Some Thoughts on Labor Arbitration

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In three decisions handed down in 1960 the Supreme Court conferred plenary indulgence upon the practice of labor arbitration; described the circumstances under which arbitration might be compelled; and sought to define the scope of the arbitrator's power. In *United Steelworkers v. American Mfg. Co.* and *United Steelworkers v. Warrior & Gulf Navigation Co.* the Court ordered arbitration of grievances that may have been outside the arbitrator's power to redress; and in *United Steelworkers v. Enterprise Wheel & Car Corp.* the majority asserted that "refusal of courts to review the merits of an arbitration award is the proper approach," thereby practically eliminating the unsuccessful party's opportunity to obtain relief from an erroneous award. More recently, the Court held that under proper circumstances an employer's damage suit may be stayed pending arbitration; that agreement between an employer and union to arbitrate...
grievances necessarily implies a “no-strike” covenant coextensive with the scope of arbitrability; and, oddly, that the survivor of a corporate merger may be compelled to arbitrate, as under a collective bargaining agreement, with the union that had represented the employees of a company that ceased to exist as a separate entity in the merger, even though the collective bargaining agreement did not by express provision bind that company’s successors.

At the bottom of the Supreme Court’s fondness for the arbitral process would seem to be the notion that in some way labor arbitration transcends the mere resolution of contractual disputes and indeed authorizes the playing of King Solomon. Although the majority opinions in the Steelworkers trilogy disclaim such an attitude, analysis of their text demonstrates that it is in fact operative.

In Enterprise Mr. Justice Douglas wrote:

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

One difficulty immediately suggests itself. Suppose a collective agreement were to contain, in its grievance and arbitration article, something like the following:

The arbitrator shall not have the authority to add to, subtract from, or in any way modify any of the provisions of this agreement; and in rendering an award shall base his decision upon the facts presented to him by the parties, upon his own knowledge of industrial practices in the Company’s establishment covered by this agreement, and upon customarily accepted standards of industrial usage.

Certainly this type of provision would authorize the arbitrator to go far beyond the written terms of the contract in reaching his decision; under such a provision it would seem that he might properly find that no agreement—whether written or the product of the parties’ own practice—existed under which the particular dispute might be resolved, and yet proceed to dictate to the parties what their course of conduct should be. The arbitrator would thus be empowered to “dispense his own brand of industrial justice,” but an award predicated

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9 363 U.S. at 597.
upon such an exercise of power would obviously draw its "essence" from the agreement and therefore be immune from attack.

Most collective bargaining agreements that provide for arbitration contain a provision narrower than this hypothetical one. Almost universal is the following provision or some slight variant thereof: "The arbitrator shall not have the authority to add to, subtract from, or in any way modify any of the provisions of this agreement." Such boilerplate language\(^{11}\) will not prevent most arbitrators from enforcing as a contractual obligation a long-standing practice that is not mentioned in the text of the collective bargaining agreement, if the practice can be found to be of benefit to employees in the bargaining unit. Among such practices are the conferring of room allowances upon certain employees,\(^{12}\) free coffee or paid coffee breaks,\(^{13}\) Christmas bonuses,\(^{14}\) paid meal periods,\(^{15}\) free meals,\(^{16}\) paid wash-up time,\(^{17}\) pay for time spent in the processing of grievances,\(^{18}\) and the number of rest periods per day.\(^{19}\) The absence of any contractual provision concerning the retention of past practices does not seem to affect their enforceability.\(^{20}\)

\(^{11}\) An almost identical provision appears in the agreement before the Court in the American Mfg. case, 363 U.S. at 565.

\(^{12}\) Mount Mary College, 44 Lab. Arb. 66 (1965).


\(^{14}\) Appropriately, Nazareth Mills, Inc., 22 Lab. Arb. 808 (1954) seems to be the earliest reported case in which an arbitrator held that an employer could not unilaterally abrogate a long-standing policy of paying Christmas bonuses, even though nothing in the text of the collective bargaining agreement specifically mandated the retention of existing practices or benefits. See also Stepan Chemical Co., 45 Lab. Arb. 34 (1965); Pennsylvania Forge Co., 34 Lab. Arb. 732 (1960); Keystone Lighting Corp., 43 Lab. Arb. 145 (1963); Tonawanda Publishing Co., 43 Lab. Arb. 892 (1964); and Budd Co. 36 Lab. Arb. 1335 (1961).


\(^{16}\) Lutheran Medical Center, 44 Lab. Arb. 107 (1964).


\(^{19}\) Formica Corp., 44 Lab. Arb. 467 (1965).

