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The Use of Precedent in Labor Arbitration

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THE USE OF PRECEDENT IN LABOR ARBITRATION

by

Joseph R. Hlavin, Jr.

**A Thesis Submitted to the Faculty of the Institute of Social
and Industrial Relations of Loyola University in Partial
Fulfillment of the Requirements for the Degree
of Master of Social and Industrial
Relations**

February

1952

LIFE

Joseph Raymond Hlavin, Jr. was born in Chicago, Illinois, January 29, 1929.

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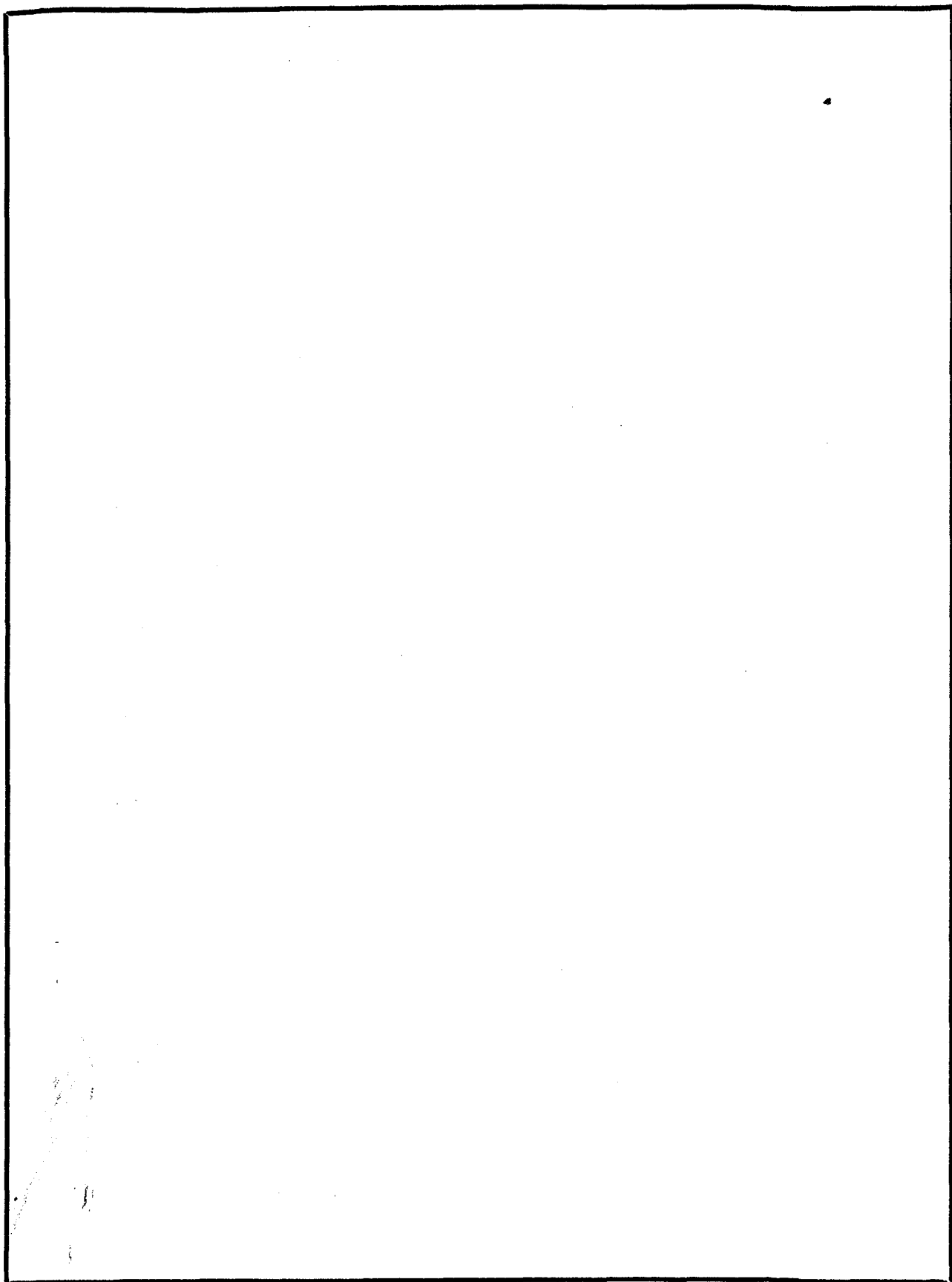
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CHAPTER I
INTRODUCTION

Recent years have witnessed an astonishing acceleration in the use of industrial arbitration.¹ Almost all types of controversies and subjects of collective bargaining are being entrusted to its process. Where but a few years ago many employers and unions were adamant against submission to arbitration, now we find they accept that process as not only a suitable and final step in the settlement of grievances, but also as an aid to the completion of collectively bargained contracts in almost all details.² Arbitration has become a standard affair in labor-management relations, almost as much so as the collective bargaining agreement itself.

Yet it must be remembered that industrial arbitration is a relatively new occurrence. And being so, without the benefit of the rules and regulations that accompany experience, it is constantly under fire. Though the basic concept of the process is fairly well established, a question presents itself as to the form it should take. Some would have it formal as the courts; others desire it as an informal procedure. The latter group fears that any other course would result in a betrayal of the very ideals that comprise the arbitration process.

¹ This paper will be limited to industrial arbitration within the United States.

² Clarence M. Updegraff and Whitley P. McCoy, Arbitration of Labor Disputes, New York, 1946, 1.

This thesis will be concerned with only one aspect of the more complex issue involving the degree of formalization that arbitration should have, that being the proper value of precedent in industrial arbitration. Three basic objectives shall guide this study: first, a comparison of the development of precedent in common law and in the arbitrational process; secondly, a presentation of the major arguments for and against the use of precedent in industrial arbitration; and thirdly, an attempt to determine the future status of precedent and its proper place in the arbitration of both disputes of rights and disputes of interests. To achieve these ends, it will be necessary to adhere to a certain procedure.

The first chapter shall introduce the problem and present the method of the study. In addition to an introduction and presentation of the chief factors involved in the thesis, a definition of terms will also be included.

The second chapter shall portray the background of industrial arbitration. This is done in order to demonstrate the factors which have been emphasized in its growth. We can better appraise arbitration's future if we analyze its past.

The third chapter shall pursue the development of precedent in common law. This is an appropriate step since arbitration and common law are often conceived of as fellow-travelers and parallel structures. A clear understanding of precedent's role in common law will do much to eliminate unwarranted analogies and consequently, invalid assertions.

The fourth chapter presents the main contentions for the use of precedent in industrial arbitration. As in any attempt to set forth a

comprehensive picture of an intricate problem, it will be necessary to draw upon the views of contemporaries, many prominent as arbitrators themselves. Their ideas shall be stressed since these men are helping to mold the future shape of arbitration.

The fifth chapter treats of the major arguments against the use of precedent in industrial arbitration. As in the previous chapter, much weight shall be accorded their reasoning.

The sixth chapter deals with the place of precedent in the arbitration of disputes of rights and disputes of interests. A distinction between the two is drawn, a step frequently overlooked.

The seventh and final chapter shall be the conclusion. Here the data will be summarized, and the writer will derive conclusions in keeping with the objectives of this study.

Since it would be unwise to proceed further without achieving a common agreement as to the meaning of terms involved, this shall be done presently. The general term "arbitration" shall be taken to mean an informal and flexible process in which the parties themselves, by mutual agreement, establish their own rules of procedure, select the arbitrator or establish a method for his selection, fix time limits, define the problem or issue to be submitted, and mutually agree that within such limits the arbitrator's decision shall be final and binding. 3

"Industrial arbitration" shall be regarded as the settlement of dis-

3 U. S. Department of Labor, Collective Bargaining Provisions, Bulletin 908-16, Washington, 1950, 82.

putes arising out of labor agreements. ⁴ These disputes may concern either existing contracts or new contracts.

A dispute that is concerned with the interpretation, application, or enforcement of an existing collectively bargained agreement shall be known as a "dispute of rights." A dispute arising in the negotiations of an initial or renewal contract which involves the establishment of working conditions, and other terms to govern the employment relations in the future shall be known as a "dispute of interests." ⁵ Both disputes of rights and disputes of interests are more fully treated in a later chapter.

"Commercial arbitration" is the settlement of disputes arising out of business contracts, under which commerce and trade are carried on. ⁶

Included in this classification are any claims which involve violations of established trade practices. Thus, the parties voluntarily submit their dispute to a neutral third party in the hopes of avoiding delay, expense, and the ill-feeling which arises from lawsuits in courts of justice. ⁷

Throughout this paper the term "temporary arbitrator" is used to designate a third party who is selected for a single case or for a specific group of cases after it has become clear that the grievance or grievances

⁴ Frances Keller, Arbitration in Action, New York, 1941, 5. This term shall be used interchangeably with "labor arbitration."

⁵ Harry H. Platt, "The Settlement of Industrial Disputes through Voluntary Arbitration," Michigan State Bar Journal, XXVIII, October, 1949, 19.

⁶ Keller, Arbitration in Action, 5.

⁷ John A. Lapp, Labor Arbitration, New York, 1942, 3; Clarence F. Birdseye, Arbitration and Business Ethics, New York, 1926, vii; Ludwig Teller, Labor Disputes and Collective Bargaining, New York, 1940, sec. 179.

in question must be submitted to arbitration. The arbitrator is selected with a specific case or group of cases in mind, and there is no commitment whatsoever to use that same person again. Third parties selected in this manner are sometimes called "ad hoc arbitrators." The majority of labor agreements providing for arbitration specify this type.⁸

The term "permanent arbitrator" is used in connection with a third party who is selected for a longer period of time. He is seldom selected for a term longer than the duration of the contract, although he may be re-selected for succeeding contracts. Sometimes he is selected for a term shorter than the life of the contract, such as a six month term.⁹

"Precedent" shall be defined as "the force which is given prior decisions."¹⁰ The same connotation shall be applied to the term "stare decisis." This distinction shall be noted in both the common law and the arbitration process.

The method employed in the compilation of this thesis was exclusively that of research. Periodicals were consulted, whether popular, professional, legal, or governmental. Books were of a lesser value. This is so because the authors of books do not treat of the subject of this thesis directly but only in an indirect manner. Therefore, in order to secure the greatest amount of original information, the periodicals have been relied upon most heavily.

⁸ William E. Simkin, and Van Dusen Kennedy, Arbitration of Grievances, U. S. Department of Labor, Washington, 1946, 4.

⁹ Ibid., 4.

¹⁰ Frank Elkouri, "The Precedential Force of Labor Arbitration Awards," Labor Law Journal, I, December, 1950, 1187.

CHAPTER II

THE BACKGROUND OF LABOR ARBITRATION

While arbitration may be said to have gained its greatest popularity within the last twenty years, that is not to say that it was unknown to previous generations. Indeed, as far back as the thirteenth century we discover its use. For Bracton, in his notebook, reports one case in the year 1224, another in 1231, and a third in 1233. These cases in no way indicate that there was anything novel about them. Though they are relatively incomplete as to an indication of procedure, they do state that it was necessary to prove the "conventions," or submissions, or agreement by which they "put themselves upon an arbitrement."¹

In 1609, Lord Coke is said to have displayed judicial hostility to this method of settling disputes. Updegraff and McCoy believe that it is likely that he did not approve of settling disputes outside of the courts.² He held

that though one may be bound to stand to the arbitrement yet he may countermand the arbitrator...as a man cannot by his own act make such an authority, power, or warrant, not countermandable, which by law and its own proper nature is countermandable.³

This was clearly but a dictum since the authorities had given an award and

¹ Updegraff and McCoy, Arbitration, 5.

² Ibid., 6.

