

BOOK REVIEWS

Labor Arbitration: A Dissenting View. PAUL R. HAYS. New Haven and London: Yale University Press, 1966. Pp. vii, 125. \$4.50

In 1960, the author, then Professor Hays and an experienced and respected labor arbitrator, deplored¹ the language used by the Supreme Court in the celebrated steelworkers' trilogy.² At that time, his criticism was directed not at the system of labor arbitration, but only at the Court's romanticism about the virtues of arbitrators, about the uniqueness of the labor agreement, and about the parties' desire for free-wheeling, rather than contractually oriented, adjudication. In this volume, which contains the Storrs Lectures delivered at Yale Law School in 1965, the author, now Judge Hays³ of the United States Court of Appeals for the Second Circuit, after reiterating his earlier criticism of the Court's approach, launches a sweeping attack on the entire institution of labor arbitration. He finds its shortcomings to be so serious that he urges, among other remedies, that "the courts should not lend themselves at all to the arbitration process."⁴ Thus, he now takes issue with not only the language of the trilogy but also with their results and with the long legal development that preceded them.⁵ His subtitle, "A Dissenting View," is appropriate, for he would bury the system that so many have praised as an instrument of industrial peace and industrial justice.

His dissent in general treats labor arbitration as a genteel and lucrative form of prostitution. Specifically, he makes the following charges,

¹ See Hays, *The Supreme Court and Labor Law October Term, 1959*, 60 COLUM. L. REV. 901, 919-35, especially 923-25, 930-31 (1960).

² *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).

³ Judge Hays' criticism of a process that will be involved in his judicial work contrasts sharply with the self-limitation practiced by Justices Brandeis and Cardozo. Their austerity has, however, not been emulated by some of the current members of the Supreme Court and by other judges, who have increasingly taken to the lecterns to speak about future issues and to defend past positions. See Kurland, *Review of Douglas, The Bible and the Schools*, Chicago Tribune, January 30, 1966 (Books Today), p. 1. This is not the place to appraise this tendency.

⁴ P. 113.

⁵ Indeed, Judge Hays would be even more restrictive than the common law; for, contrary to the common law, he would deny judicial enforcement of the award. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 21 (rev. ed. 1960).

most of which are familiar themes in the folklore about labor arbitration:

- (1) "A proportion of arbitration awards . . . are decided not on the basis of the evidence or of the contract or other proper considerations," but in a way designed to preserve the arbitrator's employability.⁶ Regardless of the proportion of such awards, which is unknown, a system of adjudication in which the judge's income depends on pleasing those who engage him is per se a thoroughly undesirable system, wholly incompatible with the independence that a judicial officer should have.⁷
- (2) Some awards, probably not a large number, are rigged.⁸
- (3) There is probably a "fairly widespread use" of "compromise awards," resulting from desire of arbitrators to preserve their acceptability⁹ and from their failure to recognize that rules as to the burden of persuasion are indispensable for any adversary proceeding.¹⁰
- (4) A large proportion of awards, "literally thousands of cases every year," are rendered by arbitrators "who do not have the requisite knowledge, training, skill, intelligence, and character."¹¹
- (5) Some arbitrators engage in ambulance chasing and fee-paddling,¹² prolong hearings by failing to control them, and delay decisions,¹³ thereby frustrating the quick and inexpensive adjudication that the system is supposed to provide.¹⁴
- (6) Arbitrators, in order to make themselves acceptable to unions,¹⁵ have introduced factors, such as the "common law" of the plant, extraneous to a proper construction of agreements and have thereby increased the power of unions.

⁶ P. 112.

⁷ *Ibid.* The author's emphasis on economic considerations invites a word about my own involvement with labor arbitration. I have served as an arbitrator in the past, and I am a member of the National Academy of Arbitrators. Several years ago I requested, however, the removal of my name from the lists of referring agencies, and, with rare and insignificant exceptions, I have also been declining appointments tendered directly by the parties. My current inactivity as an arbitrator is not based on any conviction that arbitration is corrupt but is based solely on a desire to put my time elsewhere.

⁸ P. 113. *But see* p. 59, where the author assumes "that the use of these devices is fairly widespread, although we cannot say how wide."

⁹ P. 59, 66.

¹⁰ P. 70.

¹¹ P. 112.

¹² Pp. 66-67.