\(^{20}\) I assume that none of the collective bargaining agreements construed in the cases cited in notes 12 through 19, supra, contains any provision requiring the retention of past practices or benefits. In the following cases the opinions explicitly note the absence of such provisions: Mount Mary College, Nazareth Mills, Stepan Chemical Co., Pennsylvania Forge Co., Keystone Lighting Corp., Budd Co., Elberta Crate & Box Co., E. W. Bliss Co., International Harvester Co., and General Controls Co. The arbitrator in Tonawanda Publishing Co. observed that the presence or absence of such a provision does not affect his power to enforce as contractually binding an established practice of benefit to employees, but pointedly gave no hint as to whether the agreement before him said anything about the retention of past practices or benefits. In the other cases cited in notes 12 through 19, the arbitrators' opinions do not expressly state whether the agreements contain any provision con-
Arbitrators traditionally hold these practices to be binding upon the theory that long-term usage, uniformity of application, and employees’ action in reliance upon the maintenance of existing benefits somehow make them an integral part of the collective bargaining agreement. Of no concern are provisions that the arbitrator shall not “add to, subtract from, or modify” any of the terms of the agreement or that the written text of the agreement constitutes the complete bargain between the parties and no understanding that is not expressed therein shall be deemed of any effect.

When an arbitrator enforces a past practice he is merely declaring the industrial “common law of the shop” and, since a collective bargaining agreement is a “generalized code to govern a myriad of cases,” it would seem that this is an appropriate exercise of his power. This

1 "Action in reliance," that term so dear to orthodox contract theorists, is rarely used by labor arbitrators, but it is clear that this is their underlying notion in many instances. In Mount Mary College, cited in note 12, the arbitrator ruled that the employer acted improperly when it discontinued the practice of giving $50 per month room allowances to two of its power engineers. The employer's reason for the discontinuance of the practice was that it constituted unwarrantably favorable discrimination in favor of these two employees; but the arbitrator, having found that the grievants looked upon the room allowance as part of their total compensation, was unpersuaded by this argument.

In most of the cases cited in notes 13 through 19, the “action in reliance” is of a different order. Where a practice of benefit to employees antedated the execution of the collective bargaining agreement, most arbitrators will reason that union negotiators, always seeking an increase in benefits, will orient their demands to the existing structure of wage and other benefits, necessarily assuming that the employer will not take away what had previously been given. Indeed, when an employer specifically requests the discontinuance of such a practice during negotiations for a new contract, the practice will be deemed to survive the signing of the new contract unless somewhere in its text appears forceful evidence of the parties' agreement to its discontinuance. Typical of this approach is Harnischfeger Corp., cited in note 16, where the arbitrator observed:

"... if the parties had reached a formal understanding during the 1961 negotiations to eliminate the paid wash-up periods, it is difficult to conceive why such understanding was not incorporated into the Agreement. The practice had been in effect for many years and was well known to all parties concerned. In spite thereof, the Agreement is silent on the issue. This fact suggests the conclusion that the parties in entering into the Agreement did so upon the assumption that the existing practice would continue during the life thereof."


24 See note 3, supra.

is so because all he is doing is to determine whether, as a matter of fact, the alleged practice existed and whether its nature and the manner in which it came into and remained in existence entitles it to be considered a part of the agreement. Once the arbitrator finds that the practice is contractually binding, it is a necessary conclusion (unless something in the text of the agreement explicitly renders him impotent) that he has the authority to order its enforcement.

The Steelworkers trilogy does not, however, really limit the arbitrator to the contract (written text, plant rules, established practice) before him. As long as he makes sure that his "words" do not "manifest an infidelity"26 to the text of the collective bargaining agreement, the "refusal of courts to review the merits" of his award is declared to be the "proper approach."27 The rationale for this curious form of judicial restraint is that "The grievance procedure is . . . a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."28 These two sentences, which have been deliberately wrenched from the text of Mr. Justice Douglas' opinion in Warrior & Gulf may well constitute the germinal idea of the entire trilogy. From this idea stems much of the uncertainty that has developed in the past five years over the proper ambit of labor arbitrators' power.

The unarticulated syllogism that runs through this brief passage goes as follows: the grievance procedure is part of the collective bargaining process; arbitration is part of the grievance procedure; therefore, arbitration is part of the collective bargaining process. The obvious fallacy is that nothing in the major premise requires assent to the proposition that every aspect of the grievance procedure necessarily has the characteristics of collective bargaining. The major premise can be taken to mean "some aspects of the grievance procedure are part of the collective bargaining process" or "all aspects of the grievance procedure are parts of the collective bargaining process." If we speak of "some aspects," the conclusion is clearly invalid; if we speak of "all aspects," the major premise is, we shall see, untrue.

It has been held too uniformly to require citation that an employer's refusal to discuss grievances with the union that represents his employees constitutes a failure to bargain in good faith, a violation of section 8(a)(5) of the National Labor Relations Act.29 From this it would seem to follow that the discussion of grievances constitutes part of the collective bargaining process. From the proposition that an

27 Id. at 596.
29 49 Stat. 452 (1935), as amended, 29 U.S.C. §158(a)(5) (1952). Because of the honest employment it has afforded to so many, the N.L.R.A. has also been referred to as the "National Lawyers' Relief Act."
employer may be compelled to discuss grievances with a union it does not, however, follow that he may be compelled to answer them in a manner that the union will find pleasing. And even though the National Labor Relations Board has hinted that it may be an unfair labor practice for an employer, in the course of negotiations for a new contract, to insist to the point of impasse upon a grievance procedure under which it would be given unfettered license to alter employees' working conditions at whim, without effective recourse by the union to arbitration, there can be no doubt that employers and unions are still free, if they so choose, to execute collective bargaining agreements that contain no provision whatever for arbitration. That being the case, it can hardly be maintained that arbitration is a necessary part of the collective bargaining process.