³ Vynior's Case, 4 Coke 302, Trinity Term, 7 Jac. 1 (1609).

the arbitrational proceedings were completed. Nevertheless, it was promptly accepted as a correct statement of law by the judges of the Court. It would appear that the learned judge, in this declaration, was referring to the law of agency, where the power of revocation is ordinarily inherent in the person creating the power. ⁴

The colonists, when they came over to the New World, brought with them "English common law and its fellow-traveler, arbitration." ⁵ As early as 1644, the General Court of the Colony of Connecticut is seen to have advocated the settling of controversies by this means. The New Haven Town Records of 1649-1662 contains records of how, in 1651, the Court ordered one Mr. Goodanhouse and his farmer to arbitrate their differences as to whether or not the farmer was overselling Mr. Goodanhouse's hay and under-feeding his cattle. In 1652, two neighbors, Mr. Judson and Mr. Caffinch, appearing before the Court, were ordered to refer all differences concerning matters of damage between them to arbitration and to stand by the arbitrator's award. ⁶ Similar cases appear on the records infrequently.

However, the earliest wage arbitration in the United States did not appear on record until 1865. This case involved the iron puddlers of Pittsburgh. The awards presented these workers with a fairly substantial increase in wage rates and laid the foundation for the peaceable settlement

⁴ Updegraff and McCoy, Arbitration, 5.

⁵ Fred Kent, "Pioneers in American Arbitration," New York University Law Quarterly Review, XVII, May, 1940, 501.

⁶ Ibid.

of later disputes. ⁷ The shoe workers of Lynn, Massachusetts, are reported to have arbitrated a dispute in 1870.

The year 1886 found Massachusetts establishing a State Board of conciliation and arbitration. This board enjoyed a very successful career both in conciliating disputes and in prevailing upon disputants to submit voluntarily to arbitration. Unfortunately, the early reports of the work of this Board do not give sufficiently full details of the results in individual cases. ⁸

The Bureau of Labor Statistics discloses that between 1880 and 1890, bricklayers in New York, Boston, and Chicago entered into arbitration agreements with the associations of their employers, which agreements continued in effect almost to 1900. ⁹ The Amalgamated Association of Street and Electric Railway Employees is shown to have had its present arbitration policy already well developed at this time, and local unions of several other internationals are seen to have secured agreements providing for some sort of arbitration of disputes arising during their continuance by the turn of the twentieth century.

Thus, prior to 1915, records uncover twenty-eight arbitrations affecting industrial concerns, four of which were concerned with street railways, while twenty-two were in connection with steam railroads. The

⁷ "Results of Arbitration Cases Involving Wages and Hours, 1865-1929," Monthly Labor Review, XXIX, November, 1929, 1054.

⁸ Ibid.

⁹ Eli L. Oliver, "Arbitration of Labor Disputes," University of Pennsylvania Law Review, LXXXIII, December, 1934, 213.

latter arose almost entirely under the Erdman Act of 1898 and the Newlands Act of 1913. These acts represented the first attempt of the federal government to provide machinery for the settlement of labor disputes. ¹⁰

The Erdman Act of 1898 came into being in order to repeal the Act of 1888. The latter provided, among other things, for voluntary boards of arbitration or commissions for settling controversies between railroad corporations and other common carriers engaged in interstate and territorial transportation of property or passengers and their employees. Transport workers were the ones to whom the Erdman Act specifically applied. When a dispute was threatened, the Chairman of the Interstate Commerce Commission and the United States Commissioner of Labor, on the application of either party, were enjoined to make an attempt to resolve the dispute by mediation and conciliation. If this failed, then it was the duty of the mediators to attempt to have the case brought to arbitration. If arbitration was acceptable, a board of arbitration consisting of three was to be formed. One member was to represent one party, another the conflicting party, and the third was to be nominated by the first two, or the two Commissioners if this proved unsatisfactory. The award was to be regarded as binding. The awards were to remain in force for one year. It was made unlawful for the carriers to discharge employees and for employees or organizations to engage in strikes during the pendency of arbitration under the act. For three months after an award was rendered, no employee could be discharged

¹⁰ Ibid. The Erdman Act marks the real beginning of arbitration in the railroad industry.

nor could he quit, without thirty days notice. ¹¹ It was directed that each award should continue in operation for at least one year, and that no new arbitration should take place on the subject during that time. In all, during the duration of the act, only twelve cases were submitted to the arbitration machinery. ¹²

A note of interest is that every railroad arbitration before World War I in its award granted some increase to all or part of the workers concerned.

In some instances the increases were very slight; in others, as in the eastern engineers case of 1912, some employees received increases as high as fifty-two per cent, others received no advance at all. In only four per cent of the railroad arbitration cases was the subject of hours a serious point of controversy and in all of these some reduction in hours was granted. ¹³

Of the industrial arbitrations before the first great war, the anthracite coal case of 1903 was the most important. The board in this case was appointed by the President of the United States after a long and bitter conflict. ¹⁴ The decision of the board gave a substantial increase in wage rates, amounting to ten per cent in the case of contract miners.

Three groups especially contributed to the development of arbitration after 1900. Here we include those in the printing trade, the needle trade,

¹¹ Dale Yoder, ed., Prentice-Hall Labor Course, New York, 1951, 3013.

¹² Edgar S. Furniss, Labor Problems, New York, 1925, 512.

¹³ "Results of Arbitration Cases," Monthly Labor Review, XXIX, 1055.

¹⁴ Lapp, Labor Arbitration, 7.

and the railway industry. Action taken by the International Typographical Union, in its 1900 conventions, led to the conclusion of an arbitration agreement in 1901 between the union and the American Newspaper Publishers' Association. E. L. Oliver goes on to say that the strike of clothing workers in the Hart, Schaffner, and Marx factory in Chicago, in 1910, culminated in the signing of an arbitration agreement covering that establishment, and began the now extensive use of arbitration for settling disputes in the needle trades. ¹⁵

During World War I arbitration of labor disputes increased rapidly. This was in part the continuation of a movement already under way before the war. Still the war did not impede the movement, but gave it added momentum. The fact was recognized that there should be no strikes or lockouts to interrupt war-time production. Yet the cost of living was mounting so that wage increases were essential. Arbitration afforded a logical answer to the difficulty. The close of the war came in 1918, at which time the federal agencies withdrew their control over private industry, although living costs and industrial activity continued to climb until 1921. Three outstanding arbitration cases are recorded in 1920--the bituminous coal case, the anthracite coal case, and Decision Number Two of the United States Railroad Labor Board. ¹⁶

The award in the bituminous coal case granted substantial increases in

¹⁵ Oliver, "Arbitration of Labor Disputes," U. Pa. L. R., LXXXIII, 214.

¹⁶ "Results of Arbitration Cases," Monthly Labor Review, XXIX, 1056.

wages, amounting to twenty-four cents a ton for tonnage workers, one dollar a day for certain other classes of labor, and twenty per cent for still other classes. The anthracite case also resulted in wage increases but apparently much less substantial ones than in the bituminous case and much less satisfactory to the miners concerned. Decision Number Two of the Railroad Labor Board, represented the first major activity of that board. The case affected almost all classes of steam railroad employees and the award of the board granted increases of from five to eighteen cents per hour. 17

The year 1920 also saw the enactment of a modern arbitration law in the State of New York. This was the first of its kind in the United States. This law, asserts Frances Kellor, possessed the unusual features of looking forward instead of backward, and of enabling parties in dispute to control future disputes as well as to settle existing disputes. The author goes on to say that it was little "dreamed in 1920 that under this and subsequent laws of a similar nature, arbitration would evolve into wide flunt systems of arbitration." 18

A peculiar situation came into being in 1921 with the general collapse of business. It now became the employer's turn to call upon arbitration to reduce wages and to increase hours. For the most part the employees were

17 Ibid.

18 Frances Kellor, American Arbitration, New York, 1948, 11. This law was followed in 1925 by the United States Arbitration Act and by similar laws in the states of Arizona, California, Connecticut, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

put on the defensive, that is they tried to retain the hard-earned quarter won by them in previous years. New demands by workers were out of the question.

The Bureau of Labor Statistics has made an incomplete tabulation of arbitration decisions in the United States that may prove of service in this regard. It shows fifty-four decisions being handed down from 1865 to 1914, ninety-eight from 1915 to 1920, and two hundred seventy-one awards from 1921 to 1929. ¹⁹ The Bureau's purpose in this study was such as to exclude many decisions so that only a fraction of the awards are presented. However, the increase is of some significance since it provides a fair indication as to the increased reliance on arbitration.

With the expansion of collective bargaining agreements following the enactment of the National Industrial Recovery Act of 1933, requests for labor arbitration facilities became a frequent occurrence. ²⁰ Especially after 1935, with the acceptance of the Wagner Act provision that the employer must bargain collectively, has there been a flurry of arbitration proceedings. The Taft-Hartley Act of 1947 enlarged on this when it stated that the labor representative must also bargain collectively. ²¹

The Taft-Hartley Act is the latest instance in the history of labor

¹⁹ "Results of Arbitration Cases," Monthly Labor Review, XXIX, 1053.

²⁰ Kellor, American Arbitration, 84. This act was subsequently declared unconstitutional.

²¹ The Wagner Act is officially entitled the National Labor Relations Act of 1935, while the Taft-Hartley Act is properly known as the Labor Management Relations Act of 1947.

relations which shows the desire for and the steady growth of orderly procedure. This is another way of saying that the imposition of arbitrary demands through expensive economic tests of strength submitted to a more logical solution in the form of a relatively inexpensive and orderly procedure, namely arbitration. Arbitration's flexibility proved more advantageous than rigid litigation. Its swiftness had more appeal than long court trials, especially since large amounts of money could be saved. Economic coercion, the only other alternative to the courts before arbitration, was favored by but a few. Arbitration provided a welcome relief; where disputes are arbitrated, the parties continue at work. In this way, no wages are lost, no production schedule is disrupted, and, perhaps most important, no public disturbance is created to bring criticism upon either side. 22

Arbitration creates a friendly atmosphere for the settlement of disputes and paves the way for the continuance and betterment of business relations. While the courtroom atmosphere almost inevitably leads to animosity between the parties, the voluntary submission to arbitration and the informal proceedings create good will among the disputants and an improved basis for subsequent business relationships. 23

This sentiment is echoed by Harry Platt who regards arbitration as a process which insures speedy and final disposition of all sorts of griev-

22 Updegraff and McCoy, Arbitration, 19. The furor created by the railroad switchmen's strike in December, 1950, provides recent evidence as to the effect of economic coercion on the public.

23 "Arbitration--Vital Tool for Lawyers," Connecticut Bar Journal, XXI, December, 1947, 464.

ances, and which is so effective in labor disputes that its use is "a practical and social necessity." ²⁴ A. C. Lappin further substantiates this belief in writing that arbitration does not engender hostility or stress technicalities, but rather is simple, plain, and business-like with its whole effort being directed toward ascertaining the truth. ²⁵

Still others can be cited who believe the same to be true. Jesse Freidin states that the reasons for the creation of arbitration would include simplicity and informality of procedure, speed, the fact that awards are responsive in most instances to fairness, common sense, and the force of the merits of the particular controversy, and lastly, its finality. ²⁶ Rita Morgan feels that simplicity and informality constitute the main characteristics of the arbitration procedure. ²⁷ Harold Lusk, in 1932, recognized that informal proceedings make for speed. ²⁸

It should be evident therefore, from the history of arbitration, that it was long in being accepted, and that even today some regard it skeptically. It is most difficult, however, for its critics to deny its ability

²⁴ Harry H. Platt, "The Arbitration Process in the Settlement of Labor Disputes," Journal of the American Judicature Society, XXXI, August, 1947, 60.

²⁵ A. C. Lappin, "The Case of Arbitration v. Litigation," Commercial Law Journal, XXXIX, April, 1934, 198.

²⁶ Emanuel Stein, ed., Proceedings of New York University First Annual Conference on Labor, New York, 1948, 233.