¹³ Pp. 49, 67.

¹⁴ Pp. 66-67.

¹⁵ Pp. 61-62.

Before turning to the author's attempt to support his indictment, it may be useful to refer generally to four important difficulties in his presentation, which I propose to develop later:

- (1) He ignores that the pressure for acceptability has important values, as well as dangers, and that it operates to weed out incompetent and corrupt arbitrators.
- (2) He is silent about the shortcomings of alternative methods of adjudication that he prefers to arbitration.
- (3) His brickbats, like the Court's bouquets, suffer from a painful lack of documentation. Although he acknowledges and deplors the lack of pertinent data and studies,¹⁶ that consideration does not inhibit his cynical and accusatory over-generalizations. Furthermore, in the few instances where he reaches for documentation, his methods of investigation are of dubious validity.
- (4) He suggests the importation of institutions developed abroad without considering social differences that may seriously limit the utility of such institutions in the United States.

The first two difficulties are especially apparent in the author's treatment of the problems arising from the arbitrator's dependence on his acceptability to the parties who employ and pay him. Such dependence may, of course, involve special risks. Thus, an arbitrator concerned only with future business might prefer the party who has given him more business or who controls more future business, or who otherwise would be less likely to elect him.¹⁷ He might, moreover, use particular cases to balance his box score in a particular relationship or in general. He might also render a compromise award in the hope of avoiding serious displeasure to either one of his employers or the interest group that they represent. Finally, he might give one party the decision and attempt to placate the loser with language in his opinion. The foregoing risks of distortion involve, as the author suggests, a departure from the ideals of disinterested adjudication.

The arbitration system contains, however, countervailing safeguards that the author neglects. In most arbitrations, one party must, of course, lose, and it is the losing party that is the principal threat to the arbitrator's future acceptability. The question for the arbitrator, assuming *arguendo* that he is ruled by greed, is how to reduce such threats. The answer seems to be conscientious workmanship in conducting the hearing and rendering the award; for such workmanship would appear to be the best protection against the veto that labor and

¹⁶ Pp. 38-39.

¹⁷ P. 61.

management will each have in the future. The need for future acceptability may thus bring the arbitrator's self-interest and responsible adjudication into harmony rather than into conflict. That possibility is, moreover, reinforced by the parties' frequent scrutiny of the background, record, and reputation of prospective arbitrators whom they do not know.¹⁸ Consequently, even if one accepted a devil's view of arbitrators, as a group ruled by the love of money, it would not follow that the pressure for future acceptability would corrupt the decisional process. On the contrary, the "invisible hand," even though it may be "all thumbs" in other contexts, appears in this context to link the private ends of arbitrators with the public interest in justice.

The devil's theory rests, moreover, on presuppositions about arbitrators as a class and their employers that are dubious indeed. It presupposes that arbitrators lack a sense of responsibility, of craftsmanship, and of self-respect, and that they are essentially a craven group of money-grubbers abjectly fearful of displeasing one of their customers and willing to distort their awards and their opinions in order to avoid such displeasure. I find no basis in this book or in my experience for so denigrating a view of arbitrators as a class. Indeed, the arbitrators whom I know impress me as conscientious men prepared to decide cases as they see them. Differing judgments about the character of a large and shifting class may, of course, result from different slices of experience and different standards, and I would not claim that my experience is adequate for a general characterization. But the difficulties of such general characterizations should serve as a caution against blanket indictments as well as blanket encomia.

Judge Hays' view of the parties is no more flattering than his view of arbitrators. He sees the parties as having their weapons of economic reprisal ready for use against the arbitrator who rules against them or otherwise displeases them. That view ignores, however, that the parties are often conscious of the weakness of their case, that they are often shaken, and sometimes persuaded, by the hearings or the opinion, and that they understand the possibility of honest and reasonable disagreement.