In a collective bargaining agreement that contains an arbitration provision, the proceeding before the arbitrator, to alter Mr. Justice Douglas' words, "rather than a strike, is the terminal point of a disagreement." Although strikes are frequently associated with collective bargaining, I doubt if anyone would seriously affirm that the strike is a necessary part of the collective bargaining process. The strike or lockout, far from being part of the collective bargaining process, are simply economic sanctions employed when that process breaks down. Similarly, the arbitrator's award cannot properly be viewed as the culmination of the parties' bargaining at the various stages of the grievance procedure, for it quite plainly is sought only when the parties are unable to reach agreement by themselves.

By executing a collective bargaining agreement that contains a provision for the arbitration of unresolved grievances, the parties bargain for the settlement of their differences by a third person. They do not, however—for they cannot be sure in advance of the nature of every future arbitrator's award—agree upon the substance of future awards.

In *Warrior & Gulf*, Mr. Justice Douglas, after noting that the arbitration of grievances is a "major factor in achieving industrial peace," observed:

Thus the run of arbitration cases . . . becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal tribunal on the other. In

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30 *GLENDOVER*. I can call spirits from the vasty deep.

HOTSPUR. Why, so can I, or so can any man;
But will they come when you do call for them?

the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes is part and parcel of the collective bargaining process itself.\footnote{\textsuperscript{32}}

Equally unfortunate is the assertion that arbitration is a form of collective bargaining and the notion that "arbitration is the substitute for industrial strife." Certainly the Court does not, in the trilogy, refer to that peculiar industrial practice in which, at the expiration of a collective agreement, an arbitrator is empowered to fashion a new agreement for the parties. The discussion, rather, is of arbitration of grievances that arose during the life of a collective bargaining agreement. Since nearly all such agreements contain provisions which ban strikes or lockouts during their term,\footnote{\textsuperscript{33}} and since the potential pecuniary liability consequent upon a strike in breach of contract is generally an effective deterrent to unions' striking over unresolved grievances,\footnote{\textsuperscript{34}} in what manner may it properly be said that grievance arbitration is a "substitute for industrial strife?"

The Court's answer seems to be that "industrial strife" is not limited to direct confrontations between the signatories to a collective bargaining agreement (lockouts or authorized strikes) but includes as well the petty dissatisfactions, tensions, flareups of temper, and occasional wildcat work stoppages that occur as the result of friction between low-level management (foremen and other line supervisors) and members of the bargaining unit represented by a labor organization. Thus:

The parties expect that ... [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.\footnote{\textsuperscript{35}}

In 	extit{Enterprise}, Mr. Justice Douglas puts it this way:

[Arbitrators] sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and prac-

\footnote{\textsuperscript{32}} 363 U.S. at 578.
\footnote{\textsuperscript{33}} In 1960, 94\% of collective bargaining agreements contained "no-strike" provisions of some sort. Bureau of National Affairs, Labor Relations Expediter 94.
\footnote{\textsuperscript{34}} I do not, of course, speak of those collective agreements which authorize strikes in protest against the employer's failure satisfactorily to resolve certain kinds of grievances. See 363 U.S. at 579, n. 5.
\footnote{\textsuperscript{35}} 363 U.S. at 582.
tices of a particular factory or of a particular industry as reflected in particular agreements.36

By way of documentation the Court offers a passage from an article published in the Harvard Business Review, in which the author makes the obvious point that to “farmers or professors” factories “seem like another world.”37

The function of the labor arbitrator, as the Court sees it, is paternal rather than judicial. He is more concerned with the easing of tensions than with the interpretation of a given collective agreement. His job is to reach a decision that will promote industrial peace—whatever that means—and thereby insure uninterrupted production.

Implicit in this view is the notion that the day-to-day administrators of collective bargaining agreements (foremen, personnel managers, shop stewards, grievance committees, and the like) are incapable of handling their own affairs in a responsible manner and therefore to be treated as wards of the industrial state whose father-king is the omniscient and benevolent arbitrator. With a judicious mixture of rewards and spankings, one gathers, the arbitrator will keep things going very nicely indeed.