²⁷ Rita Morgan, Arbitration in the Men's Clothing Industry in New York City, New York, 1940, 37.

²⁸ Harold F. Lusk, "Arbitration of Business Disputes," American Law School Review, VII, December, 1932, 651.

to repair breaks between employer and employee without leaving scars on the disputants. Moses Grossman summarizes this point quite adequately.

The superiority of justice through arbitration is reflected not only in the speed in which the controversy is settled but also in the attitude of the parties towards one another at the close of the affair. The atmosphere of the court is the atmosphere of war. Litigants who enter with an honest difference leave as sworn enemies. The informality of arbitration, the friendly attitude of the tribunal, constitutes an agreeable contrast to the austerity and too often, the crotchety irritability of the judge. Lawyers 'tricks' based in many cases on obsolete rules and technicalities, cause a litigant to believe that the court has helped his opponent to 'put one over' on him. ²⁹

Add to this Lappin's view that arbitration avoids confusion of witnesses, and unreasonable 'demands for impossible "yes" or "no" answers. He asserts that, in arbitration, there is no question regarding jurisdiction for the submission accepts jurisdiction; there is no dramatic appeal to secure a decision on law and eloquence rather than on justice and equity. ³⁰

The opinions here cited reflect but a few of the almost unanimous belief that arbitration was, is, and should be a swift, simple, flexible, informal and inexpensive process. Here we note the belief that these are basic requirements and cannot be taken away. To deprive arbitration of these would destroy its effectiveness.

²⁹ Moses H. Grossman, "Arbitration and the Lawyer," New York University Law Quarterly Review, XVII, May, 1940, 511.

³⁰ Lappin, "The Case of Arbitration v. Litigation," Commercial Law Journal, XXXIX, 198.

Yet, the history of arbitration shows us more than the mere facts that these elements are essential. The fact that the arbitration process has been a spasmodic one is also brought out. For arbitration has not really come of age until recent years. Until the time when collective bargaining was granted legal recognition, arbitration was comparatively slow in developing itself. ³¹ But the attention given to arbitration after the enactment of the Wagner Act has also focused the light upon a glaring weakness in the process. That vulnerable point is its procedure. For being a comparatively new thing, arbitration has not had the time to formulate a definite procedure. It is without the experience and matured wisdom that the common law possesses. It is still groping for the right course.

³¹ The Wagner Act made universal the right to organize and to bargain collectively with employers.

CHAPTER III

THE DEVELOPMENT OF PRECEDENT IN COMMON LAW

It is but proper that any attempt to arrive at a determination of the worth of precedent in labor arbitration be preceded with an inquiry into the development of precedent in common law. A study of the historical advance of the common law will facilitate an understanding of the views propounded by those who compare arbitration to common law, and employ such a comparison to deduce conclusions as to the advisability of precedent being carried over into arbitration. All too often, assertions are made concerning the common law, and the import of precedent therein, which have no justification.

George Crabbe furnishes a brief observation in his A History of English Law as to the working definition of common law in stating:

What is called the common law consists of a collection of customs and maxims, which derive their binding power, and the force of laws, from long and immemorial usage, coupled with the express sanction, or the tacit consent of the legislature. ¹

This opinion is reflected by Theodore Plucknett who remarks that the common law itself, in its ultimate origin, was the custom of the King's Courts. He discloses that the regular routine which they developed in the administration of justice became settled and known, and therefore, served as the basis upon which people could forecast with some certainty the

¹ George Crabbe, A History of the English Law, London, 1829, 1.

future decisions of the Courts. ² From earliest times, therefore, there was some regard accorded previous decisions, although, in all probability, the reason for this course of action was a desire for administrative ease. The English Court of Common Pleas, which was prominent in the twelfth century, further gave encouragement to the development of a routine to handle business.

This is not to say, however, that there was anything even remotely resembling the modern principle of precedent, even by the twelfth century. There was, rather, a mere tendency to establish a procedure and perhaps to adopt a few substantive principles which, taken together, constituted the custom of the Court. ³

After the Court of Common Pleas had already been functioning for eighty years, Bracton came forward with his treatise. This work, commonly referred to as Bracton's Notebook, made extensive use of cases. But there is nothing to warrant the assumption that he regarded them as positively binding on the judges in similar cases arising later. ⁴ The very first page of Bracton's treatise reveals that he considered the bench of his day to be much inferior to its predecessors. He asserts that they were foolish and ignorant, and had assumed the judgement seat before they had learned the law. Their fancy, Bracton goes on, decides cases rather than rules.

² Theodore F. T. Plucknett, A Concise History of the Common Law, Rochester, 1929, 302.

³ Ibid.

⁴ Sir Frederick Pollock, A First Book of Jurisprudence, London, 1918, 321.

Consequently, his book is an endeavor to bring the law back to its ancient principles. He would look "largely to the decisions of a previous generation of upright judges coupled with his private opinions." ⁵ This, he felt, would be the best method of obtaining accuracy and true judgments. Cases are carefully selected because they illustrate what he believes the law ought to be and not because they have any binding authority. He thus used cases, not on their authority as source of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions which he deemed sound. ⁶

An impressive official position was the means through which Bracton was able to get access to the Plea Rolls, a feat no other lawyer could perform at that time. He worked with the originals and since there were no duplicates, he made a copy for his own convenience.

He clearly was the only lawyer of his day who chose to exert a good deal of court influence in order to obtain the loan of numerous Plea Rolls, and who was ready to devote immense pains and labor searching hundredweights of manuscripts and having his discoveries copied in a very substantial volume. ⁷

One cannot, therefore, assume that Bracton's use of case law was any part of contemporary legal thought. On the contrary, he had devised a novel manner of undertaking research into the present and former condition of the law, namely the search of the Plea Rolls, which was in his time indeed a new

⁵ Plucknett, History of Common Law, 303.

⁶ Ibid.

⁷ Ibid.

discovery. Bracton may then be regarded as an exception to what had gone before and what came after his times.⁸

Indirectly, though, Bracton's use of cases may have interested his contemporaries and succeeding generations, by prompting other lawyers to collect records of cases when they had the opportunity. The rise of the Year Books may have been due to his initial venture. These were composed of the discussions in Court, and with the growth of scientific pleading, became superior for practical purposes to the plain transcripts of the record which Bracton used.

The reports give "not so much decisions as discussions on the question what pleas will be best suited to raise the issues on which the case is turned."⁹ Quotations from memory are a general occurrence and the names of the parties involved may or may not be listed. Yet, when a new or significant point is raised, the Court is fully conscious that its decisions may start a stream of other decisions in a particular direction. In an early Year Book, we find counsel (Herle) reminding the bench "that the judgment to be given by you will hereafter be an authority in every 'quare non admisit' in England."¹⁰ In 1305 Justice Hengham ordered a party to use a particular procedure and to "consider this henceforth as a general

⁸ John Chipman Gray, The Nature and Sources of the Law, New York, 1948, 212.

⁹ William Searle Holdsworth, Some Lessons from Our Legal History, New York, 1928, 11.

¹⁰ Pollock, Jurisprudence, 321, citing Herle, Year Book.

rule." 11 In 1310 Chief Justice Bereford observed that, "by a decision on this avowry we shall make a law throughout the land." 12

Even such striking testimony, however, cannot be thought of as evidence of the existence of a case law. This is valid even in the Year Books of the fifteenth century. Chief Justice Prisot in 1454 presents the nearest approach to such a concept:

If we have to pay attention to the opinions of one or two judges which are contradictory to many other judgments by many honorable judges in the opposite sense, it would be a strange situation, considering that the judges who adjudged the matter in ancient times were nearer to the making of the statute than we are, and had more knowledge of it...And moreover if this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the younger apprentices who study the Year Book, for they would never have confidence in their books, if we were to adjudge the contrary of what has been so often adjudged in the Books. 13

Here is a faint foreshadowing of a more novel spirit. Chief Justice Prisot maintains that there is a balance of authority in favor of his views. But the most salient point in his words is that he regards even the decisions of many honorable judges as only persuasive; neither he nor the other lawyers who argued the case regarded themselves as bound by any of the decisions mentioned.

11 Plucknett, History of Common Law, 305, citing Hengham, Year Book.

12 Ibid., citing Bereford, Year Book, 1310.

13 Ibid., 306, citing Prisot, Year Book, 33 Henry VI, Michs. 17, fo. 41.

In the sixteenth century the Year Books gave way to the Reports⁴ made by named reporters. A difference in style may be noticed in the Reports, owing to changes in the legal structure. William Searle Holdsworth maintains, "it was not till the rise of the modern reports and the changes in procedure and pleading which made these reports in their modern form possible, that the authority of the decided cases could take its modern shape." ¹⁴ Thus, with the rise of written pleadings, settled by the advisers of the parties before they got into court, the report "turns upon the decisions of the issues so raised." ¹⁵

It is when we come to the time of Coke that we find the citation of precedents particularly common, and after the Restoration we discover a few rules judicially laid down to govern their use. Chief Justice Vaughan, in 1670, distinguished "dicta" from those parts of the judgment which form an integral part of it, although he admits that if a judge believes a previous case in accordance with another court is in error, he is not bound to follow it. ¹⁶

However, from the sixteenth to the latter part of the eighteenth century, the publication of reports depended on the individual initiative of lawyers. For there was no regular reporting of decisions of the Courts

¹⁴ William Searle Holdsworth, A History of English Law, London, 1923, II, 541.

¹⁵ Holdsworth, Lessons from Legal History, 12.

¹⁶ Flucknett, History of Common Law, 308, citing Vaughan in Cole v. Horton (1670), Vaughan, 360, 382.

until Durnford and East, in 1785, instituted the Term Reports of cases decided in the Court of King's Bench. 17

It was not until 1863 that the legal profession assumed some control over the reporting of cases, by the establishment of the Council of Law Reporting which publishes the quasi-official series of the Law Reports.

A note of caution must be sounded so that the assumption is not made that all lawyers favored the trend. This is not true. In fact, there were some who denied it as late as the end of the seventeenth century.

Blackstone states quite clearly the general principle that the judges must "abide by former precedents when the same points come up again in litigation," although he admits that a decision contrary to reason or divine law cannot stand. The reason, he says, is

as well to keep the scale of justice even and steady and not liable to waver with each new judge's opinion; as also because the law in that case solemnly declared and determined, what is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his own private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land. 18

Therefore, it may be stated that the modern rule, as expressed by Sir Frederick Pollock in the following quotation, was substantially in effect:

The decisions of an ordinary superior court are binding on all courts of inferior rank within the

17 Holdsworth, Lessons from Legal History, 12.

18 Gray, Nature and Sources of Law, 221, citing Blackstone.

same jurisdiction, and, though not absolutely binding on courts of coordinate authority nor on that court itself, will be followed in the absence of strong reasons to the contrary. 19

William Searle Holdsworth contributes some pertinent matter by indicating that not all the words used by the judge, still less all his reasons, are law when the binding force of judicial decisions is spoken of. He agrees with Sir Frederick Pollock that judicial authority belongs not the exact words used in the judgment, nor even to all the reasons given, but rather only to the principle recognized or applied as necessary grounds for the decision. Therefore, Holdsworth does not look for the court to ever impose dogmatic formulae on the common law. 20

The common law has thus evolved a wholly original system of developing the law.

It is the product of small changes and gradual adaptations made by a learned, self-governing profession, responsible only to itself. Founded originally, and dependent all through its history, on professional conventions, it has become something very much more than mere conventions--even as the eighteenth century conventions of the governing classes, on which the system of cabinet government is founded, have become an important part of the law of the constitution. 21

John Chapman Gray is quite candid insofar as a denial of absolutely binding prior decisions are concerned. He views precedents in the English law as having great weight, but not irresistible weight. By this he means

19 Pollock, Jurisprudence, 319.

20 Holdsworth, Lessons from Legal History, 17.

21 Ibid., 18.

decisions can be overruled or not followed. He stresses the fact that precedents in English law are to be generally followed, and that no rules have been, or ever can be laid down to determine the matter precisely. This indicates to him that "the laws in England is (sic) the creation of the judges, for they not only make precedents, but determine when the precedents are to be departed from." ²² He further states that no court in the United States, as in England, is absolutely bound by its own decisions.