There are, moreover, bits and pieces of evidence that call into seri-

¹⁸ The author refers to organizations that make it a business to issue ratings of prospective arbitrators as "pro" or "anti" union. P. 39. My own informal checking with a small and a not necessarily representative sample of lawyers involved in labor arbitrations suggests that the importance of such ratings and of box scores and blacklists has been highly exaggerated. To be sure, those who select arbitrators prefer one who is likely to be receptive to their positions. But the search for "friendly" neutrals is so elusive, in part because of the need for joint acceptability, that the parties are, I have been assured, willing to settle for an arbitrator who appears to be competent and fair-minded.

ous question Judge Hays' dismal view of the parties. There are refreshing instances where the loser has commended the arbitrator's opinion and has called him for more work. There are also denials by attorneys appearing in arbitrations that defeat is followed by indignation or blacklisting. Finally, it is striking that lawyers for management or for unions are respected arbitrators. Their reputation for integrity and craftsmanship has overridden suspicions of partisanship generated by their identification with one group of clients or by their ideological commitments. It is, of course, possible that one canny forum-shopper will rely on the partisan connections of an arbitrator to induce him to lean over backwards while the other side will rely on his doing what comes naturally. But, if the answers of lawyers I have questioned can be relied on, the explanation for the acceptability of such arbitrators lies not in such gamesmanship, but in the parties' confidence that men of integrity and competence can, as adjudicators, transcend their personal loyalties and discipline their personal values.

I do not mean to be a Pollyanna about the parties or about arbitrators. The parties do engage in economic reprisals against an arbitrator who has displeased them, and fear of such displeasure may distort judgment in a particular case. But I do suggest that the incidence of such reprisals is probably exaggerated and that, in any event, distortion for the purpose of avoiding such reprisal is checked by the need to be acceptable to both parties and by the integrity of arbitrators. Furthermore, the work of most arbitrators is distributed over many relationships; consequently, reprisal by one party is not so fearsome a prospect. Where, as in the case of some permanent umpires, the arbitrator has many eggs in one basket, the continuing scrutiny of both parties operates to check slipshod or biased adjudication.

The author fails, moreover, to consider the extent to which similar pressures for acceptability impinge on official tribunals. I do not mean to justify distortion, partisanship, or sloppiness in arbitration by pointing to its existence elsewhere. But the author is engaged in comparing alternative tribunals in a real world; consequently, the methods of staffing official tribunals that might replace arbitrators¹⁹ deserve attention. This is not the place for an extended discussion of the factors that enter into the selection of administrative and judicial personnel. It is enough to mention that considerations of politics and patronage often place mediocrities on adjudicative tribunals and that such appointees may seek to remain acceptable to those who have con-

¹⁹ The author suggests that labor courts should replace arbitration. See pp. 116-18 and text accompanying note 60 *infra*.

ferred past favors and who may determine future preferment. Indeed, the fear that official tribunals are the targets of attempted manipulation has contributed to the growth of labor arbitration.²⁰ The existence of such fears, whatever their basis in fact, is significant for two reasons: First, it underscores that arbitration may serve as an escape hatch for those who doubt the fitness of official tribunals. Second, it brings into question an appraisal of arbitration that, like the author's, exaggerates the vices of arbitrators, then assumes that alternative mechanisms conform to an ideal model, and finally concludes that arbitration is an evil process that should be supplanted by other tribunals.

I turn now to the count in the author's indictment that deals with the "rigged award," that is, an award which is agreed to by the union and the employer but which is palmed off as the arbitrator's independent decision based on an adversary proceeding. Such awards may result from employer bribery, unknown to the arbitrator,²¹ but my guess is that they more frequently result from the desire of the union leadership to avoid the political consequences of meritorious settlements. The success of the deception naturally requires that the parties and the arbitrator keep silent about their masquerade. As a result, it is extremely difficult to get any reliable data about the incidence of such awards.

I wholly agree with the author's condemnation of the rigged award. When such awards involve the interests of an individual grievant or a group of grievants, the deception involved is wholly incompatible with the union's duty of fair representation. Such deception is also incompatible with the arbitrator's duty to protect the integrity of the decisional process over which he presides. It perverts that process into a device for insulating the parties from the political consequences of their conduct. The use of such awards to get the union off the hook is, in my view, wholly incompatible with the accountability implicit in internal union democracy. Consequently, such awards are, in my view, improper regardless of whether they dispose of an individual grievance or fix the terms of a new agreement for the entire bargaining unit and regardless of the substantive fairness of the ultimate award. As Professor Fuller observed: "In practice, the temptation to take short cuts in order to do good is a much greater threat to the integrity of arbitration than the temptation to use its forms for evil purposes."²²

²⁰ See Aaron, *On First Looking into the Lincoln Mills Decision*, NATIONAL ACADEMY OF ARBITRATORS, 12TH ANNUAL MEETING PROCEEDINGS 12 (1959).