The trouble with this optimistic formulation is that it doubtless runs counter to what unions and employers both expect from arbitration. Although it is certainly true that many grievances are processed through arbitration for no better reason than that someone wants a third person, rather than himself, to take the responsibility for a particular decision; and although the reports are full of cases that concern rather trivial irritants;38 the overwhelming majority of arbitrators’ decisions involve contract interpretations of profound importance to the parties’ continuing collective relationship.39

A decision that a particular employee should not have been discharged for failure to report to work on a snowy day will obviously influence the employer’s conduct when other employees stay home on

36 Id. at 596.
37 Id., n. 2.
38 See, for example, Glen Rock Lumber & Supply Corp., 38 Lab. Arb. 904 (1962).
39 Even the simple discharge case, by fleshing out the term “just cause,” serves as an important gloss upon the written text of the collective bargaining agreement. Moreover, it is not uncommon for a union to test the propriety of some management directive by refusing to comply therewith, thus forcing the employer to discipline some employee, and enabling the union to bring up for review in an arbitration on the merits of the disciplinary action the question of the propriety of the employer’s new rule.
future snowy days. A decision that the employer may not subcontract a given kind of work once performed by his bargaining unit employees may substantially affect his power, in the future, to subcontract other work and may even influence him, when considering the manufacture of a new product, to erect a new factory solely to avoid having production work “locked in” to an existing collective bargaining relationship.

Hundreds of instances could be recited in which an arbitrator’s award that purports to deal with only one specific issue becomes the authoritative source for the future determination of rights and obligations of various kinds under a given collective bargaining agreement. Whatever the issue, it is commonly accepted that an arbitrator’s award not only decides the particular grievance submitted to him, but also stands as precedent for analogous grievances that may be subsequently presented to other arbitrators under the same agreement. Indeed, an arbitrator’s award construing a provision in a collective bargaining agreement retains its precedent value after the expiration of the agreement under which the grievance arose, if the parties’ subsequent agreement contains an identical provision.

The major respect in which labor arbitration would seem, therefore, to differ from commercial arbitration is in the nature of the contractual relationship between the parties and the type of effect, as a consequence, that the award will have.

The commercial arbitration—whether it relate to the chartering of a ship, the purchase of goods, or the appraisal of property—stems generally from a claim of material breach of the underlying contract or from a desire for the resolution of a dispute as to a material term of the contract. The commercial arbitration typically results in an award which can have, as between the parties, no precedent value beyond the issue presented. Even if the arbitrator is asked to fix the respective shares of the parties in mineral rights to a large tract of land, his award cannot be said to have the same kind of precedent value that a labor arbitrator’s award has. All that he determines is that A has a 25% interest, B has a 60% interest, and C has a 15% interest. There

4 I have used the word “precedent” in a nontechnical way. There is obviously nothing like stare decisis in the “common law of the shop.” Some arbitrators have pointedly said that they do not feel bound in any manner by decisions rendered by other arbitrators under the same collective bargaining agreement; but this is the minority view. Most arbitrators, while disclaiming the binding nature of their predecessors’ awards, will in effect accord them the status of binding precedent by finding them “reasonable” and thus persuasive or by determining that the award became, in some mystic way, a contractually binding settlement which they lack power to upset. Responsible representatives of management and labor will ordinarily prefer the stability of operations that proceed from uniformity of approach, and will thus treat the arbitrator’s award—without undue speculation on the question of whether they may properly be compelled to do so—as if it does in fact have precedent value. Naturally, as in common law litigation, differences will arise concerning the applicability of an earlier decision to a present factual problem.
is no question of precedent in the years it takes to exhaust the mineral wealth of the land: for all time the shares of each of the parties have been fixed and all that remains to be done is a chore of simple arithmetic. Of course when the commercial arbitrator is called upon to determine a claimed breach of a "one-shot" contract, his award cannot even have prospective effect of this limited kind.

The labor arbitrator, unlike the commercial arbitrator, is generally asked to decide a claim of contract violation that falls far short of material breach. The contract before him is a "generalized code" rather than the tightly drafted instrument one expects to find in commercial transactions. His award is expected to inform the sketchy outlines of the agreement before him, to interpret the vague and often clumsy prose of its text and apply it to a given set of facts in order to define for the parties acceptable standards of conduct.

In commercial arbitration the parties for one reason or another agree that their own interests are served better by a reference to the informal arbitral forum than by insistence upon the procedural safeguards afforded by the courts. The issue, generally, is a dispute over money; and in many instances business prudence may suggest that the lack of predictability inherent in arbitration is outweighed by the speed and cheapness of the arbitral process. The loser in a commercial arbitration, having voluntarily agreed to accept an unpredictable determination, should not be allowed to complain because the determination has gone against him, unless his loss is occasioned by circumstances that are so clearly outrageous as to transcend the expectations of one who in good faith contracts to have the merits of his claim determined by an impartial person. This policy is embodied in the general arbitration statutes, under which awards may be set aside only for the most egregious kinds of misconduct on the arbitrator's part.

There is rarely, in labor relations, the same kind of voluntary contracting that underlies the commercial arbitration. The duty to bargain collectively with the representative of his employees is imposed upon the employer by legislative fiat and, all too often, enjoined upon him by a court of appeals enforcing an order of the National Labor Relations Board. The commercial agreement, at the time of its inception, is hopefully a marriage of true minds; collective bargaining is by definition a shotgun arrangement.