A blind following of precedent in common law, professes Sir Frederick Pollock, will reduce the estimation of the common law to "the level of its more technical and less fruitful portions appear inscrutable." ²³ He alleges that while respect for authorities is just and necessary, if this is not accompanied by a due measure of intelligent criticism, the system will "tend to degenerate into mechanical slavery." ²⁴ A certain measure of common sense is essential.

Another who echoes the sentiment that precedents are not always absolutely binding is Sir John William Salmond. He divided the decisions into two groups: authoritative and persuasive. These were said to differ in the kind of influence exercised by each upon the future course of the administration of justice. The authoritative precedent was defined as one which judges "must" follow whether they approve of it or not; the persuasive

²² Gray, Nature and Sources of Law, 216.

²³ Sir Frederick Pollock, The Genius of the Common Law, New York, 1912, 92.

²⁴ Ibid., 113.

precedent, one which judges are under no obligation to follow, but which is to be taken into consideration and given such weight as its intrinsic merit seems to demand. Authoritative decisions are thought of as including the superior courts of justice in England; persuasive decisions include (1) foreign judgments; (2) decisions of superior courts in other portions of the British Empire; and (3) judicial dicta. ²⁵ Thus, even in England where the most extreme adherence is given to the doctrine of precedent, there can be found a large body of decisions with persuasive value only.

That this doctrine is even more flexible in American than in England is demonstrated by Robert von Moschzisker. While referring to the belief that "stare decisis" is founded on the premise that certainty in law is preferable to reason and correct legal principles, Moschzisker avowed:

If the rule demanded absolutely rigid adherence to precedents (as in the English House of Lords), then there might be good ground for the persistence among the uninformed of the erroneous idea just referred to, but the proper American conception comprehends "stare decisis" as a flexible doctrine, under which the degree of control to be allowed a prior judicial determination depends largely on the nature of the question at issue, and perhaps somewhat on the attitude of the individual participating judges. ²⁶

He also speaks of the situation in which precedent should be departed from:

²⁵ Sir John William Salmond, Jurisprudence, 7th ed., London, 1924, 191

²⁶ Robert von Moschzisker, "Stare Decisis in Courts of Last Resort", Harvard Law Review, XXXVII, 1944, 409.

Therefore, except in the classes of cases which demand strict adherence to precedent, when a court is faced with an ancient decision, rendered under radically different conditions of society than those of today, and when it is sought to have this ancient decision control present-day conditions, even though the attending facts in the two controversies be alike, still there is nothing in the doctrine of "stare decisis" to prevent a departure from the earlier decision and (in the absence of a legislative enactment covering the matter) the restatement of the governing rule there laid down, or acted on, to meet the change in the life of the people to serve whose best interests it was originally provoked. 27

Professor Shartel has emphasized that precedents are not self-effectuating, but that they control only to the extent that they are accepted as binding by judges in later cases, and that varying force is attached to different kinds of precedent. He indicates several respects in which the variation in the weight of precedent is apparent. Here he lists differences: (1) as regards the place and court in which the precedent is cited (so that a decision of the supreme court of state X has more weight in state X than in state Y); (2) as regards the character of the judicial statement (thus, a unanimous opinion has more weight than a divided one); (3) as regards the scope of acceptance of the view (one supported by general authority would be more forceful); (4) as regards age and confirmation in later cases; and (5) as regards the subject matter involved in the previous decision. 28

An apt summary of the American doctrine of "stare decisis" by

27 Ibid., 418.

28 Burke Shartel, Our Legal System and How It Operates, Ann Arbor, 1947, Ch. 7.

Chamberlain also helps to clarify the issue:

A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority of binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases where "the very point" is again in controversy; but the degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary and inflexible. 29

From the foregoing matter, it is clear that "stare decisis" in common law was not an immediate occurrence. That is to say, it did not simply spring up and take root. Rather, it resulted through the diligent efforts of many men in many centuries. The pieces were put together and, at length, the modern doctrine of precedent in common law unfurled itself.

It is desirable to re-emphasize here the fact that precedent, as applied to common law, was not, and is not an inflexible process that requires strict adherence at all times. Decisions are subdivided into authoritative (absolutely binding) and persuasive (great weight, but not absolutely binding), if we may reproduce the terms of Sir John Salmond. The latter category claims the majority of the cases, so that we may infer that the common law is generally concerned with precedent insofar as it means great weight and not absolutely binding.

²⁹ Elkouri, "The Precedential Force of Labor Arbitration Awards", Labor Law Journal, I, 1187, citing Chamberlain, The Doctrine of Stare Decisis, 19.

CHAPTER IV
 ARGUMENTS IN FAVOR OF THE USE OF PRECEDENT
 IN LABOR ARBITRATION

A recent study by Edgar Warren and Irving Bernstein has proved of value in demonstrating the manner in which precedent is regarded. These authors attempted to accumulate statistical information on labor arbitration through the medium of a questionnaire sent to a national cross section of experienced people. This questionnaire, while drawn to permit "yes" or "no" answers, also urged the participants to append remarks or qualifications. All consulted were notified that their replies were individually confidential and that they might leave unanswered questions which they did not feel qualified to answer. The distribution of questionnaires is shown in the following table. ¹

TABLE I
 DISTRIBUTION OF QUESTIONNAIRES

PARTICIPANT	SENT	RETURNED	PER CENT RETURNED
MANAGEMENT	538	176	33
UNIONS	772	111	15
ARBITRATORS	653	238	36
TOTAL	1963	528	27

¹ Edgar L. Warren and Irving Bernstein, "A Profile of Labor Arbitration," LA, XVI, 1951, 307 (I).

More than one-fourth of those to whom forms were sent replied. The arbitrators and management appear to have expressed approximately equal interest in the project, while unions trailed far behind.

The management group consisted of one-hundred thirty-three employers, and forty-three employer counsels, consultants, and bargaining associations. These were situated in twenty-nine states and the District of Columbia. Most important industrial areas were represented. Excluded were such dubious fields as agriculture, finance, and government. One hundred employers had one thousand or more employees while the remainder had fewer than that number. ²

Union representatives of twenty A. F. L. (American Federation of Labor), twenty-five C. I. O. (Congress of Industrial Organizations), and eight independent unions took part. Thirteen union lawyers and consultants are also included here. Replies were received from twenty-four states and the District of Columbia. Excepted were the agricultural areas. ³ Arbitrators replied from thirty-four states and the District of Columbia. At least twenty-three are permanent umpires; a larger number hear cases on an "ad hoc" basis. ⁴

Having asserted these basic facts, Warren and Bernstein then present the results to the question, asking how much weight should be given to precedents in labor arbitration.

² Ibid.

³ Ibid.

⁴ Ibid., 307 (II).

TABLE II

WEIGHT TO BE GIVEN PRECEDENTS IN LABOR ARBITRATION

PARTICIPANT	DECISIVE WEIGHT	SOME WEIGHT	NO WEIGHT
MANAGEMENT	7%	66%	27%
UNIONS	19	59	22
ARBITRATORS	2	77	21
TOTAL	7	70	23

The groups agree that the grievance arbitrator should give some weight to precedents, but only a small per cent seem to feel that they should warrant decisive weight. A larger minority of each would throw them out completely rather than take them as decisive. ⁵

Joseph Brandschain distinguishes between the effect precedent will have on the same parties and the effect it will have on other parties. He believes that an arbitrator's award is binding on the parties as to the immediate dispute under arbitration and as precedent in future disputes that may be arbitrated between them. It is his firm conviction that such awards are also important in influencing decisions of arbitrators in issues arising subsequently between other employers and unions as well. ⁶

This view is concurred in by Whitley McCoy. In an opinion accompanying an award he remarked that an arbitration award is binding in subsequent arbitration proceedings between the same parties if the earlier award

⁵ Ibid., 307 (XIII).

⁶ Joseph Brandschain, "Arbitration in Labor Relations and the Lawyer," Pennsylvania Bar Association Quarterly, XVII, October, 1945, 99.

involved an interpretation of identical contract provisions. A decision, he continues, affecting one employer and union is not binding on another company and union. Such awards, for him, are entitled to as much but no more weight than "their inherent logic, common sense, and reasonableness dictate." ⁷

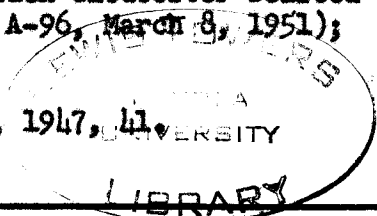
Another arbitrator, Saul Wallen, accepts substantially the same view in another case. He reasons that because of the unstabilizing effect of different interpretations of the same contract, the interpretation rendered by one arbitrator should generally be followed by a second arbitrator "if there is any ground at all for arriving at the same conclusions." ⁸ But a prior award is not binding on a second arbitrator and may be ignored, especially if he finds no justification for the logic of the prior decision.

The benefits which can be gathered for "reasoned opinions" in serving as "precedents for settling future disputes" were realized by an emergency board appointed under the Railway Labor Act on July 18, 1947. ⁹ The board attributed the large accumulation of grievances against certain railroads chiefly to the fact that the National Railroad Adjustment Board hands down awards without fortifying them with reasoned opinions. It was the belief of

⁷ In re Pan American Refining Corporation (Texas City, Texas) and Oil Workers International Union, Local 449 (CIO Griev. Nos. 147, 148, Case No. 47 A-761, March 9, 1948); see LA, IX, 1948, 731.

⁸ In re Gordon-Pew Fisheries Co., Cape Ann Fisheries, Inc., and Mariners Fish Co. and International Longshoremen's Association Gloucester Seafood Workers' Union, (Service 1572-1 (AFL) Case No. 51 A-96, March 8, 1951); see LA, XVI, 1951, 365.

⁹ "Precedent Value of Arbitration Awards," LRRM, XX, 1947, 41.



the emergency board that the inauguration of such a procedure would be of inestimable value to the representatives of both employer and employee charged with the responsibility of administering the working agreement.

The Federal Mediation and Conciliation Service urged that the parties give the arbitrator permission to publish the awards as frequently as they may find it possible. ¹⁰ The implication was that the publication of awards would prevent the recurrence of similar disputes. Thus, an indirect form of precedent would be established.

In 1948, the American Arbitration Association and the National Academy of Arbitrators arranged a code of ethics and procedural standards for labor-management arbitration. This code has been approved by the Federal Mediation and Conciliation Service and includes the following passage:

The arbitrator is expected to exercise his own best judgment. He is not required except by specific agreement to follow precedent. He should not, however, prevent the parties from presenting the decisions of other arbitrators in support of their positions. When the parties have selected a continuing arbitrator, it is generally recognized that he may establish or follow precedents for the same parties. ¹¹

This is a far cry from the rules of arbitration as formulated by Frances Kellor in 1931. It was then declared that the arbitrators were not required to, nor could they, under the rules, take into consideration the

¹⁰ "Arbitration Facilities of the Mediation Service," LA, X, 1948, 972.

