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MEDIATION CONCILIATION AND ARBITRATION

U.S.A. AND INDIA

A Comparative Study

A. V. Raman Rao

POPULAR PRAKASHAN
BOMBAY

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To

AMERICAN FRIENDS

PREFACE

This book is the outcome of my observational travels in the United States and Canada and my subsequent work on these problems at Harvard University and the Centre for Industrial Relations, Department of Social Sciences, Massachussets Institute of Technology, Cambridge, Mass. as a faculty guest during the years 1959 and 1960.

Early in 1959, I received an invitation from Mr. Ellsworth Bunker, the former American Ambassador to India, on behalf of his government asking me to visit the United States to observe the cultural and technical Institutions there. It was also intended that my travels and observations in America would serve the purpose of a good cultural exchange by enabling me to acquaint myself with the facts of American life and to help Americans, in return to a better understanding of the situation here, particularly in the fields of my competence like Economic development and Labour in which I have been engaged as an Academician and administrator prior to and after my joining as an official of the labour ministry in Bombay in 1948. Over these years I held various positions as Deputy Director of Labour Information, Assistant Commissioner of Labour Administration, Conciliator under the Bombay Industrial Relations Act, 1946, Conciliation Officer under the Industrial Disputes Act (Central) 1947, Professor-Director Bombay Government Institute of Labour, and Visiting Professor in similar other Institutions, Member, Syllabus Committee for Training of Teacher Administrators under the Workers' Education Programme of the Ministry of Labour, Government of India, Manager, Textile Labour Decasulisation Scheme, Officer in charge of supervision of labour laws like the Minimum Wages Act and Shop Acts, guiding and conducting various socio-economic inquiries into labour problems, publication of labour periodicals, thus taking an active part in various aspects of labour administration, teaching and research.

I accepted this invitation as it was a welcome opportunity for me to learn a good deal from a highly advanced

country like the United States, by observing and discussing these various problems with my counterparts there in the Government and the Universities and to exchange views with them, in the light of my experience, back home.

On my arrival, in the United States the U.S. Department of Labour at the instance of the State Department, was good enough to take care of my itinerary and administrative arrangements to put me in touch with different sections of the department of Labour at Washington D. C, various State Departments of Labour, Mediation and Conciliation agencies, Mediation Boards, Arbitration Associations like the American Arbitration Association at New York, most of the prominent American Universities, Institutes of Industrial Relations, Chambers of Commerce, Trade Union organisations and their research departments as of AFL-CIO, United Mine Workers Union, in Washington D. C., International Ladies Garment Workers' Union, the Local and Municipal Workers' Union, the Social Workers' Union, the branch of the ICFTU in New York and the related agencies in the United Nations Secretariat.

During my stay in Washington D. C. I had the pleasure of discussing with Messers. W. S. Motely, Director of the U. S. Bureau of Labour Standards, Roger Grant, Chief, International Labour Affairs Division, George C. Lodge, Assistant Secretary of labour, Jules Weinberg, Consultant on Far Eastern Labour affairs, and various other important officials and divisional chiefs, problems relating to mediation, conciliation, arbitration, minimum wage administration, farm wage regulation, labour research, trade union administration, statistics, labour standards maintenance, health, welfare and employment policies pursued by the U. S. Department of labour. I went to see the working of the National labour relations board at Washington D. C. when Mr. Louis Silverberg, the then Secretary was good enough to discuss with me, the main operational features of this machinery in the U.S. Labour relations.

Later on, during my extensive travels in the country, I met and discussed similar problems with the State depart-

ments of labour in Baltimore, Maryland, Newark, Princeton, New Jersy, Philadelphia, Pittsburgh, New York, Buffalo, New Haven Connecticut, Massachussets, Boston, Penn State, Madison, Wisconsin, Los Angeles and San Francisco in California, Nevada, North Carolina, Knoxville, Tennesse, Arizona, Seattle, Washington, and in Honololu, Hawaii.

In this connection, my itinerary also included visits for discussion with relevant faculties in some of the well known Universities like the Roosevelt University, Maryland University, George Washington University and Howard University in Washington D. C., John Hopkins University at Baltimore, Rutgers State University at New Brunswick, Newark, Princeton University, New Jersy, University of Pennsylvania, Philadelphia, University of Pittsburg, Carnegie Institute of Technology, and School of Public Administration, in Pittsburg, Pa., Penn State University, University of Columbia, New York University and New York School of Social Research at New York, Institute of Labour and Industrial Relations at Cornell, Ithaca, N.Y, Yale University, New Haven, Connecticut, Harvard University and Massachussets Institute of Technology, Cambridge, Mass., Brown University, Brandies University, Amherest University, Boston University, Universities of Chicago, Illinois, Champaign, Southern Illinois University, Carbondale, Universities of California, Los Angeles, Southern California University, University of California, Berkely, Stanford University, Paolo Alto, University of Washington, Seattle, and University of Hawaii, Honololu.

I had opportunities to observe the Federal, State and some of the private mediation, conciliation and arbitration agencies at work. I took part in some of these conferences with the courtesy of the officials of the Federal and State Departments of Labour, and the consent of the representatives of labour and managements in some of the industrial disputes. I was present at some of the long sittings to settle big strikes in some of the leading industries on the east coast. I was invited by the Federal and State Department of Labour to sit along with their conciliation officials and to

mediate in some of the disputes, where the union leaders and management representatives gave me excellent co-operation. I sat through some of the arbitration hearings of the panels of the American Arbitrations Association at New York and other arbitration proceedings by private and official arbitrators in different parts of United States.

These various agencies like the departments of labour, Universities, trade unions and employers' organisations gave me lots of literature on these problems for my use.

On the completion of my official programme with the State department, my mind was full of the American experiences and observations made in different parts of the United States, at various centres of administration, teaching and research. Wherever I went, I used to be asked, whether I would be writing about my observations and reflections in this field. But, I always felt hesitant to say anything positive as I was afraid that whatever I might say on the basis of my observations on such a whirlwind tour, without further study in tranquility, might not be correct or appropriate and hence not worth while.

This thought was once again rekindled in a chance meeting with Professor Neil W. Chamberlain, of Yale University, who was then teaching at Columbia University. He was also at the same time working as a consultant to the Ford Foundation, at the time I made a courtesy call on the top executives of the Foundation at their New York Head quarters, as a part of my official itinerary. After consulting the State Department and their representative Dr. Douglas Ensminger in India, the Ford Foundation seemed to have kindly thought of assisting me to stay in the United States for a while, to pursue this work.

At the end of my official tour, when I was about to return to India, the Ford Foundation gave me a pleasant surprise by a generous offer of a study and travel grant with facilities to do advanced work, in the Industrial Relations Centre of the Department of Social Sciences at Massachussets Institute of Technology and later at Harvard University. The

State Department was kind enough to extend my stay. My Government back home, was good enough to extend my leave of absence abroad. This all round encouragement gave me an excellent opportunity to sit in tranquility, to recollect, to reread, reassemble, think and study further all the available literature in the University of Harvard and Massachussets Institute of Technology and to embark upon this intensive study of American Mediation, Conciliation and Arbitration.

At this very time, I had the privilege of being coopted into a public administration programme for mid career civil servants, at the Littaeur Centre for Public Administration, Harvard University. The Ford Foundation, at the instance of Harvard, was good enough to give me the required additional financial assistance, for my participation in this programme.

In addition to my original commitment to undertake research on problems of mediation, conciliation and arbitration, with the help and advice of Professor Charles A. Myers of M. I. T. and Professor John T. Dunlop of Harvard University I had also gained considerable insight into the problems of public Administration, economic Development, industrial relations, Wages and public policy, by attending several seminars on these topics. At Harvard, I was involved in the study of the problems of economic development by being in a course by Mr. David E. Bell, the present Director, A.I.D. Professor Edward Mason, World Bank consultant and chairman of the Institute of International Affairs, Prof. Gustav T. Papnek of the Pakistan Iran Economic Development Project and others. I had also participated in seminars on Economic development that used to be conducted by Professor John K. Galbraith, the present American Ambassador to India, on International Economic Relations and Policy by Prof. Gotfried Haberler, on Public Administration and Public Policy by Prof. John Gaus, on Government by Dean Don K. Price and on Labour and Public Policy by Prof. John T. Dunlop. At M.I.T., I was attending the research seminars

on labour and industrial relations by Prof. Charles Myers, and Economic development by Professor Rosenstein Rodan. My participation in all these fields of study and my discussions with these eminent authorities, has considerably influenced my thinking on problems of public policy, economic development, labour and industrial relations and public administration, in general.

My travels in Canada and discussions with the Departments of Labour at Ottawa, Montreal, Quebec, Vancouver and Victoria, British Columbia and with the faculties of Economics and Industrial Relations in the Universities of Toronto, the Mcgill University, Montreal, Universite Laval, Quebec, and University of British Columbia, Vancouver, further broadened my outlook on these problems. An invitation to attend the Canadian Labour Ministers and Administrators Conference at Quebec, on board the S. S. TADOSSAC, on a cruise to the lower St. Lawrence and Sanguenay River on 2nd and 3rd September, 1959, gave me a wonderful opportunity to discuss problems of interest with the various Ministers, Dy. Ministers, and top officials of the Canadian Labour Department. Prof. H. D. Woods, Director of the Industrial Relations Centre, Mcgill University asked me to come to their 10th Industrial Relations Conference at Montreal, immediately after my visit to Quebec. This visit gave me another opportunity to meet some of the leading Canadian labour leaders and labour specialists. My talks with Professors H. D. Woods of Mcgill University, Emile Goslaine of Universite Laval, Quebec, Duetch, and his colleagues at the University of British Columbia, Vancouver further helped me in my understanding of the Canadian labour scene. As my observational travels in Canada were a sequel to my official programme in the United States, they came as a very befitting background to my subsequent stay at Harvard and M.I.T. to review and study these problems at leisure.

I consider it a rare opportunity to have such a background of stimulating experiences of observational travels in the United States and Canada at the highest level and to be

in the midst of the highly exciting intellectual atmosphere of Harvard and M.I.T. amidst which, I could do this work.

Though the Canadian conciliation is somewhat analogous to the Indian, the arbitration procedures are more or less similar to the American pattern. I gathered a good deal of material on the Canadian scene too but I contented myself in the present work with a comparative study of the U. S. and Indian patterns alone with major emphasis on the American scene. I tried to compare the American practices and procedures with the Indian ones. There are striking similarities as well as dissimilarities. The critical assessment I made of the American methods of conciliation and arbitration, in the following pages is more or less an Indian view of them.

This attempt, I hope, will dispel certain prevailing misapprehensions about the prevalance of free collective bargaining and absence of government regulation in the United States as against India. There are restraints and restrictions on the freedom of parties, mainly labour and managements even in the United States. In fact, they are more rigorous in some instances than in India. The working of the national labour relations board, the constitutional clauses and discipline rules in the bye laws of some of the American trade unions, the definitions of unfair labour practices, the seizure provisions in the emergency disputes legislations are some of the pointers in this connection. The practice of arbitration of grievances arising out of collective bargaining contracts is altogether a different institution, compared to the system of compulsory or voluntary arbitration of industrial disputes that prevails in India. The preponderance of private voluntary agencies for mediation, conciliation and arbitration in the United States is in contrast to the hegemony of statutory state agencies for these purposes in India through government appointed conciliators, adjudicators (tribunals), labour courts, industrial and arbitration courts. The respect for case law and precedents widely prevalent in India is not commonly shared in the United States. There is a very wide divergence of opinion, even among

American scholars about most of the aspects of American arbitration in practice, which is equally interesting to a foreign student of such public affairs. The Inter-State Commerce Clause in the Taft Hartley Act is not more than a dead formality, while the jurisdictional lines of demarcation between Federal and State Conciliation Agencies 'under the Industrial Disputes Act (Central) 1947, in India are quite rigorous. As voluntarism is a byword in American life, private grievance arbitration, has acquired a near religious significance. All this does not mean that American arbitration has nothing to offer to Indian experience or Indian labour relations practices cannot influence American procedures. I have discussed both these aspects towards the end of the book.

I hope I shall not be mistaken as a misanthrope, for the frank expression of my views, on mediation, conciliation and arbitration at work. My observations are those of a friendly visitor anxious to understand and explore these fields. I tried my best to understand them. I hope I got them right. I alone, am responsible for the opinions I have expressed.

The first sections on mediation and conciliation were written for a seminar paper at Harvard University. Prof. John T. Dunlop was kind enough to go through them and make some useful suggestions. The sections on arbitration, form a part of my special assignment at the M.I.T. where I worked with the help and advice of Prof. Charles A. Myers. He was also good enough to take time off to see the manuscript and give elaborate comments from which I have benefited immensely. I am very much indebted to Professor John T. Dunlop of Harvard and Professor Charles A. Myers of M.I.T. for their very kind personal interest in me and my work and for their constant help and encouragement. My intimate working association with these two leading American economists and labour specialists of repute has been a very refreshing, pleasant and highly rewarding experience.

My obligations are far too many to acknowledge individually. The hosts of ministers, government officials, trade union leaders, mediators, conciliators, arbitrators, professors of economics and industrial relations, with whom I had discussions throughout the length and breadth of United States and Canada have influenced my ideas on these matters considerably. The warm hospitality and friendliness it was my privellege to enjoy from one and all in these two great countries bound me to them by silken ties of personal attachment. I am very deeply touched by the kindness shown to me everywhere.

My stay at Cambridge was made extremely pleasant by my hosts Mrs. and Mr. Frank Scott and their family who had accommodated me in their cosy place at 62, Kirkland Street, Cambridge, which is very near to Littaeur School, one of the main centres of my activity then.

Mrs. Esther Brine, secretary of Prof. John Dunlop, Miss Rodha Abrahams, secretary of Prof. Charles Myers, the librarians at Harvard University and M.I.T. have all rendered me great assistance.

My visit to the United States itself, as said earlier, was made possible by the invitation of the American Government. I very deeply appreciate their hospitality, the warm treatment, the wonderful facilities they gave me and the very excellent and efficient arrangements they made for my stay and travel both ways and while I was in the United States and for having put me in touch with the various persons and institutions in my field. I should not fail to mention Mr. John Mcalpin of the U. S. State Department and Mr. Adrian Roberts of the Department of Labour who looked after my official Programme. I am also deeply grateful to the Ford Foundation who gave me a generous research and travel grant which made this work possible by my further stay at Harvard University and M.I.T. I am similarly obliged to the authorities of M.I.T. and Harvard universities who gave me all the facilities to do advanced work, the M.I.T. by taking me as a faculty guest and Harvard by

extending to me, an unusual courtesy of coopting me in the Public Administration Programme for mid career civil servants, after my arrival there. The Institute of International Education, at 1. E. 67 street, New York, 21, and their officials Mr. Gerard Gibbons and Miss Mary J. Rowe have rendered me significant assistance in my travels, during my subsequent stay in the United States, further to my official programme with the State Department.

I have enjoyed my stay and travels in the United States immensely. It is impossible for me to express adequately how deeply I appreciate the great hospitality and kindness I received everywhere and the significance of this visit to me.

If this modest effort of mine would serve as a token of my gratitude for what all I received from the United States and as an attempt towards a good cultural exchange, for which my visit was mainly intended, I shall have done my duty, to some extent at least.

The credit for bringing out this book so quickly goes to my friends Shri Ramdas Bhatkal of Popular Prakashan, Shri V. P. Bhagawat of Mouj Printing Bureau and Shri S. Seshadri, M.A., who took time off to edit it, before I sent it for publication.

AJJARAPU VENKATA RAMAN RAO

Bombay,
15*th June* 1963

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MEDIATION
CONCILIATION
AND
ARBITRATION

CHAPTER I

MEDIATION AND CONCILIATION IN THE UNITED STATES

'MEDIATION' in industrial relations, refers to the attempt of a third party to help to settle labour disputes amicably between employer and his employees. The term 'conciliation' had, at one time, a slightly different meaning, but now both Conciliation and Mediation have come to mean the same thing. , In United States both these terms are used interchangeably.[1]

The American public policy in Mediation and Conciliation is best illustrated by a New York Law which says :

> That the best interests of the people are served by the prevention or prompt settlement of labour disputes, that the voluntary mediation of such disputes under the guidance and supervision of a government agency will tend to promote industrial peace and wealth, welfare, comfort and safety of people.[2]

Historical Background

The United States Department of Labour was created in 1913 by the Congress "to foster, promote, develop the welfare of the wage earners of the United States, to improve their working conditions and to advance their opportunities for profitable employment."[3]

> This new federal function of mediation in labour disputes authorised by the Secretary of Labour (by section 8) to act as mediator or to appoint commissioners of conciliation whenever the interests of industrial peace may require.[4]

The U.S. Conciliation Service was then created in 1915 and the two boards under the Railway Labour Act, 1934, namely, the National Mediation Board, with headquarters at Washington and the National Railway Adjustment Board at Chicago were established in 1934 to solve the problems

of Rail and Air transport. The third was the National Labour Relations Board which among other things, guarantees workers' right to bargain collectively. President Roosevelt said, "it is an independent quasi-judicial body. It does not mediate or conciliate in labour disputes."

Techniques of Conciliation Service

The U.S. conciliation service acts (i) as a conciliator in industrial disputes, (ii) as a mediator called upon by the parties, (iii) as a referee provided for in wage agreements, and (iv) as a technical consultant called upon to come in the settlement of problems, which have become points of friction between labour and management.[5]

The conciliators can also be of help (i) when representatives of Management and Labour are new to collective bargaining, the conciliators can make the information available as to the practices in their community and industry, (ii) when the parties disagree over the language of specific clauses, the conciliator will know how to word them, (iii) when both have talked themselves out and are far from approaching a solution to their problems, the conciliator will be able to bring in a fresh point, (iv) when both have exhausted their bargaining talents and a strike is threatened or has begun, the conciliator will attempt to keep negotiations going, conferring separately with each party, till a basis for mutual discussion is re-established.[6]

Who are the Conciliators?

They come from Trade Unions, Managements, Universities and some of them are without any formal education. Twenty per cent of the conciliators have management background, 34 per cent have union or other background, but know industrial relations. When once they are taken up, all commissioners of conciliation take an oath of impartiality as representatives of public interest, in the peaceful settlement of industrial disputes, whatever be their former background.[7]

How are They Recruited ?

The methods of recruitment vary from State to State. In California, the recruitment is done by means of open civil service competitive examinations. In Colorado, the appointments are made by the Governor. In Connecticut, the Board members and Alternates are appointed by the Governor, while the mediation secretary and stenographic secretaries are appointed by the Commissioner by merit examinations. Mediation agents are appointed by the Commissioner of Labour as members of unclassified service. In Georgia, they are appointed by the Commissioner of Labour ; in Illinois, by the Director of Labour ; in Indiana, by the Commissioner with the consent of the Governor while the Commissioner is appointed by the Governor. In Kentucky, merit system is followed. In Maine, appointments are made by the Governor. In Maryland, the Commissioner is appointed by the Governor. Deputy Commissioner is appointed by competitive examination for promotions. All others are appointed after passing the civil service competitive examinations. In Massachusetts even the Board members are appointed from civil service lists based upon the results of competitive examinations. In Michigan, Board members are appointed by Governor, with the consent of Senate, executive secretary and co-ordinator of conciliation by Board, but all of them are from the civil service list. In Minnesota, State Labour Conciliator is appointed by the legislature, while deputy and assistants are appointed by the civil service departments. In Newhampshire, Commissioner is appointed by the Governor along with Board members. In New Jersey, members are appointed by the Governor and the secretary by the Board. In New York, the Board members are appointed by the Governor with the consent of the senate, executive secretary, assistant secretary and counsel are appointed by the Board supervising labour mediators. In the rest of the states, the appointments are made either by the Governor or Commissioner or the civil service commission.[8]

Size and Salaries of the Staff

The strength of the Mediation service and their salaries also vary from State to State. Federal mediation and conciliation service has the largest number of officials with twenty-nine offices all over the country, and more than one office in states like California, Michigan, New Jersey, Washington and Wisconsin. The staff size varies from 380 of F.M.C.S. to 40 in New York, 25 in Michigan to 15, 14, 13, 12, 11, 9, 8, 7, 6, 5 to 1 in the various other states.

The salaries of the conciliation service vary from $1,030 to $2,400 per year. The Board members in New York are paid daily allowance ranging from $25 to $30 per day. In Michigan, they are paid an annual salary of $6,000. The allowances and salaries vary from State to State.[9]

Qualifications and Training

The regional director of conciliation will consider the qualifications of a Commissioner of Conciliation while assigning a dispute to him. Intensive in-service training is provided for him by attaching him to others for observation, before he is asked to take up independent work.[10] The conciliators are to be resourceful, impartial, objective and clear minded to have an insight into the nature of the dispute, before they try to have a meeting of both the parties for informal discussions.

State Mediation Agencies

Mediation has a chequered background. Among the States, Maryland was the first to have mediation legislation as early as 1878 providing for arbitration by the State Board of Public Works in disputes in which they had some interest either as stockholders or creditors. New York and Massachussetts had established permanent Boards of Conciliation and Mediation, as early as May and June, 1886 respectively. Most of the other States followed suit in the next forty years. But, the legislation was usually dormant. Even by

1932, only three States, New York, Massachussetts and Pennsylvania were really active. In no other State was there a single State employee devoting full-time for mediation of labour disputes.[11] By 1958, the picture changed. There are several mediation boards, independently or under State Labour Departments.[12] Alabama, California and Puertorico have one or more full-time mediators or conciliators. Maine and Oklahama have mediators with Boards of two and three members which convene on request.

Extent of State Mediation Programmes

The extent of Mediation Service provided also varies from State to State. Among the forty-four States, Hawaii and Puertorico have some facilities, established by law or practice for mediating labour disputes in industry. Thirty-seven States have specific statutes, under the authority of which mediation is carried on by the State agency.[13] In fourteen of the States and Puertorico, special sub-divisions of these programmes have been established within the department subject to its jurisdiction. Mediation is established by law in Connecticut, Maine, Massachussetts, New Jersey, New York, North Carolina, Oklahama, Oregon and Puertorico, and by administrative action in California, Illinois, Pennsylvania, South Carolina and Washington. In the fourteenth State, Lousiana, a Board of Mediation was established by law and in addition the Commissioner of Labour has set up a conciliation service. In six of forty-four States, mediation authority has been placed by law in agencies, independent of the Department of Labour. Three of these have independent boards, i.e., Florida, Michigan and Minnesota.[14,15] In Ohio, mediation powers are vested in the Workmens' Compensation Agency. In Wisconsin, mediation is one of the functions of the Board that administers labour relations law.

Authority to Intervene in Labour Disputes

The procedure for intervening in labour disputes is different from State to State. Even the Labour Manage-

ment Relations Act requires the same mediation agencies to be notified of certain labour disputes. Such a notification does not mean that the Mediation Service will be offered automatically. Some State mediation agencies offer service under State Law or in practice or on request whenever they have knowledge of a labour controversy, while others do so only when approached by one or both the parties for assistance. In Alaska and Indiana, the State Agencies intervene on their own, only in matters affecting public interest. In some States, as in Connecticut, Illinois, Massachussetts, New Hampshire, Ohio, Oklahama, Pennsylvania and Puertorico, it is mandatory to intervene, whenever there is a strike or lockout. In New Hampshire such mandatory intervention is limited to disputes involving ten or more employees, and in Oklahama, to those involving twenty-five or more. In four States, Michigan, New Jersey, New York and North Carolina, the agency must offer its services when directed to do so by the Governor. In New Jersey, Maine, California and Oregon, the mediation agency may intervene on its own motion, but must mediate when requested by one or both the parties. In Utah and West Virginia, both parties must ask for assistance. While under the L. M. R. Act certain disputes must be reported to the State mediation agency, in four States, Illinois, Massachussetts, Ohio and Oklahama, local public officials are requested to notify the agency of the existence of any actual or threatened strike or lock-out, occurring in their jurisdiction and covered under their laws.[16] In Colorado and Michigan, a strike notice is mandatory in the industries, while in Hawaii and Wisconsin, such notices must be given when farm and dairy products are involved. In Minnesota, a petition for conciliation must be sent, at least ten days before, the due date of strike or lock-out.