Given the obvious pressures of labor-management negotiations and the steady deterioration of English prose usage, it is no wonder that

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41 Ordinarily, an arbitrator's award will not be vacated merely because it is founded upon errors of law or of fact. See, e.g., American Machine & Foundry Co. v. UAW, Local 116, —F. Supp.—, 54 L.R.R.M. 2184 (S.D.N.Y. 1963), aff'd, 329 F. 2d 147 (2d Cir. 1964).

42 See, for example, §10 of the U.S. Arbitration Act, 9 U.S.C. §10 (1952).
collective bargaining agreements are generally clumsy, inarticulate, replete with provisions that are mutually contradictory. In their haste to arrive at agreement on the so-called "economic" issues that are of most immediate interest to their boards of directors or their memberships, the negotiators of collective bargaining agreements produce writings that would horrify a meticulous draftsman. As Mr. Justice Douglas puts it:

Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith."\(^4\)

If we accept the Supreme Court's assertion that parties to a collective bargaining agreement contemplate, at the time of execution, that the sketchy text of their written contract will be given life by arbitrators' awards to be subsequently rendered, we should expect that they so agree upon the assumption that the arbitrators who render opinions under their agreement will do so not only impartially, but also with some degree of competence and in a way that can be reasonably anticipated. They in effect agree to the resolution of certain disputes that might thereafter arise between them in a manner consonant with the resolution of similar disputes under collective bargaining agreements that contain similar provisions. They agree that arbitrators' awards to be rendered under their collective bargaining agreement will have some kind of precedent value in the emerging common law of their industrial establishment.

If that indeed be the nature of the agreement between parties to a collective bargaining agreement that contains a broad arbitration provision, this question presents itself: Is the "refusal of courts to review the merits of an arbitration award" really the proper approach?

II

The award of a labor arbitrator is generally terse; several sentences will usually suffice. The resolution of a grievance concerning the proper aspect of some principle of seniority may be in an award that says simply:

Dawe was improperly laid off on January 3, 1965. He should have been transferred laterally to the job in classification no. 185 in Department L now held by Watkins. Employer

\(^4\) 363 U.S. at 580.
is required to place Dawe in the said job forthwith, and to make him whole for any loss of earnings he sustained as a result of the improper layoff. The arbitrator retains jurisdiction of this case for a period of 60 days to allow the Company and Union to enter a stipulation as to the amount of back pay due to Dawe. Failing agreement, subsequent hearings will be arranged at a mutually convenient time, upon the application of either party.

We note first of all that there are two losers in this award: the employer, who may owe Dawe a substantial amount of money, and Watkins, who for all we know may have lost his job. It is apparent that the property rights determined in this everyday kind of arbitration can be of staggering importance to those who are most directly involved; it is hard to believe that Watkins can find any therapeutic value in the arbitrator's award which removed him from his job.44

Harsh as the award's necessary consequence upon Watkins may be, we can find no fault with it if the arbitrator's determination justly applies the seniority provisions of the collective agreement before him. For we are here concerned not with some cozy easing of tensions, but with what must have been a matter of paramount importance to both employees, as well as one which involved substantial pecuniary exposure on the employer's part. Each of the parties desired justice from the arbitrator; and one hopes that justice was in fact rendered.

Upon the face of the award, it is not immediately apparent what the union's interest was in this case. There is no need to assume that Dawe is related to the shop chairman's wife or that Watkins welched on a poker debt. Grievances like Dawe's are presented hundreds of times a day in plants all over the country; and if they seem to be of at least colorable merit, will be processed through arbitration by union leaders who are terrified by the prospect of being charged with the breach of some duty of fair representation should they fail to go to arbitration.

The prime interest of the union in the Dawe-Watkins case will of course be the application of seniority principles in as uniform a manner as possible consistently with its own view as to the relative importance of certain criteria (length of service as opposed to skill and ability, for example). To determine what effect the Dawe-Watkins decision has upon the application of seniority principles throughout the plant, both employer and union rely upon the opinion which accompanies the arbitrator's award. The reasoning contained in that opinion should serve as guidelines to both parties, preventing not only some future relitigation of a Dawe-Watkins situation, but also clarifying the proper applica-

tion of seniority principles in quite different, but analogous, situations.

Let us imagine that the employer and union signed their first collective bargaining agreement on January 2, 1965—the day before Dawe's layoff. Suppose that the Dawe-Watkins case was the first grievance presented to an arbitrator in the infancy of the parties' collective bargaining relationship. The decision now becomes a truly prodigious source of precedent to be followed by subsequent arbitrators. The arbitrator has nonchalantly accorded himself the powers of injunction and of the assessment of damages; doubtless unaided by anything in the collective bargaining agreement, he has magnified his jurisdictional power in an effort to induce the parties to work out a mutually acceptable disposition of the back pay issue. And, of course, it very well may be that the contract's seniority article was silent as to what sorts of transfers might be appropriate in lieu of layoff: the lateral "bump" may be the product of the arbitrator's filling the holes in a Swiss cheese document.