²¹ Cf. pp. 62-63.

²² See Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 22. Fuller

Judge Hays is, however, not content to condemn the rigged award as an excrescence of the arbitration system. He tells us that the practice, although probably not very frequent, is so "vicious that no system including such a practice can have any proper claim to being a system of justice."²³ So indiscriminating a reaction, if generalized, would prevent any earthly form of adjudication from being called a system of justice. Manifestly, courts also can become the instruments of rigged determinations, for example, when a judge approves a settlement that results from a lawyer's sell-out of his client's interests.²⁴ I would have no reason to quarrel with the suggestion that some arbitrators are unduly tolerant of the rigged award, but surely the remedy is to extirpate such apparently infrequent awards, rather than the arbitration system. Judge Hays' overreaction calls to mind the caution that Mr. Justice Frankfurter was so fond of: Don't throw out the baby with the bath water.

Judge Hays' criticism of compromise awards fails, I believe, to differentiate such awards from rigged awards with sufficient clarity. A compromise award, unlike a rigged award, does not involve the arbi-

illustrates what he considers an innocent form of the rigged award by presenting the following case: five or six closely related grievances have been heard over a three day period. If the sixth case is to be heard, a new hearing will have to be scheduled, which will be difficult. Although the arbitrator has not formally decided the sixth case, his approach has become apparent, and the disposition of the sixth case is not hard to predict. The parties' representatives ask the arbitrator to incorporate their agreed disposition into an award: Fuller suggests: "if the first five cases were reported to the membership as settled by arbitration while the sixth was reported to the membership as settled by agreement, quite unjustified suspicions and doubts would be aroused." He concludes that it would take a "purist" to see any real wickedness in the arbitrator's putting the agreed settlement "in series" with its five companions. *Id.* at 21.

Nevertheless, Fuller's suggestion seems questionable for several reasons: (1) Approval of feigned adversary proceedings in particular situations will breed all sorts of unmanageable distinctions; (2) The deception involved in Fuller's case could probably be avoided without scheduling a hearing, *e.g.*, by a stipulation that the sixth case be resolved on the basis of the "principles" applied in the first five; (3) The individual most directly affected by the disposition of a grievance is, I believe, entitled to disclosure of the basis on which it was disposed. It is, moreover, unlikely that such disclosure would in the case supposed arouse suspicions. In any event, an additional hearing designed to avoid both such suspicions and the deception of a rigged award would not be an "excessive" price to pay for maintaining the integrity of the adversary process.

Shulman also appeared to condone agreed-upon adjustments that were presented as a decision of the umpire "to avoid internal difficulties." See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1023 (1955).

²³ P. 113.

²⁴ Such settlements may, of course, be distinguished from rigged awards in that the court, unlike the arbitrator, is unaware of the breach of fiduciary obligations. But judges may also be corrupt or complacent. In this connection, New York counsel have suggested informally that the New York practices surrounding approval of agreed-on settlements in stockholders' derivative actions raise serious questions.

trator in a conspiracy of deception. Since compromise awards are more visible, a study of published awards or survey techniques might have yielded pertinent data about the incidence of such awards. In any event, a compromise award is not necessarily wrong. Such awards, to be sure, may flow from the arbitrator's irresolution or from his desire to be loved by both parties—weaknesses that are, however, not peculiar to the arbitration system. But such awards may also flow from difficulties presented by particular situations that do not fit neatly into legal or contractual molds, or may, indeed, result from the parties' intimations in open proceedings as to the terms of an acceptable disposition that falls short of the parties' maximum demands. Such intimations are not peculiar to arbitration. Accordingly, labelling an award "a compromise" tells us little about its intrinsic desirability. Similarly, the existence of "compromises" in arbitration should not lead to outright condemnation of that system any more than compromises by judges or juries warrant wholesale condemnation of the legal system.

Judge Hays is probably making a more modest point about compromise awards, *i.e.*, that the desire for acceptability produces a large number of compromises prompted by the quest for business rather than justice. That point at first glance has some plausibility. But, according to a study relied on by the author for another point,²⁵ compromise awards are distasteful to both sides and are likely to result in future disqualification of the compromising arbitrator.²⁶ Consequently, the need for acceptability may inhibit undesirable compromises more in the arbitration process than in other forms of adjudication. In any event, a priori surmises are of doubtful utility in determining the incidence of undesirable or self-serving compromises.

