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COLLECTIVE BARGAINING, LABOR ARBITRATION AND THE LAWYER

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The role of the lawyer in labor arbitration must be appraised in the light of his function in society generally and the unique demands of the institution of collective bargaining, of which arbitration has become an integral part.

The role of the lawyer generally is to assist in resolving conflicts among individual and group interests within a framework of rules developed by the common law or by legislation, as interpreted and applied by courts and administrative agencies. Operating within that framework, the lawyer advises his client whether and how he can accomplish his immediate objective. The professional skills which he employs include analysis and advice, negotiation with opposing interests, drafting contracts or other documents, and advocacy before a court or administrative agency.

In applying these skills to ordinary conflicts, the lawyer as a rule feels no responsibility to the institution of which his client is a part—banking, insurance, real estate and the like. He does not usually concern himself with the impact of his advice or actions upon the interests of his client's adversary, third parties or the public, or upon the long range economic or social interests of his own client, such as the possibility of losing a valuable customer or status in the community by starting a lawsuit. There may be exceptions, as in the case of a lawyer advising a client against filing a petition for divorce because of his concern for the institution of marriage or for the welfare of children who may be involved. By and large, however, the lawyer leaves questions of institutional interests or economic or social values unanswered, without feeling remiss in the performance of his professional obligations.

In the field of labor-management relations, likewise, the lawyer assists in resolving conflicts of interest among individuals and groups, including the employees, management, organized labor, and the general public. Such conflicts, however, as well as the framework of rules within which they must be resolved, are today highly specialized and present unique problems calling for intelligent adaptation of the lawyer's usual skills.

Prior to 1935, when the Wagner Act established collective bargaining as our national policy, the basic issue on which the lawyer was called to advise his client was the extent to which the union or the employer could invoke self help to achieve or resist union recognition

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for the purposes of collective bargaining. Such conflicts were in the main determined within the usual legal framework, through court actions for injunctions or damages, or criminal prosecutions. Since 1935, primary emphasis has shifted to what happens after union recognition. While rules of law and the courts still play some part, a new set of rules has been adopted, administered in the first instance by the National Labor Relations Board. The main thrust of these rules is to promote the institution of collective bargaining. Arbitration is basically a part of that institution. For the proper performance of his function in the arbitration process, therefore, the lawyer must have a basic understanding of the nature and purposes of collective bargaining. Recognition of this need is evidenced, for example, by the formation some years ago of the Section on Labor Law of the American Bar Association, which includes a Committee for Improving the Processes of Collective Bargaining, and a Committee on Improvement of Administration of Union-Management Agreements.

Collective bargaining is in essence a system of industrial self-government effectuated through private law making by management and organized labor jointly. Government support of collective bargaining, originating in the Wagner Act and continued in the Taft-Hartley Act of 1947, is based on the theory that self-regulation is the method most likely in a democracy to achieve industrial peace and stability. Nevertheless the parties are left free, with limited exceptions, to resort to economic force to support their respective positions in a labor dispute.[1] If strikes were prohibited, Government would have to fill the vacuum by prescribing the terms of settlement, thereby negating the voluntaryism which is the essence of the collective bargaining process. The risk of a strike which may succeed or fail may therefore be regarded as an inherent element in the collective bargaining process.

Like most systems of government, collective bargaining embraces legislative, executive, judicial and administrative functions. The legislative function appears most clearly in the negotiation of a collective bargaining agreement which establishes the wages, hours and other terms and conditions of employment for a stated period. While drafted in the form of a contract, the agreement is designed more broadly as a code of conduct to govern the daily relations of the employees, management and the union within a plant community. The agreement defines and allocates executive responsibility for the conduct of these relations, a simple example being the usual "management" clause reserving to the employer the unilateral right to determine the schedules of production, the methods of manufacturing and

1. See §§ 7, 13, 8(d) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 61 STAT. 140, 151, 143, 29 U.S.C.A. §§ 157, 163, 158(d) (1956).

the like. The typical agreement also establishes an administrative scheme for the handling of some or all problems arising during its terms, usually in the form of a grievance procedure, which is in essence a continuation of the collective bargaining process. Finally, the agreement normally incorporates a private procedure to resolve such problems—judicial in that it ends in a final and binding determination of rights and duties—in the form of an arbitration clause.