¹¹ "Code of Ethics and Procedural Standards for Labor-Management Arbitration," LA, XV, 1950, 961; see also "Arbitration Sets Its Standards for Conduct in Labor-Management Arbitration," Arb. J., N. S. VI, 1951, 6.

decisions of any other arbitrators with respect to the merits of the controversy. Kellor disclosed that the lack of reasoning was responsible for most awards being useless as precedents. ¹²

Several authors, in one way or another, have observed that a "common law" of arbitration is taking root insofar as labor disputes are concerned. George M. Taylor, in discussing the arbitration procedure in the hosiery industry, states that a body of common law has already developed therein. ¹³ He thereby implies that precedent has a real place in the hosiery industry and that it has been of aid in the past in fostering more amicable working relations between the employer and employee. Lloyd Garrison has also suggested that there is value in the building up of a body of decisions on common problems in a particular industry. ¹⁴

However, these are not the only ones to recognize such a growth of "common law." An article in the Illinois Law Review of January, 1949, also regards such a process as in the making which will enable businessmen and union leaders as well as arbitrators to handle cases more efficiently. The same essay deems previous decisions as of more substance than the mere personal predilections of arbitrators. Yet, it is also presumed that "stare decisis" can play but a limited role in arbitration cases. ¹⁵

¹² Frances Kellor, Code of Arbitration Practice and Procedure of the American Arbitration Tribunal, Chicago, 1931, 22.

¹³ "Arbitration as a Substitute for Strikes," LRRM, IA, 1938, 913.

¹⁴ "New Labor Law's Effect on Arbitration," LRRM, XXI, 1948, 4.

¹⁵ "Discharge and Discipline Cases in Labor Arbitration," Illinois Law Review, XLIII, January, 1949, 850.

The thought continues with M. Herbert Syme who notes that a body of common law has arisen in not only the hosiery industry but also in the Mens' and Ladies' Garment Industry, the printing trades, railroad arbitration, and the mass transportation industry. But, he says, this is not slavish adherence to precedent. 16

Still another source echoes this sentiment.

Something resembling a "common law" of the principles and policies followed by the industry arbitrator (permanent) develops. Union and employer elements in the industry became acquainted with the arbitrator's decisions and, on the basis of these decisions settle similar problems directly without appealing to the impartial chairman. 17

Morton Singer has recently urged a similar course.

Until a common law has been developed in labor arbitration, where awards will truly reflect all that has been submitted to the hearing officer, and the precedent value of the award may be used to support a finding in a given set of facts, present-day criteria will, when used, be useful only on a case-to-case basis. 18

John Lapp also reflects this position. He contends that in industries of long arbitration experience, such as the Amalgamated Clothing Workers, the International Ladies' Garments Workers, the International Typographical Union, and the United Mine Workers, a body of settled law has been created, and therefore, the permanent arbitrators here concerned may be expected to

16 "Opinions and Awards--M. Herbert Syme's Views on the Role of Arbitration and Public Value of Opinions," LA, XV, 1951, 961.

17 "Industry Arbitration in the New York City Area," LRRM, XXI, 1948, 6.

18 Morton Singer, "Labor Arbitration: The Need for Universal Wage Criteria," Labor Law Journal, II, June, 1951, 434.

follow their own precedents. Yet, he voices another opinion with respect to temporary arbitrators and their use of "stare decisis." Here he states that prior decisions have some value, but it is the particular set of circumstances surrounding that one case that decides the issue. 19

There is no doctrine of "stare decisis" in arbitration according to Updegraff and McCoy who take the term to mean positive adherence to prior awards. Yet they regard previous well considered decisions, if presented, as having a persuasive force. Arbitration decisions and awards, when more completely collected, may

furnish a fund of information and illustrate a technique of approach to problems which should make them as useful logically to arbitrators and bargaining parties involved in the processes of labor relations decisions as are the law reports to judges and lawyers concerned about questions which confront them. 20

Corroboration in this appraisal is evident in the work of Simkin and Kennedy. For them, there is no hard and fast rules applying precedent to every case that arises. But

it is inevitable and desirable that decisions have some precedent value. Just as a clear-cut contract clause settles one issue for the life of the agreement, an arbitration decision on an issue susceptible to precedent may also remove that item from dispute for the life of the contract. 21

In continuing they stress the fact that stability of relationship is so

19 Lapp, Labor Arbitration, 174.

20 Updegraff and McCoy, Arbitration, I.

21 Simkin and Kennedy, U. S. Department of Labor, Arbitration of Grievances, Bulletin No. 82, 33.

important that the acceptance of some precedent value of decisions is almost essential. There are "enough new disputes arising during the life of an agreement without rehashing old ones that have been settled in principle by a third party." ²² This does not signify however, that the parties necessarily bind themselves to indefinite acceptance of the principles contained in an arbitrator's decision.

A typical representative of those who would give prior awards some weight, though not binding weight, is Jules Justin. He has deduced that the precedent value of an arbitrator's decisions lies in the persuasive force which they exert and which compels consideration. ²³ Prior awards which enunciate just and reasonable principles of conduct and contract interpretation command respect from an arbitrator as they do from the parties themselves. He claims that the considered judgment of one arbitrator cannot be lightly dismissed or ignored. When fortified by others, Justin asserts that such judgments warrant acceptance.

Though not controlling or authoritative, these judgments and principles exercise significant weight with another arbitrator. It is in this sense that prior decisions have value as precedents. Regarded in this light, reported cases can be made to serve both management and unions in the preparation and proof of the arbitration case. ²⁴

²² Ibid.

²³ Note the similarity of this and the thought of Sir John William Salmond on the place of precedent in common law.

²⁴ Jules Justin, "Arbitration--Precedent Value of Reported Awards," LRRM, XXI, 1948, 16.

Thus, he foresees a more harmonious industrial setup through the acceptance of previous decisions as being of some value.

Earlier decisions, reports Maxwell Copelof, point the way to what arbitrators have considered especially pertinent. They indicate how a case is likely to be settled if all relevant facts are substantially the same. In actual practice, he goes on, no two cases are identical. This situation then discloses that no previous arbitration award is binding upon any arbitrator. ²⁵ Once again we can see the view espoused in favor of some weight but not all-powerful weight for precedent.

Elmer Hilpert asserts that only a bold arbitrator will assume that he can derive no assistance from a reading of the opinions of his fellows. Mr. Hilpert stresses the fact that there is value in reading and comparing the decisions of numerous arbitrators in cases involving the same or closely related issues. He regards such research of the arbitration cases as not all unlike the greater part of the legal research presented in the ordinary law courts. In continuing, he argues that

Neither does the fact that arbitration decisions need to be scrupulously distinguished, because they are novel or because they arise under different contracts, between different unions and different companies, in widely separated areas, and in highly divergent industries, argue against the value of their comparative study. In much the same way, and in varying degrees in various areas of the law, judicial decisions are weighed, compared, distinguished, and cautiously applied

²⁵ Maxwell Copelof, Management-Union Arbitration, New York, 1948, 40.

to the very case at hand. ²⁶

He further suggests that the chief argument in favor of the comparative study of labor arbitration awards is the pragmatic one. The publication of selected arbitration awards is a going commercial concern which, of itself, is a very strong indication that their worth is recognized in practice.

Published opinions of arbitrators are more and more cited in support of one contention, or another, by both representatives of labor and representatives of management. Labor arbitrators resort increasingly for guidance to the published opinions of their brethren in distant parts. ²⁷

But, in summarizing, Mr. Hilpert holds that these previous decisions are, after all, only of persuasive value and are, by no means, final and binding.

The University of Canada Bar Review, in its November, 1947, issue, adjudges that, unless arbitrators can receive some aid from prior awards in similar cases, the prospects of achieving some measure of certainty and uniformity in labor-management relationships are quite poor. ²⁸ J. Noble Braden, in line with this, regards the addition of established procedure as an assurance of an impartial and expert administration of arbitration. ²⁹ Thus, he implied that such a course will bring about a final settlement of

²⁶ Elmer E. Hilpert, "Precedents in Labor Arbitration," Wash. ULQ, LXXI, Fall, 1949, 72.

²⁷ Ibid., 73.

²⁸ "Labor Relations--Arbitration--Functions of Management--Conditions for Successful Arbitration," U. of Canada Bar Review, XXV, Nov., 1948, 1017.

²⁹ J. Noble Braden, "Sound Rules and Administration in Arbitration," U. of Pennsylvania Law Review, LXXXIII, December, 1934, 193.

disputes more easily.

The Harvard Law Review of November, 1948, feels it is necessary to differentiate between intra-plant "stare decisis" and inter-plant "stare decisis." The former, since a permanent umpire is generally provided for, seems to be favorable to an adherence to precedent in order to avoid continued reexamination of disputed issues. It is believed that the moral force of the arbitrator's decision will be considerably weakened if his standards for decisions apparently varied from day to day. The article goes on to recognize that even here the way should be left open for any important modifying facts in future cases.³⁰ If a temporary arbitrator is employed, then it is reasoned that he ought to be under less compulsion to follow the decisions of other arbitrators than he would be to maintain consistency in his own application of a contract. The article further contends that it "ought ordinarily to be insufficient to outweigh the arguments of administrative economy in favor of resort to precedent."³¹

Returning to inter-plant "stare decisis," the article acknowledges that widely different industrial conditions may exist in the various plants. Nevertheless, a well developed inter-plant common law of grievance arbitration would have the effect of achieving predictability, and thereby minimizing the parties' fears of erratic decisions by the arbitrator. The

³⁰ "Case Law or 'Free Decision' in Grievance Arbitration," Harvard Law Review, LXII, November, 1948, 121.

³¹ Ibid.

article also calls attention to the traditional concept that justice may best be secured by the application of uniform rules which in turn calls for a body of generally applicable law. ³² The conclusion sounds a note of caution.

In most of the cases considered, the weight accorded to precedents drawn from other arbitration systems does not appear to have placed undesirable limits on the arbitrator's discretion. Nevertheless, it would seem that, if grievance arbitration is to remain responsive to the needs of the collective bargaining process, continuing emphasis must be given to the maintenance of flexibility rather than to the development of a comprehensive common law...More important, however, before applying a rule derived from an outside award, the arbitrator should be certain that it will provide an equitable solution in the particular case before him. While he may find the discussions of similar problems in other awards helpful in his decisional process, his written opinion should not rely heavily on cited awards or on unexplained rules, but should demonstrate that the decision was made because it was demanded by the equities of the case. ³³

Robert Satter is another who concurs with this train of thought. As he sees it, the arbitrator, like a judge, seeks precedents to guide him to a sound decision and "to justify before critical eyes the decision reached." ³⁴ Here again, we find the belief that precedent will guide and support rather than be the criteria itself for determining the case being contested.

³² Ibid., 123.

³³ Ibid., 125.

³⁴ Robert Satter, "Principles of Arbitration in Wage Rate Disputes," Industrial and Labor Relations Review, I, April, 1948, 369.

A definite contribution to the field of labor relations is the book that Harry Shulman and Neil Chamberlain have compiled. This work is composed of a series of arbitration cases and the resulting awards and opinions of the arbitrators. One opinion in particular is noteworthy. In it, Herbert Blumer, the arbitrator, furnishes some reasons as to the value of precedent in labor arbitration.

In the judgment of this arbitrator, aside from certain conditions, which will be shortly specified, it is only fair and reasonable to expect an arbitrator's decision to apply to subsequent cases of the same nature. Otherwise, a distinct injustice would be done. There would be an unwarranted financial expenditure in having to carry each case to arbitration--an expenditure that would bear heavily on the party least able to stand it. Further, the refusal to apply the arbitrator's decision to similar cases leaves unresolved and unsettled the general problem covered by the decision. The parties have a legitimate right to expect the decision to clarify and stabilize their relations. Consequently, to force a union to carry repeatedly to arbitration a type of case already decided is unfair and unjustifiable; a company that would engage in such a practice would be guilty of bad faith, unreasonable action, and improper labor relations. 35

Arbitrator Blumer then sets forth the circumstances under which it is proper and legitimate to question whether the decision of an arbitrator on a case should be carried over to other cases of the same nature. First, he realizes that an arbitrator may err badly in his judgment and make a decision which is manifestly unfair; also, the previous arbitration decision

35 Harry Shulman and Neil W. Chamberlain, Cases on Labor Relations, Brooklyn, 1949, 976, citing Herbert Blumer, arbitrator, Inland Steel Co. and United Steelworkers of America, Local 1010 (1944).

may have been made without the benefit of some important and relevant facts or considerations; and lastly, some new conditions may have arisen which clearly question the reasonableness of the prior award. ³⁶ Such circumstances show that precedent cannot be had in an absolutely-binding form.