The author's charge of widespread incompetence among arbitrators is no more persuasive than his imputations of widespread venality. He acknowledges that, apart from the 300 members of the National Academy of Arbitrators, there are no figures, no statistics, no studies about the background of arbitrators.²⁷ For reasons that he does not state, he passes over the membership of the Academy, despite the availability of pertinent data. He turns instead to a publication by the Bureau of National Affairs, which lists a larger number of arbitrators, consisting of those whose awards are published by the Bureau, together with biographical sketches of some of the arbitrators involved

²⁵ P. 39.

²⁶ See Macdonald, *The Selection and Tenure of Arbitrators*, N.Y.U. 1ST ANN. CONF. ON LABOR 145, 179 (1948).

²⁷ P. 53.

(*i.e.*, 652 biographees out of 945 arbitrators). He pronounces the following judgment about the biographees:

[There are] only a dozen or so persons whose records reveal any *substantial distinction*, but there are astonishingly few whose past experience, other than legal training, includes anything of *importance* that is relevant to arbitration.²⁸

As the underscoring, which I have supplied, suggests, the author's standards are somewhat elastic. More importantly, his treatment of the biographical list appears to have been dominated by a spirit of denigration. Thus, he indicates that the list he examined included 223 academics and 43 judges, past and present.²⁹ The substantial range of competence among judges and academics warrants skepticism that either affiliation is necessarily a badge of ability. Nevertheless, the conclusion that only a dozen or so from the total of over 600, including the academics and judges, had records showing any substantial distinction suggests that the author was applying extremely exacting standards as he searched for men of distinction. I have tested that possibility by looking at a small portion of the group involved. That sub-group was limited, first, to names of lawyers and law professors appearing in the first volume of the four volume directory, about whose work and careers I had enough information for a responsible judgment. I set forth below 19 lawyers and law professors³⁰ who are listed in the first volume and whose records I would read as showing some substantial distinction. Plainly, my own list of 19 would have

²⁸ P. 54.

²⁹ *Ibid.*

³⁰ Aaron, Ben

Feinsinger, Walter Paul

Fisher, Walter T.

Forrester, William Ray

Frey, Alexander H.

Garrison, Lloyd K.

Gellhorn, Walter

Hamilton, Walton H.

Hays, Paul R.

Maggs, Douglas

Matthews, Robert

Morgan, Edmund M.

O'Brian, John Lord

Poletti, Charles

Rosenman, Samuel F.

Schaefer, Walter V.

Shulman, Harry

Smith, Young B.

Wirtz, W. Willard.

been considerably higher if it had been culled from all four volumes³¹ and if its completion had not been subject to the drastic limitations described above. I agree, however, with the author's conclusion that the biographical directory affords no support for the theory urged by the Supreme Court "that arbitrators in general have some special expertise in the labor relations area that gives them an advantage over even the 'ablest judges.'"³² But neither the author's biographical exercise nor any other data presented by him support the charge that "thousands of cases" every year are decided by incompetents.

The author's conclusions again outdistance his data when he deals with the experience of arbitrators. Thus, he tells us that the biographical data and the published awards suggest that "in scores of instances arbitrators' experience has been confined to a single case, and in hundreds of others is limited to very few cases over a considerable period of time and involving different enterprises."³³ Earlier he had relied on an estimate that only four per cent of the total number of awards rendered are published.³⁴ That estimate suggests that the biographical data and the awards listed in the BNA are a hopelessly inadequate basis for judging the experience of arbitrators. That difficulty is, moreover, compounded by the existence of multiple publication services. The data about the author himself demonstrates the weakness of his method. He tells us that he has decided "hundreds of cases,"³⁵ but an examination of the BNA index covering volumes 1-40 and the period from 1949 to 1964 shows that only twelve of his awards were reported there.

The author again gives free rein to his penchant for denunciation in his discussion of fees. He relies on secondary materials to support his charge of fee-padding but sometimes ignores that those materials criticized only a minority of arbitrators.³⁶ He gives us one undocumented statistic about per diem charges, telling us that some arbitrators charge as high as \$500 per day.³⁷ Charges that high seem to be so rare that that figure is a misleading truth. Thus, a study based on a sampling of cases in the files of the Federal Mediation and Concili-

³¹ The same name may appear in more than one volume of that directory. Hence, it would be erroneous to multiply the sum derived from any one volume by four.