In those instances in which the lawyer is called upon to assist at the negotiation or drafting stage, he must understand these multiple aspects of the collective bargaining agreement and their interrelation. In particular, he must anticipate that post-agreement problems will arise as to the meaning or application of the language used, as to whether a certain dispute is covered by the language at all, and what to do if it is not so covered. With certain exceptions, labor is free to strike[2] or perhaps to sue at law in support of its position in these post-agreement problems. One of the main purposes of the agreement, however, is to stabilize industrial relations for a period of time, and strikes defeat that purpose. Court litigation is for many reasons not suited to the constructive settlement of labor disputes. Aside from the formality, expense and delay of such litigation, it generally leaves a bitter taste in the mouth of the loser, who does not have the usual recourse of terminating relations with the other. The question which confronts the lawyer advising his client initially as to potential post-agreement disputes, therefore, is what he can recommend as alternatives to strikes or lawsuits for the peaceful settlement of such disputes.

To begin with, the lawyer should advise an agreement that any dispute, regardless of its nature, must first be submitted through the grievance procedure, so as to encourage the fullest use of collective bargaining as the means of settlement. While opinions differ,[3] a "wide open" grievance procedure is useful not only to the employees and the union but also to the employer, since the feeling of frustration resulting from the bottling up of complaints of any nature tends to impair production. The lawyer may further advise an agreement that after the grievance procedure has been exhausted, the parties will invoke private or public mediation, again with a view to encourage the maximum use of collective bargaining. If the dispute still persists, the question is what to do next, if a strike or law suit is to be avoided. Specifically, should such disputes be submitted to arbitration, and if so, with what limitations, if any?

In giving advice at this point, the lawyer must consider his client's paramount interest from the client's point of view. If his client be an

2. *Ibid.*

3. *Compare* Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations,* 12 LAW & CONTEMP. PROB. 297 (1947), *with* Katz, *Minimizing Disputes through the Adjustment of Grievances,* 12 *id.* at 249.

employer whose paramount interest is in uninterrupted production during the term of the agreement, the lawyer will keep in mind the fact that the union is legally free to strike, unless it agrees otherwise, over any dispute arising during the term of the agreement except, perhaps, one involving a demand for a change in the terms and conditions thereof,[4] and possibly advise an arbitration clause equally broad in scope. The client's interest in avoiding employee unrest short of a strike may even persuade him to include the latter type of dispute. Many employers, however, and some unions, will not agree to arbitration of any of the *terms* of an agreement, even at the risk of a strike, on the theory that by so agreeing they are surrendering their "sovereignty," whereas they are accustomed to third party decision, *i.e.*, by the courts, of disputes concerning the *meaning* of the terms of an agreement generally. In such cases, the agreement to arbitrate will exclude demands for either changes in or additions to the terms of the agreement, and will be limited to disputes over the interpretation or application of those terms, with a provision for good measure that the arbitrator shall not add to or modify such terms. The agreement may be further limited by excluding certain issues, such as a dispute over job standards, or by having it apply only to certain specified issues.