Still another article by Jules Justin reveals that a perusal of the findings of previous arbitrators in other cases will help in sifting the material and relevant facts from the unessential ones. He declares that this practice will assist the parties concerned as well as the arbitrator.

An adamant position maintained by one party during the hearing sometimes gives way to a more conciliatory one, when confronted with the reasoning and conclusion of an arbitrator in another case. To the arbitrator, awards and opinions by his colleagues in the field on the same or related issues, provide a broader perspective of the problem at hand. A just determination by one arbitrator commands the respect and acceptance, by another as well as by the parties. ³⁷

John W. Taylor has written that there is good cause to consider prior awards. Negotiators of new contracts will, in his opinion, find in the content of awards many useful hints on avoiding the pitfalls in the language of agreements. Thus, forewarned as to previous interpretations of specific phrases by other arbitrators, the negotiators are also forearmed. He then proceeds to say that

Although it is frequently stated that precedents have no place in arbitration, few arbitrators would

³⁶ Ibid., 977.

³⁷ Jules Justin, "Arbitration: Proving Your Case," IA, X, 1948, 968.

object to obtaining hints in deciding a doubtful issue from other awards which appeared to be thoughtfully and fairly reasoned...Finally, the knowledge on the part of an arbitrator that his award will probably be widely read and studied operates as an inducement to make the award understandable to those who are not parties but for whom it may be useful. Many will testify that such discipline helps the arbitrator to clarify the issues in his own mind. 38

The same article quotes Theodore Kheel as stating that it is unlikely that arbitration awards will be considered judicial precedent in the same manner as a court decision. He anticipates that labor and management will turn to the awards merely to find out how an experienced man has solved a similar problem. Thus, they will use the experience, not the result. 39

A three man discussion presented to the National Academy of Arbitrators on January 20, 1950, found Jesse Freidin, while upholding the employer's point of view, remarking as follows:

If employers, and unions too, were not free to select or reject arbitrators, on the basis of principles or views embodied in earlier awards, they would be loathe to subject themselves to the ever larger risks which arbitration would then involve, and the system of arbitration would itself suffer. 40

Thus, Mr. Freidin presumes, as Mr. Kheel did, that an earnest study of prior awards will allow labor and management to become more acquainted with the

38 "Reporting of Labor Arbitration: Pro and Con," Arb. J., N. S. I, Winter, 1946, 422.

39 Ibid., 424.

40 "Status and Expendability of Arbitrators," LA, XIII, 1950, 1022.

reasoning, the philosophy of arbitrators, and hence, profit from this.

Even William H. McPherson, generally critical of precedent in labor arbitration, has a good word for it. He has stated that the following of precedent is to be expected in some cases. He ascertains that any arbitrator will normally wish to maintain consistency with his previous decisions involving the same parties. Similarly, an "ad hoc" arbitrator or a newly appointed "permanent" umpire will be influenced to a considerable extent by the decisions of his predecessors. ⁴¹ In this fashion, prior awards will lend guidance to the hesitant or inexperienced.

In a case concerning North American Aviation, Inc. and the United Automobile, Aircraft, and Agricultural Workers of America, Michael Komaroff concluded that it is desirable and conducive to good labor relations for decisions to have precedent value. Yet he perceives that the doctrine of "stare decisis" is of only limited application to labor arbitration. He has therefore decided that the interpretation given a contract by an arbitrator in an earlier arbitration proceeding, need not be binding on the second arbitrator in interpreting the same language of the contract. ⁴²

Frank Elkouri, in his discussion of the degree of force to be allotted to prior awards, has acutely analyzed the situation. The majority of the

⁴¹ William H. McPherson, "Should Labor Arbitration Play Follow-the-Leader?", Arb. J., N. S. IV, Autumn, 1949, 164.

⁴² In re North American Aviation, Inc., Downey Facility, (Los Angeles, Cal.) and United Automobile, Aircraft, and Agricultural Workers of America, Local 887 (CIO), (Grievance No. C1593, October 18, 1950); see LA, XV, 1950, 626.

cases are, for him, of persuasive value only; a small number are of binding force. Thus, he infers that arbitrators, with respect to the great majority of arbitration cases, may or may not follow previous decisions as they see fit. Such an interpretation, he opines, will prove a contribution to industrial peace. ⁴³

What then may be said of the case for the use of precedent in industrial arbitration as presented by its proponents?

By and large, it is a comparatively safe observation to profess that the majority of writers herein consulted are of the opinion that prior decisions be accorded persuasive force. That is to say, the consensus seems to favor previous decisions being given some degree of weight. As for precedent having a binding effect, none advocate this step. A few do affirm that circumstances may arise in which binding precedent is acceptable, but even here, there are limitations on its use. A use of binding precedent in all arbitration cases is not considered by any author.

⁴³ Elkouri, "The Precedential Force of Labor Arbitration Awards," Labor Law Journal, I, 1188.

CHAPTER V
ARGUMENTS AGAINST THE USE OF PRECEDENT
IN LABOR ARBITRATION

The opponents of the use of precedent in labor arbitration are not always as compromising as its advocates. Fear is quite often sensed in their writings. It is a fear that the arbitration process itself will suffer if precedent is encouraged. Consequently, harsh denunciations have been phrased by some of its more belligerent foes.

Industrial arbitrating, according to P. G. Phillips in 1933, was an undefined process differing from case to case. He viewed it as a rarity to find in a labor agreement any reference to previously worked-out rules of arbitration. ¹

Parker, Landon, and Kellor, in 1937, did not deviate from this concept of arbitration.

Nothing permanently attaches to the office (of temporary arbitrator) for precedents have no influence and arbitrators serve in that one case only. Each case is an entity in itself, depending upon neither analogy nor the reasoning in previous cases. ²

¹ Philip G. Phillips, "The Function of Arbitration in the Settlement of Industrial Disputes," Columbia Law Review, XXXIII, December, 1933, 1377.

² Franklin E. Parker, Jr., S. Whitney Landon, and Frances Kellor, "The Arbitrator," Arb. J., April, 1937, 160.

A. C. Lappin also presents an early opinion on the subject. Arbitration does not concern itself with any technicalities but rather seeks justice. It is, in his mind, not interested in ancient precedents and decisions, but only with the merits of the immediate matter. He quotes from Clarence Darrow that the law is generally behind because lawyers look to the past for their precedents and are governed by the dead.³ Lappin would not have this happen to arbitration.

The survey conducted by Warren and Bernstein revealed many interesting comments as to the place of "stare decisis." One arbitrator is said to have remarked that he shuddered at the thought that there should be a system of case law which arbitrators would be called upon to follow.⁴ Another arbitrator replied that it was a dangerous check on arbitration as a normal safety valve in labor relations to jam precedents down the throats of people. He also felt it would be difficult to convince workers that a certain precedent applied to them.⁵ Another arbitrator contended that the parties to the dispute do not expect the arbitrator to be a conglomeration of arbitrators; they take him and his particular ideas of arbitration.⁶

For Karl Ettinger, each case in arbitration is decided on its own

³ Lappin, "The Case of Arbitration v. Litigation," Commercial Law Journal, XXXIX, 199.

⁴ Warren and Bernstein, "A Profile of Labor Arbitration," LA, XVI, 307 (XIII).

⁵ Ibid.

⁶ Ibid.

merits, and decisions should not be unduly complicated by precedents, technicalities, and rituals. ⁷ Agreement in this is shown by David Cole, who regards precedents as a hindrance to the functioning of arbitration's flexibility. He believes a single error is vastly better than the perpetuation of error that would accompany the introduction of precepts. ⁸

It is difficult for Morton Singer to see how prior awards may be used to affect a particular case aside from demonstrating how a term is defined or used. He has stated that arguments based "on awards theretofore issued merely delay a hearing, and place an undue burden upon the hearing officer." ⁹ Precedent, for him, is limited and definitely not binding.

A withering assault on the use of precedent in arbitration has been rendered by Leo Cherne.

But precedent is anathema to arbitration. The judge decides with an eye to past decisions and the effect on future litigants; the arbitrator looks solely at the rights and wrongs of the parties before him. The effects of publishing domestic arbitration awards are inevitable and inevitably undesirable. The fact of the publication itself creates the effect and atmosphere of precedent. The arbitrators in each subsequent dispute are submitted to the continuous and frequently unconscious pressure to conform. A bad award--and there are such in both the courtroom and arbitration tribunal--will have the effect of stimulating other bad

⁷ Karl E. Ettinger, "The Public Relations Value of Arbitration," Arb. J., N. S. II, Winter, 1947, 305.

⁸ David L. Cole, "Fixed Criteria in Wage Rate Arbitration?", Arb. J., N.S. III, Fall, 1948, 174.

⁹ Morton Singer, "Labor Arbitration: Should It Be Formal or Informal?", Labor Law Journal, II, February, 1951, 90.

ones; a good one, by the weight of precedent may be applied where the subtleties of fact should urge a different award. 10

Thus, he would agree with Jesse Freidin's observation that awards are determined on the basis of fairness, common sense, and the particular merits of the controversy rather than the compulsion of an impersonal precedent or principal previously established in some other case. 11

Several authors, to strengthen their disapproval of precedent in arbitration, have resorted to a comparison between the courts and arbitration. Included here is P. H. Casselman who has written that courtroom justice rests greatly upon an accumulation of precedent whereas an arbitrator's decisions are based upon the specific facts of each case, disregarding past decisions. Traditions and conformity thus introduce an element of rigidity in the courtroom which he reasons may interfere with strict justice. Arbitration, being a more flexible and dynamic technique, must enjoy freedom from outmoded technicalities and precedents. Then the arbitrators will be enabled, so far as their wisdom permits, to render justice to both parties. 12

Aaron Levenstein continues the discussion on the differences between the courts and arbitration.

For the arbitrator knows very well that his decision is based on a hundred subtleties of economics, social

10 Leo Cherne, "Should Arbitration Awards Be Published?", Arb. J., N. S. I, Spring, 1946, 75.

11 Stein, ed., Proceedings, 233.

12 P. H. Casselman, "Voluntary Arbitration in a Democratic Society," Arb. J. N. S. I, Winter, 1946, 426.

philosophy, psychology, and pure hunch--all of which add up to his estimate of what will best further a continuing, more harmonious relationship between the contenders. He knows that he has been selected not merely because of his knowledge of precedents but because of the parties' confidence in his realism and his ability to find an answer which will leave both sides functioning. In fact, he is usually selected because of his personal intimacy with the parties' background, their trade practices, their psychology, the history and economics of their industry, and a feeling for what is likely to happen in the trade. None of these factors may be expressed in his decision--yet these are really the foundation stones of his findings. A cold reading of the award or an accompanying opinion can rarely reveal all the logic that led to the result. ¹³

From all this it follows, according to Levenstein, that any mechanical attempt to duplicate case reporting in the field of arbitration is deceptive. Thus, to all arbitrators, cases will have only a background value; they are never to be essential in his decision. The judge, however, regards them as his basic guideposts. ¹⁴ Several aspects cause a distinction between common law and arbitration in the eyes of Jules Justin. Common law is public, judicial. It follows "stare decisis," so that court declarations and judgments have authoritative weight as legal precedents in the determination of similar future cases. ¹⁵

¹³ Aaron Levenstein, "Some Obstacles to Reporting Labor Arbitration," Arb. J., N. S. I, Winter, 1946, 426.

¹⁴ Ibid.