³² P. 58.

³³ Pp. 58-59.

³⁴ P. 53.

³⁵ P. 42.

³⁶ See Raefle, *Needed: A Fourth Party in Industrial Relations*, 13 *LAB. L.J.* 230, 238 (1962), cited on p. 52; cf. p. 60; see also Aaron, *Labor Arbitration and its Critics*, 10 *LAB. L.J.* 605, 610 (1959), cited on p. 52.

³⁷ P. 67.

ation Service indicates that in 1962-63 the average per diem charge for discharge cases was \$129,³⁸ that the mode of per diem charges was \$125, and that the number of cases involving charges of \$200, the highest charge shown, was quite small.³⁹ And a survey by the National Academy of Arbitrators, which purports to be an elite group, showed that the average daily rate charged by its members for grievance cases in 1964 was \$142, up from \$126 in 1962.⁴⁰ Those figures were available to the author. His disregard of them, coupled with his exclusive reliance on high-priced sports in his discussion of fees, is scarcely calculated to inspire confidence in his methodology or judiciousness.

The final count in the indictment involves "the approach to arbitration in terms of the necessity of considering 'the common law of the shop,' the 'gaps' in the collective agreement, 'past practice,' 'increased productivity,' and the 'lessening of tensions.'" ⁴¹ The author appears to ratify the suggestion that "these concepts were introduced for the purpose of permitting the arbitrator to decide more grievances for the union and thus to keep his job."⁴² Neither the author nor his source explains how a would-be arbitrator promotes his acceptability to employers by adopting an approach designed to aid unions as a class. That suggestion again seems to ignore that the pressures generated by acceptability are opposing or countervailing rather than one-directional.

The author's judgment about the consequences of the "approaches" described above seems more persuasive than his imputation of motives. Arbitration is essentially a vehicle by which unions protest action initiated by management on the ground that it is contrary to the contract. To the extent that restrictions embodied in contract terms are extended by reference to the "common law" of the shop, the number of successful union protests will increase. But that generality tells us nothing about the soundness of an approach that goes beyond the words of a written agreement. Surely, nothing is more familiar in the general law of contracts than consideration of background, practice, function, and consequences.⁴³ It is strange for Judge Hays, who so persuasively

³⁸ See Fleming, *The Labor Arbitration Process*, NATIONAL ACADEMY OF ARBITRATORS 17TH ANNUAL MEETING PROCEEDINGS 33, 42 (1964).

³⁹ *Id.* at 44. These figures may have to be qualified because the Federal Mediation Service imposed a ceiling of \$150 on January 18, 1957. 29 C.F.R. § 1404.12 (1965).

⁴⁰ See *Survey of Arbitration in 1964*, NATIONAL ACADEMY OF ARBITRATORS 18TH ANNUAL MEETING PROCEEDINGS 243, 246 (1965).

⁴¹ P. 61.

⁴² *Ibid.*

⁴³ See Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464, 480-81 (1960).

admonishes arbitrators to take account of the general law of contracts,⁴⁴ to complain because they have applied concepts made familiar by that law. Indeed, Professor Fuller has argued that if a general comparison is to be made about the relative strictness or looseness of contract construction, the generalization should be that arbitrators are more strict and literal than the courts.⁴⁵ Finally, Professor Cox, whose work the author praises as demonstrating the qualities of the ideal arbitrator,⁴⁶ has in his academic writings emphasized the importance of giving effect to the common law of the plant, past practice, and the other concepts⁴⁷ that the author apparently views as having been used so as to increase unwarrantedly the power of unions.

In his concluding lecture, portentously titled "The Future of Labor Arbitration," the author turns from criticism to reform and suggests three remedies for the shortcomings of labor arbitration:

- (1) The courts, if they are to enforce the duty to arbitrate and arbitral awards, should carefully scrutinize, instead of rubber stamping, awards.⁴⁸
- (2) But the remedy preferred by the author, is, as already indicated, the withholding of any judicial assistance to the arbitration process.⁴⁹
- (3) Finally, as a concession to those who, unlike the author, believe that "special expertise" is desirable for those who adjudicate asserted violations of collective agreements, he suggests the establishment of labor courts, based on European experience and employing simplified procedures such as those used by small claims courts in this country.⁵⁰

The proposal for greater judicial supervision of the award, as I have urged elsewhere,⁵¹ is appealing. Arbitration, like other modes of

⁴⁴ See pp. 44-47.