Fact Finding Authorities

Some of the State laws of mediation authorise the agencies to investigate and make public reports on labour disputes, in which one or both the parties refuse to agree

for mediation. In some States the law requires the reporting of the mediating agency to assign responsibility or blame for failure to settle disputes on either of the parties. Provisions for investigation and public reporting are found, in the mediation laws of about twenty States including Hawaii.[17] In four of these, public reporting is authorised only when certain industries or employees are involved in the dispute—in Hawaii and Illinois, a public utility must be involved; in Minnesota, an industry or institution engaged in the supply of necessities of life, safety and health; in Michigan a hospital or public utility or public employees. The New York law is the only State-law that provides for investigation, not by the Board of Mediation, but by a specially appointed Board of Inquiry, which is set up for the purpose, when the Board of Mediation certifies that it is unable to settle the dispute.

Arbitration Provisions in State Mediation Laws

Arbitration differs from mediation. In arbitration, the impartial third party, called the arbitrator, after hearing both sides to the dispute, makes a decision which is binding on both the parties. But in mediation, the mediator has no authority to make or give decisions, he only aids the two parties to settle their differences by making their own decisions.

The laws of Hawaii, Puertorico and thirtyone other states provide for mediation by statute.[18] They also include some provisions of arbitration, if mediation fails. In some, the mediation agency itself may arbitrate upon agreement of the parties. In others, it may appoint one or more arbitrators to an Arbitration Board and in others, the mediation agency is merely directed to promote arbitration.

Special provisions relating to public utility disputes

The public utilities constitute a special core and are governed by different provisions for the maintenance of industrial peace in them. Twelve states including Hawaii

provide for mediation and arbitration of labour disputes in public utilities, i.e. industries supplying heat, light, gas, water, power, transport and communications. The Michigan law includes hospitals and Minnesota law, institutions supplying the necessaries of life, health and safety. Most of these thirteen laws have been passed since 1946. Some prohibit lockouts and strikes or permit them only after all procedures outlined in the law are complied with. Nine state laws provide either for compulsory arbitration of labour disputes or for seizure and operation of the utility by the government for a certain period, if the dispute cannot be settled by mediation. Laws of Florida, Indiana, Nebraska, Pennsylvania and Wisconsin provide for compulsory arbitration, but later amended to make arbitration voluntary rather than compulsory. In Hawaii, Illinois, and Minnesota, the laws do not provide for either arbitration or seizure in the case of public utility disputes, but place reliance for settling disputes, if mediation fails, on finding and publicising facts in each case.

Mechanics of conciliation

The way the facilities of Mediation and Conciliation are provided is also important. It is necessary to know whether the parties should write or request the federal or state mediation agency when a dispute arises and how they do it.

The L.M.R. Act of 1947, section 8(d) requires that if a union or company wants to change or modify or terminate a contract, it must give the other party, sixty days' advance notice. If within thirty days thereafter, agreement has not been reached, the party that made the initial request must notify the F.M.C.S. and the appropriate state mediation agency about the existence of the dispute. For the convenience of the parties, the mediation service provides a formal notice which may be obtained from any of the regional offices. Parties needing help in negotiating their first contract or who have a dispute over a matter not

requiring the filling of a notice may communicate with the regional director of F.M.C.S. About two hundred and fifteen mediators are located in strategically located communities with regional offices throughout the country.

Emergency injunctions

The treatment of emergency disputes is rather different. The L.M.R. Act 1947 provides for the intervention of the federal government in disputes which threaten or imperil national safety or health. It authorises the courts, on request of the Attorney-General, to enjoin a stoppage or production period of 80 days. This may be a "cooling off" period or "heating up" period depending on the circumstances of the case. It is clear that government cannot just stand by, when the safety or health of the nation is imperilled. Any action which it takes must of course be consistent with the national traditions and customs. To many Americans, such injunctions are inconsistent with the traditions of voluntarism.[19] Cyrus Ching, a former director of F.M.C.S., felt "that the continuance of work and production for 80 days or any other period might be assumed in some national emergency dispute without the necessity of resorting to injunctive practices or any other methods of compensation."[20]

Federal-State Cooperation

There is a clear cut distinction between the jurisdiction of the federal and state mediation agencies, as contemplated in the scheme of the law. The L.M.R. Act 1947, provides that the F.M.C.S. shall make its mediation facilities available in labour management disputes, threatening a substantial interruption of inter-state commerce. The act also stipulates that the service should avoid mediating disputes that have only a minor effect on inter-state commerce, if state or other mediation facilities are available. The director of the Federal Mediation and Conciliation services is also

authorised to establish suitable procedures for cooperation with state and local mediation agencies.

In December 1955, the F.M.C.S reached an understanding with the officials of the state mediation agencies association and individual officials and issued general regulations to replace individual agreements that had been previously entered into with various state mediation agencies in this matter.

Policies of the Federal Mediation Service

(Section 1403.2) It is the policy of the F.M.C.S. (a) to facilitate and promote the settlement of labour disputes through collective bargaining by encouraging labour and management to resolve differences through their own resources, (b) to encourage the state to provide facilities for better labour management relations and for resolving disputes, (c) to prefer its services in labour management disputes in any industry affecting commerce, except in matters subject to the provisions of the railway labour act as amended, either upon its own motion or upon the request of one or both the parties to the dispute, whenever, in its judgement, such disputes threaten to cause a substantial interruption to inter-state commerce, (d) to refrain from offering its services (i) in labour management disputes affecting inter-state commerce exclusively (ii) in labour management disputes having effect on inter-state commerce if state or other services are available to the parties, or (iii) in a labour management dispute, when a substantial question of representation has been raised, or to continue to make its facilities available when a substantial question of representation is raised during the negotiations, (e) to proffer its services in any labour management dispute directly involving government procurement contracts, necessary for national defence, or in disputes which imperil national safety or health (f) to proffer its services to the parties in grievance disputes arising over the application or interpretation of an existing collective bargaining agree-

ment, only as a last resort and that too in exceptional cases."

Obtaining data on labour management disputes (Section 1403.3).

The act lays down the way in which a dispute, when referred, should be handled. When the existence of a dispute comes to the notice of the Federal Mediation and Conciliation Service, upon a request for mediation service from one or more parties to the dispute through notification under the provisions of section 8(d) (3) of Labour Management Relations Act, 1947 the federal Mediation and Conciliation service will have to examine the information, to determine whether it should proffer its services under its policies or not. If sufficient data on which a decision could be arrived at is not at hand, the federal service shall inquire into the circumstances of the case.

Assignment of Mediators (*Section* 1403.4)

If it is decided that the Federal Mediation and Conciliation Service is to intervene in any dispute, then the federal mediation service will assign one or more mediators to each labour management dispute.

Relation with State and Local Mediation Agencies

In practice, there is no clear-cut jurisdictional division. If under a state or local law the state or local mediation agency must offer its facilities in a labour management dispute, in which the Federal Mediation and Conciliation Service is also offering its services, the interest of all such agencies will be recognised and their cooperation will be encouraged, in order that all efforts may be made to prevent or to effectively minimise industrial strife. (ii) If in labour management disputes, there is a reasonable doubt that the dispute threatens to cause a substantial interruption of commerce, or there is more than a minor effect upon inter-state commerce and state or other conciliation services are available to the parties, the regional director of Federal Service will endeavour to work out suitable arrangements

with the state or other conciliation agency for mediation of disputes. Decisions in such cases will take into consideration the desire of the parties, the effectiveness and availability of the respective facilities and the public welfare, health and safety. (iii) If required by a state or local mediation agency, or the chief executive of a state or local government, the Federal Mediation and Conciliation Service may make its services available in a labour management dispute, which would have only a minor effect on inter-state commerce, if and when, in the judgment of the federal service, the effect of the dispute upon commerce or public welfare, health or society justifies making available its mediation facilities.

Voluntary arrangements by the parties

Besides the statutory arrangements discussed so far, occasionally the parties in a labour dispute will prefer to select a particular individual to act as mediator, rather than accept the services of Federal or State Government Agency. The variety of circumstances under which such decisions are made are infinite.

City Mediation Plans

Several Municipal cities have also established mediation plans to handle disputes, affecting the welfare of the community. Groups of prominent public citizens have created voluntary mediation machineries sometimes manned by union and management representatives alone, and sometimes with public members.

Mediation with powers to recommend

Under the Federal and State laws, if statutory mediation fails, the union can go on a strike. But, under the Act, the Railway labour machinery and the Atomic Energy Labour Relations Panel have the powers to issue reports after failure of mediation. The Railway Labour Act established a National Mediation Board to mediate disputes not covered

by the contract. One or both the parties may request the Board to intervene or the Board may intervene in case an emergency is found to exist. If mediation fails, no change in wages or working conditions may take place for thirty days. During this period, the union may take a strike vote. If the mediation board feels that it threatens inter-state commerce and deprives the country of essential transport services, it must notify the President, who in his discretion, may create an Emergency Board. Railway Emergency Boards are usually manned by three persons, all chosen by the President as impartial people representing the public. Such Boards are directed to investigate disputes and submit recommendations for their settlement. For thirty days after the appointment of the Board, neither party may disturb the status-quo or do anything which will interrupt the transportation services. The recommendations of the Railway Emergency Board are not binding and should either of the parties refuse to accept its recommendations, a strike may legally take place. This legislation was severely tested, some strikes having also occurred leading to the President's threat of using the army.

The Atomic Energy Relations Panel was established in April 1949. The final recommendations powers of the Panel are similar to those of the Railway Mediation Board. One interesting difference is that the panel has no statutory base. The Atomic Energy Commission and the unions were consulted about its establishment and it relies wholly upon the voluntary acceptance of its mediation by the parties. The Panel follows very informal procedures for its operations. There are no set rules.

After this brief resume of the various types of the existing mediation and conciliation machinery, governmental and voluntary, an attempt is made to highlight a few systems, like the Municipal Mediation Plans, Jurisdictional Mediation, State Emergency Laws, Mediation and Fact Finding Boards, Mediation and Arbitration Agencies etc.

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CHAPTER II

DIFFERENT TYPES OF MEDIATION

I. Municipal Mediation

THE closure of the War Labour Board at the end of the war brought a number of new experiments to bloom. The City Municipal Mediation Plans have been doing a good job both in resolving strikes and threatened strikes, and in fostering long term labour management co-operation. But, there is a lot of variation in the plans.

(i) Toledo and Detroit have Mediation Plans established by City Ordinance. They are tripartite, with labour, managment and public representatives, making their decisions public. (ii) Three cities, Pittsburgh, Boston and Vermont, have bipartisan committees consisting of labour and managment established without the inclusion of any public authority. In Pittsburgh, neither the situation nor the recommendations are made public. In Boston mere results were used to be given. In Vermont, only the recommendations are made public. (iii) New York city has arrangements for handling labour disputes by a special secretary to the Mayor who intervenes only in major strikes or threatened strikes or in those affecting the whole city. But all actions are taken under the pitiless glare of great publicity. (iv) Cities of Buffalo and St. Louis have informal arrangements. The causes for the success of these plans seem to lie in (i) their ability to get the top management and union leaders to serve with them, (ii) avoidance of politicians hitchhiking for jobs, absence of publicity in the beginning, reluctance to put too much pressure on the participants (5)[21] giving plenty of time to enable the management, labour and public to get acquainted with and agree upon a set of principles.

The most successful of these Municipal Mediation Plans seem to be those of Toledo and Detroit which copied

Toledo. These City Mediation Agencies work in cooperation with the state and federal mediation agencies.

Toledo Mediation Plan is established by a City Ordinance and is financed by the city. There are six public, six labour and six management members who serve as 3-man hearing panels. If the Panel hearing does not secure a settlement, the full council hears and makes recommendations by unanimous vote. It can also give publicity to its findings. Cases come before the committee by the initiation of either party or on the Committee's own initiative. The prestige of the members is responsible for the assent of the parties to make up their case. The City Council provides single or bigger panel of arbitrators according to the exigencies.

Toledo Scheme is the trial blazer of all these plans in Municipal mediation with a national reputation for its success.[22] It was inaugurated in 1935 by Mr. Edward F. Mcgardy, the then United States Secretary of Labour. Toledo labour management citizens committee is a national pioneer as a muncipal agency dedicated to the promotion of industrial harmony. It is a grass-roots organisation in which leading citizens of the committee contribute their services. It contains thirty regular and eighteen associate members, appointed for two years. Industry and labour send their representatives and appointments are made with the consent of the Mayor and the Council. The labour management citizens committee is a voluntary organisation with no powers of coercion. It uses only persuasion. Mediation of disputes is its main job. Initially, such disputes are referred to the administrative director with a full time administrative officer under his direction. He will initially try to settle the disputes and if he does not succeed then he will call a 3-man panel, with a brief handed over to them about the previous progress.

The Labour Mediation and Conciliation Committee settled hundreds of labour disputes, removed rancour between management and labour and developed better relations

between them. Both labour and management recognise their mutual rights and obligations.[23]

This experiment received a lot of publicity. The subject was the topic of some doctoral dissertations, broadcasts, television talks, pictures and intense discussions trying to imitate its model in other parts. Various visitors from European countries seem to be visiting to inquire about the secret of its success. In 1953, Toledo was ranked 58th in matter of industrial strife for the entire country which was very low in the ladder.

Pittsburgh has established, independent of municipality, a private Mediation Agency with labour and management agreeing to send 8 members each, chosen by the chamber of commerce and the American Federation of Labour—Council of Industrial Organisations respectively. This body attempts conciliation only on the request of both the parties and makes no attempt to assess blame or publicise its recommendations. It does not interfere in disputes of national dimensions and puts emphasis on restoring collective bargaining.

Boston, to which reference was made earlier, established in 1941, a council of labour and management financed by both. It used to have six labour and six management men on its executive Committee, chosen by member groups, plus a public representative with advisory powers. It used to provide conciliators, arbitrators, conciliation panels and suggest impartial chairman in contract panels. But, after a while, it ceased to work effectively.

Vermont established a Labour Management Committee on the suggestion of the War Labour Board. It is financed by Association of Industries and American Federation of Labour —Counsel of Industrial Organisations. It constitutes eight-man Panels of conciliation or arbitration whenever needed. It offers mediation service on request of parties and will seek the assent of the 2nd party, if only one asks for its service. It has been named in several contracts as the final agency in conciliation or arbitration of grievances. It makes

all its recommendations public whether they are accepted or not.

The City of New York has no permanent Municipal Mediation Committee or Board. Mediation Panels are constituted and arbitrators are obtained only on the occurrence of a dispute. The division of labour relations has a Director appointed by the Mayor for handling cases which are likely to threaten public welfare or affect the city government as consumers or employers. He could appoint nationally famous conciliators who could operate with a full publicity.

Buffalo has a good federal mediator and St. Louis has Father Leo Brown who is a prominent Clergyman-conciliator for the maintenance of its Industrial Peace.

II. Mediation of Jurisdictional disputes

The jurisdictional disputes usually occur in trade union and construction indstry. Such jurisdictional disputes are intractably resilient to conciliatory intervention.[24] Unlike disputes between employers and unions, the disputes over workers or jobs between different unions are not easily compromised. Because like territorial disputes, jurisdictional compromises become a part of the imperishable record to be cited by the opposition and as such, are not easily agreed to.

(a) American Federation of Labour—Council of Industrial Organisations—NO Raiding Agreement

Under the legislative frame-work of Labour Management Relations Act, National Labour Relations Board disposes of the union representation disputes, by election. (Section 9.) Once the bargaining representative had been certified by the Board, it becomes an unfair practice for another uncertified union to seek to force the employer, to deal with it, as the bargaining representative of the employees (Section 8b 4.c). It is possible to mediate in such circumstances both on private and public levels. On the public

level, the professional mediator can frequently persuade the rival unions to bide by the National Labour Relations Board decision. In recent years the A.F.L.-C.I.O. labour federation, through its adoption of a NO raiding agreement and jurisdictional umpire system, provided an intramural mediation by Mr. David Cole as the Umpire with the status of a machinery comparable to that in the construction industry. This is a private arrangement of unions to limit their areas of *"organising jurisdiction"* as against the public policy arrangements cited above, to recognise the bargaining agent of workers by the procedures of the National Labour Relations Board under the Labour Management Relations Act of 1947. Article 3, section 4 of A.F.L.-C.I.O. constitution spells out the constitutional situation applicable to all unions, not to raid existing collective bargaining relationships.

Mr. Cole renders two types of decisions: one in which they are not binding by "the no raiding agreement" and the other under the constitutional provisions. He indicates two limitations of the system namely that (i) it deprives the workers of full freedom of choice in the selection of their bargaining agent, (ii) it serves to extract and strengthen the position of leadership in unions by eliminating competitive elements.[24]

(b) Mediation Board for Jurisdictional Disputes in Building Industry

The National Joint Board for Building and Construction was created by voluntary arrangements, effective 1st May, 1948. The Board consists of four regular representatives on the contractors side, two from general contractors association, two from national speciality contractors. On the union side, two are drawn from general trades and two from speciality trades. There are four alternatives besides one of each side, who customarily participate in the weekly meetings of the Board.

The only problem which concerns the Board is the problem of work assignment. Which trade shall perform which work ? Who shall instal metal windows ? Who shall lay alternate sewer pipe ? The National Joint Board was created by agreement between the construction trade department of American Federation of Labour and the Associated General contractors. It comprises nineteen international unions and seven national speciality contractor groups.

The Board has finalised procedural rules which set forth the standards, which a contractor must follow in making work assignments. He must assign work instead of trying to get a decision ahead of making an assignment. He is required to look into a green book which constitutes the decisions of the agreements. The union should stay at work and if it wants to protest, should protest thereafter, through its national president. The first level of operations are under the immediate supervision of the Chairman, Dr. John T. Dunlop of the Harvard University. The second level of operations is for making decisions on a particular dispute or what are called job decisions. The third level of operations constitute a national decision or mediation of national agreements.[25]

There is legislative provision to serve jurisdictional disputes over work assignments by public policy arrangements too. An attempt by a union to force an employer to assign work to its members in a particular organisation or trade or craft or class in an unfair labour practice, unless the employer is failing to conform to an order or certification of the Board, determining the bargaining representative of the employees performing the work. (Section 8b 4.d.) The section also provides that when violation of section 8(b)4(d) is charged, National Labour Relations Board is empowered to and directed to hear and determine the dispute, unless the parties voluntarily agree to the other settlement procedures. (Section 10.)

It is considered that—

> Jurisdictional disputes are awefully bewildering and require the services of a specialist to assist them in their disentanglement. The average mediator though relatively well-informed is not considered to have been steeped in the folklore of the factors of the disputes. The jurisdictional disputes, it is felt, are not amenable for outside mediation, as the judiciary established to deal with them is not designed to encourage or facilitate mediation settlements.[26]

It is this sort of traditional distrust of the efficiency of public policy arrangements which perhaps leads to the belief that "professional mediation is frequently a difficult one and where jurisdictional disputes are concerned, it is usually impossible. The long and melancholy record of attempts to regulate and control jurisdictional warfare in the American Labour Movement by peaceful means is marked by more failures than success. The outlook for private mediation is on the other hand most encouraging."[27] This is the opinion of the academicians who are practising as professional paid mediators and arbitrators by private arrangements.

(c) State Laws Affecting Jurisdictional Disputes

About ten States have statutes to regulate jurisdictional disputes of one type or other to the provisions of jurisdictional strikes by providing criminal penalties and civil remedies against those who engage in such acts. They are: California, Colorado, Florida, Iowa, Kansas, Massachussetts, Michigan, Minnesota, Pennsylvania and Wisconsin.

(i) Michigan Labour Relations Act defines a jurisdictional dispute narrowly as one involving the representation of employees in any bargaining unit. Rival claims must be filed with the Labour Mediation Board which attempts a settlement. Failing in this the Board orders an election and during these procedures strikes are forbidden. During the entire period, 1951-54, there was only one jurisdictional dispute.

(ii) Minnesota law applies to both representation and work assignment disputes. The facts are certified by the State Labour Conciliator to government who appoints a referee to deal with it and decide in accordance with the statute. The rival claimants themselves submit the dispute to mediation before the referee is appointed, but when once the referee sets in, it is unlawful to picket, boycott or strike on account of the dispute.

(iii) Wisconsin Employment Peace Act, 1951 (Section 111.06) makes it an unfair labour practice to engage in or promote or induce jurisdictional strike.

(iv) Kansas and Oregon laws have been nullified by jurisdictional decisions. Other laws, except the California Law, have never been invoked. California Jurisdictional Strikes Act 1947 declared that jurisdictional strikes, broadly defined to include those arising out of representation and work assignments were against the public policy of the State and were unlawful. Any person injured or threatened was entitled to injunctive relief and damage. Organised labour opposed it as a lever to crush it, as the employer could put up rival unions and seek injunctive relief, if the other union called a strike. In 1955, the law was amended to exclude the employer-formed or .... financed unions. Benjamin Aaron referring to this position says :

> Essentially jurisdictional disputes are between managements and unions over the question of recognition. Now the law is restricted to work assignments and the mediator finds himself in the cold again.[84]

III. State Public Utilities and Eemrgency Mediation Laws

In 1947 Slichter Commission in Massachussetts declared that—

> Great interdependence of the modern economy means that the health and safety of the community are immediately jeopardised by interruption to certain types of goods and services.

The Cole Committee in 1957 said :

> Despite the fears to the contrary, we have never suffered a paralysing emergency because of a strike of the kind contemplated by the public utility labour disputes law and there is no reason to expect that we shall, in the foreseeble future.

The Slichter Committee said that government should have a clearly defined authority and well-planned policies to protect the country from interruptions to production. To this end "it is necessary to limit strikes by employees in industries affecting public health and safety. The right to strike is a right, in effect, which they possess so long as they do not use it."

Cole Committee went to the other extreme and questioned the utility of Public Utility Laws.

> Not only do we doubt the value of such laws to be good, but we believe they have done harm and impaired collective bargaining. Our statute in public utility laws should be repealed and no statute should be enacted to replace it. (New Jersey.)

Irving Bernsteine ascribes the difference in the two views to the change in the climate of public opinion from 1947 to 1957. The torrent of legislation in 1947 is due to the irritation of the previous ten years, the Congress enacting Taft Heartley Act, fourteen States passing right to work laws, twelve restraining picketing, four outlawing secondary boycotts, five restraining jurisdictional disputes, six denying public employees' right to strike and twelve establishing procedures to prohibit strikes in public utilities.

Compulsory Mediation

Twelve states in 1947 imposed compulsion in the conduct of collective bargaining in public utility disputes. Nine of them, Florida, Indiana, Massachussetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania, Wisconsin, provided for compulsory arbitration as one method of dealing with public utility disputes. Minnesota has compulsory

arbitration for charitable hospitals and Virginia has seizure arrangements. Texas outlawed strikes without providing any means to resolve disputes.

Public utilities covered are power, heat, gas, water, telephone, telegraph, transport, sometimes food distribution and hospitals too.

State Emergency Disputes : (i) Mediation in New Jersey

Public utilities were singled out for special treatment in the matter of labour disputes. In 1946, New Jersey legislation enacted a bill empowering gubernatorial seizure of utility projects involved in a labour dispute when the said dispute represented a threat to the health and welfare of the people served by the utility. In 1947, the Law was amended to provide for compulsory arbitration after seizure.