The important moral of Dawe-Watkins is that the major objectives which both employers and unions seek in arbitration are predictibility and justice. By "predictibility" is meant simply the existence of a tradition of decisional approach that is sufficiently well established to enable one to guess intelligently how most arbitrators would respond to a given set of facts. "Justice" is a much harder term to define.

Two recent publications, one concerned with predictibility, the other with justice, demonstrate the kinds of problems that beset labor arbitration today. The picture of the arbitral process that emerges is somewhat less than flattering.

Solution to 3500 Labor Problems,45 a kind of digest to the bound volumes of Commerce Clearing House's arbitration service, purports to be an infallible guide to the proper conduct of labor relations. With this book, the publisher tells us, the doubts and uncertainties which plague harried labor relations personnel will be banished: thirty-five hundred clear-cut and definitive answers are presented that perforce will be followed by every arbitrator called upon to decide any grievance.

This new two-volume trouble shooter shows you what's been done in thirty-five hundred different labor dispute situations. It represents the distillation of the considered judgment of more than two hundred labor law experts who've been called on to resolve 3,500 different labor problems as they actually occurred. . . . All you have to do is scan the subject lists, flip through the alphabetized pages, find the problem paralleling yours and you're in instant touch with the precedent-setting decision of an experienced authority.46

46 Undated flyer, signed by James A. Merchant for CCH Products Company, a division of Commerce Clearing House, Inc., publisher of SOLUTIONS TO 3500 LABOR PROBLEMS.
We live in the age of the instant banana and the prefabricated martini. The University of Chicago Press offers the Hundred Great Books, which somehow manage to contain 101 Great Ideas. *Solutions to 3500 Labor Problems* is both symptomatic of the intellectual flabbiness that is so firmly entrenched in the Great Society and of the quest for definition in an area where definition is, perhaps, unattainable.

If the book were simply a digest of certain bound volumes of the publisher's labor arbitration reporter, it would be perfectly defensible. The type is readable; the arrangement of topics is convenient; and the breadth of coverage is fairly representative of the everyday grievances determined by labor arbitrators.

But we are promised more. The cases digested, we are told, are “precedent-setting”; all one has to do is to fit a factual situation within the terms of a digested case; close one's mind, and, presto! an answer comes forth. The assumption is that arbitrators, as a rule, act as if there is some kind of nationwide common law of grievance resolution; that one arbitrator's settlement of a grievance at one plant will, by virtue of a process in some way analogous to *stare decisis*, influence other arbitrators at different plants to decide similar grievances in similar ways.

The trouble, of course, is that this kind of comforting uniformity is by definition unavailable in labor arbitration. Different norms of conduct are required in different industries; among different employers in the same industry; and often among different departments of a single employer's bargaining unit. Smoking on the job in a sheet metal assembly operation may warrant a disciplinary warning, or at worst, a suspension of employment for several days, but even the first offense of smoking in a petrochemicals plant may justify immediate discharge. A truck driver's fondness for Anglo-Saxon expletives in addressing motorists may perhaps be one of the virtues required for the performance of his job; but surely one hopes for gentler speech from the mouths of school bus drivers.

As desirable as may be uniformity of approach among arbitrators, it is unthinkable that there can be anything like the instant “solutions” to labor problems which Commerce Clearing House so proudly offers. There may be, however, generally accepted standards of arbitral approach; and the parties to a labor agreement are entitled to believe that the man they have selected—whether as umpire or as *ad hoc* arbitrator—will bring to bear upon the problem before him an awareness of, and commitment to, the tradition in which he is working. Although the various decisions handed down by arbitrators in a given plant form the common law of that shop, decisions handed down elsewhere are no more than part of a developing tradition, an index to the current thinking of labor relations experts which may or may not
be persuasive on the factual issue immediately at hand. The parties to a collective bargaining agreement therefore seek predictability in the sense that they expect that arbitrators will be guided by the developing tradition or arbitral case law when they decide question of first impression under their agreement; and they expect that in other cases, arbitrators will act like common law judges.

But predictability is not the only virtue sought in arbitrators. We expect as well that perhaps indefinable quality of justice. A seemingly orthodox decision may work manifest injustice, while an idiosyncratic opinion may effect substantial justice upon the immediate question presented without doing violence to the common law of the shop. Frequently a decision will not only be eccentric but also unjust.

Suppose a manufacturer of wooden furniture were to discharge a cabinet maker who had been in its employ for thirty years and whose personnel record was exemplary, for the sole reason that he came to work twenty minutes late on the day after his youngest daughter's wedding. No arbitrator, one should like to think, would sustain such a discharge. And yet, although this instance is imaginary, the labor arbitration reports are full of decision that seem equally unjust.