⁴⁵ Fuller, *supra* note 22, at 7-8. See, e.g., *Zdanok v. Glidden Company*, 327 F.2d 944, 953 (2d Cir. 1964), where the court, although invoking the "law of the case" as grounds for not disturbing its previous decision, questioned the free wheeling approach on which it had rested. It is also of interest here that arbitrators, in the interval between the first two rounds of the Glidden case, rejected the free construction adopted by the court in round I. See, e.g., *United Packinghouse Workers of America, Local No. 277*, 38 LABOR ARBITRATION REPORTS 619 (award dated May 18, 1962, by Peter M. Kelliher, Esq., Chicago).

⁴⁶ P. 52.

⁴⁷ See Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1493-1500 (1959). See also Wellington, *Judicial Review of the Promise to Arbitrate*, 37 N.Y.U.L. REV. 471, 475 (1962).

⁴⁸ Pp. 79-80.

⁴⁹ P. 113.

⁵⁰ Pp. 116-17.

⁵¹ See Meltzer, *supra* note 43, at 485.

adjudication, involves sufficient danger of error and abuse to justify the deterrent and curative influence typically provided by judicial review.⁵² A broader reviewing power exercised, as the author suggests, after rendition of the award,⁵³ would, moreover, give the reviewing tribunal the benefit of any special insights possessed by the arbitrator. An enlarged judicial role, even though coupled with such a concept of primary jurisdiction, would, of course, involve the risk of excessive judicial interference. But that risk would be essentially similar to that involved in judicial review of administrative determinations. It is true that the parties by modifying their agreements could expand the judicial role with respect to arbitration. But the Court's endorsement of arbitral autonomy adds to the other complications surrounding such attempted modification.⁵⁴ In any event, there are well-founded doubts about a system that requires courts to exercise their equitable powers both to compel arbitration and to enforce compliance with arbitral awards, and at the same time denies courts the power to determine whether there is a rational basis in the parties' agreement for the awards that are to be enforced. The suggestion supported by the author would, in my opinion, impose a desirable limitation on such an extraordinary conscription of judicial power.⁵⁵

The alternative proposal preferred by the author, *i.e.*, judicial abstention, appears at first blush to be inconsistent with his plea that judicial enforcement should be accompanied by more extensive judicial supervision. Plainly, if the potential for arbitral abuse is so great that the courts should do more, if anything, it seems strange to urge that courts should do nothing at all in relation to arbitration.⁵⁶ That

⁵² The author, p. 101, points to *Grace Line v. National Marine Engineers Beneficial Assn.*, 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 (1st Dep't), *leave to appeal denied*, 14 N.Y.2d 484, 200 N.E.2d 220, 250 N.Y.S.2d 1026, *cert. denied*, 379 U.S. 843 (1964), as a case in which an unjustified award was not disturbed because of limitations imposed on judicial review. I agree with that assessment; it is, however, of interest that a decision by a trial court in a similar case was left undisturbed by the supreme court of New Jersey. See *Adams v. Jersey Central Power & Light Company*, 21 N.J. 8, 120 A.2d 737 (1956); HANDLER & HAYS, *CASES ON LABOR LAW* 408 (3d ed. 1959).

⁵³ For a case that appears to involve a more expansive review of the award, see *Torrington Co. v. Local 1645, Metal Products Workers*, 62 L.R.R.M. 2495 (2d Cir. June 22, 1966) (one judge dissenting).

⁵⁴ See Meltzer, *supra* note 43, at 486-87.

⁵⁵ *Id.* at 484-86. It should be noted, however, that judicial scrutiny only after an award has been rendered may be of limited usefulness where strikes or employee unrest is touched off or threatened by an employer's failure to abide by an award. Nevertheless, the prospect of such scrutiny may encourage more careful workmanship by arbitrators and thereby reduce the occasions in which judicial review is invoked.