This statute, due to lack of experience, was over-used and there was seizure of the unit over every threat of strike, with the consequent bad effect on collective bargaining. Later, appreciation of this fact considerably delayed seizure till it became almost clear that it cannot be settled. After this, the Wisconsin Law was considered unconstitutional by the Supreme Court and was allowed to lie dormant. The Cole Committee which was appointed to review New Jersey law concluded, "there is a great doubt as to the constitutionality of New Jersey law dealing with labour disputes in public utilities."[35] Regardless of the constitutionality, compulsory arbitration statutes do violence to enunciated public policy, favouring collective bargaining as a device to ensure industrial peace. An official of the mediation agency in New Jersey said :

> If we believe that lack of transport or low pressure in gas is the price we pay for freedom of bargaining and freely disagreeing with one another, we think we should accept the Committee's views.[36]

(ii) Emergency Mediation in Minnesota

Minnesota has emergency disputes legislation for charitable hospitals, light or power. For emergencies there are two regulations, (i) for charitable hospitals which prohibit strikes and provide for compulsory arbitration of minimum wage and maximum hours. Unless the parties agree to choose an arbitrator, the government appoints one. Since 1947 when the law was passed several disputes were arbitrated. Negotiations take place with the aid of a conciliator, where an honourable settlement could be reached if the parties are not reluctant to assume their responsibilities. Conciliators say :

> We think, it is fair settlement, but we are not going to take responsibility for increased cost of hospitals and consequent possible increase to the public.[37]

Even though compulsory arbitration is thus in the interest of public welfare, an American writer on this subject asks :

> If the parties in that situation were without the crutch of compulsory arbitration, would they assume and carry out their responsibilities ? I think our unions and employers are capable of accepting such responsibilities.[37a]

This looks a very risky optimism. What, if they don't ? Should the patients suffering in the hospitals be subjected to these agonising uncertainties in addition to their own sufferings ? Particularly even when the law had not proved to be bad and even according to the author himself, "compulsory arbitration has been successful in Minnesota" and he feels, "we better stay with it."[38] The opinion, as such, appears to be more due to a doctrinaire love of voluntarism than based on merits of the prevailing system.

Fact Finding Procedure in Minnesota

All disputes including public utilities are handled through mediation in the Minnesota Labour Relations Law. When

a settlement can't be reached by a conciliator, he would report to the Governor, who would appoint a tripartite committee with one representative of labour, one of management and one of public, to study the dispute and report the findings. The reference of a dispute, to the Governor, in public interest automatically stays the strike for thirty days. This procedure has been successful in the majority of disputes. The salient features of the Law are: (i) all settlements are voluntary, (ii) the responsibility to lead and to manage is left in the hands of the prime parties and not to the whims and fancies of outsiders, (iii) fact finders are local people and all phases are worked out, on a local level.[39]

(iii) Wisconsin State Emergency Dispute Legislation

An author who wrote about the Wisconsin experiment says:

> While I believe in collective bargaining, I do not want to make a fetish of it. I do not mean that if we have emergency legislation, we don't have collective bargaining.[40]

He is also an academician professionally practising in Mediation and Arbitration.

But for the declaration of the Wisconsin Law as unconstitutional by the Supreme Court, it would still be applicable to areas which are outside the National Labour Relations Board. The same writer defending compulsory mediation says:

> My position is, basically, we are in a new field. Our compulsory arbitration laws have been applied generally, and in Wisconsin, entirely to situations which, if allowed to develop, would affect large segments of our economy. We have not had enough experiences in Wisconsin or other States which have adopted some types of legislation to attempt to control these agencies, to make broad statements that they will not work. It is entirely possible that this type of legislation or something that will grow out of it, would be beneficial to the general public and at the same time would not harm the parties involved in the dispute. One way that such a deter-

mination could be made would be to testify to the efficiency of the various types of emergency legislation, whether it included compulsory arbitration or not in the different States, hoping eventually that the experience gained, would help, solve some of the present difficulties.[41]

(iv) State Emergency Disputes Legislation in Missouri

There is emergency legislation for public utilities alone which gives State Board of Mediation its jurisdiction in all labour disputes of public utilities including transport.

The Board is tripartite consisting of two labour, two management and one public member who acts as a chairman. The law authorises them to enter into any dispute. So there are as many disputes as there are contracts. This is somewhat similar to the situation in India. Whenever a union or a management specify a change with sixty days' notice, they should send the same to the Mediation Board too and ask for intervention if they cannot settle it themselves. Eighty per cent of the cases are settled by correspondence alone. Fact finding panels are used for issuing recommendations, whenever any strike occurs. The Governor gives a telegram to the parties reminding them of their responsibilities and asking them to settle it. Here too there is an evidence of support for compulsory arbitration and seizure, then allow the parties to go on strike. People, it is said, will not tolerate the calamitous situations caused by strikes, at least not in public utilities.[42] In Wisconsin and Missouri where the legislation is somewhat analogous to that in India in the case of public utilities, the logic of emphasis is also somewhat similar in declaring it as essential and making conciliation compulsory.

(v) State Emergency Disputes Legislation in Puerto Rico

The state emergency legislation in Puerto Rico has still a limited experience. It defines an emergency in terms of existing limited supplies of food, medicines, a crippled industrial programme, etc. After a prolonged strike on the

water front, the secretary was authorised to have seizure, but as government has to assume the role of employer to buy materials, make servicing and shipping arrangements, this required accounts from the employers, which they resisted to give and challenged the authority of the government instead. Meanwhile, the dispute was settled.

The experience of Puerto Ricans in emergency legislation is limited. They would like to place emphasis on collective bargaining and are in active search for a procedure to settle disputes which affect the public interest, that is consistent with the principles and procedures of free collective bargaining.[43]

The opinion about the desirability of emergency legislation in public utilities is divided.

IV. Mediation Boards

The most active mediation boards are those in Connecticut, Massachussetts, New York and New Jersey.

Organisation

The Connecticut Board of Mediation and Arbitration is a part of labour department with six members, two from labour, two from management and two from public, all appointed for six years, spaced in such a way that two retire every year, but are eligible for reappointment. These appointments are made from the lists submitted by the National Organisations—one from American Federation of Labour and another from Council of Industrial Organisations. The Board members get no salary except an honorarium of $35 per diem, while at work. Three mediation agents are appointed to assist the Board for the settlement of disputes and no qualifications are insisted on for them.

Procedures in Mediation

The procedure for intervening to mediate in industrial disputes by the State or Federal Agencies is usually through

notices under the Taft Hartley Act, which are received by them. Besides, there are the agents in the field to give information. In addition, the co-operation of municipal officials, Mayors, Chiefs of Police, and a few selected men is also sought in reporting of cases. The agents first try to intervene, and if they do not succeed, they report to the Commissioner who calls a Panel. Sometimes, one of the public members may join the Federal or State Mediation Agency operations to co-operate, as he does, while an agent is trying to settle. It is found that labour and management panels have great influence in persuading their respective sides to be reasonable and as such, the tripartite system is considered very fruitful. The Commissioner will keep in touch with the agent who is the Secretary of the Board, but, he himself, does not intervene, unless asked by the Governor to do so.

Relation between State and Federal Mediation Agencies and their Jurisdictional Problems

While both Federal and State Mediation Agencies have jurisdiction, they usually work in co-operation, covering each others' work.

> The Mediation Panel will enter the dispute only after the agents have done their job and found it impossible to settle and ask the Panel to intervene. The Panel could also intervene on its own motion, if it thinks it necessary.[44]

(i) New Jersey State Board of Mediation

New Jersey Labour Mediation Act was passed in 1941 with a Mediation Board of five members, one representing labour, management and three public. Regular meetings are held the second Friday of every month and special meetings, whenever occasion demands it. The jurisdiction is divided between Trenton, Princeton and Northern New-Jersey. The management and labour representatives give general advice to the Board on Labour and Management policies and also participate in panel mediation.

Creation of County Mediation Plans

The United States Conciliation Service has set an example that strikes and other labour disputes are best handled by trained and professional mediators. The New-Jersey Board had also encouraged the formation of Municipal Mediation Plans in Campden, as in 1942 with four labour, four management and four public members. The Panel had the support of all groups and the Mayor and the workmen.

Arbitration

The Board does not take upon itself the task of arbitration, but, provides arbitrators from a Panel at a rate of $10 per diem.

Reports of disputes are received both from municipalities as well as from a teletype police reports.

Public Utility Emergency Legislation

This was started in 1946 which brought industrial strife to a low lovel. By 1948, New Jersey enjoyed relative industrial peace compared to other states. It ranked 7th out of 9 states in the number of strikes experienced in 1948, 8th out of 9 states in the total number of workers involved in all strikes reported in United States and 9th out of 9 states in the percentage of man-days lost. Massachussetts and New Jersey were the 2nd best out of 9 industrial states in the United States, (viz., California, Connecticut, Illinois, Indiana, Maryland, Massachussetts, New York and New Jersey) in 1948 and next only to New York in losing minimum time per employed worker, because of strikes in the United States.

In Public Utilities, sixty days prior to the termination of a labour agreement, either of the parties to the said agreement, proposing changes in the terms of the termination, must file notice of such change with the Board. (ii) If in

the event of new agreement not affected by direct negotiation or mediation, five days after the termination of the contract, the parties to the said contract should nominate one person each to represent their points of view on a public hearing panel. The Board shall appoint such 3rd and impartial person using the same procedure to make such appointments, as is precisely made in arbitration cases. (iii) The Board shall appoint such 3rd and impartial person in the same way as such appointments are made now in arbitration cases. (iv) The duly constituted panel of public hearing conducts such hearings as may be necessary to ascertain the facts relating to whatever items may be in dispute. (v) Upon conclusion of hearing, the public hearing panel prepares a report settling forth the issues, the position of the parties with regard to the issues, its findings and recommendations. The panel's recommendations are submitted to Government with copies to the parties. The idea is that informed public opinion may act as a deterrent to the parties, to settle their disputes amicably.[45]

(ii) Board of Mediation in Pennsylvania

The Labour Mediation Act of Pennsylvania, 1937 authorised the representatives of labour and management to make and maintain industrial peace in all Agreements concerning wages, hours and conditions of employment and to settle all controversis arising out of employment and to settle all controversies arising out of application of such agreements.

For this, the department constitutes a Panel, whose members are without pay. They shall be representatives of Secretary of Labour and Industry.

Arbitration

Whenever a controversy arises between an employer and his employees which is not settled by them through mediation, such controversy, by agreement of the parties, be

submitted to arbitration, each party choosing one representative and a 3rd to be chosen by the two selected or in the absence of that, one provided by the Government.

If the parties do not want to follow either of these procedures, they are free to strike or lock out.

(iii) New York State Board of Medication

It is the first Board of Conciliation in the United States which started in 1886 as an independent agency in the Department of Labour. The Board has no power to compel an employer or union to appear before it or accept its recommendations under Section 755 of the Labour Law. It is given the following duties:

(i) The Board may encourage conferences between the disputants in an existing, imminent or threatened dispute, (ii) The Board may invite the disputants to submit their grievances either orally or in writing, (iii) The Board may, with the consent of the parties, arbitrate such grievances, (iv) may assist in drafting and negotiating agreements for the adjustment or settlement of disputes, (v) The Board may also designate one of its members to act on its behalf. There are four offices of the Board in Albany, New York, Syracuse and Buffalo.

Contractual Mediation

Some labour agreements provide that if in their negotiation at the expiring period of the contract, they do not succeed, they can ask the Mediation Board to intervene.

Mediators are professionally trained in law, economics, public administration or labour relations with five years experience in collective bargaining as Staff Mediators, District Directors and must pass a comprehensive written or oral examination.

The seven members of the Board are appointed by the Governor with the approval of the legislature. Their posi-

tion is not salaried. They are selected from the top level of fields of public service, i.e., education and labour relations leadership. In 1956, four had their residence in New York. The Board members are, in general, asked to mediate in disputes in which their prestige stands high. They all act as panels and not individually. Their term is for three years. Government nominates the Chairman.

The Board has an Executive Director and Assistant Executive Director, charged with day to day responsibility to mediate in disputes and to consult mediators in all crucial disputes.

Contract Negotiations

The Board encourages them to have collective bargaining and if it fails, then to come to them.

Grievance Mediation

While grievance arbitration has come to be universally accepted as a clause in collective bargaining contracts, there is a feeling in certain quarters that parties are better off, if they can resolve their differences without referring them to a third man for binding decision. (ii) If they cannot settle their grievance disputes without outside assistance, they may avail themselves of an intermediate step, which may be called grievance mediation. Some unions and employers have asked State Board of Mediators to submit informal written opinions on a grievance which they accept.

Arbitration

The Board either supplies the list of arbitrators or if service is required, sends its own mediators to act as arbitrators, free of charge in contrast to the practice of New Jersey, which does not accept such obligations, beyond providing the list of arbitrators for the parties to choose.

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CHAPTER III

MEDIATION IN ACTION

HAVING reviewed briefly the structure, mechanics and different types of mediations in the preceding sections, we shall now review mediation and conciliation in action, how they are effective, how they operate and how they are assessed and measured.

As Paul Henri Spaak said :

> (Mediation will never be a science, but will always remain an art. Nothing can replace human touch which is so rare and so precious.[46])

Inspite of Federal and State Labour Legislation with different institutional frameworks, the managements and unions with their independence, prudence and political considerations, have evolved other means of handling their conflicts, by means of a voluntary machinery which is better cherished by the American tradition.[47]

(Mediation is an emotionally charged process and) as Garfield and Whyte have pointed out, (the mediator must see that these human emotions are constructively discharged as well as dealt with as substantive issues in disputes.[48]

The disputants may come to a mediator in rough tempers, and he has to first cool them down, must build up the confidence of the parties initially, and make the parties feel that he has understood their problems and points of view. He has to endeavour to see each party realises the untenability of its original position, and insert in their minds "areas of reasonable expectations". The mediator's sense of timing is most important. He should not start making suggestions too early or withhold, till it is too late to make them. The use of his power depends upon the machinery under which he acts, but he must raise doubts in the minds

of the parties how each would act in case of a particular hypothetical stand. During the negotiations, each party will be trying to size up the other all the time. He must be able to deflate the inflated misunderstandings in their relative positions and enable them to see the reasonableness of the other party's point of view too, as each party will be preoccupied with its own attitude to the problems. He should be able to appreciate the basic political and economic trends which the settlement will have to fit into. If necessary, he may meet both separately and make suggestions which could be acceptable as alternative solutions, without springing them too suddenly on them. It is important during the negotiations that each party should understand the limitations within which the other party must work. After a basic agreement has been reached, it is better he keeps it till the last point of their understanding to be reached completely in a written memorandum.[49]

Conciliation is a more informal process and is closely related to the extension of good offices.) In the International field, as in labour field, the terms 'Conciliation' and 'Mediation' are coming to be used interchangeably. (Mediation is somewhat of a more vigorous process in which, a third party has the freedom to serve as more than a "go between", or chairman of negotiations, and undertakes, if necessary, to suggest measures for possible settlement.[50])

There are others who think that conciliation is a matter which the parties themselves can decide without the need for a third party.[51] Conciliation and Mediation are non-coercive. Conciliation which is carried on by labour mediators is a milder form of third party intervention, which limits itself to the calling of conferences, keeping the discussions on a conference basis, controlling the order of the business and conveying the proposal of one side to the other. Conciliation does not involve power to make recommendations or to impose terms of settlement.[51a] Such characterisation of conciliation is a half truth, the first half destroying the truth of the second. Some attempts are made

to identify the ideal mediator as one who is married, between the ages of 30 and 65, but without the need for any formal education or any understanding of labour law, by surveys conducted by some agencies in United States. What is needed according to them is vivid imagination, high professional integrity, patience and persistence.[52] E. L. Warren says :

> Mediation is a non-coercive third party intervention, a method of persuasion, using pressures some of which are intrinsic in labour disputes, and some of which are created by the labour mediator. It is the function of the mediator to exert, channel and control these pressures.[53]

Some research projects were attempted by means of tape recorded conciliation hearing, which concluded that marked disparity exists in what conciliators verbalise about their operations and what they are seen doing in action.[54] One research project says there is a disagreement among them about the irresponsibility of their settlement which terminates their mediation efforts, some maintaining that any settlement is a satisfactory outcome from the mediation point of view. The research claims to show that mediators are not aware of their own contributions and they think they have very little to do, except making people meet and settle. But, in fact, they are found to have a much greater role, whereas economic forces create a climate, in which a settlement is formed. The mediator's influence determines it at large.[55] A doctoral dissertation tried to find out the success of conciliation by relating it to the attitudes of the parties and the degree of mediation success, the character of participation by the parties, the effect thereupon and the counter-effects on the mediator. The student tries to relate the mediation participation to the nature of the issues involved and the attitudes of the parties. This study when finished is supposed to help even the training and selection of mediators.[56] Several such attempts are in process to define the content of conciliation or to give a shape to it. Arnold M. Ross of Minnesotta University

suggests a sociological approach to the study of conflicts in mediation, to study group conflicts. (Ellis Chalmers suggests a ten-fold path of conciliation process, such as: (i) be impartial, (ii) avoid bias, (iii) have ability to inspire confidence and develop manners, (iv) knowing the goals of the parties, (v) achieving confidence of parties, their background, (vi) integrity and impartiality, (vii) helping the parties to find their own agreement, (viii) not to undercut the negotiations, (ix) encourage participation of more responsible representatives, and (x) seeking maximum co-operation and workability of terms, besides his attempts to analyse the pathology of industrial conflict.[57] A British student of psychology at Cornell made an attempt to psycho-analyse the likes and dislikes regarding conciliation, by measuring the reaction of parties and then to determine the process and its usefulness.[58]

But, as Cyrus Ching observed among other things:

> It takes much more than cleverly drafted laws to protect parties from industrial strife. In requiring a well developed, useful social atmosphere, in which good human relations may flourish, industrial conflict is the product of many causes and a program to eliminate or minimise such conflicts must precede, not on one but many fronts. This may seem too evident to deserve any discussion.[59]

Clark Kerr, speaking of the inevitability of industrial conflict refers to what he calls tactical mediation, which occurs in an already given situation and strategical mediation consisting of structuring of the situation itself, by creating a favourable situation in which the parties interact.[60] These are some of the academic opinions of the process in action.

It is on such grounds as these that further explorations have to be made to find out the efficacy of the fact finding boards, as in the recent steel strike, and the need for strategical mediation. There is a feeling in some knowl-

edgeable persons that the Federal Mediation and Conciliation, in spite of being an independent agency—the Director being appointed by the President—has not been able to make itself felt as a force to count. In the recent steel strike, Secretary Mitchell and Vice-President Nixon appeared more prominently, on the scene than the Federal Mediation and Conciliation chief. It looked as though they have been temporarily set aside in an all important emergency. Dr. George Taylor, the Chairman of the Emergency Board, had stated openly, that till he got into the negotiations, even the issues were not properly spelled out by the parties, and it was a sad commentary on the role of the existing mediation agencies too. This is a very curious situation into which the Federal Mediation Agency seems to have slipped from which it has to be resuscitated.

More light is needed to assess the functioning of these agencies, which are so varied in their powers and jurisdiction. Very few empirical studies seem to have been made on any one of the statutes, barring one about New Jersey and another about Pennsylvania. Most of the opinions expressed by writers abut the public utility laws, or Mediation Boards or State Mediation Laws or Jurisdictional Disputes Machinery, seem to be born of traditional prejudices against public policy arrangements, rather than findings based on adequate empirical research. More of such studies may be necessary to make some meaningful observations.

There is a recurrent theme of complaints about the conflict of jurisdictions in certain quarters, while others begin arguing, that whatever be the statutory requirements of intervention, both State and Federal Mediation Agencies as well as private agencies could work in co-operation with each other by joining hands. It matters little as to who intervenes. The co-operative agreement cited at the end of the first section displays the same view, that both agencies will work together on any dispute whenever they

are called in. The Taft Hartley Act lays down that the Federal Agencies should intervene only in disputes affecting inter-state commerce, while the rest can be taken up by the state agencies. But, still in actual administration, it is found that there is no such water tight arrangement. Sometimes in my inquiries with the agencies during my travels, it was revealed that they do so for want of adequate staffing arrangements either at the state or federal levels, always these being short of requirements. While the spirit of camaraderie is appreciable, it is not clear whether technically this position could not be improved, to remove the frustration of some and the failure of the administration in some other places to translate the actual division of poorers, as originally envisaged in the Labour Management Relations Act.

Again, there is a plethora of private arrangements as opposed to public policy arrangements, and their roles in relation to them needed to be studied in all their ramifications, before bestowing praise on one and condemning the other.

Mediation in International Affairs

Mediation in international disputes is considered to be somewhat analogous to labour mediation in its techniques. some of those who have been most successful in international mediation have been prominent labour mediators. Personal qualities which make for a mediator's success seem to be the same in both the fields. The techniques of getting settlements too appear to be the same as according to Mark Ethelridge and Dr. Frank Graham, both experienced labour mediators who served the United Nations as distinguished mediators.

In a recent book, *A Modern Law of Nations,* Phillip C. Jessup suggested that "the parallelism between labour relations within states and international relations between states are striking." According to him, it was experience

in labour problems that led William Jennings Bryan to negotiate as Secretary of State a series of treaties providing for "cooling off periods" and "fact finding commissions". Ernest Bevin, the late British Foreign Secretary suggested that industrial relations had much in common with international relations and the experience in the former field was a good guide to procedures in regard to disputes in the latter.[61]

There is also another point of striking similarity between labour and international disputes. Just as labour and management insist on their own private rights to deal with their issues, the national states too do not want any outside interference. Disputes in both areas arise out of conflicts between powerful groups and they are usually unwilling to have their rights and interests subjected to the decision or ruling of a third party. In both labour and international fields, conflicts, often involve a balance of power between the disputing groups. The parties may be of equal strength or one of them may be weaker. In the latter case, national or international, those charged with the work of obtaining a solution, have to act before the forces reach an explosive point. It is considered safe for an individual to mediate first in both the instances, calling a national commission or international commission only afterwards. Publicity to the respective positions at the outset makes subsequent stands difficult, and as such it is better to confine it to the least. The mediator offering a series of alternative suggestions to explore the area of agreement seems to be a strong point of international mediators like Ralf Bunch, just as in the case of individual mediators in industrial disputes. Timing of the intervention as well as the recommendations in both have to be done cautiously to make them effective enough. However, international conciliation has not yet developed any definite code of ethics and is still in the process of formation, with the varied efforts made from time to time in disputes between India and Pakistan, Indonesia and Holland, etc.

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CHAPTER IV

MEDIATION AND CONCILIATION IN THE UNITED STATES AND INDIA

Some Similarities and Differences

1. IN India, as in United States, Labour legislation for settlement of industrial disputes started with the Act of 1889, and later on was amended by the Indian Trade Disputes Act of 1934, providing for voluntary conciliation of industrial disputes which proved very ineffective. Later, the Bombay Government passed the first Industrial Disputes Act in 1938, called the 'Bombay Industrial Disputes Act', which was introduced for the first time compulsory conciliation as well as the concept of a collective bargaining agent, by certifying a union with 25 per cent of the workers in the locality in the industry, as its members. This Act was confined in its application to major industries like the textiles, woollen, silk mills, transport, electricity and later sugar. The Act was amended as Bombay Industrial Relations Act in 1946. The following year, the Government of India enacted the Industrial Disputes Act of 1947. There is no membership requirement under the Central Act ; any registered trade union can represent workers in the unit in which it has membership. It has to satisfy the labour ministry about its representative character by submitting the membership records for verification. This is a practice followed in the States like Bombay, while others do not, as it is not statutorily required. Like the secretary of the National Labour Relations Board under the Labour Management Relations Act, the Registrar under the Bombay Industrial Relations Act, 1946 will have to make inquiries and certify the bargaining union. There are several similarities between the Bombay Act and the Acts of Michigan, Missouri and Wisconsin, where every industrial dispute that arises must be taken cognisance of, by the state machinery, even

if 80 per cent are settled informally without the need for actual intervention. In Bombay Act, no change can be made in service conditions by either party without giving a notice of change to the other, and the same procedure is introduced in the Central Industrial Disputes Act too, recently. State intervention in emergency disputes by legislation is compulsory both in United States and India.

