers v. Neevel Luggage Mfg. Co., 325 F.2d 992 (8th Cir. 1964).

54. 330 F.2d 562 (8th Cir. 1964).

55. 330 F.2d 562, 564-65. See also Textile Workers v. American Thread Co., 291 F.2d 894 (4th Cir. 1961).

56. 363 U.S. 574 (1960).

57. Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1963), *aff'd by an equally divided court,* 379 U.S. 130 (1964) (contracting out); Sperry Gyroscope Co. v. International Union of Elec. Workers, 49 C.C.H. Lab. Cas. ¶ 51076 (N.Y. Sup. Ct. 1964) (contracting out); Local 30, Philadelphia Leather Workers v. Hyman Brodsky & Son Corp., 49 C.C.H. Lab. Cas. ¶ 18987 (E.D. Pa.

> [T]he plaintiff has not been able to point to any provision in the contract that it seeks to have applied or interpreted, and from an examination of it, I find no provision that could be applied or interpreted. As a result, I cannot find that the parties have agreed to arbitrate this matter.[58]

In *H. K. Porter Co. v. United Saw, File and Steel Workers,*[59] a Third Circuit case, eligibility for pensions had been held to be an arbitrable issue and the parties had proceeded to arbitration. The arbitrator decided, *inter alia,* that proportionate pensions should be paid to those sixty-five years of age or over who had less than 25 years of work for the company. The court in setting aside this part of the award said:

> That the Company was moving its plant to a new location may have invoked hardship on older employees. Yet, absent any provision either explicitly or implicitly authorizing the Arbitrator's ruling in Part 2 of his award, or any prior practice which reasonably could so interpret it, he lacked a basis for his conclusion. As already stated, the Arbitrator may not administer his own brand of industrial justice.
>
> We find that in Part 2 of the award the Arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner than according to its plain meaning. Bereft of any practice evidencing a relaxation of the requirement of years of total service and relying only upon age, the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause, as it concerned those who fulfilled only the portion making the age of sixty-five a requirement. Indeed, such an interpretation neither goes to the essence nor to the application of the collective bargaining agreement.[60]

Grace Line v. National Marine Eng'rs Beneficial Ass'n,[61] a state case, presents in its results a contrast to the *Porter Company* case just cited. In the *Grace Line* case the collective agreement provided that severance pay should be paid when a vessel was transferred to foreign registry. Because of the meaning of the words "severance pay," it is obvious that the contractual clause was to be read as providing severance pay for employees who lost their jobs as the result of transfer of a vessel to foreign registry. However, an arbitrator without legal training awarded severance pay to employees of two ships which were laid up for three years and then transferred to foreign registry, even though the employees had been transferred to new ships of the same name at the time the original vessels were laid up. Thus the award gave severance pay to employees whose employment had never for an instant

1964) (claim for severance pay not arbitrable where contract did not cover such matters).

58. Local 30, Philadelphia Leather Workers v. Hyman Brodsky & Son Corp., *supra* note 57, at 31489.

59. 333 F.2d 596 (3d Cir. 1964).

60. *Id.* at 602.

61. 38 Misc. 2d 909, 239 N.Y.S.2d 293 (Sup. Ct. 1963), *aff'd mem.,* 20 App. Div. 2d 759, 246 N.Y.S.2d 994, *leave to appeal denied,* 14 N.Y.2d 484, 250 N.Y.S.2d 1026 (1964), *cert. denied,* 379 U.S. 843 (1964).

been severed. The New York court, believing that it was bound by a recent New York statute providing that the court "shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute,"[62] refused to set aside the award, though it said: "The award renders a disservice to the cause of both arbitration and collective bargaining."[63] The court should have decided the case under federal law rather than under New York law. If it had done so the result should have been different.