⁵⁶ As the author acknowledges, p. 114, his objection to judicial intervention is based on considerations quite different from those that moved Shulman, among others, to decry

apparent inconsistency can, however, be avoided on the basis of two separate, if overlapping, grounds: (1) the author's suggestion that arbitration departs so fundamentally from a system of justice that it should not be legitimated by judicial support; (2) the premise that even enlarged judicial review could not effectively curb arbitral abuses; hence, courts should not attempt to regulate a system whose results are beyond effective judicial control. I have not found the author's development of either ground convincing. Furthermore, the author does not adequately explore the implications of his suggestion for a wholly voluntary system. To be sure, he favors legal enforcement of other provisions of the agreement,⁵⁷ including, presumably, no-strike clauses. But he ignores the truth in the conventional insight that arbitration is a substitute, not for a law suit, but for a strike. Even though that insight, as Shulman urged, is incomplete,⁵⁸ the connection between arbitration and no-strike clauses raises the question whether withdrawal of legal support for arbitration would weaken the moral force of the no-strike clause and, indeed, of the whole agreement, or would at least give rise to justifiable charges of one-sidedness like those prompted by *Sinclair Refining Co. v. Atkinson*.⁵⁹

The author does little more than mention his final proposal, that a system of labor courts with jurisdiction over grievances be established.⁶⁰ That proposal is inspired by labor courts abroad, which deal with issues resolved in this country by arbitrators and courts of general jurisdiction. The foreign models differ in their docket and in the social context in which they operate. That diversity, together with the author's sketchiness, makes it difficult to react to his proposal. This reviewer disclaims, moreover, adequate knowledge of foreign models. Nevertheless, there are several obvious points that sharpen the familiar question as to whether good foreign institutions, like good foreign wines, would export well: The coverage and the detail of American bargaining agreements have been considerably greater than that of foreign agreements.⁶¹ Such coverage, together with our greater size and litigiousness, is likely to produce a much larger and diversified

such intervention. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955). *But cf.* Feller's comments in *Arbitration and the Law*, NATIONAL ACADEMY OF ARBITRATORS 12TH ANNUAL MEETING PROCEEDINGS 14, 16-17 (1959).

⁵⁷ P. 116.

⁵⁸ See Shulman, *supra* note 56, at 1024.

⁵⁹ 370 U.S. 195 (1962), holding that the Norris-La Guardia Act bars specific performance of no-strike clauses. Although employers may also seek to compel arbitration, unions generally have been the moving parties.

⁶⁰ P. 117.

⁶¹ McPherson, *Basic Issues in German Labor Court Structure*, 5 LAB. L.J. 439, 441 (1954).

docket than has confronted foreign systems. Consequently, the demands on the personnel of such courts in the United States are likely to be exacting. Furthermore, such tribunals would scarcely contribute to industrial peace or justice if they became bogged down in the delays that have characterized the administration of specialized tribunals such as the National Labor Relations Board. Beyond those issues, there is even a more critical one: Whether labor courts, as they are likely to be staffed in this country, would deserve and command the confidence of both parties. In this connection, it is useful to remember that arbitration was in part a response to the fear that official tribunals would be manipulated. The crises of confidence that from time to time have shaken the specialized tribunals, such as the NLRB, are not a happy augury for the future and should qualify the enthusiasm that typically accompanies proposals for new directions. An additional basis for caution is that labor and management abroad have preferred to establish their own arbitration mechanisms in lieu of using labor courts.⁶² In any event, arbitration is so deeply embedded in American labor relations that it seems unlikely that it would be abandoned in favor of a labor court. Hence, the establishment of such a court might be a futile exercise. It might, moreover, be affirmatively mischievous by encouraging tactical maneuvering in bargaining negotiations about the forum for resolving grievances. In any event, a great deal more thought than the author apparently gave, or even purported to give, to the problems raised by a labor court is necessary for a judgment about its potential utility in the United States.

Judge Hays' lectures, despite their shortcomings, are likely to provide a corrective against the mystique of expertise and the uncritical praise that has been lavished on arbitration. But the Judge, while debunking a mythology of arbitral excellence, has produced a new mythology of incompetence and corruption. Unfortunately, his "extremism" may make it too easy to dismiss the sobering questions that he has raised, or, what is less likely, may reduce the value of a social tool that has made a substantial contribution to labor relations even though it has the imperfections of all earthly institutions.

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⁶² See SCHMIDT, *THE LAW OF LABOUR RELATIONS IN SWEDEN* 45 (1962).

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