2. Both under the Taft Hartley Act and under the Indian Industrial Disputes Act, the parties must give each other sixty days' notice, to terminate a contract or to modify it. In India this could be done after a minimum period of six months, while the normal period of duration both in India and United States is one year. The agreement continues to be in force till either party terminates it with a notice of two months. While in India conciliation, under the Bombay Industrial Relations Act 1946, is compulsory, under the Central Act, it is optional except in case of strikes in public utilities. In the public utilities, where a strike notice is given, the conciliator must intervene and make a report to Government in 15 days. But, under both laws, the cases can be adjourned from time to time by mutual consent of the parties. The demands covered by an existing award or agreement cannot be reopened unless the binding award is terminated. If a dispute is settled under the Bombay Industrial Relations Act or the Disputes Act, all the three, namely, the union representative, the management representative and the government official before whom the settlement is reached sign the document. Under the Bombay Industrial Relations Act, if there is any violation of the agreement, either party can go to labour court for prosecuting the other. Under the Industrial Disputes Act, the complaint can be brought to the conciliator who would try to settle, and if the management is adamant, can prosecute and collect the dues from them as arreas of land revenue. In the case of the Bombay Industrial Relations Act, the conciliation reports are printed in the government gazette, making public why an industrial dispute failed.

Under the central Industrial Disputes Act, the reports are not published, but the parties can get copies of the conciliator's report to Government on request. In the United States, the Boards could sometimes make their recommendations public, but not always.

3. In India under the Industrial Disputes Act and the Bombay Industrial Relations Act, there are works committee and joint committees in industry, which sometimes try to settle the day-to-day disputes in the factory itself, but the effective working ones are very rare. In the United States no such system is provided by the labour legislation.

4. The industrial relations machinery and legislation is almost contemporary in both the countries. Both have federal constitutions with labour as a concurrent subject. But, the type of labour legislation that is passed in both the countries is very different.

5. The jurisdictional lines between the powers of Federal and State Agencies in India are very sharp and there is no overlapping. The federal conciliation service will intervene in disputes covering more than one state like banks, insurance companies, railways, harbours, ports and mines, defence establishments etc., while all other industries continue to be administered by the State governments. The termination notices of agreements or awards from the Parties are sent only to the concerned authorities and not to all. They do not both rush to intervene in the same dispute, even if the parties wrongly bring the dispute or request either agency to handle it when it does not fall in their jurisdiction. This is a clear contrast to the prevailing practice in the United States, where the statute makes a distinction of division of powers on the basis of inter-state commerce clause, which is not strictly found in practice. There is no reason why these clearly defined jurisdictions could not be adhered to in the United States. The only usual answer is there is no need for such a rigidity.

6. Managements and unions in India are not supposed to take law into their own hands and go on strike or lock-out, without first exhausting the constitutional provisions made available for them. If no settlement can be arrived at in Conciliation, the case may be referred to adjudication or arbitration, and unless the union hears from government about the reference of the dispute to adjudication or refusal to do so, it cannot legally go on strike. In the United States, after the Fact Finding Board's recommendations are out, the parties are free to accept or reject them and can resort to strike or lockout.

7. The awards are given by Industrial Court or Tribunals and settlements are arrived at usually before the government conciliation officers and are binding on the labour and management. If there is any interpretation needed, in their implementation they can go to the court or Tribunal after going to the government officer who would help them free of cost. The system in such instances in United States is to have voluntary arbitration. The conciliation agreement itself usually provides for such a course.

8. In India as well as United States, Contract Conciliation and Mediation is not out of the question. In fact, Mediation Boards like the New York Board do this work. But, there is much difference between the Mediation and Conciliation in action in the United States and India. Conciliation in India is more positive than what it is in the U.S.A.

9. Collective bargaining in the two countries is decentralised.

10. There are Conciliation Boards in India too, like those in the United States, while private mediation arrangements are not entirely uncommon. In the United States, these practices are more organised than in India. In Gujerat, in municipal disputes, hospital cases and even a few others, the parties developed an attitude of compromise and desired to leave it to some impartial umpire whom both choose.

But, in many cases, these attempts did not fully succeed in restoring industrial peace.

11. While mediators go to parties to settle disputes in United States of America, even if they are in the same locality, the practice in India is to call the parties to the labour office or to the Government Inspection Bungalow in out stations than the labour official going from management to management or union to union. But, the bargaining in both the countries is decentralised. The background of conciliators in the United States is diversified. Some of them have trade union background, some are from managements, and some do not even have education in universities. The recruitment in India is much more restricted and only the University trained persons with experience in labour could enter the service through selection by public service commissions and partly by promotions after meritorious service in lower positions.

12. In India, the size of staff and amount of salaries vary within each state as it is in the United States.

13. Mediation Boards and private panels of mediators as in Atomic Energy exist in the United States. There are no such parallel institutions in India.

14. In India, the process is called conciliation and not mediation and conciliation as in the United States, though virtually both mean the same thing.

15. In the United States, there is the formality of the government announcing the appointment of a conciliator sometimes which is not in India in the Industrial Disputes Act. The disputes are allotted to each officer as per his previous acquaintance of the parties and the issues involved. The practice varies from State to State.

16. There are no municipal mediation plans in India but they are not new to Indian institutions, as the Panchayat Court or Judicial bench in India, has the same powers. In India needless and illegal strikes are frowned upon and

penalised while in the United States there are no such restrictions on them. Local Boards and Municipalities in India could very well attempt mediation by Voluntary Panels as in the United States.

17. Jurisdictional disputes over work assignments do not exist in India. Disputes regarding workers representation are handled by the National Labour Relations Board or the State Laws along with private arrangements made by the American Federation of Labour—Council of Industrial Organisations. In India, only the question of bargaining agent is in the Bombay Industrial Relations Act, 1946 and Central Provinces and Berar Industrial Disputes Acts, 1947 and not in the central Industrial Disputes Act, 1947 in the same way.

18. While by and large American institutions depend not so much on governmental machinery, the reverse is the case in India.

19. While the American situation is one of perfect free enterprise, the Indian economy which is a developing one cannot afford the same type of free collective agreements procedures, with freedom to break off, if they fail to agree.

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CHAPTER V

ARBITRATION IN AMERICA

What is arbitration ?

> AMERICAN arbitration is the settlement of private disputes between parties, by persons selected by themselves. It is an alternative to litigation. The arbitrators are usually laymen, experts in the field of arbitration of disputes and intended to hear and decide them in the light of their own experience and knowledge, without reference to technical rules of procedure and law.[1]

The advantages are speed and quick disposal, reasonable costs, no undue expenditure on long-term lawyers' engagements, no high docket fees. Transcripts are not usually necessary, a case is heard only once.[2]

> The fact that arbitration is final, expeditious, private and inexpensive, puts it in a class by itself, for, while other processes may possess some of these characteristics, they rarely possess them all, especially, finality. For, it is only in arbitration that Arbitration Law accords the high privilege of giving the decision of an arbitrator, the same legal judgment of a court.[3]

> An outstanding will of Americans to preserve the democratic process and free enterprise has been the wide-spread adoption of voluntary arbitration, for the settlement of disputes arising out of and in connection with the collective agreements.[4]

> Arbitration is peculiarly American in that it is organised as a part of the social system of America and not as part of its legal system. It is peculiarly American, in that it is one of the permanent institutions of its civilisation, maintained primarily through its economic structure, trade, industry, commerce and finance and is set firmly in the fundamental life of the American institutions.[5]

To Francis Kellor,

> "The function of arbitration is to destroy disputes." Any dispute which the parties find that they cannot settle by

themselves may be the subject of reference to arbitration.[6]

"This subject of arbitration is considered to be of immense importance, because it is the answer to warfare. This is true, whether it is arbitration in industrial relations, union and management relations or in the international sphere," says J. Noble Braden.[7] It is the voluntary submission of a dispute, by the parties, to a disinterested person, for final arbitration. It is voluntary, it is an adjudication and a final decision.[8]

An efficient procedure for settling disputes over the interpretation and application of collective bargaining agreements in United States is felt to be one of the most important factors in peaceful industrial relations.[9]

> The advantages of arbitration are said to be the great informality of the hearing which has a tendency to decrease emotional antagonism between the parties, the availability as arbitrators of persons with expert knowledge in the field of controversy, the wide range of judgments possible from arbitrators, more flexibility in arranging a place and date for hearing to suit the convenience of the parties themselves and the witnesses, an earlier and more prompt determination of the controversy.[10]

This process of arbitration has a long and respectable history. It has found favour in disputes of all natures. As long as people are unable to resolve their own problems, there seemed to be some need to submit issues to a third party, for final and binding settlement.[11] Labour arbitration, in its broadest meaning, is the process of settling labour disputes by the decision of third party or outsider acting alone or having the customary casting vote, whereas the arbitration board includes representatives of directly interested parties.[12]

Historical Background

Arbitration is as old as the labour disputes. In 1824, Britain, while repealing the combination acts which outlawed so far labour unions, had also provided for voluntary,

and failing that, compulsory arbitration of labour disputes. In the United States, the first experiment of arbitration in the dispute of the iron puddlers of Pittsburgh in 1865 roused considerable interest during the days of the Rail Road strikes of 1877 and throughout the 1880's and 1890's. The Knights of Labour favoured it while it was also the major objective of the National Civic Federation in the nineties. A National Congress of Industrial Conciliation and Arbitration was held under its auspices in Chicago in 1894. The first state laws dealing with industrial arbitration were passed in Maryland in 1878, New Jersey in 1880, and Pennsylvania in 1883. In 1886 Massachussetts and New York established the first State Boards of Arbitration. By 1901, the figure rose to 17 by the other states falling in. Federally, President Cleveland suggested in April, 1886, the establishment of a Federal Tribunal for voluntary arbitration of labour disputes affecting inter-state commerce. In 1888, the Federal Conciliation Act was passed for peaceful settlement of Railway disputes which was subsequently repealed successively by the Erdman Act of 1898, the Newlands Act of 1913, the Railway Labour Board Act of 1920, the Railway Labour Act of 1926 amended in 1934 and still effective. In a study of the results of arbitration cases involving wages and hours in 1865-1929, the Bureau of Labour Statistics reported a total of 54 arbitration cases in 1915, out of which 28 involved industrial concerns. The most important one was the Anthracite Coal Commission Arbitration which Theodore Roosevelt forced down the throats of the operators to settle the Anthracite strike of 1902. A most significant development was the inclusion of provisions for arbitration in trade agreements between employers and unions as in 1900, between the American newspaper publishers and the International typographical unions which is continued till now.

War and the Post-War period

But arbitration gained recognition during World War I and rose to its present stature during World War II, with

the creation of the War Labour Board. There were fifteen federal agencies settling thousands of disputes regarding wages and other service conditions. During World War II, the National War Labour Board intervened to settle disputes on unilateral request of either party and sometimes even on its own initiative. In meat-packing and other industries the machinery for settling disputes by negotiations was initiated during this period. Judge Alschuler, selected to serve the Chicago Meat-packing Industry, was the first permanent arbitrator in the United States of America.[12a]

Another agency active in arbitration was the American Arbitration Association. With 10 years of experience in commercial arbitration, it started in 1937 an Industrial Arbitration Tribunal, which, by 1941 had panels of arbitration in 1,600 cities which handled 700 industrial arbitration cases.[13]

Mediation and Conciliation

The terms 'Mediation' and 'Conciliation' are used sometimes interchangeably as meaning the same, in spite of a technical distinction between the two. The conciliator is a mere "go between", the catalytic agent, who creates an opportunity for the parties to meet face to face to resolve their own problems. Mediation, on the other hand, has been regarded as a process by which a third person brings together the opposing groups, not only to iron out the differences, but also to actively find an answer to the Problems by specific proposals and alternative suggestions. The distinction is indeed a fine one.[14]

The United States Conciliation Service started in 1913 along with the Department of Labour and continued till 1947, when its functions were transferred to the Federal Mediation and Conciliation Service, an independent government agency, created by the Labour Management Relations Act of 1947, with substantially the same functions. But

the former was one without the benefits or the disadvantages of any statute defining or circumscribing its functions. Its services were available to both labour and management at their discretion, while the Labour Management Relations Act requires by Section 203(a) to encourage the developmenta of local mediation services and to leave the federal also intervene, on its own, whenever in its judgment, any dispute threatens to cause a substantial interruption of commerce.[15] Mr. Cyrus Ching the first Director of the Mediation Services considered his job as one of contributing to fire prevention.[16]

Mediation, since then, has been developed both by the Federal and State governments, besides municipalities as New York City and Toledo and the various State Mediation services, the problems of handling major disputes. It could Boards.[17]

Fact Finding Boards

There were also the Fact Finding Boards, leading to substantial reduction in labour management disputes. During the World War II, the question of finding facts as in the case of cost of living index figures was a major factor, in the policy discussions of the National War Labour Board. The classic example was the Colorado experiment, on a state level which provided for the compulsory investigation. State Mediation Agencies also provided for Fact Finding Boards in disputes with or without powers of specific recommendations as required. Some of the important ones in 1946 were those established in General Motors, Grey Hound Bus Services, International Harvester, the Meat-packing and Oil Industries. It was during this period that the President established Fact Finding Boards to settle disputes in the labour management arena.[18]

These Boards were expected to get all data submitted to them by the parties to the dispute, with brief statements of the case of each side. The parties could also make oral

or written statements in support of the original statements, could cross-examine each other and at the end of hearing, could also submit written statements by way of rejoinder and then, the Boards could make specific recommendations, as to how the dispute should be resolved.[19]

Emergency Boards

Emergency Boards are basically the same as the Fact Finding Boards, except that they are used in emergencies to expedite the settlements of issues. The Taft Hartley Act refers to them as Boards of Inquiry and are established "whenever in the opinion of the President of the United States of America a threatened or actual strike affecting an entire industry, or part thereof, engaged in trade, commerce, will, if permitted, occur or continue to imperil the national health or safety, he may appoint a Board of Inquiry to inquire into the issues involved in the dispute."[20]

Some states also make provisions for the establishment of Emergency Boards for settling disputes in Public utilities. But, these Emergency Boards are of two kinds—those which study and review the factual situation without any recommendations and those which suggest solutions to the problems before them. The Board of Inquiry under the Taft Hartley Act is prohibited from making any recommendations.[21]

While arbitration is used for settlement of disputes, its scope and functions vary very widely. There is arbitration of *'Rights'*, as well as arbitration of *'Interests'*; thereby meaning arbitration of grievances and contracts. There are other kinds of arbitrations deriving their names from their subject matter, i.e., 'International arbitration', referring to political relations between nations, 'Commercial arbitration' relating to disputes in business contracts, 'Civil arbitration', relating to settlement of disputes arising out of civil relations or accidents and 'Industrial arbitration', referring to disputes arising out of labour agreements.[22]

Other Methods

It is with industrial or labour arbitration that we are mostly concerned; and even here, there are a variety of methods of arbitration, like wage arbitration in Transit Industry, contract arbitration in Hotel industry, in San Francisco, Dairy Industry in Hawaii and Laundry Industry in New York. There are umpireships by way of permanent arbitrators provided as in General Motors, Ford Motors, John Deer Corporation, Bethlaham Steel Industry grievance procedure, Voluntary arbitration followed in the Electrical Contract Industry, and Board of jurisdictional disputes in the Construction Industry. Arbitration of "No Raiding" Agreements exist in American Federation of Labour-Council of Industrial Organisations. National Railway Adjustment Board which is a national and regional one has compulsory arbitration, in public utilities as in New Jersey, Pennsylvania, and Maryland. References are made to these methods of arbitration, later on. Wage arbitration is not more than 2 per cent of the total arbitration of contracts, while the growth and development of grievance arbitration constitutes 97 per cent of the United States arbitration process, as a specific feature of the post-war experience.[22a]

During World War II, there was compulsory arbitration, though not of the traditional type. The War Labour Board decided about 21,000 disputes while twice that number were settled privately. In all cases, it passed on the issues, the National War Labour Board inserted requirements for the arbitration of disputes, arising over the application and interpretation of contract provisions. In cases which involved disputes of this nature, it quite often sent them to arbitration. This was a war-time expediency. Confronted with terrific pressure of work in the settlement of disputes, to maintain the war effort and to avoid industrial strife, the National War Labour Board introduced the practice of grievance arbitration. This became the starting point of this practice. In a labour management conference,

called by the President in 1945, consisting of 36 representatives of major labour and management organisations, it was unanimously agreed to include in all labour management agreements provision for final and binding arbitration of all disputes involving the application and interpretation of agreements, as the final step in grievance procedure.[23]

What was essentially a product of war-time expediency in American governmental labour administration was subsequently adopted as a matter of permanent practice, resulting in a new field of grievance arbitration, without which collective bargaining could and did exist successfully.

With all the merits claimed conceptually for arbitration, its actual working for the last 16 years has earned for it, a spate of conflicting opinions from different quarters in the United States, thus making it an exceedingly interesting field of study.

Some views on the value and use of arbitration in the United States

"Voluntary arbitration of disputes over the terms to be included in contracts may or may not be consistent with the public policy of this country of encouraging collective bargaining. . . . In a sense, it represents a failure of collective bargaining . . ., it may do violence to our American policy of encouraging parties to settle their own difficulties", is is the fear expressed by Mr. Edwin White, one of the highly respected American authorities, in an address to the National Association of Arbitrators in 1948 in Chicago.[24] To Mr. Harold S. Roberts,

> "Those who look to the process of arbitration as the answer to the basic labour management problems are looking in the wrong direction. Arbitration is not a substitute for the mutual give and take in the relationships between the employers and the employees. Arbitration is not a substitute for good faith, nor is it an easy way to resolve underlying labour management relations too often. Labour and management have refused to face their own responsibilities by throwing a knotty problem in the lap of a third person, knowing

full well that he is in no better position than themselves to resolve it. Too often, also employers and unions use the arbitration procedure to cover their own ineptness and incompetence in meeting the day to day issues required in human relations."[25]

Some feel :

"That collective bargaining is still frequently conducted in an unscientific manner, with maximum of table pounding and minimum of objective analysis of the underlying situations, as if arbitration is the panacea, for all evils."[26]

But, a few managements and unions are convinced that arbitration is an indispensable aid to equitable administration of contracts.[27] Majority of professional arbitrators argue it is better to legislate requiring arbitration, as the terminal point in grievance procedure for disputes over arbitration.[28] Lloyd Garrison had recommended Federal legislation to this effect.[29] But, Senator Wayne Morse would make it an unfair labour practice, to violate the terms of a collective agreement for an employer or union, and to submit it to a labour dispute arbitration.[30] Ludwig Teller would only make it an unfair labour practice if either an employer or a union refused to comply with the terms of an arbitration award where the arbitration was held pursuant to the agreement of the parties.[31] To Mr. Harold W. Davey,

"It is heartening to note that the practice of arbitration of grievances, under the existing contracts, is rapidly becoming universal[32] as the vast majority of collective agreements currently provide for arbitration."[33]

He feels :

"No written agreement can anticipate all the differences and disputes concerning its meaning and application, that may arise during its life time."[34]

Similarly, the American Arbitration Association asks :

"Do you write invisible clauses into your contracts ? Perhaps, you don't know it, but, you do. For every agreement, you reduce to writing, contains one or two provisions. Both

concern the dispute and your recognition of the fact, that the dispute may arise out of the agreements is implicit in the fact, that you put your understanding into writing."[35]

"You could be vague, does not matter, you are after-all human. The American Arbitration Association (A. A. A.) and its long lists of arbitrators are there to take care of this matter. Only make sure, you bind yourself by the contract clause to leave all such matters to A. A. A., and we will straighten them for you." The standard arbitration clause that should be included is :

Any dispute, claim or question or difference arising out of or relating to an agreement or its removal or the negotiations of a new contract shall be submitted to arbitration upon the initiative of either party to the agreement upon notice to the other party under the Industrial Tribunal Arbitration Rules then obtaining, at A. A. A. and the parties agree to abide by the award.[36]

Even to Professor Archibald Cox of the Harvard Law School,

"A collective agreement rarely expresses all the rights and duties falling within the scope of it. One can't spell out every detail of life in all industrial establishments or even of that portion by which both management and labour regard as matters of mutual concern."[37]

According to Harry Shulman,

The collective agreement is not the typical offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not made by parties who seek each other to make a bargain from scratch and go their own way. Though cast upon in an adverse position, both are dependent on their common enterprise. They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future.[38]

No matter, how carefully the parties may attempt to do so, a collective agreement like any body of rules can't answer day to day questions or problems. Furthermore, the rules set up are subject to conflicting interpretations. So, unions and employers include them in grievance procedures.[39]

The arbitration process is a purely voluntary agreement between the parties, as the sole creators of that machinery, have expressly agreed shall be final and binding, stands in clear contrast.[40]

Industrial peace insurance is being written all over the United States and there is resulting a corresponding drop in casualties. This insurance is provided through labour contracts and the decrease in labour disorders attests to its effectiveness.[41]

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CHAPTER VI

WAR TIME GROWTH AND AFTER

THE theory and practice of grievance arbitration developed by the American Arbitration Association, Professional arbitrators, academicians, employers and unions, since its emergency as a measure of expediency of the War Labour Board, acted and helped its rapid growth in an atmosphere of sustained and sympathetic encouragement.

President's Labour Management Conference, 1945

The President's Labour Management Conference in 1945 to which a reference has been made earlier for endorsing arbitration, as the last step in grievance procedure, laid down the following five principles :

(i) The parties should provide by mutual agreement, for the final determination of the unsolved grievances or disputes involving the interpretation or the application of the agreement, by an impartial chairman, umpire or board of arbitration.

(ii) The parties should provide a definite and mutually agreed upon procedure for selecting the impartial chairman, umpire, arbitrator or Board.

(iii) The impartial chairman, umpire, arbitrator or Board, should have no power to add to, or subtract from, or change, or modify, any of the provisions of the agreement, but should be authorised only to interpret the existing provisions of the agreement and apply to the specific facts of grievance or dispute.

(iv) The decision of the impartial chairman, umpire, arbitrator or Board should be accepted by both parties as final and binding.