In addition to the more general grounds for court intervention, there are a few situations in which the courts may act, which, though limited, are of sufficient importance to deserve some mention. Courts have refused in a few cases to enforce awards on the ground that the awards contravened public policy. For example, the Supreme Court of California refused to enforce an award ordering the reinstatement of a Communist employee.[64] Holding that the award was contrary to the public policy expressed in a statute providing a penalty for refusing to transmit messages,[65] the New York Court of Appeals refused to enforce an award setting aside the disciplinary suspension of employees of a telegraph company who refused to handle messages emanating from a struck company.[66] In another case,[67] the New York Appellate Division, refusing on the ground of public policy to enforce an award which included penalty damages, stated:

> The trouble with an arbitration admitting a power to grant unlimited damages by way of punishment is that if the court treated such an award in the way arbitration awards are usually treated, and followed the award to the letter, it would amount to an unlimited draft upon judicial power.[68]

Similarly, the New Jersey Supreme Court refused to enforce an agreement to arbitrate the discharge of employees who during a strike against a gas company had broken into a meter room and removed some gas meters.[69] And a lower Connecticut court vacated on public policy grounds an award reinstating an employee who had been discharged for gambling on the premises of the employer.[70] Some federal courts have also affirmed the role of public policy in

62. N.Y. Civ. Prac. Act § 1448-a (effective Apr. 9, 1962), now superseded by N.Y. Civil Practice Law and Rules [referred to hereinafter as N.Y. CPLR] § 7501 (effective Sept. 1, 1963).

63. 38 Misc. 2d 909, 914, 239 N.Y.S.2d 293, 298-99.

64. Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955), *petition for cert. dismissed*, 351 U.S. 292 (1956).

65. N.Y. Penal Law 552.

66. Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949).

67. Publishers Ass'n v. Newspaper and Mail Deliverers Union, 280 App. Div. 500, 114 N.Y.S.2d 401 (1952).

68. *Id.* at 404.

69. Public Utility Constr. Workers v. Public Serv. Elec. & Gas Co., 26 N.J. 145, 139 A.2d 1 (1958).

70. Avco Corp. v. Preteska, 22 Conn. Supp. 475, 174 A.2d 684 (Super. Ct. 1961).

review of arbitration awards. The Court of Appeals for the Second Circuit, for example, though granting enforcement, stated in *Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.:*

> It is no less true in suits brought under section 301 to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States . . . ." Hurd v. Hodge, 334 U.S. 24, 34-35 . . . (1948). The public policy to be enforced as a part of the substantive principles of federal labor law which federal courts, under the mandate of Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 . . . (1957), are empowered to fashion. *Cf.* Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95 . . . (1962). Thus, when public policy is sought to be interposed as a bar to enforcement of an arbitration award, a court must evaluate its asserted content.[71]

Finally, it should be noted that in its original form the Uniform Arbitration Act contained a clause providing for vacation of an award where the award was contrary to public policy.[72] This provision, however, was adversely criticized by the National Academy of Arbitrators, and the clause was stricken.[73]

Closely related to public policy as a ground for refusing to enforce arbitration awards, and similarly limited in scope, is the defense of illegality. The Fourth Circuit, for example, recently denied enforcement of an award on the ground that it ordered the employer to commit an unfair labor practice.[74]

Aside from the various points at which courts may intervene on the merits, there are also procedural aspects which justify refusal to enforce awards. The United States Arbitration Act[75] provides for vacation of awards procured by corruption, fraud, or undue means. There are similar provisions in state statutes.[76] The courts passing on arbitrations conducted under section 301 are certain to reach the same result. In addition, the requirements of basic due process will without doubt be held applicable to the arbitration procedure.

There is surely a requirement, for example, that the arbitrator not show bias and prejudice. However informal the procedure may be — and sometimes the informality appears to border on anarchy — there are basic requirements of fairness upon which the courts will insist when asked to enforce the awards. These requirements of procedural due process include adequate notice and opportunity to defend, willingness on the part of the arbitrator to hear all material evidence, and a requirement that the decision be based on the record, not on ex parte investigation by the arbitrator. In a recent

71. Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25, 29 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

72. 24 Lab. Arb. 886, 887 (1955).

73. 27 Lab. Arb. 909, 910-11 (1957).

74. Glendale Mfg. Co. v. Local 520, ILGWU, 283 F.2d 936 (4th Cir. 1960), *cert. denied*, 366 U.S. 950 (1961).

75. 9 U.S.C. §§ 1-14 (1958).