¹⁵ Justin, "Arbitration: Precedent Value of Reported Awards," LRRM, XXI, 14. He overlooks the fact that common law decisions also have persuasive force.

Such is not the case with arbitration. Justin regards this to be a private, quasi-judicial process in which the arbitrator, although a judge, is limited, since his choice, jurisdiction, and authority are controlled by the parties. His decisions also are not subject to general court review, so that, if he is within his jurisdiction, the finality of his award will not be challenged. ¹⁶ Consequently, Justin asserts that the doctrine of "stare decisis" plays no part in the arbitration process. Arbitrators' decisions have no corresponding authority or force in the courts; they are not conclusive or binding on an arbitrator in subsequent cases. But they do have some persuasive value that cannot be neglected. ¹⁷

Mr. Herbert Syme points out that the arbitrator has not been selected because of his knowledge or ignorance of precedent. The parties have, rather, designated him because of their "confidence in him as a knowledgeable person; because they believe that he knows the facts of life, and that he will understand their problem and try to find a solution for it." ¹⁸ If after having examined the particular situation and having familiarized himself with all its intricacies, the arbitrator then analyzes an opinion by another arbitrator in an identical or a similar situation, Syme sees no harm in it. But,

¹⁶ Ibid.

¹⁷ See Chapter IV for additional information on this point.

¹⁸ "Opinions and Awards--M. Herbert Syme's View on Role of Arbitration and Public Value of Opinions," LA, XV, 959.

Arbitrators who wistfully hope to substitute precedent for ingenuity, resourcefulness, and knowledge are courting destruction. Advocates who seek to replace common sense and justice with specious precedent are impairing the arbitration process. Arbitration is constantly presenting new problems. The decision that was handed down yesterday and was perfectly fair may be found to be unworkable tomorrow. ¹⁹

This also is the position of Frances Kellor who has observed that the arbitrator need not be influenced by precedents established by the decisions of other arbitrators. Independent judgment should be exercised in arriving at a decision. ²⁰

The real issue in question, as K. S. Carlston would have it, is whether an award made between "different" parties, involving a "different" institution, and necessarily with a "different" history of labor-management relations and industrial environment can have any persuasive influence as a "right" solution of a conflict. He is convinced that the necessity of following precedent in our system of law grew out of the fact that our courts were engaged in developing and maintaining a set of consistent rules of action within the political institution--the organized political state. He feels that the same requirements of uniformity, consistency, and certainty may impel an arbitrator to maintain consistency with his previous decisions in cases involving the "same" parties, since then it is operating within the "same" institution, and engaged in developing sound rules of

¹⁹ Ibid., 960.

²⁰ Frances Kellor, "Standards of Practice for Arbitration," Arb. J., N. S. IV, 1949, 50.

action within that institution. 21

But the requirements of consistency loses its force, Carlston reasons, when the prior award is viewed from a different institutional background. No arbitration award can report all of the imponderables, all of the evidence considered by the arbitrator in reaching his decision. Yet if awards are to be taken into account, what has been excluded is of as much import as what has been included. Therefore, Carlston assumes the significance of a decision to lie "in the entirety of the context out of which the dispute arises and all the circumstances, explicit as well as implicit, considered by the arbitrator." 22

It will be remembered that William H. McPherson felt that giving some weight to precedent was perfectly permissible. 23 But he also notes that there are many dangers that will accompany precedent if it is inaugurated. To begin with, he argues that precedent would do much to formalize the arbitration process; arbitration would become legalistic. The parties would no longer be able to argue solely on the merits of the specific situation but would be compelled to hire experts to search through past awards. This would constitute an additional cost for the parties. Arbitrators also might be selected for their extensive knowledge of the established rules of labor agreement interpretations rather than their ability to understand and

21 K. S. Carlston, "Arbitration: An Institutional Procedure," Arb. J., N. S. IV, 1949, 251.

22 Ibid., 253.

23 See Chapter IV for an enlargement of this point.

settle constructively difficult labor relations problems. Confidence in their ability would probably sag. Grievance arbitration would then become a means for obtaining a ruling on right and wrong between two antagonists, and not a method for maintaining good relations between two parties who must continue to work and live together as it should be. ²⁴

Another serious consequence of the acceptance of precedent listed by McPherson is that arbitration would then be deprived of most of its peculiar advantages. Combatants might just as well go straight to the courts, without wasting time and money in a preliminary arbitration hearing. Contract negotiations would then have to be most careful, since certain phrases would come to be associated with definite meanings. Emphasis would shift from intent and understanding to phraseology. Those less familiar with past awards would be a pawn in the hands of their adversaries; mutual suspicion would be engendered. ²⁵

McPherson goes still further. He recalls that only a fraction of the total awards is at present published, and these awards are not written in a manner desirable for application to other cases. McPherson reminds the reader that whereas court opinions are constructed for the enlightenment of the lawyers, arbitration opinions are for the benefit of the parties concerned. And finally, he reveals that there is no room for appeal in arbitration. An arbitrator's decision is final and binding on all parties concern-

²⁴ McPherson, "Should Labor Arbitrators Play Follow-the-Leader?", Arb. J., N. S., 164.

²⁵ Ibid.

ed. Therefore, it is difficult to differentiate between a sound and an unsound award. ²⁶

A good summarization of the arguments against precedent's use in labor arbitration is given by Frank Elkouri. His work supplements that of William McPherson so that the opposition's case is adequately treated. Elkouri finds that the opponents of the use of prior decisions tend to voice the same criticisms sometimes directed towards the doctrine of precedent in law, namely, that the binding force of prior decisions ties the present to the past in such a degree as to

stultify progress and the observance of precedent becomes an end in itself with the result that justice is sometimes forced to give way to the symmetrical majesty of prior decisions. These antagonists assert that the arbitrator searches for a rule of reason which will render justice and at the same time permit the parties to continue "living together"; they say that the desirable rule is determined in part by the character of the disputants--by their economic position, their strength or weakness, their importance to the community, the history of their past relationships, and their objectives in taking their present stand. These factors request each other case to be decided on its own and explain why two arbitrators dealing with different parties, but similar facts, will arrive at seemingly opposing decisions. ²⁷

Elkouri discloses another argument frequently employed by the foes of precedent. This stand is based on the belief that arbitration proceedings are private business matters, involving the presentation of confidential data,

²⁶ Ibid.

²⁷ Elkouri, "The Precedential Force of Labor Arbitration Awards," Labor Law Journal, I, 1184.

which should be kept secret from competitors. He concludes with the usual argument that the high degree of informality which is one of the great advantages of arbitration would be lost should the arbitral tribunal be bound by precedent and legalism. ²⁸

These contentions, it will be observed, have in them some validity. Though some exaggerate and some rest on weak premises, these arguments against the use of precedent in labor arbitration cannot be scoffed at. They are representative of experienced arbitrators, educators, lawyers, and labor-management officials. Each must be carefully analyzed so that a distortion of their reasoning will be avoided.

As in the previous chapter, it is realized here that prior awards do have some value. It is the degree of force to be applied to previous decisions that has created the controversy. Generally, the opponents of precedent are concerned over the fact that the informal and flexible nature of arbitration will suffer. It is mainly for this that they would keep precedent out of arbitration.

²⁸ Ibid., 1185.

CHAPTER VI

ARBITRATION OF DISPUTES OF RIGHTS

AND DISPUTES OF INTERESTS

The disputes brought before the arbitrator have, up to this point, been treated in a general manner. It now becomes necessary to note that some disputes are more amenable to arbitration than others. Therefore, in order to evaluate the proper sphere of precedent in arbitration, it becomes essential to determine when the arbitration process itself should be invoked, if at all, in the various types of disputes.

One author who recognizes that disputes fall into two categories is John Steelman. The first, he remarks, arises out of the interpretation of an existing contract, and the second embraces differences about the terms of future contracts. He discloses that while the former seldom makes it difficult for an impartial arbitrator to find an award fair and equitable to both sides, the latter is generally frowned upon as fit for arbitration.¹

This belief is concurred in by John Spielmans. However, Mr. Spielmans supplements this by stating that arbitration in disputes of interests is

¹ John R. Steelman, "Value and Limitations of Arbitration," LRRM, II, 1938, 1066. See also Howard S. Kaltenborn, "The Adjustment of Labor Disputes," Iowa Law Review, XXIX, 1944, 230; T. W. Kheel, "The Voluntary Umpire System," Annals of the American Academy, CCXLVIII, November, 1946, 94; Robert Abelow, "Arbitration of Labor Disputes," Brooklyn Law Review, XIV, December, 1947, 32.

not a quasi-judicial, but a quasi-legislative function.² For the arbitrator, in the absence of a law covering the issue, is actually called upon to decide what the law shall be. But, he continues, the arbitrator may be still "guided by largely objective standards and not, as is often claimed, by his mere subjective notions of fairness."³ Thus, Spielmans feels that where there is agreement on the general principles of settlement by the parties and the arbitrator in these disputes of interests, then the dispute may be arbitrated. Lack of such agreement would cause the arbitrator to do hardly more than give expression to his subjective preference in the matter. In such cases, Spielmans regards an "ad hoc" arbitrator as preferable to a permanent arbitrator; if used constantly, he reasons that a permanent arbitrator may become too much of a "czar" to inspire continued confidence, and also may be dangerously exposed to profitable monetary propositions.⁴

Wayne Morse acknowledges that it is doubtful that arbitration is the best process which could be used in settling a dispute of interests. It is clear to him, however, that it should be resorted to if other peaceful and orderly methods fail.⁵ Florence Peterson has echoed this sentiment. For

² John V. Spielmans, "Labor Disputes on Rights and on Interests," American Economic Review, XXIX, June, 1939, 302. See also "Statutes--Arbitration --Contracts to Arbitrate Future Industrial Disputes," NYULQR, XVIII.

³ Ibid.

⁴ Ibid., 304.

⁵ Wayne L. Morse, "The Scope of Labor Arbitration," LRRM, VIII, 1941, 1284. See also William H. Davis, "Final Determination of Disputes," LRRM, XI, 1943, 2538.

in cases of a stalemate in the negotiations which shows both parties have almost equal bargaining strength and withholding power, she believes arbitration may be sought to avoid a stoppage of work. Arbitration may also bring to a speedier conclusion a settlement which would probably result if the dispute were prolonged. ⁶

This line of reasoning is reflected by Sidney Asch. He perceives that though disputes of interests may be of a lesser quantitative importance, they are of a greater qualitative importance than disputes of rights.

It is quite clear that, wherever possible, the formation of new contracts should result from free collective bargaining by the parties. Yet arbitration can offer valuable assistance where the parties are unable to agree. It can prevent a cessation of production and of wages while the issues are being objectively considered and decided. The problems involved in this type of arbitration are infinitely more complex than those involved in the decision of a grievance question, demanding social and economic determination of the highest order. ⁷

No experienced arbitrator, according to Copelof, is eager to step in and take over the writing of a new contract. As he sees it, arbitration of new contract clauses should be used as a last resort, and only that. But there are situations when both sides have good and sufficient reasons for standing pat on an issue which is of tremendous import to them. An obvious solution would be economic force. But such enterprises as power companies,

⁶ Florence Peterson, "Adjustment of Labor Disputes," Monthly Labor Review, XLIX, November, 1939, 1025.

⁷ Sidney H. Asch, "The Voluntary Arbitration of Labor Disputes," Arb. J., N. S. IV, Autumn, 1949, 188.

certain food distributing companies, and transportation and communication companies find strikes intolerable. Hence, arbitration is face-saving to both union and management who do not want to back down, but still do not want to arouse the public with a strike.⁸ In any event, he is of the opinion that the submission agreement must clearly delineate the extent of the arbitrator's jurisdiction.