(v) The cost of such impartial chairman, umpire, etc., shall be borne by both equally.[1]

Issues of Arbitration

From an analysis of the collective bargaining agreements provisions for arbitration, the issues seem to relate to (1) union security, (2) vacation, (3) holidays and week end work, (4) military service, (5) strikes and lock outs, (6) incentive wage provisions, (7) time studies, (8) standards of production, (9) apprentices and learners, (10) discharges and, discipline and quits, (11) shift operations, (12) layoffs, (13) work sharing, (14) overtime employment, (15) wage adjustment plans, (16) dismissal pay provisions, promotions, transfers and assignments, (17) leave of absence provisions, (18) union management co-operation, (19) plant efficiency and technical knowledge, (20) general wage provisions, seniority, union rights and activities, (21) management prerogatives, (22) safety, health, sanitation clauses, scope of bargaining units, etc.[2]

In 1944, three out of four union agreements, covering 83 per cent of the workers in 14 major industries, covered by them, provided for arbitration as the terminal point.[3]

Methods of Arbitration

Accoding to the clarification made by the Bureau of Labour Statistics, the methods of arbitration were permanent arbitration, *ad hoc* arbitration, automatic arbitration and permissive arbitration. Permanent arbitration occurs mainly in Aircraft, Automobiles, Meat-packing, Rubber and in some other industries, except Petroleum, Ford, General Motors, Chrysler who provide for permanent umpires who are removable. *Ad hoc* arbitration was provided for in Boeing Aircraft, Vultee Aircraft Corporation (Sandiego-California), Curtis Wright Corporation, (Buffallo, N.Y.), Aluminium Corporation of America (All agreements), General Electrical Co., Westinghouse Electric and Manufacturing Company, Caterpillar Tractor Company, Sinclair Refineries and American Woollen Company. Automatic Arbitration is that resorted to at the request of either party or by mutual consent of the parties. Permissive Arbitra-

tion is provided by 4 per cent of the agreements, wherein, it is allowed only if both agree ; if not, resort to economic force is the alternative.[4]

Extent of Arbitration

(1) In New York Metropolitan area, Impartial Chairman and Single Arbitrators were used in 56 industries branches in New York City area for 397,000 workers and 22,000 establishments. (2) Two-thirds of the total number were covered by the Permanent Arbitrators. The next biggest was Hotels, Laundries, Cleaning and Departmental establishments. (3) The first impartial Chairmanship started in 1910, with Louis Macdonald, as the Chairman for Women's Cloak and Suit Industry, with two Labour and Management representatives. The rest, favoured single arbitrators and 36 of them were active in 1947.[5]

More than 5,000 cases were handled by the Board of Conciliation and Arbitration in Massachussetts. Some of the unions used the Board's services and many more used private arbitrators. Private arbitration became extremely popular in 1949, and the Board took 6 weeks to hear a case, while earlier it took only two days.[6] Flashing headlines in newspapers read :

> Arbitration is found effective in settling contract disputes, industry using outside interpreters on voluntary basis to resolve issues . . . compulsion, United States intervention strongly opposed . . . safeguards to employers. . . . (1) Arbitration should not cover matters not included in contract, (2) Unions to shoulder costs, (3) arbitrators not permitted to reverse the contract, by interpretation, (4) lists should contain names of people who possess necessary knowledge. American Arbitration Association has 3,000 persons and 79 per cent received no pay last year, while there is a trend for a permanent umpire in big industries.[7]

A study of 1,442 collective agreements made in 1952 by the Bureau of Labour Statistics in Boston found 89 per cent of the contracts covering 29 broad categories of industry containing provisions relating to arbitration.[8]

An exhortation came from the *New York Times* in 1947, saying:

> Pick up umpire list, union and industry, panel of 150 arbitrators set up to act for conciliation agency—selected from 7 regions on the basis of advisory bodies, national labour management advisory committee.[9]

Publicity for Arbitration

American Arbitration Association to which reference has already been made is said to be a non-profit-making organisation devoted to the extension and development of arbitration in all fields of human endeavour. It has published a list of all the unions which had used its arbitration services in 1,577 cities.[10] It also announced that:

> Labour arbitration's outstanding accomplishment in this period was that it escaped the dangers of compulsion and came to remain the same voluntary, self-regulatory private proceeding, it had always been in this democracy.[11]

In the first three months of 1942, the number of disputes submitted went up by 106 per cent over 1941. With full speed ahead from New York headquarters, the American Arbitration Association (A. A. A.) claimed for setting up an Industrial Tribunal in 1937, with its 15 years of experience of research, organisation and practice, of commercial arbitration.[12] It had provided 30 branches, each equipped with staff, hearing rooms, operating as a national system. These voluntary industrial arbitration facilities, supplied the nation with a self-regulating system of arbitration and a choice between voluntary civilian services, such as contemplated by the President's Executive Order, and optional government services. They provided rules and regulations, and a technique by which parties could dispose of their own disputes, with a minimum of delay, costs, and with no publicity.[13] The cost was only $15 to $25 a day, and $15 for each additional hearing.[14] The Tribunal has answered by practical experience, one great question that

had troubled the managements and unions alike. "Will the union abide by the award ? The answer was : Yes, when they obtain a fair trial, have equal opportunities to be heard and receive an impartial award based upon the facts. Out of 702 disputes in 1941, only 2 awards were challenged in courts. The number of employees involved varied from 1 to 11,000.[15]

> Like the minute men in our first war, arbitrators are ready to go into action on a moment's notice. There is no need to train new men as arbitrators, qualified ones are always available on call. No valuable time need be lost, in setting up machinery. It is ready and waiting to be called. There is no danger of haphazard proceedings, defeating the desire of the parties to arbitrate, the procedure is standardised, and carefully supervised by experts. Arbitration is ready in every war time centre, plant vicinity, big or small producing for the war, operating at scheduled fees, the cost of using this machinery is at all times subject to the control of the parties. This means fewer delays, lower costs, quicker decisions, expert arbitrators, non-partisan, non-political, non-profit making proceedings, avoidance of harmful publicity, helpful to eliminate red-tape and litigation rules, understandable procedures and the right of parties to select their own arbitrators and conduct their own proceedings. Our slogan would be, "we fight our enemies abroad, but not ourselves at home".[16]

It claimed experience in dealing with provisions like anti-union activities, back dues on closing a plant, closed shop, continuous operations, designation of collective bargaining agency, discharge and reinstatement of workers and issues like discrimination, division of work, holidays with pay, hours, infringement of rights, interpretation of contracts, lay offs, methods of payments, overtime rates, penalties for workers, seniority, sick-leave, rest periods, vacation pay, wages, hours and working conditions, etc.[17]

In 1944 the *Arbitration Journal* brought out a brochure, *speaks for Arbitration, Union speaks for Arbitration* to emphasize the importance of arbitration.

Dr. George Taylor, representing government said :

> I should like to reiterate my firm conviction, that collective bargaining is such an integral part of industrial life that it must be developed by the parties themselves. The government should not go too far, in designating the terms of settlement in war-time.[18]

Mr. Dale Parvis, Vice-President, John B. Stelson Company, said :

> Industrial arbitration requires judicial temperament and technical competence. Arbitrators should be furnished with good arbitration rules. It is up to the parties to say within what limits the arbitrator shall rule. They need not and should not leave the arbitrator the unlimited determination of any disputes[19]

James L. McDevitt, President of the Pennsylvania Federation of Labour, in an address before the Pennsylvania Bar Association, in Atlantic City remarked :

> Experience shows that in a democratic country, the main responsibility for strikes prevention, does not rest with government or requires government interference. Strikes will diminish in the same degree as workers and managements gain respect for each other's point of view. Arbitration implies a willingness on the part of sensible men to submit differences to a democratic test. That means, careful examination of disputed facts, presentation of views and counter-views in an atmosphere of courteous persuasion, cordiality and intellectual honesty. But, if the subject is worth any consideration at all, it should be explored and not experimented with.[20]

> A caption for a review of arbitration affairs read, "preventon of strikes in national defence industries—voluntary arbitration of disputes is receiving encouraging support from the administration and labour leaders, encouraging signs were everywhere evident."[21]

Beginning and the growth of the use of Labour Arbitration

In this achievement the American Arbitration Association had a share to begin with in 1938. It settled in the neighbourhood of 100 active disputes between management and labour, to the full satisfaction of the parties, with every

award voluntarily accepted by both parties to the controversy. It started with a request from the Actors Equity Association, to interpret its labour contract with the dramatists, authors, screen actors, and later radio artists.

Some where, in the course of establishing arbitration in the amusement industry, for this great industry was the first to recognise, hire off arbitration from Mediation and conciliation, the association had a glimpse of the world of tomorrow.[22]

When it was thinking actively in 1937, things began to bring about labour controversies. A steadily increasing number of calls for information came. It found it had a new problem, first to provide for arbitration and arbitrators and begin a new path through wilderness of amicable undertakings towards a real use of arbitration.[23]

> In the first year, it had settled 103 controversies. In the cases referred to the Tribunal, it used arbitrators, all chosen by the voluntary agreement of parties. All this is in reality, a voluntary tribunal and the only cases taken are those that are willingly submitted. So only such arbitrators are used, that are voluntarily selected.[24]

As arbitration of rights and arbitration of interests began to increase, there was also growth of professional arbitration and arbitrators.[25] There were a number of persons, working as part-time or full-time or per diem arbitrators, with the National War Labour Board, and its regional offices. The American Arbitration Association, has 10,000 individuals on its labour panel. Several states like New York have well-developed lists of arbitrators who are part-time. Federal Mediation and Conciliation Service also keeps a list of experienced, part-time arbitrators and impartial professionals.[26] The Bureau of Labour Statistics called the process as "voluntarily accepted compulsory arbitration."[27] "Arbitration clauses in domestic and foreign business agreements and in labour relations have soared over previous years," said Mr. Arthur Croft, the President

of the American Arbitration Association. An increase of 86 per cent over 1950 in the number of arbitrations between American businessmen and concerns of 43 foreign nations marked the biggest advance. Labour arbitration between unions and managements saw a 12 per cent increase over last year, while the number of commercial disputes involving only American firms advanced 9 per cent. The United States Department of Labour estimated that 9 out of 10 labour management agreements have arbitration clauses.[28]

How arbitration grew in importance from the days of the War Labour Board has been indicated by a study of Freidin and Ulman.[29] In 1944, a Bureau of Labour Statistics study showed 73 per cent of the agreements having arbitration clauses.[30] Seventy-four per cent was indicated by a study of the National Industrial Conference Board.[31] It went up to 83 per cent in 1948.[32] In a study entitled "Profile of Labour Arbitration" made in 1951, arbitration appeared to have been favoured by 91 per cent of managements, 93 per cent of unions, 97 per cent of arbitrators.[33] In Boston, Massachussets, arbitration provisions were found in 73 per cent, 83 per cent and 91 per cent of collective agreement in 1944, 49, and 52, respectively. Ninety per cent of the workers covered by the provisions were in industries like food, and kindred products, textile mills products, apparel, paper and allied products, printing, publishing, chemicals, petroleum and local products, rubber, leather products, primary metal industries, transport, trades, hotels, restaurants, etc.[34]

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CHAPTER VII

ARBITRATORS AND THEIR SELECTION

Who are the Arbitrators?

WHO are the arbitrators? What are their qualifications? How are they chosen? Do they work alone or jointly on Boards? What is the experience and training they bring to bear on the job with which they are entrusted? Who chooses them? Who appoints them and how? Permanently or on *ad hoc* basis? Are they expendable? Who are their masters? Are they responsible to any one? If so, to whom? How are they paid? Per case or per diem? What other allowances are they supposed to get? How much time should they take to dispose of a case?

In view of the weighty public opinion in favour of arbitration and the rapidity with which it is increasing, answers to the above questions become not only relevant, but very essential.

A survey conducted by the National Academy of Arbitrators in 1952, by issuing a questionnaire to 197 members showed that their average age was 49.7 years, 73 were under 40 years. All except five were highly educated. 54 per cent of them were law graduates, 36 per cent Ph.Ds. and the rest were B.As. Majority were in professions like law, teaching of labour economics and industrial relations. Some had 11 years of experience and some less than 5 years. Out of 10,000 cases handled, 24 did two-thirds of the cases while 29 did little or no work. Virtually every one had at least 20 cases while grievance cases were 2,764. Twenty-one per cent were by Tripartite Boards, 79 per cent by Single Arbitrators. An overwhelming number were selected by the parties, while a few were selected by the National Academy of Arbitrators or the Federal Mediation and Conciliation Service Agencies.[1] Majority of them earn

$5,000 to $20,000 per year. The usual per diem fees is $100. It was not uncommon even for some of the student-wives to take up occasionally some arbitration work to see themselves and their husbands through the school, when their husbands were busy studying.

Another survey conducted by the American Arbitration Association also showed the existence of Single Arbitrators, Tripartite Boards, or Boards composed of all impartial arbitrators. Eighty-two per cent of the decisions seem to be rendered by single arbitrators alone. In a survey of 1,183 cases in 1953, the situation was as follows:

Neutral and Tripartite Boards

Neutral arbitration or Board	No. of cases	Percentage
Single arbitrators	965	81.6
The Neutral Arbitrators	5	.4
	970	82.0

Tripartite Boards

1 neutral, 1 labour, 1 management	195	16.5
1 neutral, 2 labour, 2 management	16	1.4
1 neutral, 2 labour, 1 management	1	—
3 neutral, 1 labour, 1 management	1	—
	213	17.9
TOTAL ..	1,183	99.9

Selection of Arbitrators

In 88 per cent of the cases, parties used the standard procedure of American Arbitration Association, i.e., sending call lists to each party, each side then gives the list of arbitrators' names to each party. Each party indicates the arbitrators they object to, and an order of preference of

those they accept, and when these lists are returned, a mutual choice becomes evident:

Methods of Selection of Arbitrators

Selected from the panels of American Arbitration Association	*No. of cases*	*Percentage*
Named directly by parties	1,045	88.3
Administrative appointments	73	6.2
No information available	63	5.3
	2	—
	1,183	99.8

Occupation of Arbitrators

About 15,000 names occur in the 1,183 cases examined by American Arbitration Association (A. A. A.) in 1954. They are usually selected for their integrity and impartiality.

Occupational Status of Arbitrators

Vocation	*No. of arbitrators*	*No. of cases*	*Percentage of total cases*
Educators	130	495	41.8
Practising attorneys	96	404	34.2
Professional arbitrators	16	170	14.4
Consultants	18	67	5.7
Industrial engineers	10	13	1.1
Labour relations executives	9	14	1.2
Clergymen	5	7	.5
Miscellaneous	9	13	1.1
	293	1,183	100.0

Among 96 attorneys, half of them spend their time in arbitration besides 16 devoted exclusively to arbitration. Among 130 educators, 20 per cent are in law schools and

the rest in the schools of Business Administration, Industrial Engineering, Labour and Industrial Relations.[2] The fees per diem ranged between $25 to $50, $75, $80, $100, $125, $150 and $200, in addition to almost half the rate for study allowance for study days in each case.[3]

Methods of Arbitration

Permanent or *ad hoc* arbitrators ? or a joint Board with an Impartial Chairman ? These depend on the relationship of parties. They ought to have an impartial chairman who will not only arbitrate, but mediate as in General Motors, Ford, Chrysler, etc. They have a tight system with few grievances. Mr. David Cole, Arbitrator for International Harvester seemed to have had only 5 cases in 18 months. Sometimes, a permanent arbitrator is objected to, on the ground that too many disputes would be referred to him by the people below as mentioned by Mr. Nicholas Kelly, General Counsel of Chrysler Corporation.[4] If an arbitrator is to be selected on an *ad hoc* basis, from the American Arbitration Association list, suitable names are given from the list of clergymen, lawyers and economists on a per diem rate.

One writer suggests :

> A final step towards minimising the disadvantages in the voluntary arbitration would be the use of Tripartite panel, rather than a single arbitrator.[5]

This is to avoid the fear of error of judgment by a single arbitrator and based on the author's own experience as the chairman of the Tripartite Board and as single hearing arbitrator with the National War Labour Board. Even though it was his considered opinion that the judicial character of tripartite decisions depend on the scrupulous impartiality of the disinterested member, he could not help frequently his own awards improved upon as to their workability, by retaining their judicial character.[6] Such optimism in Tripartite Boards was not shared by another important

member of the American Arbitration Association, who felt that—

> A serious impediment to successful arbitration has been the customary method of choosing arbitrators by each side to the controversy and the selection of a third, by the first two chosen. The practical effect of this procedure is the substitution of a board of negotiation, or a judge or a body, acting judicially. When one resorts to arbitration, he has usually exhausted the possibilities of negotiation and he desires that his controversy be judicially passed upon. The appointment of new negotiators is likely to result in an award which is a compromise disappointing to both sides, with consequent distrust of arbitration, as a method of settling controversies and dissatisfaction with its results.[7]

Selection of Arbitrators

How to select a good arbitrator? Is it a blind man's bluff, or is it an open eyed choice? As American Arbitration Association (A.A.A.) says,[8] since selection of arbitrator is the crux of the problem, there are numerous ways, in which provision is made for the appointment. (1) The parties may agree upon a single arbitrator and name him in the contract along with an alternate, (2) provide for naming a single arbitrator by mutual consent, when and if a dispute arises, (3) leave it to an outside agency or to an individual to name an impartial arbitrator, (4) provide that each side will select one, and the third will be selected by those two, or by the choice of the parties, (5) or agree upon a Board, consisting of equal number of arbitrators, appointed by each, or (6) agree to have a single arbitrator, under the rules of American Arbitration Association.

All these methods are open to criticism as (1) leading to the disadvantage of having too many disputes referred to, delays caused in case of illness or death, (2) assumes parties ability to "agree to agree" in the spirit of the contract, which may be facile, (3) if they leave it to Federal Mediation and Conciliation Service, or to American Arbitration Association, they may get unknown people, wth whom they

are not familiar and may feel frustrated, (4) a provision by which each party nominates one and the third if he can't be agreed upon is left to an outside agency, their voluntary choice is defeated inspite of 3 independent men being selected. Even otherwise, it would raise questions like "shall the award be by majority or unanimous vote, or should the impartial arbitrator vote with equal parity with his colleagues or should the impartial umpire take no part in the proceedings except when called upon to decide a deadlock and then cast the deciding vote ? If the other arbitrators are partisans, should he make an award, with the persuasion they bring to bear ? These are difficult choices to make and if both arbitrators won't agree and if the umpire has no powers to make an impartial award, the whole process is a waste. The height of frustration would be for each party to nominate its arbitrators 5 or 6 times and both not agreeing.[9] The mutual assistance method by which the parties select an arbitrator as from American Arbitration Association lists as per the standard procedure is said to be safe. But, the square method by which every arbitration should be tested is (1) that the Board of Arbitration or Arbitrator is impartial and competent, (2) that it represents a high degree of mutual choice, (3) that it can arrive at a fair decision without compromise and (4) can be appointed inspite of any neglect by either party. The American Arbitration Association recommends a Tripartite Board, "as it represents a true cross section of view-points, offers security against deadlock, (inspite of all that is said already against the hazards) gives a high dignity to labour and management and secures a greater effort on the part of all to have a true and just settlement." "Get a good arbitrator, you will have good arbitration" is the formula."[10]

Labour arbitration tribunal is not partisan. The parties may request for a single or multiple arbitrator system. The jurisdiction is restricted to the matter, arising out of all existing contracts or agreements or its renewal. The Tribunal does not take any jurisdiction for adjustment, mediation or conciliation prior to making an award. They come

and do the job, and go back awaiting another call. The proceedings are as per the rules. The demand should contain a submission, the replies are received and the clerk keeps them, sends the lists, informs the dates of meetings, etc. within 5 days and the administration fee is 15 $ (dollar) for each party and 10 $ for 2nd and subsequent hearings.[11]

This type of facile appreciation about the tripartite tribunals is not shared by some knowledgeable observers and judicial authorities, to whom, of course, the arbitrators, in general, have no regard, as they do not consider them to be as expert in labour matters as themselves.[12] More glimpses into the world of arbitrators could be had by closer inquiries into their working.

Types of Arbitrators :

New York University school of Industrial Relations made a study of 80 arbitrators, out of whom only 44 replied, while the rest felt that their information should not be included. Even on the basis of such a small sample, some results are forecast by the author.[13] Who are the arbitrators as per the survey ? Three-fourths are members of the legal profession. There are others with experience in labour work on the War Labour Board, National Industrial Recovery Board, or on the Mediation Services of State or Federal Government, 25 per cent are in Labour Economics, Law, with an equal percentage in Labour Consultation and Arbitration. 60 per cent of them have acted as Impartial Chairmen, some for 5 years and some for more. Some adhoc appointments are intermediary. Most spend their time in permnant arbitration, 80 per cent of them in grievance arbitration and 90 per cent in contract arbitration. 90 percent of them prefer the same parties, as they are familiar with them. Some think that this may weaken the judicial tone of their decisions and lead them to favour some alternatively, particularly of arbitrators who depend on this source of income alone. Greater specialisation may also narrow the outlook and precedents may be looked up to. Some want to give their opinions

with awards, when their vocation is arbitration, but, the parties don't want it if it costs them more or sometimes even otherwise.[14]

Terms of Employment :

Some want permanent retainer basis to be very sure of their income. Some want per diem basis and a very few demand flat rates. Those who choose permanent basis, want flexible incremental rates, depending on the complexity of each case. Security frees the arbitrator from worry and prevents compromising opinions. This also may lead to the undesirable practice of favouring parties by turns, and since costs involved are heavy, the parties may not submit to arbitration. But, the arbitrators argue that their continuity favours submissions and since their fee is independent of a case, they need not rush things through. As they are on call, delays are avoidable. Those who want a per diem rate have their own view of advantages as the rate varies with the time spent on each case in hearing, in studying and preparing the award. The realisation that arbitration costs money may prevent parties from resorting to it too often. But, the arbitrators do not want the parties to consider their cases in terms of costs, because thereby the parties prejudice their own interests. This might open the way for the other party to indulge in more time consuming ways. So it is considered advantageous for either party to resort to arbitration first. Sometimes, arbitration takes the form of extra hearings, framing of opinions etc., depending on the nature and habits of each arbitrator and it is felt difficult to generalise the practice.

Most of them prefer flexible rates, per diem, ranging from 25 $ to 250 $ (dollar) per day.

Problems in selection and turn-over :

There are no uniform qualifications or standards which would make the vocation professional.[15] Many new persons are entering the field, soliciting work. "The influx of the well intended amateurs is deemed to be a menace and

detrimental to work. An Association like the National Acadamy of Arbitration is considered as a proper step by some, while nobody wants a closed shop. Some managements want, "Pro management," and some unions want "pro union" arbitrators. There is an allegation that a close knit union and management lawyers select arbitrators from another close knit group of lawyers. All arbitrators want the parties to be educated about the advantages and the limitations of arbitration. The American Arbitration Association, Federal Mediation and Conciliation Service, Mediation Boards, Municipalities, Courts, Governments provide arbitrators. The appointment of arbitrators by municipal mayors and government are not considered happy as they might mean favouring their party members, while court nominations are considered to contain the danger of delivering the cases to lawyers without practice, who are in the good books of judges. Appointments of arbitrators by government at no cost to the parties is not liked on the ground that governmental service would not attract the best talent.[16]

Preference for different types of arbitration :

Another survey conducted to have a profile of labour arbitration, also showed somewhat similar results. A sample of cross section of 528 of employers, unions and arbitrators was chosen to assess their opinion, about the desirability of various forms of arbitration, the appointment made by the various agencies, the need for technical expertise among arbitrators and the issues to be excluded from their jurisdiction.[17] Voluntary grievance arbitration was favoured by 91 per cent of managements, 93 per cent of unions and 97 per cent of arbitrators. Contract arbitration was favoured by 31 per cent of managements (small 56, big 20), 47 per cent of unions and 62 per cent of arbitrators. Compulsory grievance arbitration was favoured by 46 per cent of managements, 44 per cent of unions and 43 per cent of arbitrators. Compulsory contract arbitration was favoured by 51 per cent of managements, 25 per cent of unions,

and 53 per cent of arbitrators.[18] Those who favoured compulsory arbitration, industrywise were as follows[19] :—

	Light, power, water, gas	Rail Roads	Street railways	Coal	Auto	Others
Management	91%	87%	75%	61%	10%	44%
Unions	93%	67%	37%	44%	11%	22%
Arbitrators	96%	91%	95%	69%	11%	39%
All	94%	87%	70%	63%	11%	39%

Preference of Appointing Agencies.

	*F.M.C.S.	*A.A.A.	State Agency	Courts	Others
Managements	41%	40%	9%	9%	1%
Unions	67%	16%	10%	2%	—
Arbitrators	46%	29%	18%	2%	5%

*F.M.C.S.:—Federal Mediation and Concilisation Service.
*A.A.A. :—American Arbitration Association.

Preference and need for technical expertise and significance attached.