Since arbitration is designed as a substitute for strikes, it is reasonable to infer an agreement not to strike as to any dispute made subject to arbitration, and such appears to be the law.[5] The parties are free, however, to agree either to a more restrictive or less restrictive no-strike clause. Thus, the parties may agree to an absolute no-strike clause despite limited arbitration, or they may agree that the union may strike as an alternative to arbitration or following an award. The lawyer must therefore relate the arbitration and no-strike clauses in his advice and drafting. The same care must be used in relating either or both clauses to other clauses in the agreement, such as the "management" clause. For example, a dispute concerning the meaning of that clause may itself be arbitrable, but assuming that its meaning is clear and no arbitrable issue exists, the question may arise as to whether the union may strike to protest the exercise of a right reserved by the management clause. It is, of course, a matter of judgment as to whether the lawyer might not be creating

4. See § 8(d) of the National Labor Relations Act, as amended, 61 STAT. 143 (1947), 29 U.S.C.A. § 158(d) (1956).

5. See Teamsters Union v. Mead, Inc., 230 F.2d 576 (1st Cir. 1956), *appeal dismissed*, 352 U.S. 802 (1957); Construction Workers v. Haislip Co., 233 F.2d 872 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955). A similar problem concerns the right of the union, the employer or the employee to resort to the courts in lieu of, or subsequent to, the grievance or arbitration procedure. To an extent, this problem may be avoided by appropriate provisions in the agreement. See Cox, *Rights under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

more problems than he is foreclosing by attempting to close this and similar gaps at the time of negotiating the agreement.

Enough has been said to indicate the wide choice available to the parties as to the scope of the arbitration clause. It is of the utmost importance that the lawyer advise his client of this latitude, and the advantages and disadvantages of each choice, in relation to the risk of strikes and otherwise. He may be doing a great disservice to his client by carelessly borrowing a clause from another agreement or a collection of clauses, or by insisting on one of his own preference.

It is also important that the choice once made be drafted in the clearest possible terms. One of the greatest and most frequent irritants in labor management relations is a dispute over "arbitrability" or the arbitrator's "jurisdiction," which may lead one party to refuse to arbitrate or to comply with an award once rendered. In such a case the other party may be forced to strike or to seek relief in the courts, thus defeating the main objectives of the arbitration process. The lawyer may help to avoid such results by defining the scope of the arbitration clause as clearly as possible in the first instance, and then by defining the procedure for deciding disputes as to arbitrability or jurisdiction if they should arise.

In the latter connection, lawyers may soon be confronted with the question of how to advise their clients with reference to the proposed Uniform Arbitration Act. By section 1, the Act applies to arbitration agreements between employers and unions "unless otherwise provided in the agreement," thus permitting the parties to "contract out." The Act provides for specific performance of an agreement to arbitrate, and for enforcing, vacating, modifying or correcting an award. One of the grounds for vacating an award, for example, is that the arbitrators "exceeded their powers." A common argument against the proposed Act is that its adoption would encourage the trend towards court resort to avoid arbitration or to defeat an award, aggravated by the tendency of some courts to concern themselves with the merits of the dispute. The power to "contract out" is designed to offset that argument. The question remains as to what form of relief, if any, would be available to a party claiming, for instance, that the agreement did not authorize arbitration of the particular dispute, that the arbitrator acted improperly in the arbitration proceedings, or that he exceeded his authority in making a particular award.

These are types of risks which the parties do not normally intend to assume by their agreement for "final and binding" arbitration. The problem is not so much whether an avenue for relief should exist, but whether relief should be available only through the courts, with the delay and expense incidental to law trials and appeals, and, more important, the friction often engendered when a labor problem is forced

through that route. The suggestion that the arbitrator should be authorized to pass on his own authority begs the question, and is wholly inapplicable to such claims as that the award was tainted by misconduct of the arbitrator.

Assuming a need for some method of review of such questions, that need might be supplied by an arrangement under which the parties (1) define in advance their own grounds for review and (2) agree to submit the questions for decision by a second arbitrator. Of course, the decision of the reviewing arbitrator may be "wrong," but so might the decision of a court, even after appeal. The real choice lies between private and court review, and for parties concerned about the possible impact of increased judicial intervention on good labor relations, a choice of review by a second arbitrator rather than by the courts may be worthy of consideration. If the parties wish to avoid a second proceeding, they can, in any case in which a question of arbitrability or jurisdiction is anticipated, agree initially to a board of two or three impartial arbitrators and thus insure a broader basis of judgment in the first instance. Such a procedure would also minimize claims of improper conduct or lack of due process.