The proliferation of weird decisions from arbitrators has been increasingly a matter of concern. In a recent article, Judge Paul R. Hays expressed this gloomy thought:

Pending scholarly studies and evaluations, I am forced to the conclusion, based upon observation during twenty-three years of very active practice in the area of arbitration and as an arbitrator, and from suggestions in the more intelligent literature in this field, that labor arbitration has fatal shortcomings as a "system for the judicial administration of contract violations," since this is, I believe, all that is basically claimed for it. An arbitrator is a third party called in to determine a controversy over whether one of the parties to the collective bargaining agreement has violated that agreement. He is not a wise counsellor and statesman to whom the management and the union look for advice on how to run their affairs or how to increase production or lessen tensions. He is merely an ad hoc judge to whom is submitted the question of whether the collective bargaining agreement has been violated. The chances are very good that, in all but a tiny percentage of arbitrations, this is the first time he has had anything to do with the plant, and that he knows nothing of the background of the dispute or of the "common law" of the industry. In fact there is a considerable possibility that this is his first arbitration case, .

There are only a handful of arbitrators who, like Shulman and Cox, have the knowledge, training, skill, and character which would make them good judges and therefore make them good arbitrators. In literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training,
skill, intelligence and character. In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract or other proper considerations, but in a way calculated to encourage the arbitrator's being hired for other arbitration cases. It makes no difference whether or not a large majority of cases is decided in this way. A system of adjudication in which the judge depends for his livelihood, or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system. In no proper system of justice should a judge be submitted to such pressures; on the contrary, a judge should be carefully insulated from any pressures of this type. There are many discussions of arbitration which do not mention this aspect of the process. In my opinion no discussion of arbitration which does not consider the effect of the arbitrator's dependence on the good will of the parties is completely honest.47

Convinced that "labor arbitration is a usually undesirable and frequently intolerable procedure,"48 Judge Hays toys briefly with the idea of specialized labor courts as an alternative, but expresses doubt that any expertise other than that generally expected of judges is really needed. He notes that in recent years courts have decided, under collective bargaining agreements that contain no provision for arbitration, the same kinds of issues as those generally submitted to arbitrators;49 and concludes:

I would be content, therefore, with a procedural reform which would make available for such case a simple, speedy, and inexpensive remedy. If the suggestion of a procedure like that of a small claims court does not satisfy these requirements, then I suggest as an alternative a procedure along the lines of the New York Simplified Procedure for Court Determination of Disputes.50 That procedure could be specified in the collective bargaining agreement, and the promise to submit to it would be specifically enforceable. The action is commenced without the service of a summons and without pleadings by the filing of a statement setting forth the issues ("claims and defenses"). A submission to this simplified procedure constitutes a waiver of trial by jury. At the hearing, rules as to the admissibility of evidence are dispensed with. The court may hold a pre-trial hearing and may direct pre-trial discovery and the taking of depositions. Although the New York simplified procedure permits no appeal, I would allow appeals in this area upon permission of the Court of Appeals.51

It is plain that Judge Hays would throw out the baby with the water.

48 Id. at 1035.
49 Id. at 1031-1022.
50 Judge Hays, in a footnote reference at this point of his text, cites the New York Civil Practice Law and Rules, §§3031-3037.
51 74 YALE L. J. at 1037.
Presumably most labor lawyers will agree that the rosy accounts of arbitration that appear in the self-congratulatory publications of the National Academy of Arbitrators go a bit far. Arbitrators, being men, are fallible: that proposition does not, however, warrant Judge Hays' conclusion that labor arbitration is a procedure that should be junked as efficiently and as brutally as possible.

If what is really desired in the resolution of grievances is a reasonable degree of predictability as well as substantial justice, the most sensible inquiry, one would think, is whether those ends can be realized within the existing framework of labor arbitration as it has developed in the past two decades. If some tinkering with the present machinery can produce the desired results, it is certainly poor economy to insist upon relegating it to the scrap heap.

Apart from this consideration, other strictures can be inveighed against Judge Hays' approach. One may assume that Judge Hays is correct when he speculates that thousands of arbitral decisions are rendered annually by incompetent arbitrators, but it is difficult to see how it necessarily follows that all judges are competent to render adequate decision on grievances that arise under collective bargaining agreements. Investiture in judicial robes does not constitute immunization from sloth, corruption, or just plain stupidity. Even the wisest judges err; and it is for this reason that we require some right of review of the decisions of judges and administrative tribunals.

By way of substitute for the arbitral process as it now exists, Judge Hays suggests something like the "simplified procedure for court determination of disputes" now available under the New York Civil Practice Law and Rules. Apart from the fact that no congruent procedure is available in the federal courts—and it is the federal judiciary, after all, who are to fashion the new common law of the collective bargaining agreement52—the crucial flaw in his reasoning is that it would provide no realistic alternative to the decisional quirks that make the process of labor arbitration too often fraught with exasperation. If appeals from the court which decided a labor grievance were allowed only with the leave of an appellate court,53 a party who feels himself wronged by the court's decision will probably have no more adequate chance of vacating the judgment than, under present law, he would have of vacating an arbitrator's award. Since, as Judge Hays

53 Judge Hays apparently misreads the New York statute when he observes that "the New York simplified procedure permits no appeal." Section 3037 of the Civil Practice Law and Rules authorizes appeals from final judgments or from orders "determining the making of the contract or submission or the failure to comply therewith." Interlocutory orders that do not determine the making of the contract or submission or the failure to comply therewith may also be appealed, but only with leave of the court.
notes, the rules of evidence are ignored in the "simplified" court procedure, it would seem that the major difference between arbitration and the kind of forum that he proposes is that one is not generally allowed to smoke in a courtroom.