	Very important	Fairly important	Insignificant
Managements	27%	48%	25%
Unions	31%	47%	23%
Arbitrators	13%	64%	23%
All	21%	55%	24%

Permanent..vs..Adhoc arbitration			Single..vs..Tripartite Arbitration
Management	37%	(Small 63%, Large 39%)	53%
Unions	45%		46%
Arbitrators	76%		50%
All	55%		50%

The arbitrators do not usually want any restrictions on their jurisdiction. A west coast arbitrator said, "I do not believe there is any single issue that should be excluded

from grievance arbitration at all times and under all circumstances."[20] Another arbitrator felt equally self-conscious, "I feel that anything can be arbitrated."[21]

The Federal Mediation and Conciliation Service, in the words of one of its Directors,

> performs service similar to that of a marriage broker who hopes to aid in the creation of a happy and indissoluble marriage relationship—one that threatens neither long run friction nor immediate separation. But, he need not wait for a heaven to build a happy marriage.[22]

President Eisenhower, subscribed to the Lincoln statement, that the correct role of government is to do, what people themselves cannot do, or do well, alone.[23] The roster of Federal Government seemed to contain about 400 names with 60 added. Seven names are suggested each time to the parties on request. Normally, on an average, an arbitrator is supposed to receive 15 nominations depending on the geographic location. Some areas, because they are not highly industrialised, or have not accepted arbitration, or have their own arbitrators, do not ask for nominations either from American Arbitration Association or Federal Mediation and Conciliation Service.

In South-East United States, each arbitrator had 20 nominations on an average, whereas in the North-West, the average was seven. In Ohio, Michigan, the average was 21, in New York it was 13 and in Texas about forty. Where regional variations are not a factor, Federal Mediation and Conciliation Service attempts to make an equitable distribution.

The fees are $150 per diem for grievance cases and the average charge is $100 per day. In 1949, the average charge was $75 per day. There is considerable disparity in the fees charged in the various parts of the country. There are differences due to variations for the different activities in an arbitration case. . . . Travel, hearing, studying and writing the award. A substantial number of arbitrators charge more to hear a case than for travel or study. One

curious anomaly is that some arbitrators charge more than usual fee for discharge cases, others less.[24]

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CHAPTER VIII

PROCESS OF ARBITRATION

I

Character of Office

THE function of the arbitrator is to decide disputes. He should adhere to such general standards of adjudicatory bodies as require a full, impartial and orderly consideration of evidence and argument, in accordance with application of arbitration law and the rules and general understanding or practices of the parties.[1] (1) The parties to dispute, in referring a matter to arbitration, usually indicate their desire, not to resort to litigation or to economic conflict. They delegate to the arbitrator the power to settle their differences. (2) In Tripartite Boards, while the parties expect their representatives to serve their interests, the neutral arbitrator should maintain strict impartiality and should not divulge any secrets. (3) Any person whom the parties or the appointing agency chooses is regarded as qualified and (4) He should be conscientious, considerate and patient in resolving disputes. He should be fearless of public clamour and indifferent to private, political or partisan influences. He should not incur obligations, impairing his impartiality with either party. (5) His duty is to determine the dispute over the interpretations of existing provisions or new terms of contract, in accordance with the wishes of the parties. (6) He should continue in office till he submits the award, in the absence of causes leading to his withdrawal, caused by the parties or by himself with their consent, after due notice. (7) He should observe the standards, irrespective of taking oath or otherwise, and (8) should keep the secrecy without disclosing to the third person, any evidence or discussion or argument or the terms of the award till it is delivered simultaneously to all the parties. (9) Advertising and solicitation of cases by arbitrators is considered improper and infradig.[2]

Compensation

Arbitrators serving in labour management disputes are compensated, but whether they are paid or not, they are asked to consider their work as an opportunity for public service. Their compensation should be reasonable, consistent with the nature of the case and circumstances of the parties. A fee, previously fixed should not be altered later on, during the time of proceedings or thereafter. Necessary expenses including travel, communication, maintenance, incurred by the arbitrator are reimbursable.[3]

Hearing Arrangements

The arbitrator should consult the convenience of the parties in fixing the time and place for the hearing and should not allow either party to delay unduly, the fixing of a date for the hearing. Timely notice in writing of date, time and place of the hearing should be given. (a) He may take oath, if the law of the State requires. (b) The arbitrator should be prompt in his attendance at the hearing and should so conduct the proceedings as to reflect the importance and seriousness of the issues before him. (c) The orderly conduct of proceedings is under his control. He should not allow unnecessary delays in the examination of witnesses or in the presentation of evidence. He may participate in the examination of the parties or to elucidate relevant facts, but, should not exert his views unduly, should be fair, courteous, avoid a controversial attitude and expression of premature opinion. The informality of the proceedings should not affect the decorum or orderly presentation of proof. (d) Unless the parties approve, he should not, in the absence of one party, hold interviews with or consider arguments or communications from the other party. (e) He should allow a fair hearing, with full opportunity to the parties to ofier all evidence which they deem reasonably material. He may exclude evidence which he deems clearly immaterial. He may receive and consider affidavits, giving them such weight as the circumstances warrant, but in doing so, he should afford the other

side an opportunity to cross-examine the persons making the affidavits or to take their deposition or to interrogate them. (f) He is expected to exercise his best judgment. He is not required to follow precedent. He should not prevent the parties quoting other arbitrators. When the parties have selected a continuing arbitrator, he may establish or follow precedents for the same parties.[4]

Award

The arbitrator should render his award promptly, and within the time prescribed, if any. (a) It should be final, certain, definite and should dispose of all matters submitted. (b) The award should be stated separately from the opinion, if an opinion is rendered. (c) It is discretionary, with the arbitrator, upon request of all parties, to give the terms of their voluntary settlement, the status of an award. (d) The award should be personally signed by the arbitrator and delivered simultaneously to all parties. The arbitrator should exercise extreme care to see the controversial or legal requirements of making the award are met. (e) It is discretionary with the arbitrator to state reasons for his award or to accompany the award with an opinion. Opinions should not contain gratuitous advice or comments not related or necessary to the determination of issues. If either party requests the arbitrator to prepare an opinion, such requests should be followed. (f) After the award has been rendered, the arbitrator should not issue any clarification or interpretation thereof, except on the request of both the parties, unless the agreement provides for such clarification or interpretation.[5]

Conduct and Behaviour of Parties

(1) Arbitration is predicated on the voluntary agreement of the parties to submit a dispute to a disinterested third party for final determination and acceptance. (2) The scope of the arbitrator, depends on the agreement of the parties. The contract or submission agreement should define his powers. (3) They should not select an arbitrator with

a view to favouring them. (4) In choosing Neutral Arbitrators, in Tripartite Board, the parties should choose those who would be impartial. (5) The parties should approach arbitration in a spirit of co-operation with the arbitrator. (6) They should not unduly delay hearings, should proceed expeditiously with the hearing of evidence, presentation of exhibits and furnish whatever information is required. When the hearing is concluded, they should not send additional information. (7) The parties should consider and inform the arbitrator their views regarding their need for publicity or privacy of the hearings. (8) They should not try to get information from third member on arbitration boards. (9) They should accept and abide by the award. (10) If they want their settlement to be recorded by the arbitrator, they should explain whether they want the arbitrator to join them or want him to make an award and if so, their reasons therefor. (11) The agreed compensation for the arbitrator should be decided at the outset and be paid without withholding it because of the displeasure over the award. If there is any disagreement about the payment between the parties, they should not discuss this before the arbitrator.[6]

The above code of ethics was published and adopted by the Arbitrators, those suggested by the Federal Mediation and Conciliation Service and Mediation Boards of California, Connecticut, Lousiana, Massachussetts, Michigan, New Jersey, Minnesota, North Carolina, Oklahoma and South Carolina.[7]

The Emergence of National Acadamy of Arbitrators

The National Acadamy of Arbitrators is another institution, interested in arbitration. It is best described in its own words,

> We urge no one to join our ranks, nor do we refuse to admit to membership, any one who meets the standards set by us. Ours is neither an open nor a closed door policy. Unless the Industrial Relation Research Association or the Academy of Social Sciences, which seems fit to admit to mem-

> bership any individual who desires to receive the literature issued by it or participate in its local and national activities, we have deemed it advisable to limit our membership to those of good moral character with substantial and current experience as impartial arbitrators of labour management disputes. In certain situations, those who have limited but current experience in arbitration, who have attained general recognition through scholarly publications, or other activities as an impartial authority of labour management relations are likewise admitted to membership. We have no ambition to have as members those whose relationship with arbitration is only occasional and who do not find themselves vitally concerned with its continued progress, except in so far as it provides them with financial returns. The Academy has never been and never will be a case-assisting agency. Its members do not consider themselves the "elect" of the profession and those not in the Academy as "Mediocrities". We do not solicit members but, applications for membership are welcome.

The academy is for those in arbitration who are currently active in the field to a substantial extent who wish to add their support to the study and research, which it aims to promote, who welcome the opportunity to exchange views with their colleagues . . . in short, who desire to participate in the development of arbitration process through legislative channels, through academic institutions, through co-operation, through American Arbitration Association, Federal Mediation and Conciliation Service, the New York State Board of Mediation, etc.[8]

The causes for the emergency of this body were also explained in a preface to one of its annual proceedings. Even after 10 years of arbitration in existence, a college professor seemed to have asked why the National Academy of Arbitrators came to being. It was considered strange how a question like that could ever be asked after 10 years of experience of labour arbitration, by any one.[9] Almost at the same time, in 1947, another article seems to have appeared criticising the "big business" aspect of the practitioners, passing on awards on a "now it is your turn" basis.[10] These comments were also repeated in a book on case law, giving currency to such notions. So, the academy was

founded, to improve arbitration process.[11] The first was an informal meeting in Washington D.C., followed by another in Stephenns Hotel in Chicago, on September 13, 1947 with 43 qualified arbitrators representing several sections of the United States. These are all devoted to Arbitration "as one of the examples of American Voluntarism."[12] It was also considered significant that the labour management conference of 1945 on existing collective agreements unanimously recommended the use of arbitration to resolve disputes over contract terms. Today, it is a major factor in the maintenance of industrial peace.[13] Speaking of the arbitrators in 1947, William Simkin seemed to have said, "Many of us in the lone wolf type of work, felt a need for a common meeting ground."[14] The only indication as to what other arbitrators are doing was to be found in the Labour Arbitration Reports of the Bureau of National Affairs, or in the Prentice Hall Labour Law Service. The arbitrators read with chagrin the criticisms and complaints about the questionable practice of their fellow arbitrators. So as a dedicated group of professional men, they proceeded to keep arbitration in the hands of professional men and away from the amateurs and the shysters.[15]

From its inception in Chicago, the Academy grew in strength with 250 arbitrators. In 1948, an ethics committee was established and in its final stage worked with the American Arbitration Association and finally laid down a uniform code of ethics and procedural standards for labour management arbitration.[16] The members of the academy came from judges, Senators, University Chancellors, Sheriffs, persons holding administrative positions in industry, government and the academic world. They meet annually, discuss the problems of arbitration, and publish their proceedings.

Though, when started, it was never the intention of the academy to serve public as an appointive agency, since the beginning of its publication of its membership roster, the academy says, it finds in spite of itself, only its members,

being nominated or asked for, by the parties in their collective bargaining agreements, which they regard, as an evidence of their popularity. . . . They also find the appointive agencies being requested only to include the members of the National Academy of Arbitrators.[17]

The National Academy of Arbitrators said :

> The work of the arbitrators, like that of judges, is in one sense enduring, and in another sense ephemeral. That which is erroneous is sure to perish. The good remains. That which is bad will be cast off in due time. We take pride in the contribution of N. A. A. towards the strengthening of the arbitration process.[18]

II

To what extent these very laudable precepts enunciated by the American Arbitration of Association and the highly impressive objectives of the N. A. A. are found in practice, by the arbitrators selected by A. A. A. or other agencies and in the performance of some of the celebrated fraternity of the National Academy of Arbitrators itself would be reviewed in the present and subsequent sections.

Dr. George Taylor of the University of Pennsylvania provided one type of philosophy for the grievance arbitration.

> It is not a substitute for, but often is a continuation of collective bargaining. An important key to understanding of grievance arbitration lies in the realisation that while collective agreement is necessarily continuous in settlement of grievances, negotiation or arbitration of grievances should not "*add to*" the labour agreement in the sense that there are new basic terms interspersed nor a clear agreement of the parties be modified. During the life of an agreement, grievance settlement by its very nature fills out the understanding, expressed in the contract, which are inherently incomplete.[19]

This is only one view of grievance arbitration. There are several different views as to the meaning and implica-

tions as well as the role of arbitrator in grievance arbitration to which full attention would be paid while considering the problems of arbitration.

Here, the chief concern is with the mechanics of arbitration, the presentation of cases, the conduct of hearings, the submission of evidence, the stenographic records, the appearance of lawyers, the use of transcripts, the compensation of arbitrators, their hearings and study periods, their charges for the same, their travelling allowances, the time taken for the rendering of an award, the issues brought in arbitration, the jurisdiction of the arbitrator, the sharing of costs by the parties, the original abhorrence of parties for arbitration, etc.

Some employers and unions are reluctant to have arbitration by outside parties who are either biassed or not fully informed or because the disputes may be referred too frequently to arbitration without negotiation. In spite of these fears, arbitration provisions are in vogue, for half a century in printing and apparel and not common in many industries.[20] Thirty-nine per cent of the agreements fail to provide a pre-determined means to breaking of a deadlock, 19 per cent leave the selection to Federal Mediation and Conciliation Service, 16 per cent to American Arbitration Association. Other outside agencies designated were state and local government bodies or officials or judges 4 per cent, private individuals and organisations, 2 per cent.[21]

Jurisdiction of Arbitrators

Eighty-two per cent of the clauses of collective agreements in 1952 provide for grievance arbitration, but exclude management rights and union membership, production standards, rates on new or changed jobs, health, welfare and pension benefits. In 8 per cent cases, the scope of arbitration is indicated in general terms, as any dispute or grievance or controversy between the parties. Eleven per cent of the agreements authorise arbitration on general wages increases, or decreases and 2 per cent request arbi-

tration on deadlocks over the terms of a new or revised agreement.

Costs of Arbitration

Three-fourths of the agreements mention how the costs shall be borne by both, and usually equally. One per cent of the agreements either specially require the losing party in arbitration to bear the entire cost, or leave it to the arbitrator, to levy the cost against the loser, at his discretion. One agreement requires the employer to pay the full cost of arbitration, while another makes him pay 60 per cent.[22]

Time Limits

To avoid the delay in settling disputes and to prevent obstruction from either party, time limits are specified in over half the arbitration agreements. The largest proportion of them, i.e., 70 per cent of them are confined to selection of arbitrators, an indication that unnecessary delays are not anticipated, when once the appointment is made and proceedings are under way.[23]

Scope of Arbitration

Definition of the scope of agreements vary from agreement to agreement, ranging from brief general statements to lengthy intemisation of the specific issues. Disputes over discharges are most frequently listed as arbitrable, a few do not include disputes over discharge that results from participation in work stoppages, incompetency, insubordination and other special causes or that involve probationary employees. Many agreements specify that the arbitration agency, has no power to "add or subtract from or modify any terms of the current agreement or that the arbitrator may not arbitrate away, in whole or in part, any provisions of this agreement". Such safeguards may be considered as restricting arbitrators and arbitration to interpretation and enforcement of the terms of agreement.[24] Some agree-

ments provide that any dispute over wages, hours or other conditions of employment may be arbitrated without clearly indicating whether arbitration is restricted to interpretation of the wage and other clauses in the agreement or any dispute involving these subjects may be arbitrated. Among the major agreements which permit the arbitration of individual wage disputes are those covering the subsidiaries of the United States Steel Corporation, United States Rubber Company, (Indianapolis—Indiana), Shell Oil Company (California) and Wheeling Steel Corporation. Agreements in American Thread Company, American Woollen Company (North Vassalboro, Maine) and Marshall Field Company (North Carolina Plants) specifically permit arbitration of general wage disputes.

Some agreements specifically exclude from arbitration designated management functions, such as "the methods of production and the company's 'operating policy', use of machinery and matters pertaining to the financial status of the business", while others specifically exclude, "the purpose or the inclusiveness of the agreement, the enlargement or the extension of the scope of the status of the union and grievances or disputes that arise out of governmental orders, regulations or contracts, etc."[25]

A few agreements state that any "grievance or complaint" or "any difference" may be arbitrated and provide no clue as to whether arbitration is limited to the interpretation, application and enforcement of the provisions or whether grievances over matters not specifically covered by the agreement are included within the scope of the arbitration. A small portion of the agreements, in addition to authorising the arbitration of disputes over interpretation and or disputes over certain working conditions, specifically authorise arbitration of disputes over items and conditions of a new agreement.[26]

What are the grievances brought into arbitration ? Some of the issues arbitrated by the American Arbitration Asso-

ciation in 1954, as revealed by a survey of arbitration cases are as follows :—[27]

Complaints of inefficiency (111), absenteeism (59), dishonesty (32), Insubordination (29), Leaving job without permission (24), Refusal to perform job (24), Assault and fighting (20), Strike activity (19), Intoxication (14), Abusive language (12), Slowdown (12), Union activity (12), Refusal to work overtime (11), Sleeping on the job (10), Lateness (9), Physical disability (9), Scarcity risk, etc. (48).

"Arbitration requires a maturity in bargaining relationships before it has a chance to survive. Unless labour and management have advanced beyond the stage of open conflict, arbitration cannot have optimum potentialities.[28] The four main hazards of arbitration are considered to be, (1) a failure to distinguish between mediation and arbitration, which results in an operating assumption that it is essentially a political than a judicial process, a cynical attitude towards the process which results in pressure by management and labour, to obtain arbitrators, "who are impartially on our side", (2) an over optimistic estimate of the effective use of arbitration which tends to consider it as an all purpose tool or panacea for the resolution of any and all disputes which the parties fail to settle privately, (3) a tendency to utilise arbitration as a "face saving mechanism, instead of paying more attention to the necessity for constant effort at improvement and perfection in the handling of disputes at the negotiation stage or in the lower levels of grievance procedure", (4) a failure to recognise that too frequent arbitration may prove as destructive of sound labour arbitration as much as neglecting to provide for arbitration machinery.[29]

In the opinion of a prominent union :

> It would be a mistake to consider arbitration as a cure all. Some times, union officials or managements will not give up a dispute to save face, and want settlement through an arbitrator. Some of the arbitrators are hanging around, hanging up their shingles, and are proclaiming that they are capa-

ble arbitrators and are looking for business. If more than one grievance is referred to at a time, he is prone to split it into a 50-50 to give both sides an equal break. He does not want them to get mad at him. He wants business. This sort of arbitrators do irreparable harm if the grievance has merit. Back in the plant, 99 out of 100, the stewards are going to be confronted with the same unsettled conditions that the arbitrators ruled upon.[30]

To Noble Braden :

Arbitration is frequently confused with conciliation and mediation and is sometimes referred to as a step in the collective bargaining. It is not conciliation, mediation or compromise, nor is it an extension of the collective bargaining. Arbitration is a judicial process. The arbitrator is a judge.[31]

To the New York Chamber of Commerce, it is a wonderful process, quick, less expensive, voluntary and private. In 1936, lawyers appeared in 36 per cent of the cases while today they appear in 91 per cent of the cases.[32]

In a survey conducted by the University of California, Los Angeles, the preference of management unions and arbitrators with regard to the various processes of arbitration is as follows: (1) The need for interpretation of awards, managements 87 per cent, unions 94 per cent, arbitrators 89 per cent. (2) The need for stenographic records —management 69 per cent, unions 50 per cent, arbitrators 55 per cent. (3) Rules of evidence needed—management 35 per cent, unions 18 per cent, arbitrators 9 per cent. (4) The need for attorneys and consultants—managements 69 per cent, unions 71 per cent and arbitrators 87 per cent. (5) The need for avoidance of social relations with the parties—managements 87 per cent, unions 71 per cent and arbitrators 87 per cent. (6) Appropriateness of mediation. (Those who take a judicious approach oppose mediation and the inclination of arbitrators to mediate as shown below is alarming, page 15) managements 33 per cent (small 44 per cent, large 27 per cent) and arbitrators 64 per cent. (7) The need for precedents or "Stare-decis" and principles of common law is as follows :—

	Decisive weight	Some weight	No weight
Managements ..	7%	66%	27%
Unions ..	19%	59%	22%
Arbitrators ..	2%	77%	21%

(8) Need for opinion in awards—managements 77 per cent, unions 73 per cent, *arbitrators* 91 per cent. The author says :

> (Arbitrators) themselves reflecting on their, perhaps, unusual insecurities, are eager to elevate themselves and their status. They are far more enthusiastic than the parties about the permanent umpires as contrasted with *ad hoc* arrangements, though it is done due to a belief in the standards of the former. They also showed concern for unitary rather than tripartite boards for the same reason. Similarly, they want to expand their authority, in grievance causes by broadening the range of issues that may be arbitrated and in contract disputes by extending the voluntary and compulsory arbitration, the last key to industrial peace. Finally, they ask for higher fees than what the unions or managements are willing to offer.[33]

Louis Macdonald, in another survey, mentions that the problem of costs, is too often complained against by the parties. They are usually high, and if they still increase, would be disadvantageous to arbitration process. They are considered a drain on some union funds.[34]

The issue of quick disposal, another merit claimed for arbitration, was examined by taking a survey of a 10-year period from 1945-46 to 1955-56 and the time taken by cases during this period as per the Bureau of National Affairs reports on labour arbitration, by Dr. Arthur Ross. He comes to the conclusion that the stage of first hearing takes 112 days in preparation and it takes another 116 days to give award, i.e., 228 days from start to finish, it sometimes takes 200 days (see the table attached).

He examined in this sequence : (1) date on which the case started, (2) length of the time of grievance hearing, and (3) length of time taken from grievance to decision.

Period of time from Grievance to Hearing, Hearing to Decision and Grievance to Decision. All cases 1945-46 and 1955-56.