The wide latitude available to the lawyer in the drafting of arbitration clauses, to meet the needs and desires of the particular parties, has already been emphasized. The same flexibility exists as to the form and procedure of arbitration. Here, again, it is the obligation of the lawyer to acquaint himself with the various alternatives, to explain to his client or to both parties the existence of those alternatives and the advantages and disadvantages of each, to assist them in making a considered choice, and to reflect that choice properly by painstaking draftsmanship. For example, shall the agreement provide for a "permanent" or *ad hoc* system of arbitration? Shall there be one arbitrator or a board? If the latter, shall the board be "all public" or "tripartite"? If tripartite, shall the decision be by majority vote or left to the chairman? Who shall appoint the arbitrator, if the parties fail to agree? Shall he be permitted or invited to mediate? Shall he file written opinions? What limitations, if any, shall be imposed on his authority in the making of awards? Shall he be permitted, for example, to modify disciplinary penalties, or only to sustain or set aside? On these and similar questions, of course, there may be a disagreement between the parties, which must be resolved by collective bargaining. But the lawyer can often help towards agreement on an intelligent and effective choice, provided that his advice is geared to the needs and wishes of the particular parties, rather than to a personal predilection or a random choice.

The matter of arbitration procedure has two related aspects, namely, how the proceedings should be conducted, and how the lawyer should

conduct himself. Considerable controversy exists over the question as to whether arbitration is, or should be, a "judicial" procedure. It is a judicial procedure in the sense that each party is entitled to the basic elements of procedural due process, notably a fair hearing and a decision based on the merits. It is not a judicial procedure in the sense that the parties are entitled to rely on the rules of evidence, practice and procedure, or even the formal doctrines of contract interpretation applicable in the courts, unless, of course, the parties have agreed otherwise. One of the purposes of arbitration, both labor and commercial, is to avoid the technicalities of courtroom procedure, and "legal technicalities" in general; moreover, one party or both may not be represented by counsel, and the arbitrator himself may not be a lawyer. The arbitrator is, or should be, selected not for his "legal ability" but primarily for his understanding of collective bargaining, and his fairness and good judgment. Incidentally, lawyer-arbitrators frequently are less inclined than non-lawyers to allow "legal technicalities" to get in the way of a speedy and just result.

One phase of the question as to whether arbitration is a "judicial" procedure pertains to the propriety of arbitrators attempting to mediate or compromise a dispute. Even in court proceedings, there is the familiar figure of the "settling judge." Moreover, mediation is a concomitant of the growing practice of pre-trial conferences. Aside from these comparisons, since arbitration is a private process, mainly within the control of the parties, they can advise the arbitrator of their preference in advance—if they can agree—or select one who by habit or reputation follows the procedure they prefer. The arbitration process, aside from the finality of the award, is sufficiently flexible to accommodate varying needs and desires as to procedure, and so are most arbitrators.

The lawyer is, or should be, concerned over how to conduct himself in presenting an arbitration case. He will usually have had no contact with the dispute prior to its submission to arbitration. His preparation will normally consist of analyzing the issue, interviewing witnesses, and composing a preliminary brief or memorandum. In some cases, he will have visited the plant where the dispute arose, to gain perspective on the problem. He may or may not have become acquainted with the principals on the other side. In either case, by the time of the hearing, he is often regarded by the other party as the *alter ego* of his client, and his conduct will often determine considerably more than the outcome of the particular controversy. It is a truism that the labor-management relationship, unlike that of buyer and seller, for example, is a continuing one; regardless of how a particular dispute is resolved, the parties will normally resume their dealings. The manner in which the lawyer conducts his client's side of that dispute,

while of course doing his best to win a favorable result, may have a profound effect upon the future of the collective bargaining relationship, particularly at the plant level.