76. N.Y. CPLR § 7511(b) (McKinney, 1963). In 1961 Illinois adopted the Uniform Arbitration Act.

New York case the court vacated an award in which the arbitrator insisted upon scheduling the hearing at a time when the employer and his lawyer could not attend for what the court held good and sufficient reasons.[77] Jones and Smith quote a union attorney as saying:

> My most important concern is that arbitrators pay closer attention to the procedural due process. I will predict that in the near future, a new line of court attack on arbitration rulings will commence on procedural due process grounds unless arbitrators pay greater attention to those requirements. For example, some arbitrators seem to consider that rules of evidence are useless technicalities to be scorned by broad-thinking men. They forget that rules of evidence are usually based upon rules of reason and if they continue to admit hearsay, wholly irrelevant matters, and similar oddities, there will be difficulty ahead.[78]

One of the procedural problems which frequently arises is the receipt of evidence from anonymous witnesses. Many enterprises such as retail stores and bus companies hire investigators, or "spotters," to observe the employees at work especially for the purpose of discovering instances of theft or other dishonest practices. In order to preserve the usefulness of these special employees, the employers are unwilling to produce them as witnesses at arbitration hearings. Yet an employer's case in support of disciplinary action taken against an employee may rest wholly on the evidence given by a "spotter." Courts will be asked to pass upon the question of whether such evidence anonymously given is consonant with the requirements of due process. This problem is closely related to another, that of surprise evidence. In the courts, with discovery procedures freely available, there is no reason for anyone's being surprised by evidence of which he had no knowledge prior to the hearing. But the discovery procedures are not available in arbitration. Due process may require that the arbitrator adjourn the hearing to give a party an opportunity to prepare to meet evidence which has taken him by surprise, and the courts may vacate awards in situations in which the arbitrator denied such an adjournment. Another complaint against arbitrators is "their being willing to listen ad nauseam"[79] to completely irrelevant evidence. This is unfair to the opposing party who feels that he must meet this irrelevant material.

In a recent case involving due process, the California Supreme Court faced a three party representation situation in which the arbitrator had purported in his award to affect the rights of a third party who had not been a party to the arbitration or to the agreement to arbitrate.[80] The third party claimed to be the employer of the employees whom the union claimed to represent. The arbitrator held, in a proceeding which did not include the second employer, that the employees were represented by the union. The second employer was

77. Farkash v. Brach, 47 CCH Lab. Cas. ¶ 50773 (N.Y. Sup. Ct. 1963).

78. Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1127 (1964).

79. *Id.* at 1130.

80. Retail Clerks Union v. Thriftmart, Inc., 59 Cal. 2d 421, 380 P.2d 652, 30 Cal. Rptr. 12 (1963).

permitted to intervene in the court proceeding and, in an opinion by Judge Traynor, prevailed in having the award vacated on due process grounds — on the ground that the arbitrator had issued an award purporting to bind a third party who was not only not a party to the agreement to arbitrate, but who had taken no part in the arbitration.

The situation in which the clearest case is made for judicial intervention to vacate an award on the ground of public policy is the rigged award. Unfortunately this is the very situation which is least likely to come to the court's attention. In the first place, since the rigged award is one to which both sides have consented, no recourse will be had to the courts. Moreover the success of the rigged award depends entirely upon the conspiracy being kept secret, so that those who would object to the position taken by the parties are unaware that they have "requested" the award. The impossibility of detecting the rigged award means that, insofar as the courts are participants in general in the arbitration process, they are being used as unwitting accomplices to this skullduggery. It raises most emphatically the question of what preferential treatment arbitration should receive.

Procedural irregularities may also cause the National Labor Relations Board to reject an arbitration award. The NLRB has stated that it will defer to awards where the arbitration "proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the [National Labor Relations] Act."[81] The Board has refused to honor an award where a discharged employee was not permitted to be accompanied at the hearing by his counsel,[82] and in another case, where an employee received notice of the arbitration hearing only two days before the hearing which was held only four days after the discharge. Of course the Board would refuse to honor a rigged award if by some chance it learned of the rigging.

* * *

When picketing first reached the Supreme Court, that Court, in an opinion characterized by somewhat extravagant language, held in effect that picketing was a form of free speech.[83] With the passage of time, as the real nature of picketing became clearer to the Court, the Court gradually receded from its original position. Today picketing is subject to broad regulation by both national and state legislatures and courts. It may be that, as the courts become more familiar with the real nature of the arbitration process, they will likewise recede from the more extreme positions respecting arbitration. A reading of Dean Shulman's famous lecture[84] and a selective reading from some of

81. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

82. Honolulu Star-Bulletin, Ltd., 123 N.L.R.B. 395, *remanded on other grounds*, 274 F.2d 567 (D.C. Cir. 1959).

83. Thornhill v. Alabama, 310 U.S. 88 (1940).

84. Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955). See, *e.g.*, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579-80 (1960).