1945-46	No. of Total days	Cases 1-10 days	11-30 days	31-60 days	61-120 days	121-180 days	181-one year	Over one year	Average No. of days	Percentage increase in 1945-46 and 1955-56
a) Form Grievance to Hearing.	74	1	13	13	25	10	11	1	99.7	
b) From Hearing to Decision.	128	1	40	20	11	5	—	—	27.8	
c) From Grievance to Decision.	105	52	10	18	36	13	22	6	133.1	
1955-56										
a) From Grievance to Hearing	79	—	4	14	34	16	10	1	111.7	71.8
b) From Hearing to Decision.	94	11	30	29	20	3	1	-	45.9	65.1
c) From Grievance to Arbitration.	144	—	1	11	37	42	35	18	201.6	51.5

Period of time from Grievance to Hearing, Hearing to Decision & Grievance to Decision by types of cases 1945-46 & 1955-56

	Wage Rate, Job Classification. Fringe Benefits.		Employment Security.		Discharge and Discipline.		Procedure and Miscellaneous.	
	No. of cases.	Average No. of days	No. of cases.	Average No. of days.	No. of cases.	Average No. of days.	No. of cases.	Average No. of days.
1945-46	1	2	3	4	5	6	7	8
a) From grievance to Hearing	411	168.6	20	96.6	36	81.6	7	95.9
b) From Hearing to Decision.	40	31.5	34	18.9	39	34.4	15	21.3
c) From grievence to Decision.	16	223.6	25	119.7	51	121.4	13	92.9
1956-56								
a) From Grievance to Hearing	18	117.4	29	115.1	28	110.3	4	71.8
b) From hearing to Decision.	25	34.8	33	63.9	28	38.6	8	31.6
c) From Grievance to Decision.	34	215.1	53	236.1	48	151.0	9	217.7

For 79 cases, an average period of 111.7 days from grievance to hearing in 1955-56 and from hearing to decision 45.9 days for 94 cases. From beginning to end it is 201.16 days. In 1955-56, the largest group is from 60 to 120 days. In 1945-46, for 11 cases, the period from grievance to hearing was 168.6 days. In 1955-56, it was 3 per cent less. Briefs, lawyers, councils all these add up to the time and hearing. For disciplinary grievances, it is 110 days. The period subsequent to hearing was 28 days in 1945-46 and 46 days in 1955-56. The hearing period too increased from 32 to 35 days in wage-rate classification, 19 to 64 days in employment security, 34 to 39 days in discharge and discipline. Aggregate span from grievance to decision averaged 133 days in 1945-46 and 202 days in 1955-56. Employment of attorneys was more than doubled during the period. The American Arbitration Association also says it takes 200 days from the origin of the dispute.[35]

Preparation for Arbitration

How then should the parties prepare and present cases in arbitration? There are a variety of views again. A series of conferences on arbitration inside and outside the contract expressed the fear "that perhaps the greatest danger is, that public may look upon arbitration, as the most desirable means of settling disputes and collective bargaining may go into the background, which neither party wishes".[36]

This conference suggested that both parties better represent their interests through their own experienced officials, than lawyers and have stenographic records and briefs, if necessary. It also emphasized the strict definition of and limitation on the powers of the arbitrator.[37]

According to Dr. Ross, the arbitrator mainly needs from the parties two things, (a) what is expected of him, and (b) the evidence on which a sound decision can be based. The arbitrator learns what is expected of him from the submission agreement which is most important as his juris-

diction depends on that. He is in every sense of the term a creation of it. The most important part of the submission agreement is the stipulation of the precise questions to be answered. It is too important to be left to a verbal understanding or hastily drawn up without reflection.[38]

Dr. Ross would also like reliance on other arbitration awards in similar situations, though one has to be careful in using them by examining whether they are really under similar circumstances.[39]

Mr. John B. Laweritzen of Sanfrancisco says, three questions might logically be taken into consideration before commencing preparation of an arbitration case. First, the client should ask, "is an attorney necessary for the case ?". He says, if the case involves construction of a contract, there is good reason to engage an attorney, a person, supposedly good and specially trained in the field of contract construction.[40]

Secondly, if the client has decided to have lawyers, "I would make the suggestion, if you have an arbitration case, it must be an important one. Go first class. Don't talk about fees. A client might say, "we should not have transcripts, because it costs money, we don't want you to come to the plant, because that will involve travelling expenses or let us not have any photostat copies, because that is another expense". But, if it is not possible to go into arbitration well prepared, the best advice, I can give is. "don't go". The third question is, "is arbitration really necessary ?" It is of extreme importance to realise when arbitration is necessary. By collective bargaining, fees and expenses can be saved and a situation can be created whereby the parties themselves have settled their own differences.[41] To him, the method of preparation of a case either for contract or grievance arbitration is similar and deserves the same remuneration while others like Noble Braden feel that they are not so, and grievance arbitration being less exacting, arbitrators should charge less. Any way, Mr. Laweritzen would like that if the parties don't

have an attorney for the case, they should at least consult one, on the matters of submission agreement.[42] The arbitrator, then is considered to be one who is supposed to "call the shots and resolve the theory". "Having resolved the theory, you have to start figuring out what you are going to fit into that theory. One thing is the past practice in amending that contract. I assume that you have analysed and understood fully the contract in which you are involved. Then ask, have these changes amended or changed the contract". That is his advice to the arbitrators. Then he wants exhibits, witnesses, evidence, proofs to justify each side and all the framework of legal formalities in a court to be repeated in the hearing of arbitration. He also wants the arbitrator to visit the plant in every case, even when the arbitration is simple. He insists on all that.[43]

Mr. Maurice I. Gershenson, Chief of the Department of Labour Statistics, has understandably cautioned about proper use of statistical data in arbitration to avoid confusion, as that is of paramount importance.[44]

Mr. Ronald C. Davis referred to the evidence, irrelevantly given by the parties and accepted by the arbitrators making it needlessly expensive and confusing rather than helpful.[45]

> This is a kind of abuse of arbitration process, that can be and should be controlled by the timely objection and intelligent handling by the arbitrators. In the early days of arbitration, employers' attorneys used to accuse unions of holding back a part of the evidence, "sand bagging" as the phrase goes. It may be the same is done in arbitration proceedings. I think, the arbitration process might be expedited be made more orderly and understandable, both to the arbitrator and the parties concerned. It has been my experience that many things go into the record of arbitration proceedings that do not properly belong. They tend to confuse the arbitrator, they extend the proceedings so that they become more expensive and exhausting than they should be. All of us have had experience of cases that have taken days and weeks of hearing, solely because one side or both, in an excessive zeal, pour into record a mass of detail and irrelevantly, bring witness after witness. . . . Though an experienced arbitrator can sift the wheat from the chaff, the parties

> are also entitled to have the record protected by a little judicious sifting and curbing the abuses. Otherwise, I fear the efficacy of arbitration process itself, as an expeditious, practical and inexpensive method of determining labour disputes, could be seriously injured or destroyed.[46]

He also suggests some house-keeping of details, by arbitrators, and reliance on previous awards for their persuasive value.

> I would treat them with a little more respect than is usually indicated for, the past arbitration awards are valuable tools for both the parties and the arbitrators."[47]

Cost and Delay in Arbitration

Mr. J. Noble Braden, speaks of the problem of costs continuously coming up. Many small employers and many unions complain that arbitration costs too much. Large employers say, "well, the trouble with arbitration is that it does not cost enough. If only you would quadruple the fees and get an arbitrator charge $500 per day, then the darn unions would not bring so many cases for arbitration". But the costs depend on the parties too. They come with inadequately prepared case, they try to convince each other in the proceedings or make speeches for the audience. Another element in the arbitration proceedings is the cost of the stenographic records and notes. When you think of them, they turn out 1,500 pages of testimony, and they get more than the arbitrator does. Even at that cost the dely in getting them has bad effects on judgment.[48] Governor Thomas Dewey once said in a New York dinner conference to about 1,800 lawyers and judges at Waldorf Astoria :

> I look around my library and see those volumes on cases I have tried. I get a thrill of pride. Here are those thousands of pages of testimony that have been produced. I wonder whether any of them is worthwhile, whether any court ever reads them at all. I have a strong feeling that we ought to consider in New York the system used in England where a judge, while hearing, makes notes of testimony as it is being introduced and the appeal is, on the judge's memorandum, not

> on a stenographic transcript". The same thing can be done by arbitrators, as at the close of hearing, the facts will be fresh in their memory instead of waiting, till the stenographic records get ready. The stenographer is busy. There is another transcript ahead of you. You are not paying spot delivery rates. You are paying regular rates. Therefore, you must wait between a week and a fortnight. In Carolina, it takes 4 weeks as the court stenographers who are busy are used. Then, another 10 days is required to prepare a brief. If you have a distinguished counsel, you have to have a reply brief . . . another week. The arbitrator then finally sits down to make his decision. He reads the demand for arbitration and the submission agreement. He tries to recollect the testimony, can't figure it out. He goes back and forth, and tries to think how much weight he can give that testimony.[49]

An arbitrator, who has been the chairman of a negotiation committee of warehousemen for 20 years, was once told after an exhaustive hearing in Maryland, "Mr. Arbitrator, we would like to submit briefs, but I have just been talking to the stenographer and it will be four weeks before he can get the record out. Thereafter, I would like two weeks". The arbitrator told the counsel, "Four weeks, and then I will forget what the people said. Never mind that. I am going to decide this issue, going back on the train, when I know, who lied and who told the truth. I can remember that, if I do it right away. But, six to eight weeks from now, I wait."

According to the research report of the American Arbitration Association, there was representation of cases in 63.7 per cent by counsels and use of transcripts in 22 per cent.[50] The clerk is present in 75.7 per cent of the cases. Briefs are filed in 41.9 of disputes. The duration of the dispute has been from one month to one year and over. The use of transcripts had contributed to the extension of time by 4 to 5 months. The fees of arbitrators as mentioned earlier, vary from $25 to $250 per day and the ratio of hearing and study days vary according to each arbitrator. Sometimes, three days hearings go upto 9 days study. Sometimes even if the hearing days are two, the study days are also two. In some cases, for four hearing days, the study

days go upto eleven, for five to ten days and for six hearing days, the study days go upto twelve.[51]

A criticism that is recurrently met with is about the expenses in arbitration. The fees of arbitrators and the cost of stenographic records, which are sources of concern to parties. Too often, under stress of circumstances, they agree to compensation of arbitrator at rates, higher than they believe is justifiable, in order not to be placed in an embarrassing position. The same is true of stenographic expenses. With no desire or necessity, the parties agree because the other party suggests it as necessary to the arbitrator.[52]

"Times" of September 30, 1946 said that when Harry Shulman was offered a raise of $6,500 to his salary of $12,000, refused it saying to the union and management in General Motors, that he did not want to have a monetary interest in the job. Mr. Braden recommended this example to other arbitrators and wished they would put service above monetary gain.

In 1938, when arbitrators were first serving free, *Fortune* magazine paid them a tribute, saying:

> That the arbitrators are not unrewarded. His time is taken and he is put to some trouble, but he has the gratification of having his worth and wisdom appreciated, and of sitting at their express request, in absolute judgment of his fellows. The opportunity is one, which people rarely refuse.[53]

This situation has changed since 1943. "Almost any individual who had served for a few months, as an employee of some government agency concerned with labour, offered to serve as an expert arbitrator."[54] A New York member said to the American Arbitration Association, "the country has in the last few years spawned an enormous number of men, who hold themselves as arbitrators, and who in some way or other have succeeded in having their names put on various panels of government and semi-government agencies."[55]

The government policy of appointing an arbitrator on $18 per day appeared to be salutary. But there are several stories told, as to how the arbitrators desire various methods to secure higher fees by bidding before the parties.[56] In some proceedings, without rules and administrative procedures, fees have been fixed at higher amounts so that the other party would not be able to pay. Such unethical practices may be few, but serious enough to cause alarm to discredit arbitration process.[57]

The War Labour Board has suggested a standard rate of $25 to $100 per diem. The United States Conciliation Service led it up to $150 per diem, and they also agreed to supply arbitrators paid by government. Not only the fees, but the frequency of recurrence and length of proceedings have also a bearing. Not unjustifiably charges are made the arbitrators prolong the hearing to increase their compensation per diem, allowance, etc. Insistance on a separate arbitrator for each grievance is another method to increase expenses and one that has been recommended by so-called Labour Relations Advisers in the hope that increase in arbitration costs will discourage its use. There is no reason why a single arbitrator can't dispose of several grievances in one proceeding, unless they are so different. It is short-sighted to think better labour relations result, in making it costly. It will only endanger animosity.[58]

A spirit of public service in arbitrators is considered a paramount need. Similarly, a change is essential in the attitude of parties regarding the qualifications of the arbitrators they want. "Honesty, fearlessness, competence, an agreeable personality are all highly important." But all too often they also appear to expect their choice to fall upon a man who is completely frank, with respect to political, social, economic or other predilections, reminding one of the saying, "why be difficult, if when with just a little more effort, you can be impossible."[59]

There is no lack of people. It is said :

> In every community, there are some men, whose training has been such as to develop in them intellectual honesty, a capacity for suppressing pre-conceived notions and arriving at conclusions on the basis of objective considerations.[60]

As disputes regarding "Contract" require more expert advice and more protracted hearings than over "Rights", the same payment for both is obviously unrealistic. The fees are to be based on the nature of controversy, the standing of the arbitrator, abilities of the arbitrator, time spent and rate fixed in advance of appointment.[61]

Mr. J. Noble Braden makes these suggestions, in view of the complaints against the arbitrators, which are on investigation found justifiable. He refers to lengthy opinions, (2) excessive time taken for studying and preparing the decision, (3) excessive hearing days, (4) delays in rendering the award, (5) and attempts at mediation by the arbitrators. An arbitrator seems to have copied lengthy exhibits and portions of the record and prepared a long and drawn out opinion for which he charged a number of days additionally, thereby increasing his fees. The number of study days have increased in recent years, over the time that had been used by the same arbitrator in years past. There has also been a great deal of discussion for increasing the per diem rate of arbitrators. Mr. Braden would not like an increase in the number of days charged for study and opinion. He is aware of the skepticism of arbitrators about these complaints and their feeling, that nobody ever complained against their fees or anything else. Ample correspondence was received at American Arbitration Association from which he could substantiate his remarks. He quoted his opinions from the letters received. One read :

> We can't understand why 9½ days are required to make a decision, when the arbitrator spent only six hours in hearing. We have submitted many cases in the past which were much more difficult, many more briefs filed, and much more time involved, and I can't remember a bill being submitted as in this case.

A second letter from a union said:

> It is my understanding that the arbitrator agreed to charge $100 per day of hearing. The hearing consumed approximately all days. The decision was a brief undercounted statement and no one in his right mind could conceive of the necessity for his consuming more than one day, in reaching or expressing it. The daily rate is a substantial one. If the arbitrator is dissatisfied, we would consider another rate, but we think it is not fair or reasonable to obtain additional compensation, though a charge for consumption of this time cannot be justified under any circumstances.

Another corporation has complained:

> An arbitrator travelled by car by a very circuitous route, stayed in a hotel 50 miles away from the place of hearing and drove between the places in two days and the decision was given at the end of hearing. We cannot understand his charging for all distances he travelled as per his personal wishes. Moreover, he also charged $100 for each day of travel in addition to milage and other expenses.

Another arbitrator is alleged "to have spent 8 additional days to write an award after hearing 20 days."

12. *Screening of Arbitrators*:

A prominent labour leader made the same complaint:

> Literally thousands of arbitrators are in the field waiting or seeking business. There is, therefore, more need to study their awards by listing their names, the geographic location, with a biographical note, an analysis of their decisions with awards, the names of companies and unions, as well as information whether they are professional arbitrators or lawyers or professors or labour consultants. Arbitrators should encourage parties to settle the disputes by themselves, though it may look like liquidating themselves. They often complain that preparation of cases by managements and unions is too poor. Why should they not, then, try to improve them? Again, arbitrators' fees are mounting up, being too much for the unions to pay. Many locals are small and can't afford the extravagance. Arbitration can make them bankrupt and hence the Union of Automobile Workers proposes to investigate into it.[62]

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51. *Ibid.*
52. Noble Braden, J., "Problems of Labour Arbitration", *Missouri Law Review, April,* 1948.
53. *Fortune,* December 1938.
54. Noble Braden, J., *op. cit.*
55. Maximum Arbitration and the Scope of the Collective Bargaining. Personnel Series, No. 110, p. 31, 1947.
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57. Noble Braden, J., *op. cit*, p. 161.
58. *Ibid.*
59. *Ibid.*
60. Fry, "Logic of Collective Bargaining and Arbitration", *12, Law and Contemporary Problems,* 264-78, 1947.
61. Noble Braden, J., *Policies and Practices of American Arbitration Association,* p. 89.
62. Woodcock, Leonard, *Problem Areas in Arbitration.* The author is Vice-President, Union of Automobile workers of America.

CHAPTER IX

PROBLEMS OF ARBITRATION

I

WHAT are the mechanics of arbitration viewed in its functional aspect ? What are the problems involved ? How are they approached and dealt with by the professional arbitrators provided by the American Arbitration Association or the Federal Mediation and Conciliation Service or National Academy of Arbitrators or other agencies or appointed otherwise ? Is there any uniform approach ? Any single coherent philosophy ? Is there any need for it at all or is not ? Is arbitration an adjudicatory process in grievance interpretation ? Or is it mediation, arbitration and an extension of the collective bargaining, as some like it to be ? Are the precedents of any significance ? What is the role of government ? What are the conditions necessary for successful arbitration ? What are the limitations ?

Different views on the Nature of Arbitration

According to J. Noble Braden :

> Arbitration is a quasi-judicial process whereby the parties, instead of resorting to the established State or Federal Courts, determine upon the Tribunal. . . . Arbitration is not to be confused with mediation or conciliation which is the process of bringing both the parties together, to work out a compromise of their differences, with a view to settling their disputes. Under common law and statutory law, arbitrators are required to be impartial, to have no interest in the outcome of the proceedings, and no relation with the parties, that may give rise to an assumption of bias.[1]

The Tripartite Boards have been used sometimes and their impact is said to have done harm to arbitration, as a judicial process.[2]

The United States Circuit Court said :

> we note that under the Act, (Railway arbitration, transport, etc.), the arbitrators, save the neutrals, may be directly inte-

> rested in the award and thereby not disqualified. This, we may add, is a radical and we may also add an unfortunate departure, from the common law. An open-minded consideration of the issues can hardly be expected, where they are chosen to represent contestants. It is such a misnomer, to call them arbitrators. They are advocates.[3]

The New York Court of Appeals has expressed itself more vigorously.

> The practice of arbitrators conducting themselves as champions of their nominees is to be condemned as contrary to the purpose of arbitration, and as calculated to bring the system of arbitration into disrepute. An arbitrator acts in a quasi-judicial capacity and should possess judicial qualifications of fairness to both parties, so that, he may render a faithfully honest and disinterested opinion. He is not an advocate; his function is that of an umpire or a third arbitrator. He should keep his own counsel and run to his nominators for advice when he is in a minority. When he enters arbitration, he ceases to act as the agent of his party, who appoints him. He must lay aside all bias and approach the case with an open mind. He must seriously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude.[4]

The American Arbitration Association is the most influential exponent of strict construction. J. Noble Braden, its Tribunal Vice-President, whose views were already mentioned, had always emphasised:

> the American Arbitration Association has from its inception been the strongest advocate of the development of arbitration as a judicial process. Its publications present almost incontestable evidence of arbitration, as a judicial process.[5]

The American Arbitration Association code of ethics, subtitled, "Some Basic Principles of Right Conduct", suggests the office is of a judicial nature, for the arbitrator is chosen to determine the respective claims of the parties by making a just and final award. In the performances of his duties, the arbitrator remains independent and impartial, acts within the powers bestowed on him, is responsible for the conduct of the proceedings before him, offers a fair

hearing and receives evidence, all acts of high judicial importance. His only responsibility is to avoid having any personal part in arranging a settlement for he is a judge and not a compromiser.[6]

According to Senator, Wayne Morse, himself an outstanding arbitrator,

> the arbitrator sits as a private judge, called upon to determine the legal rights and economic interests of the parties, all these interests and rights are provided by the records made available by themselves. The principle of compromise has absolutely no place in arbitration hearings.[7]

Harold Davey said :

> I am not advocating a wide open arbitration of a grievance. I am convinced, however, that the jealous emphasis on retention of exclusive functions is detrimental.[7a]

He said in the same paper, at another place :

> it is extremely important to avoid a narrow view that a complaint need not be considered, unless it involves the interpretation or application of the provisions of the agreement.[7a]

In the words of a union official, whom he quoted,

> it is the least desirable approach to the objectives of adjusting grievances.[8]

Perhaps, bewildered by such a complexity of conflicting views, as to what arbitrators should and should not do and convinced, as to the dearth of competent and impartial arbitrators, Fairweather and Shew pleaded for government appointed, federally governed and paid arbitrators, to substitute the practice of private arbitrators.[9] William Waite held :

> an arbitrator to take jurisdiction and render an award in a matter not covered by the contract would be equivalent to adding a clause, or modifying a contract, that is something which runs directly counter to the specific provisions of most agreements.[10]

The objective of restricted and limited clause is to try to secure a judicial determination of controversy, to try to

prevent the arbitrator from mediating or compromising the dispute, and expanding or changing the written agreement of the parties. Typical are the arbitration clauses, which provide the arbitrator may not vary or modify the terms of the contract. The arbitrator must decide all questions in accordance with agreement and apply such provisions to the particular case presented. "An arbitrator must conform to the terms of the agreement, and not go beyond it ; nor should an arbitrator directly or indirectly rewrite or insert new clauses in the agreement."[11]

Most convincing is the statement of the President's Committee in 1945.

> The impartial chairman, umpire, board or arbitrator should have no power to add to or subtract from, but should be authorised only to interpret the existing provisions of the agreement, and apply them to the specific facts of the grievance and dispute.[12]

Awards are being set aside, for not allowing standard procedures, as is said in the Supreme Court of New York. "The arbitrator, not only failed to decide all the issues in his report but went outside his duty, and gave advice and rendered his opinion."[13]

In the General Motors umpire system, the philosophy of arbitration is one of adjudication. The consistent course has been one of self-restraint against any tendency to disregard the plain mandate of the national agreement. The national agreement never vested the umpire with any power to mediate. Accordingly all General Motor umpires have functioned as adjudicators and not as mediators. Dr. George Taylor did not conceive of the function of the umpires as that of a mediator or arbitrator with general powers. He said it in a preface to the first volume of umpires' decisions.

> Since the umpire's sole responsibility is to apply terms of the basic agreement to specific cases, he has no right to change or modify the agreement. While the umpire's decision must recognise the fundamental necessity of both parties, even

> this cannot go to the extent of changing agreement terms. As a matter of fact, even the errors that might have been incorporated in the agreement are not subject to change by the umpire. Only the parties can change their agreements, for if the umpire should start to change what he considers to be error, the way would be open to change all the terms of the agreement and thereby thwart the entire relationship between the parties.[14]

He holds a different view in a different place.

> The view that an arbitrator should decide every case without any attempt at mediation has two essential defects. It embodies some part of the fatalisic idea that labour and management differences are irreconcilable. In the second place, the parties knew more about their affairs than an outsider. If an arbitrator could be a catalytic agent to bring about a meeting of minds, the strength of all parties must be best utilised.[15]

While it is not thus uncommon, but appears to be a sophistication for some of the arbitrator-cum-scholar authors, to hold views favouring and opposing judicial approach, appreciating and condemning it alternatively, in the same article (as illustrated earlier) or in speech or sometimes more distantly or at more far off intervals, some others found a virtue, in consistency either for or against a judicial approach, as well as for or against the practice of accepting precedents, in similar decisions at least for their persuasive value. A glance into some of the papers in the publications of the National Academy of Arbitrators, together with the writings of these authors in other places and the views they expressed, would amply illustrate this experience to which attention would also be drawn in the ensuing discussions to some extent. On one occasion, Dr. George Taylor said :

> grievance arbitration is not a substitute, but often is an extension and continuation of collective bargaining. An important key to understand grievance arbitration is to realise that while collective bargaining starts with negotiations of an agreement, it necessarily continues in settlement of many grievances. Negotiation or arbitration of grievances should not "add to" the basic terms of the labour agreement nor should a clear

agreement of the parties be modified. But he adds, "during the life of an agreement, grievance or settlement by its very nature fills out the understanding expressed in the contract, which are inherently incomplete".[16]

No matter how carefully the parties may attempt to do so, a collective bargaining agreement, like any body of rules, cannot answer day to day questions and problems. Furthermore, the rules set up in agreements are subject to conflicting interpretations. So employers and unions include them in grievance procedures.[17]

In emphasising their preference for a wide latitude of arbitrators, they explain themselves further,

this is a factor that cannot be served by contract provisions alone . . . where either party takes a legalistic view of the agreement as a body of fast and hard rules, determined solely by the written word, objections will be raised by that party to considerations based upon the (i) intention of the parties, (ii) practices in the plant, (iii) equities present in the circumstances of the case. Carried to an extreme, such a legalistic approach sometimes confines arbitrators to a literal analysis and interpretation of written words without the humanising realisation, that disagreement between labour and management grew out of relations between people and cannot always be solved by applying dictionary definitions.[18]

In an article on "Acceptability as a factor in arbitration under existing Agreements", a writer of American Arbitration opens up very wide horizons for arbitration and says :

arbitration process is not a fence which merely marks the line, separating what is in the contract, and what is outside. Rather, it is a process of cultivating the contractual field, within which the relationship of employer and employees exist.[19]

Dr. George Taylor also thinks this approach is essential to the attaining of full values of arbitration.[20] Professor Robert H. Skilton joins in saying that :

collective bargaining, unlike many commercial agreements, is not the end of negotiation. Much of its interpretation, implementation and enforcement is beyond the province of courts, since the contract written typically leaves much unsaid, to be settled as the occasion arises, by day to day bargaining

between the parties and sometimes by the judgment of an arbitrator.[21]

This is something unthinkable in the context of Indian industrial relations. This is not a view of collective agreements held very widely even in the United States, thereby reducing all collective bargaining to virtual imbecility, which would not be fair. Harry Shulman notes that "arbitration can do no more than resolve stalemates, it can help powerfully in the achievement of wise solutions and in the development of attitudes and arrangements tending to improve the parties' cooperation in the enterprise". Dr. L. Reed Trip's monograph on "Wage Reopening Arbitration", was reviewed by David Cole, who agrees with him in saying, "the main concern is whether grievance arbitration can be designed to meet such problems, without broadening the arbitrator's authority, beyond the proper limits of the contract interpretation."[22] Dr. George Taylor, in another place, exhorts "forward looking managements and unions have to recognise that a negative approach does not "pay off." The will to agree, a spirit of compromise, mutual understanding of problems and a modern and positive approach to collective bargaining will bring about harmony which can never be achieved by statute. Follow the saying, "Accentuate the positive and eliminate the negative."[23] "Compromise and principle in the decisions of labour arbitrators", depends, according to another arbitrator author, on :—

(1) the intentions of the parties when drawing upon the contract, (2) the wording of the contract, (3) any one of several economic criteria, (4) prevailing practices, (5) decisions maximising labour management satisfactions, (6) public welfare, etc."[24]

In a survey of labour arbitrators, most of them lawyers, Louis Macdonald is reported to have found that a majority looked with some concern, at a strictly legal approach. She wrote : "It is felt by arbitrators, that, in most instances, lawyers are too legalistic in their thinking and tend to overlook the spirit of the agreement and the dynamics of

labour relations."[25] There seems to be confusion in the authors atributing to her, an opinion which does not seem to follow from what she implies. The arbitrators with their characteristic disparagement of lawyers and judges, and their abilities to know anything of the fine domain of arbitration which they consider to be their own privilege and prerogative, indicate that lawyers and judges cannot understand and deal with it, just as they, the arbitrators can do.