At one time, a labor dispute of any character was often regarded as an instance of class warfare, and this attitude was likely to be reflected in an arbitration proceeding, with or without lawyers in attendance. Today, most experienced management and labor representatives regard a labor dispute, at least one arising out of an ordinary grievance, as a temporary disagreement among human beings living together in a plant community, who have chosen a simple and expeditious procedure, they hope, to resolve that disagreement. Tensions may, of course, mount as the moment for presenting the dispute for final decision arrives. The lawyer's job is to lessen, rather than heighten, that tension. All too often, the opposite is the case. By the lawyer's tactics, the underlying issue becomes subordinated to a display of courtroom forensics, minus even the usual amenities.

The lawyer's use of technical language as an irritant in arbitration proceedings has been over-emphasized, but still may create a problem. Many of the expressions used in legal proceedings are merely shortcuts to stating common sense propositions, which may fairly be applied to any adversary proceeding. The lawyer can and should use those propositions for his client's protection or advantage. He may do so effectively and without causing resentment by translating them into terms easily understood by a layman. For example, when Union witness Smith testifies that Jones told him he saw Brown, the grievant, at work when he was accused of loitering, the employer's lawyer need not protest "hearsay"; he need only ask, "Where is Jones?" Or, if a question pertaining to the seniority rights of the grievant or of an employee similarly situated has been decided previously through arbitration, the lawyer need not argue "res adjudicata" or "stare decisis"; he can talk about the need on both sides for consistency in contract interpretation. Examples need not be multiplied.

It appears, then, that there is a place for "law" in the procedural sense in labor arbitration, provided the law is kept in its place. What about substantive law? One commentator has concluded that the arbitration process can and should be divorced from "the law" completely.[6] Another suggests that the arbitrator can and must undertake to apply established principles of law, and so, for example, dismiss a grievance which would require conduct the law forbids or which would enforce an illegal contract.[7] The problem has two aspects, first, what the arbitrator should do as a matter of discretion and sec-

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

7. Cox, *The Place of Law in Labor Relations,* Speech before the Fifth Annual Meeting of the National Academy of Arbitrators (1952).

ond, to what extent his decision may be subject to reversal by the courts or by administrative agencies such as the National Labor Relations Board. The second question is beyond the control of the arbitrator.[8] The answer to the first question may depend on the extent of the discretion given by the parties to the arbitrator. Within those limits, he should consider, but not feel bound by, "established" rules of law. For one thing, the rules of labor law are not always so clear or immutable that the arbitrator may feel secure in applying them to the particular case before him. More important, he has been selected by the parties for the exercise of his own best judgment on what is the proper decision under all the circumstances of the case. In any given case, he should feel free to decide, on the basis of that judgment, what weight, if any, to give to rules of law derived from sources outside the agreement.[8]

Arbitration, then, is not the practice of law, but the practice of adjusting labor-management disputes within the framework of collective bargaining. Whatever doubt may exist as to the place of law within that framework, there is no doubt a place for the lawyer who understands his role in the collective bargaining process. While statistics are unavailable, the demand for the lawyer's services in that process, including his selection as an arbitrator, seems to be increasing. The cynical might say his usefulness is increasing in direct ratio to his ability to forget he is a lawyer. More accurately, his usefulness grows as he absorbs the mores of collective bargaining, appreciates its cooperative as well as its competitive aspects, and adjusts his basic skills to its unique demands, thereby serving the best interests of his client and demonstrating the adaptability of the legal profession to the changing needs of society.

8. See Note, 69 HARV. L. REV. 725 (1956). For recent cases in which the arbitrator considered NLRB rules as part of his reasoning in interpreting an agreement, see Celanese Corp. of America, 27 LAB. ARB. 844 (1956); Braniff Airways, Inc., 27 LAB. ARB. 892 (1956).