Archibald Cox's work does not provide a sufficient basis for a judgment as to the character of the arbitration process. Since labor arbitration plays such an important role in our system of justice, it is incumbent upon the scholars to make more extensive and careful studies of the process than have yet appeared. On the basis of these studies we must have disinterested evaluations of the process as a whole. Too much of the material which is now available consists of enthusiastic endorsement of arbitration by arbitrators who are making a living from it, or by organizations seeking to advance the cause of arbitration.

In the meantime, until the courts can get a more realistic picture of the whole process, there are a number of points at which the courts can legitimately intervene, and some courts have been scrutinizing arbitration more closely at these points. Moreover, Congress has entrusted to the judiciary the task of fashioning the law governing the collective bargaining agreement. As courts pursue this task, they are bound to come into ever greater conflict with the arbitration process and will be forced by the necessity for uniformity to develop some kind of resolution of this conflict.

Pending scholarly studies and evaluations, 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. I call labor arbitration "a system for the judicial administration of contract violations," since this is, I believe, all that is basically claimed for it. An arbitrator is a third party called in to determine a controversy over whether one of the parties to the collective bargaining agreement has violated that agreement. He is not a wise counsellor and statesman to whom the management and the union look for advice on how to run their affairs or how to increase production or lessen tensions. He is merely an *ad hoc* judge to whom is submitted the question of whether the collective bargaining agreement has been violated. The chances are very good that, in all but a tiny percentage of arbitrations, this is the first time he has had anything to do with the plant, and that he knows nothing of the background of the dispute or of the "common law" of the industry. In fact there is a considerable possibility that this is his first arbitration case. He does not in fact have any expertise in these matters and is not actually expected to have any, since it is expected that he will listen to the evidence presented by the two parties and decide on the basis of that evidence whether the charge of contract violation is or is not sustained. For his task he requires exactly the same expertise which judges have and use every day. He must be expert in analyzing issues, in weighing evidence, and in contract interpretation.

There are only a handful of arbitrators who, like Shulman and Cox, have the knowledge, training, skill, and character which would make them good

judges and therefore make them good arbitrators. In literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, intelligence and character. In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract or other proper considerations, but in a way calculated to encourage the arbitrator's being hired for other arbitration cases. It makes no difference whether or not a large majority of cases is decided in this way. A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system. In no proper system of justice should a judge be submitted to such pressures; on the contrary, a judge should be carefully insulated from any pressure of this type. There are many discussions of arbitration which do not mention this aspect of the process. In my opinion no discussion of arbitration which does not consider the effect of the arbitrator's dependence on the good will of the parties is completely honest.

It is my view that intervention by the courts, even if a broad intervention should be permitted, is not a sufficient answer to the shortcomings of labor arbitration. I believe that the courts should not lend themselves at all to the arbitration process. Labor arbitration is a private system of justice not based on law and not observant of law. There is no reason why it should be able to call upon the legal system to enforce its decrees. On the contrary, there are positive reasons for the courts not exercising their enforcement powers in favor of arbitration. We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion, we do not know how large but are permitted by the circumstances to suspect that it is quite substantial, are rendered not on the basis of any proper concerns, but rather on the basis of what award would be best for the arbitrator's future. We know also that there is another group of cases, though it is true that the courts are not called upon for enforcement in such cases, in which the arbitrator has rendered a rigged award, a practice so vicious as to be unacceptable in any system of justice.

In his lecture Dean Shulman suggested that "the law stay out" of arbitration. While his reasons for such a conclusion are quite different from mine, I wish to make the same suggestion — that the law get out of labor arbitration and leave the procedure exclusively to the voluntary action of the parties. In this way those who believe that labor arbitration is a praiseworthy system of industrial justice will be able to have such a system working on its highest level, the level Shulman described and advocated. Those who believe, as I do, that labor arbitration is a usually undesirable and frequently intolerable procedure will not be offended by the requirement that our courts rubber stamp the questionable results which the arbitrators have reached.

No one envisaged labor arbitration as a complete and very extensive system of private justice when the arbitration statutes were adopted. Nobody thought of a system in which people earned a living by conducting arbitrations. It is even doubtful whether the United States Arbitration Act has any application to labor arbitration, but in any event, it was not designed to cover labor arbitration as it has developed, and the sponsors of the Act did not have in mind any such system as has grown up.