When they select an arbitrator to resolve their dispute, the parties to a collective bargaining agreement generally assume that the man they have chosen, if not an "expert," is to some degree conversant with problems similar to the one presented to him. They assume that his experience in dealing with problems of labor relations will enable him to grasp the gist of the question before him upon "proof" that is sketchy or inarticulate. In most cases, labor arbitrations are tried not by lawyers, but by personnel managers and union representatives. For some reason, most employers and most unions prefer it this way; and in speculating about any system for the "judicial" resolution of their disputes, the habits and preferences of the parties should be taken into consideration.

Assume that under some "simplified" court procedure, a judge were called upon to determine whether a time value set for the performance of a certain task upon a certain set of machines was too low to enable the grievant to earn the incentive bonus contemplated under the collective bargaining agreement. Rules of evidence or not, the judge will doubtless be completely at sea when the "claims and defenses" are presented to him. In order to arrive at an intelligent decision, he will probably insist upon lengthy (if not formal) articulation of the parties' positions, and will probably also require the assistance of expert testimony. The imagination boggles at the length of time it would take to try a run-of-the-mill time value grievance in a court of law.

There are, however, grievances over issues that are more in line with questions that may be reasonably expected to arise in general litigation. An employee discharged for gambling may claim that the employer fired the wrong man: getting at the truth, in a case like this, will obviously involve precisely the same processes that are ordinarily called into play in the resolution before a court of any factual dispute. In this sort of grievance, dispensing with the rules of evidence would be equally intolerable in the arbitral and the judicial forum.

The two examples just given present two vastly different, yet tiresomely familiar, kinds of grievances that are ordinarily decided by labor arbitrators. It is hard to imagine that anyone who does not possess considerable expertise in labor relations will be able to render a fair decision on the time value grievance with anything remotely resembling expedition. No amount of labor expertise, however, can be deemed a reliable substitute for the careful sifting of evidence that would be required for a just decision to be reached in the gambling case.

It would seem, therefore, that the substitution of a "simplified"
court procedure for arbitration would create more problems than it would solve. Where shorthand proof is desirable, the technical complexities of the problem would require most judges to hold cumbersome and time-consuming hearings; where lies are to be sorted from half-truths, the dispensing with the rules of evidence might constitute a license for perjury and would certainly sorely affect the rights of the individuals most intimately concerned in the outcome of the litigation.

What is needed is a less drastic reform than that proposed by Judge Hays, but one that is reasonably calculated to promote the ends of predictibility and justice in labor arbitration. The author is in basic agreement with the Supreme Court that, under the usual broad arbitration provision contained in a collective bargaining agreement, every grievance that is not specifically exempted from arbitration by a written provision of the agreement should be deemed arbitrable on the merits. That does not mean, for the reasons suggested, that there should be no efficacious means of reviewing a labor arbitrator's award.

Labor arbitration, as we have seen, differs in certain fundamental respects from commercial arbitration. The general arbitration statutes were framed with commercial arbitration in mind; and the very limited grounds they allow for vacating an arbitrator's award should properly have no application in the context of labor arbitration.

There is some evidence that a re-thinking of the validity of the Steelworkers trilogy is taking place in the Supreme Court; and it is suggested the case which most warrants reevaluation is the Enterprise decision, in which the Court held that "refusal of courts to review the merits of an arbitration award is the proper approach."

The best interests of all concerned would be served by a repudiation of Enterprise and the authorization of full review—to the same degree that an appellate court will review the judgement of an inferior court sitting without a jury—of arbitrators' awards. Review could be obtained upon a simple motion brought in a district court, utilizing the procedures of the U.S. Arbitration Act and invoking special federal question jurisdiction under §301 of the Labor Management Relations Act of 1947.

This suggestion, if followed, would bring about an increase in the number of arbitrators' awards that are sought to be vacated, but probably not a very substantial increase. Arbitrators who today are given free rein to practice decisional whimsy will no doubt be more chary about

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55 See cases cited in note 54, supra.
the application of their "own brand of industrial justice" when they realize that their decisions, like those of judges, can be set aside because of errors of law or of factual determination. The existence of a meaningful power of review should reduce significantly the number of awards that cry out for reversal. Arbitrators' livelihoods, as Judge Hays points out, are at the pleasure of those whom they judge; and it is certain that no party to a collective bargaining agreement would for long expend money upon an arbitrator whose decisions are frequently set aside.