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Arbitration and the Law (Twelfth Annual Meeting of the National Academy of Arbitrators, 1959)

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BOOK REVIEW

ARBITRATION AND THE LAW. BNA, Inc.: Washington, D. C. 1959. Pp. xix, 198. $6.50.

This volume reports the papers presented to the twelfth annual meeting of the National Academy of Arbitrators held in Detroit, Michigan, January 29-31, 1959. It is the sixth in a series published by BNA, Inc. covering the proceedings in similar meetings of the Academy. The five previous volumes were published under the following titles: *The Arbitrator and the Parties, Critical Issues in Labor Arbitration, The Profession of Labor Arbitration, Management Rights and the Arbitration Process,* and *Arbitration Today.* The six volumes constitute what the publisher describes as a Library of Labor Arbitration. They should be deemed indispensable to the library of any arbitrator or person regularly participating in arbitration proceedings.

Only the first eighty-nine pages of the current volume are devoted to the title subject; the remaining pages cover other subjects, such as "Problem Areas in Arbitration," "The Ford-UAW Negotiations of 1958," "Impartial Umpireships: The General Motors-UAW Experience," and "Arbitrators and Foreign Policy." Each of these topics commends itself to the reader's attention, but they will not be discussed in this review.

The papers and discussions directly related to the title subject are "Current Criticisms of Labor Arbitration" by Harry H. Platt; "On First Looking into the Lincoln Mills Decision" by Benjamin Aaron, containing an excellent discussion by David E. Feller; "Reflections upon Labor Arbitration in the Light of the Lincoln Mills Case" by Archibald Cox; and "The Role of the Law in Arbitration: A Panel Discussion," with Nathan P. Feinsinger as panel chairman and discussions by Arthur M. Ross, William E. Simkin, and Russell A. Smith. All of these persons are distinguished in their fields of endeavor, and they constitute an elite group, probably as well versed in the subject of arbitration as any group that could be assembled for the purposes of the discussions; six are lawyers, five are professors, five are authors, and six have served the federal government with distinction.

The discussion was most timely, largely because of the decision of the United States Supreme Court in *Textile Workers Union v.*

Lincoln Mills.[1] The full text of this opinion is reported in Appendix F of the volume. The principal issue in that case was whether a union can enforce an executory arbitration agreement by resort to a United States district court, under the authority of section 301 (a) of the Labor Management Relations Act of 1947, which provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Court, with Justice Douglas writing the majority opinion, held: (1) an agreement to arbitrate a grievance dispute should be specifically enforced; (2) the substantive law to apply in such cases is federal law, which the courts must fashion from the policy of the national labor laws; and (3) the "anti-injunction" provisions of the Norris-LaGuardia Act do not inhibit the federal courts from enforcing agreements to arbitrate.

One thing that particularly worries the authors of *Arbitration and the Law* is the statement in the opinion, in reference to the necessity of the federal courts' establishing federal substantive law on the subject, that "the range of judicial inventiveness will be determined by the nature of the problem." In general, the authors are fearful that courts, unlearned in the philosophy of labor arbitration, will fashion a body of law that will disturb that philosophy and either inhibit or destroy the procedures and approaches taken by many arbitrators. It may be said that most professional arbitrators, as well as many representatives of both labor and management, fear the encroachment of "legalism" upon arbitration. They argue that the voluntary nature of the arbitration process may be disturbed, that areas should be left open for arbitration that are not specifically covered by the collective bargaining agreement, and that legal rights will predominate over equity and practicality.

Most of the authors agree, as they must, with Justice Douglas's statement that arbitration provisions in collective bargaining agree-

[1] 353 U.S. 448 (1957).

ments are a substitute for the strike during the life of the agreement. This, of course, is the basic reason why most representatives of management have agreed to arbitration clauses in collective bargaining agreements. Much is made of the voluntary nature of arbitration. However, the voluntary nature exists only because the parties have agreed in their collective bargaining contracts to arbitrate certain things in certain ways. As pointed out by Mr. Feller, the *Lincoln Mills* case arose only because the employer refused to submit a grievance to arbitration. The union sought specific performance of the agreement to arbitrate. It seems to this reviewer that arbitrators are inconsistent in their philosophy when they demonstrate fear of encroachment upon their prerogatives by virtue of a court decision which holds that the parties may seek the aid of a federal court to enforce the obligations arising out of the arbitration provision of their contract.

Considerable disagreement is demonstrated in *Arbitration and the Law* by the various authors as to whether collective bargaining agreements should be considered as governed by the law of contracts. For instance, one or more of the authors argues that the entire scope of arbitration disputes cannot logically be covered by the collective bargaining agreement and that certain areas must be left to the decision of the arbitrator. This fear is engendered by other recent federal court decisions holding that a dispute as to whether a certain grievance is subject to the arbitration provision of the contract must first be determined by the federal court, in the absence of a provision in the contract vesting such authority in the arbitrator. In the large basic industries in highly industrialized areas of the nation this is probably true, because many such industries operate under the permanent umpire system and only selected grievances are presented for determination. It is doubtful that disputes in such industries require the intervention of a federal court; it is likewise doubtful that either management or labor would find situations in which such a result was deemed necessary or desirable. In the not so highly industrialized parts of the nation, where collective bargaining agreements cover relatively small groups of employees, the necessity of one party's having to resort to the courts is more prevalent.

The common law does not provide for the enforcement of executory contracts to arbitrate. That is to say, the common law would not enforce an agreement to arbitrate a dispute arising subsequent to the agreement. The statutes of many states are equally as ineffectual. Some means of enforcement through the federal courts should be

viewed with favor by arbitrators. The principal fear is that intervention by the courts may inhibit the informality of arbitration proceedings, bring about a body of court-made law that will have the effect of pre-judgment by courts as to the arbitrability of issues, and result in judicial interpretation of contracts at odds with the "philosophy" of arbitration adhered to by many arbitrators.

The volume gives a keen insight into the philosophies of some of those most directly concerned with arbitration. It should be read with avid attention by all who are interested in the field of arbitration. This short, absorbing volume presents a variety of views from top experts whose opinions should be given much weight.

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