Section 203(d) of the Labor Management Relations Act, 1947, so often quoted as indicating a national policy in favor of arbitration, says nothing of court enforcement, and may be read in fact to favor the courts' keeping out of the procedure. Section 203(d) provides:

> 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.[85]

The section then goes on to direct the Mediation and Conciliation Service to make its services available in grievance disputes "only as a last resort and in exceptional cases." This provision thus expresses a strong policy in favor of purely voluntary adjustment by the parties. The interference of courts in the process may be thought of as just as much contrary to the policy set forth as is the interference of the Mediation and Conciliation Service. The principle for which the section appears to stand is the principle of "hands off" by government agencies of whatever sort.

We may also assume that the intervention of courts has a much wider affect than that upon litigants in cases in which the courts actually play a role. The availability of resort to the courts must serve in countless situations to persuade reluctant parties to collective agreements to accept arbitration and to abide by awards. We are, therefore, not considering merely those comparatively few cases which now get into the courts, but also the thousands of cases which are now settled by reluctant acquiescence to arbitration without resort to the courts.

If the use of the courts for the purpose of enforcing arbitration were withdrawn, it would of course leave the courts available for the enforcement of collective bargaining agreements through regular judicial procedures. Yet to make arbitration purely voluntary would entail, as I see it, refusal to give effect to an arbitration clause as a defense to an action in the courts, as well as the refusal of affirmative action for the enforcement of a promise to arbitrate. For voluntary arbitration to be effective the parties to the collective bargaining agreement must be genuinely willing to carry out the agreement to arbitrate without outside pressure from any official source.

There are certain procedural advantages in arbitration which some would want to see preserved. There is nothing about those procedures which makes

85. 61 Stat. 153 (1947), 29 U.S.C. § 173(d) (1958).

them indissolubly a part of a private system of judicial administration. They could all be readily adapted to a public system of justice and made available in our courts.

For those who believe, for example, that a special expertise in labor problems is desirable for those who pass upon violations of collective bargaining agreements, there is the suggestion that we set up in this country a system of labor courts after the model which has been so successful in countries like Germany, Sweden, and Denmark.[86] Such courts could be operated with a simplified procedure, like the procedure in small claims courts, so that cases could readily be presented by personnel managers or union representatives without the necessity of being represented by counsl. On the other hand, the courts would be equipped to hear complex cases as well as simple ones and to give full scope to representation by counsel.

Specialized labor courts could of course be given jurisdiction to hear labor relations problems other than actions for breach of collective agreements. What these cases might be has been suggested in connection with prior proposals for labor courts, but I seem to have enough controversy on my hands here without venturing any further into that question.

As I have made clear, I do not believe that any expertise other than that of judges in general is required for the resolution of controversies over collective bargaining agreements. I would be content, therefore, with a procedural reform which would make available for such cases a simple, speedy, and inexpensive remedy. If the suggestion of a procedure like that of a small claims court does not satisfy these requirements, then I suggest as an alternative a procedure along the lines of the New York Simplified Procedure for Court Determination of Disputes.[87] That procedure could be specified in the collective bargaining agreement, and the promise to submit to it would be specifically enforceable. The action is commenced without the service of a summons and without pleadings by the filing of a statement setting forth the issues ("claims and defenses"). A submission to this simplified procedure constitutes a waiver of trial by jury. At the hearing, rules as to the admissibility of evidence are dispensed with. The court may hold a pre-trial hearing and may direct pre-trial discovery and the taking of depositions. Although the New York simplified procedure permits no appeal, I would allow appeals in this area upon permission of the Court of Appeals.

This procedure has all the advantages of arbitration plus certain procedural advantages, like discovery, which are not available in arbitration. In addition it has the advantage of being presided over by a judge who is trained and skilled, who is a part of the judicial tradition, and who is protected by tenure. The judgments will be judgments in accordance with the law of collective

86. See Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1122 & n.11 (1964).

87. N.Y. CPLR §§ 3031-37 (McKinney, 1963).

bargaining agreements as that law is being fashioned by the courts. This law will be uniform throughout the nation, as Congress intended it to be.

Perhaps I will be accused of stirring up trouble where none has existed. I plead in my own defense that I am deeply committed to the integrity of our court system and that I do not believe that judges should stand idly by and let that court system be used as the handmaiden for a system of private adjudication which has as many fatal shortcomings as has labor arbitration.

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