Jules Justin is aware of the same difficulty in the arbitration of a wage dispute case, one of the most common of the disputes of interests. While he does not regard such arbitration as an entirely unpredictable affair, he notes two principal sources of difficulty. The first is a lack of clarity and definiteness in the written submission agreement setting forth the issues to be decided; the second is the incomplete, ineffective or faulty proof of the factors and criteria upon which the arbitrator will decide the issues before him. Thus, there is "no established or fixed formula, let alone a blueprint, available to arbitrators for the determination of a wage dispute."⁹

Another who stresses that the parties define with careful and proper restrictions the issues to be arbitrated is Clarence Updegraff. Unless this is done, he envisions the arbitrator as quite possibly reaching extremes in his award which might shock or outrage one or both of the parties concerned.¹⁰

⁸ Copelof, Management-Union Arbitration, 10.

⁹ Jules Justin, "Arbitrating a Wage Dispute Case," Arb. J., N. S. III, Winter, 1948, 230.

¹⁰ Clarence M. Updegraff, "Arbitration and Labor Relations," Washington University Law Quarterly, III, Fall, 1949, 59.

The same thought is expressed by Harry Platt. He has said

Some employers and unions are unwilling to commit a decision of such vital issues as wages, social benefits, and other matters involving principle and long range interests to the uncontrolled discretion of an "outsider". Such issues, they say, are life and death issues both for a business and a union, and to make an irrevocable agreement to abide by a third party's decision of them is a dangerous gamble. ¹¹

He goes on to say that in reality, however, the absence of standards does not present an insurmountable obstacle to the arbitration of contract terms. He suggests that the parties themselves can prescribe standards and impose restrictions upon the arbitrator's discretion and authority which he will be bound to observe. Some parties may even proceed without such preconceived standards, presumably on the basis that even a "blind date" with an arbitrator is preferable to a strike or lockout. ¹²

Charles Gregory is not quite so compromising as Mr. Platt. Arbitration in a dispute of interests is not real arbitration for him. In his opinion, it is practically impossible to arbitrate deadlocks of this type in the absence of generally conceded standards of conduct and decisions. To Gregory, it seems absurd to let arbitrators draw upon their personal notions of economic values in order to break collective bargaining deadlocks. Only our "legislatures can create the necessary procedures and sanctions behind

¹¹ Platt, "The Settlement of Industrial Disputes through Voluntary Arbitration," Michigan State Bar Journal, XXVIII, 20.

¹² Ibid.

a successful system of arbitration." ¹³ Another author has stated on the basis of a study, that it cannot be asserted that there are accepted standards governing the determination of wage disputes. Rather, he feels that at best there are only various conflicting doctrines. ¹⁴

An important insight on the question of disputes of interests is contributed by Harold Davey. He opines that it is necessary to recognize that if arbitration is used as the final means of settlement in disputes of interests as an alternate to economic force, then "the parties must respect the essentially judicial character of the arbitration process and not expect a straddling type of political decision." ¹⁵ Davey urges that arbitration be used sparingly, that is, as a last resort before economic coercion. A genuine will to agree on the part of the parties will abet the procedure considerably.

What conclusions may then be garnered? Are disputes of rights and disputes of interests fitting subjects to be referred to the arbitral proceedings?

Let it first be said that there is a consensus of opinion that arbitration can readily be employed in disputes of rights. In actual practice such disputes are frequently taken to the arbitral tribunal. For a

¹³ Charles O. Gregory, "The Enforcement of Collective Labor Agreements by Arbitration," University of Chicago Law Review, XIII, June, 1946, 463.

¹⁴ Emmanuel L. Gordon, "Arbitration of Wage Levels," Lawyers' Guild Review, VIII, November, 1948, 495.

¹⁵ Harold W. Davey, "Hazards to Labor Arbitration," Industrial and Labor Relations Review, I, April, 1948, 393.

dispute of rights, involving as it does the interpretation, application, or enforcement of an existing contract, gives the arbitrator something tangible to work with and decided upon. There is no desire to bring about a formal change in the terms of the contract.

This is not so in the arbitration of a dispute of interests. Here the arbitrator is, in effect, negotiating the terms of the contract which both parties bind themselves to observe; he becomes a legislator as well as a judge. He is then making up the contract and determining that it is a perfectly good one at the same time. And the parties have no choice but to accept it, for the award is final and binding.

But is the arbitrator so infallible that he can do no wrong? Can he understand the situation as well as the parties therein concerned? For the arbitrator is, after all, an outsider and cannot be expected to sense the conflict as well as those directly participating. It is extremely doubtful that the combatants will accept graciously terms that they had no hand in constructing. Needless to say, an unsatisfactory award will remain an Achilles' heel for the duration of the contract.

And a baneful award is a distinct likelihood. For there are no specific criteria to guide the arbitrator in a dispute of interests. Some authors, it is true, have suggested standards that might be used.¹⁶ But

¹⁶ Justin, "Arbitrating a Wage Dispute Case," Arb. J., N. S. III, 230. See also Satter, "Principles of Arbitration in Wage Rate Disputes," Industrial and Labor Relations Review, I, 363; Singer, "Labor Arbitration: The Need for Norms and Standards," Labor Law Journal, II, 270.

the individual arbitrator may employ those criteria he deems applicable, and reject all others. He may even go so far as to turn aside all norms and render a purely personal opinion. This is an extreme but it proves the indefiniteness of the affair.

Still another factor must be considered. The parties in a dispute of interests are not always the same. That is to say that there are privately owned companies and government regulated companies. Each will react to the arbitrator's decision in a different way. The former is not as likely to bear a poor award as the latter. An improper decision in such a dispute may virtually drive a private organization from business; on the other hand, a company regulated by the government, by virtue of its monopolistic power, may be able to suffer such a decision. The latter's main advantage is that it can request rate relief for the government to counteract an adverse award.

It is the view of the author of this thesis that arbitration of disputes of interests as it is now known is not really arbitration at all. It is rather a pseudo-arbitration. In the true sense of the word, arbitration is a quasi-judicial process. The arbitrator is not there to make up the facts; rather, his task is to interpret existing facts.

However, the writer is inclined to believe that such a process, though not bona fide arbitration, has some merit. It is indeed preferable to public discomfort. Of necessity, some alterations would have to come about to assure the most efficient functioning of such an operation.

A logical first step would be to see that every matter that could possibly be settled at the collective bargaining table by the parties themselves would be settled there. In this way, a minimum of these disputes of interests would reach the arbitrator. Thus, the arbitrator would not be compelled to shoulder the entire responsibility; in fact, he would do only that which could not otherwise be solved by the parties themselves, and which would otherwise result in a strike or lock-out.

Another precaution would be to define and delineate in a careful manner the precise jurisdiction and authority of the arbitrator. Limits would be constructed which the arbitrator could not go beyond. He would know what was and what was not expected of him.

The erection of definite criteria to assist the arbitrator would do away with much of the vagueness surrounding the process at present. These norms would eliminate any blind clutching at straws or yielding to pressure from one or both of the parties by the arbitrator. His decisions would then be an objective presentation of the facts and would minimize the subjective inclinations of the individual arbitrator. Inordinate awards would then be ruled out. The parties could be fairly confident of a just and coherent decision.

A final measure that might possibly prove of aid in the "arbitration" of disputes of interests would be some form of a board of appeal.¹⁷ For the very lives of the company and the union are at stake here. An untenable

¹⁷ This is provided for in the newspaper industry.

decision under such circumstances need not be tolerated by the victim. Recourse to appeal will permit an honest complaint to be aired and an injustice removed. Only the test of time can determine the validity of these proposals. It is certain, however, that the affair as now conducted is a highly precarious and unsound one which needs corrections if the process is to be an effective instrument in industrial relations.

CHAPTER VII

CONCLUSION

The place of precedent in common law was not easily determined. It did not simply come into being. On the contrary, "stare decisis" resulted only after a gradual process of trial and error. And even after its worth was acknowledged, there still remained the question as to the amount of weight that precedent should have. Finally, it came about that precedent might be persuasive or authoritative. The doctrine was evolved that the great majority of prior decisions were to be carefully considered, but in no event were they to be absolutely binding. It proved to be the exception rather than the rule for a previous case to have authoritative bearing on another case.

A somewhat similar course is being treaded as concerns the use of precedent in labor arbitration. That the process is not as yet a set one is disclosed by a study of its history. It has not sufficient experience; it is still in search of its most advantageous procedure. That is the reason for the delay in the assimilation of precedent, even persuasive precedent, into its makeup. The fact of the matter is that the arbitration process itself has not the blessing of all those in the field. Under such circumstances, it is reasonable to anticipate conflicts over any development that occurs within the framework of the affair.

The debate over the proper place of precedent in industrial arbitration reflects this confused state. The advocates of precedent say it is well and good to have precedent, but only in a persuasive sense. They shrink from authoritative precedent; it is too unyielding. On the other hand, the lending of persuasive force to prior decisions will guarantee a greater degree of stability and definiteness. Some believe a common law of arbitration is in the offing; others remark that it is already an accomplished fact in certain industries. The formation of such an occurrence is viewed as wholesome for then there would be guidance available to the arbitrator. The pertinent would be separated from the irrelevant; all would benefit.

The opponents do not really differ too radically from the proponents. They too insist a system of absolutely binding precedent is unworkable; they too realize that prior awards have some persuasive value. But they fear the consequences that the inauguration of such a scheme would bring about. The loss of arbitration's informality, speed, flexibility and relative inexpensiveness is dreaded as likely. Arbitration is, to them, a dynamic thing which cannot wear the saddle of prior decisions. They foresee the selection of an arbitrator as based on the arbitrator's knowledge of the established rules of labor agreement interpretation, rather than on his ability to understand and settle constructively difficult labor relations affairs. Arbitrators may seek "short cuts" and substitute the decision of a past case for diligence and good judgment. The contestants would be obliged to engage experts to discover past awards favorable to

their side. Industrial progress would then be thwarted and labor-management harmony bypassed.

Both sides, however, generally are not aware of, or pay no attention to, the fact that all labor disputes are not in conformity with the basic characteristics of labor arbitration. Aside from the work of a few discerning writers, there is a lack of appreciation concerning the reality that disputes of interests involve legislation on the part of the arbitrator rather than adjudication. Realization of the importance of such a distinction is not, for the most part, accepted.

The author of this thesis feels that the future trend of labor arbitration will, in all probability, see precedent gaining in stature. He believes that prior decisions should at all times, in disputes of rights, have persuasive force. This would give arbitration the constancy it requires. The writer also favors a course that would have prior awards of binding force where a permanent arbitrator is interpreting the same contract between the same parties. An "ad hoc" arbitrator, would be compelled, however, to limit the weight he would allow prior awards to a persuasive weight only, unless of course, the parties decide otherwise. An intelligent and thoughtful perusal of previous decisions will assist every arbitrator. In the last analysis, however, it is the unique merits of the individual case under consideration which will guide the arbitrator to his ultimate award. Thus, a situation would prevail comparable to that existing in the common law.

A dispute of interests is another matter. Here it is doubtful whether arbitration should be attempted in the first place. The writer is inclined to believe that a dispute of interest does not constitute fit grounds for arbitration. Arbitration's very nature clashes with the demands that the settlement of a dispute of interests requires. Arbitration is a judicial process essentially, not a legislative one. What is now proceeding under the name of arbitration of disputes of interests is not arbitration as it is known today or as it was known in its development. True, it is akin to arbitration, but it definitely is not arbitration.

Therefore, the author concludes that disputes of interests cannot be arbitrated in the true sense of the word. It necessarily follows that precedent, in such a proceeding, is relegated to a minor role. This is not to say that such a process has no worth. It may, in specific instances (public utilities), be more suitable than a strike or lock-out. Its present structure, however, is not without faults; hence, it might reap greater benefits by the adoption of the proposals cited in the preceding chapter. Time, above all else, will determine the true course of this process as well as the proper arbitral procedure to be followed.

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