Theodore Iserman, a well-known management man says :

> one sees to the extent to which labour arbitration undermines collective bargaining, substituting for it collective litigation... ....also how arbitrators, all sturdy believers in arbitrating further the process, taking great pains to make their awards palatable to both the sides.....this attitude of babying and favouring unions, encourages misconduct, subverts the aims of collective agreements, and undermines output."[26]

This is a bleak note, in an atmosphere of all-round jurisdiction for the arbitrator that is being generally advocated. A case is made out, as to why grievance arbitration becomes operative from a welfare viewpoint.

> There are disagreements which collective bargaining cannot solve, because (1) the parties have not acquired the habit of negotiating effectively to resolve their own differences. (2) The parties recognise their duties to the public at large and prefer not to inconvenience them or harm the bystanders. (3) The issue is that one or the other parties lacks the courage to make the change and would rather use arbitrators as "cat's paw." (4) If rates are involved which are subject of public regulation, it may be advantageous to have an outsider to determine the labour costs.[27]

Professor Willard Witzt, urges :

> making the contract, perhaps only a part of the background of the private administrative procedure, rather than permitting it to be the exclusively controlling consideration. If the parties can find a mutually satisfactory basis, for realising a particular problem, it would be unfortunate if anything in the contract should be considered a bar, to the settlement of the basis. The contract approach is, or may be, in good many

> cases, in what is virtually a vacuum. It is not the way the parties would themselves settle the problems if it could be done by negotiation and bargaining.[28]

The judicial position is adopted in many controversies. Particularly grievance arbitration on adhoc basis does not, however, cover all the situations or encompass all the realities of many disputes. In grievance arbitration, in contrast to contract, the precedents established by other awards under the same agreement limit the arbitrator's discretion.[29] In industries, where an impartial chairman handles all differences, there is clearly more than judicial responsibility. In the protocol of peace, in the formation of which justice Brandis participated and was signed by the suit, cloak and shirt manufacturers of the ladies garment workers on September 2nd, 1910, article 17, reads :

> in the event of any dispute, arising between the manufacturers and the unions, or between any one of the manufacturers and unions, there shall be no strike or lockout, concerning such matters in controversies until full opportunity should be given for submission of such matters to said Board of Arbitration and in the event of a determination of the said controversy by said board of arbitration, only in the event of a failure to accede to the determination of the said board."[30]

Donald B. Robson said, the needle trades mothered the conception of impartial chairman.[31] The chairman is to preside over the collective bargaining agreements and its observance by both the parties[32]. In the full fashioned hosiery industry, the impartial chairman has always acted as a conciliator, mediator and arbitrator."[33] Professors E. L. Warren and Irving Bernstein think, "no matter, how carefully a contract or submission is drafted, unforeseen difficulculties often develop. Hence the arbitrator's ability to mediate is more important than his judicial competence.[34]. Dr. George Taylor says :

> a mutually acceptable solution need not be a compromise solution or even a decision mutually agreed upon. The chairman may find it necessary to develop understanding of an adverse ruling to the extent of gaining an acquiescence in its soundness.[35]

He also urges that, "mediation in arbitration should not be dismissed as an impossibility, unless a contrary desire of one of the parties to the dispute is explicitly expressed."[36] To, Edgar L. Warren and Irving Bernstein, "the confusion in the terms of mediation and arbitration stems in part from the loose terminology in the field of industrial relations and also from the merging of functions in a single individual."[37] "Mediation", to Dr. George Taylor, "is the first cousin to arbitration."[38]

Thus American Arbitration, as shown above, has invited upon itself many conflicting claims of procedures. Prof. John T. Dunlop has ably pin-pointed these dichotomies when he observed :

> there are two cliches in the arbitration process. Each has a meaning of validity but, neither by itself, is an adequate description of arbitration. These statements are (a) arbitration is an extension of collective bargaining, (b) arbitration is a judicial process. Each statement has a measure of truth. Voluntary arbitration as a judicial process, could not long survive and yield a substantially different result than the parties could bargain for or force on the other side by economic power. Arbitration, on the other hand, could not long endure, which simply mirrored current economic power relatively, without reference to the merits of the case, as adjudicated by standards. Arbitration is a flexible process, which is necessarily shaped by the parties. The form of arbitration adopted by the parties will significantly determine the relative proportions of "collective bargaining" and "judicial process" in a particular case.[39]

This appears to be a more understandable analysis of the function of arbitration in America.

Use of Precedents in Arbitration :

Turning to the use of precedents in the practice of arbitration, the practitioners are equally divided in their views on its utility. Prof. J. Fred Holly and Dr. Arthur Ross made detailed researches with impressive scholarship into the problems of arbitration and decisions in cases of discharge etc., and what happens to a worker after reinstatement.[40]

Professor Holly wants to know the important criteria or considerations, which have swayed the arbitrators in the determination of a penalty....Moreover, the result should make possible the drawing of conclusions, on the role of precedents, in arbitration awards and should aid arbitrators by indicating to them those considerations that have been deemed to be important in the various types of discharge cases.[42] Dr. Ross says:

> the various fields of the law, judges, attorneys and scholars are already concerned with the effecacy of established principles in ordering the affairs of men and solving their controversies .....We have had to invent standards because none have been furnished.[43]

Some others like Jules Justin, Noble Braden, emphasise the importance of precedents, and awards in similar situations, for their persuasive value. But, there are others like Mr. Benjamin Aaron, Mr. William Mcpherson, who think that the arbitrator has his own jurisdiction and is not obliged to have any regard for precedents, nor is it worth while.

Jules Justin says:

> arbitration decisions in labour cases are no more dead issues. They reveal the adjunct process of arbitration at work. Reported awards are like tools to be used in shaping and applying the collective bargaining agreement. They have a place at the bargaining table and the proceedings under the grievance machinery contract. There are four chief uses. Reported awards and opinions have practical application in (a) negotiating the substantive provisions of a first contract, (b) in drafting appropriate clauses, (c) handling disputes under the formal steps of the grievance procedure, particularly the role of foreman and shop stewards, (d) preparing and presenting the arbitration case. The doctrine of **"Stare Decis"** is fundamental in common law, and judges are bound by that. Arbitrator's decisions have no such force. But still they have a persuasive force which they exerted and which compels consideration. Prior awards, which enunciate just and reasonable principles command respect from an arbitrator and cannot be lightly ignored or dismissed. When fortified by others, his judgment warrants acceptance.[44]

Dr. George Taylor supports precedents and publication of awards saying :

> publicity of a labour award can, if properly handled, be of great service, both in the early settlement of disputes that might otherwise go for arbitration and in facilitating sound judgments in the awards, when resort is made to arbitration.[45]

William Mcpherson, considers, "following a precedent is like following a leader" and asks, "should labour arbitrators follow the leader?"[46] "I have hunted in every source there is and I just can't find it," says the occasional arbitrator in his imaginary conversation with Mr. Mcpherson. You would think that someone must have decided a case like that, but apparently this issue has not been raised before. This often epitomises the characteristic approach of arbitrators to him. He visualises a new crop of unheard of issues, fresh for the first time, in each and every case and each one according to him is bound to be utterly different from anything else so far heard of, or seen anywhere. This is a very refreshing outlook indeed. But, many of the other American scholars-cum-arbitrators seem able to see some comparable issues in arbitration which have a persuasive force and a "precedent" value. They do not seem to take the same dim view about their comparability as indicated in the metaphorical case referred to above. American arbitrators do not think that each arbitration issue is so fundamentally different from the other. When there are such vast differences in the view points of American Arbitrators themselves on the nature of American arbitration, it is bound to be baffling to an outside observer. Arbitrators, like Mr. McPherson, "deplore the common law techniques of citation, of analysis and distinction of precedents is becoming more frequent."[47] The reason why other arbitrators look to previous awards according to Mr. McPherson is, "(1) they are printedly available, or (2) because inexperienced arbitrators who take only a case at distant intervals lack confidence in their own ability. So it is natural they should take guidance from published awards." They are not meant for expert or experienced arbitrators, according to him. He doubts the

validity and value of the application of the doctrine of "Stare Decis" and also the use of publishing awards and agrees with Mr. Theodore Kheel, who says, "arbitration will bring peace, not on ever-increasing body of law, but on common sense".[48] Mr. Kheel advocates publication of awards only to bring to the attention of managements and unions that arbitration is the best means of resolving unsettled grievances and to show that arbitration works. They say, the dangers of precedents are too many while the advantages are dubious. This would make arbitration a dubious process, legalistic. The parties would no longer be able to discuss their cases on merits of specific situations. They will have to employ more experts to search for awards and incur more expenses. Arbitrators would be chosen for their knowledge of others' awards, and not for their own ability. (2) The practice of following precedents creates widespread misunderstanding among arbitrators, and (3) also creates serious consequences for contract negotiations. Any attempt to follow legal procedures in labour arbitration is especially dangerous. (4) Court opinions are written for lawyers and arbitrator's opinions are written for the parties. The judge drafts his opinion to justify his decision in the eyes of his colleagues. It is unlikely that the litigants will have any future dealings with each other. (5) The judge's decision is subject to appeal and the arbitrator's not. It is, by consent, final.[49] Experienced arbitrators refuse to give their awards for publication and so we can't get all. (6) Fortunately, the arbitrators are under no obligation, to consider any awards. (7) There may be many arbitrators who take a pride in the publication of their awards. Where a considerable demand and supply exists, it is probably inevitable that the publishers will serve as the intermediaries. Probably realising that the publication of awards cannot anyhow be helped, he wished the publishers would warn their clientele about their misuse and dangers. He has very interesting ideas as to how this should be done. According to him, "the title page of each issue should contain some directions for use, such as appear on

the containers of many products. It might also include a warning against improper use similar to those found in certain medicaments that are intended for external use but poisonous if taken internally."[50] A labour representative echoes similar views, "Labour and the world in general had made progress not because of precedent, but in spite of it".[51] In hosiery industry, Van D. Kennedy notes that, "it is *'inconsistency'* of the spirit and *'intent'* of the decisions which should be maintained as distinguished from a narrow legalistic interpretation of the word 'consistency'."[52] The role of umpire and impartial chairman and the value of precedents in some such specific situations are also generalised, as aplicable to all types of arbitration. The precedent value is sometimes recognised as particularly valuable, in *ad hoc* arbitrator system by Edgar Warren and Bernstein,[53] while an umpire in Detroit area thinks that "as grievance cases have seldom identical facts, the parties often 'shop around' to find a man whose decisions they like."[54] The reverse situation prevails under a permanent umpire, where a "common law" had developed. The parties then expect the arbitration machinery to produce a system which Prof. Sumner Slichter had called "The Industrial Jurisprudence".

Role of Government

In the settlement of industrial disputes in the United States, government plays a minor role and it is desired to be so. Some arbitrators[55] even complain that government does not specifically ask the parties to submit their disputes to arbitration, when negotiations fail, as the Labour Management Act only says :

> If the director of the Federal Mediation and Conciliation Service, is not able to bring the parties together by conciliation within a reasonable time, he shall seek to induce the Parties voluntarily to seek outer means of settling their disputes without resort to strike, lockout or other coercion.[56]

Whether "other means" should include arbitration is left to the discretion of the Director. Though it has been fre-

quently suggested, that there should be legislation, requiring labour and management to incorporate arbitration clauses in their contracts to assure the settlement of grievances as for example by the Research and Policy Committee of the Economic Development, the Taft Hartley Act, merely said, that certain controversies which arise between parties to collective bargaining agreements may be avoided or minimised by making full and adequate governmental facilities for furnishing assistance to employer and the representatives of their employees in formulating for inclusion within such agreements "provisions . . . for the final adjustment of grievances or questions regarding the application or interpretation of such agreements and other provisions, designed to prevent the subsequent disputes arising out of such controversies."[57] Edgar Warren and Irving Bernstein felt that an act which intervenes boldly in other aspects approached voluntary arbitration with timidity.[58]

The Railway Labour Act encourages contract arbitration and requires adjustments of grievances. As already indicated, arbitrators are usually for grievance arbitration. The rest of the industries are usually served by a variety of agencies like the American Arbitration Association, Federal Mediation and Conciliation, Service, National Arbitration Association, Courts, Municipalities, State Mediation Boards and governments. The Government also pays the costs of arbitration as in the case of National Railroad Adjustment Board. There is some feeling particularly among unions but including small employers and public officials that this policy should apply to other industries.[59]

Apportionment of Costs

An experimental cost procedure is an agreement by the disputants, that the arbitrator will assess costs between them. Thus expenses are divided by the merits of each case. If an arbitrator felt that a dispute was submitted for frivolous reasons, he might charge the initiating party with the entire cost, or the loser might be asked to assume

the entire burden. This would discourage the submission of disputes which should have been settled by negotiation and resembles judicial process.[60]

Edgar L. Warren and Irving Bernstein laid down some conditions for successful arbitration :

> (i) the unions and management understand the process and practice it with skill and restraint, this is because the arbitrator is least important, (ii) the principals agree on the area of arbitrability, (iii) they should also determine the procedure, judicial or bargaining, (iv) the parties themselves should select the arbitrator as far as possible, (v) they should not expect the impossible from the arbitrator.[61]

II

ARBITRATION IN ACTION

Now, a few glimpses into the actual working of arbitration as from the practices of the National Academy of Arbitrators, and a few others would show the way in which the various problems that are arbitrated are looked at by themselves and their colleagues. Issues like 'discharges', 'discipline' matters, absenteeism, promotions on seniority and ability basis, wage incentives, classification, management and union rights, etc., are often the subjects of arbitration brought before them.

Use of Past in Arbitration

Speaking on the "use of past", in arbitration, Benjamin Aaron illustrated his views by giving the example of a case he arbitrated in which the clause was "when skill and physical capacities are substantially equal, seniority shall govern in the following situations only : Promotions, downgrading, lay offs and transfers." The problem brought before him was about not distributing overtime as per seniority and contending that as a breach of arbitration clause. He felt that he could approach it in the light of past practices at variance with the plain language of the

contract, to give a decision on this.[62] According to the law of contract, which is accepted by the parties to the arbitration, the party's intent must be determined by the plain meaning of the pertinent language of the agreement and where language is unambiguous the past practice is irrelevant.[63] But he proceeded with the case and gave a decision even though there was no mention of overtime in the agreement anywhere, with the argument, "anyone familiar with collective bargaining agreements knows how poorly written they are on the average, and that one of the most troublesome features of these agreements is the inartistic and inconsistent use of words." In grievance arbitration, there is an illusory safety in basing a decision upon the plain meaning of the contract language. In other words, the arbitrator can add or substract or modify or reverse the terms of the contract and give decisions on them. Mr. Pears Davis of Illinois Institute of Technology, pointed out that the "use of past practice citation" cannot by itself be an adequate criterion in deciding cases, as the attendant circumstances are so varied and different. It is not clear how, Mr. Aaron did not ask the parties as to how he ought to consider seniority for overtime when it is not mentioned in the agreement at all? If in the past, the employer did it and the union never complained, one cannot help agreeing with Mr. Davis that the union has no right to complain even later. If as Mr. Aaron said, they blindly copied a contract without knowing it his intervention with an award could hardly be a remedy for it. His plea of inept draftsmanship of contracts cannot be an excuse for his intervention to arbitrate on a clause that did not exist. This should not and could not be an adequate defence even by the canons of American arbitration. Nor could the language and contract be dismissed so easily, as Mr. Aaron sought to do.[64] Mr. Lloyd Blair of New York too felt like Mr. Pearce Davis about Mr. Aaron's action by saying that Mr. Aaron had disposed of the word "only" with great facility, which caused concern to him too. Mr. Person was also terribly puzzled at the tremendous ease with which

Mr. Aaron disposed of arbitration. Similarly, Mr. Aaron's readiness to disturb "wage differentials" on the basis of past practices was considered quite ill-advised, unless he was specifically authorised to do so.[65] As Mr. Blair says there is no simple answer to the question : What role past practices should play in labour arbitration ?

Problems of Wage Incentives

Similarly, problems in the arbitration of wage incentives and job classification are also confronted with some contradictory approaches.[66] William Waite says, "if management has not included incentives as wage criteria that means management retained its discretion and not included it in the contract. So later on, it cannot be made an arbitrable issue at all. (2) When a contract is signed, it continues to be in its life time the guiding instrument of joint relations. The arbitrator must maintain a judicious role, both by determining the arbitrability and interpretation of the provisions of the contract, to which the parties have entered." He said, "in cases where the contract clause is apparently applicable, but the language is unclear to allow more than one interpretation, an arbitrator may be justified, in taking such evidence in considering similar cases in the past to see whether a pattern has been established to which the instant case may be fitted."[67] "For a job evaluation, the arbitrator must be properly qualified, must be doubly diligent in getting all the information, and should be qualified to understand and interpret the data he secures."

Mr. John Seybold from Philadelphia says, Mr. Waite defines wage incentives as monetary payments made to employees as an arrangement to perform work, including hourly base rates of pay, overtime rates, individual and group production bonuses, piece work rates of all kinds, and job evaluation. Towards the end, he defines, "wage incentives" as designed to encourage increased productivity by the application of increased effort with earnings in proportion". To Mr. Seybold, the second concept comes closer

to the concept of wage incentives. . . . According to him, whether the increased productivity is due to ingenuity or team work, the individual or group responsible for that added output should be properly compensated for the increased production and not for the position which may stem from arrangements, introduced by the management.[68] A test of the good incentive system according to the War Labour Board was to permit adjustment of incentive rates, when changes occurred in product, materials, equipment, etc. It should not lead to an increase in unit labour costs, but if anything to a decrease. Mr. Seybold says that Mr. Waite treats his subject as falling into two categories, i.e., the issue of arbitrability of the incentive system itself, and the handling of grievances arising out of the interpretation of a wage incentive system. Not all the wage incentive problems can be divided into two categories, and mostly they are not mutually exclusive. So barring the contract language, one may usually start on the presumption that changes of this character should be argued upon during negotiations and not left to grievance arbitration.[69]

Mr. S. Herbert Utenberger, Washington D.C., in his comments says, he "is surprised at the comprehensiveness of Mr. Waite's definition of 'wage incentives', as all monetary payments made to employees as an encouragement to perform work. It is very difficult to see where they begin and where they end." He covered only two kinds: (i) piece-rates, and (ii) production bonuses, that is, payment directly related to output and job evaluation, that is, wage rates related to comparative job content". He treated the two as they were essentially the same and Mr. Herbert's experience is quite different in dealing with similar problems.[70] Who is right? Mr. Waite? Mr. Seybold? Mr. Herbert Utenberger? or All are right, each in his own way, adopting his own view point and arbitrating on the parties' problems, that are brought to them without concern for unanimity? Even on job evaluation, Mr. Herbert has different views.

> It seems to me that once the principle is admitted that the rate for job is a valid measure of the rate for another job, the scene is set for a chain reaction. Any change in one of the relationships automatically invites requests for the next change. It destroys any rationalised wage structure and does a great deal of damage to those that are fully rationalised. The error of making job to job comparisons is one that many managements frequently slip into. Sophisticated arbitrators, perhaps, would want to avoid either interlinking or perpetuating such a difficulty. The way out is to arrive at a rate, which would be arrived at, by using the wage setting methods, employed on the property.[71]

No need of technicians in job evaluation

Even in technical matter, where the material is necessarily technical and the arbitrator is not a technician, either by training or inclination, should he give up 15 per cent of the cases provided for himself by the Federal Mediation and Conciliation Service ? Mr. Herbert Utenberger affirms, "surely not". He quotes himself for his authority to an article he wrote agreeing with somebody where he said :

> The use of technicians as arbitrators in wage incentives and job evaluation cases is generally unnecessary and sometimes unwise. I would not go along with the notion that all cases involving technical matters must be referred to technicians. A wrong answer in a technical case is at least as good as that of a non-technician coming up with the wrong answer.[72]

Right or wrong, it is the arbitrator alone and not the technician that should handle any of the issues of arbitration, and the arbitrator is considered all wise. But, John Seybold, comments on this problem by saying "that if arbitrator has optimum commonsense, he need not fear to step into those cases. But, if he gets involved into a complex wage incentive problem, he is likely to conclude that in trying to be a technician he is no wiser than trying to be his own doctor or lawyer".

In deciding incentive problems, Mr. Pears Davis says, "the really difficult incentive arbitration cases are those

that raise questions of method and standard engineering. But, the difficulties are minimised, if the parties present the case well, and if a visit to the plant is made. But, he does not want any industrial engineer even as consultant to the arbitrator. On the other hand, he considers them a disadvantage. He found some reasons too to justify his fears, when he says "(i) the companies object to the outsiders in the plants (the arbitrator, of course, is not to be considered as an outsider in the same context), (ii) costs would be considerable, (iii) qualified personnel are difficult to get, (iv) unless the issue is rather simple and clearcut the *outsider* may not have sufficient time to obtain adequate familiarity with the job operations, (v) if the outside expert is used, he should be employed if the cost is only moderate". All these objections are apparently taken up by the professional arbitrators in the interest of their own client and for his sake and to save him needless expense on the employment of outsiders, whose presence is of doubtful value. So far as they are concerned, they identify themselves with the best interests of the parties for whom they exist.

Criteria for Promotion : *Seniority* versus *Ability*

To Mr. James Healy of the Harvard Business School, "there is little doubt that personal abilities and qualifications of an employee do not play a predominant part in determining his status, within the unit covered by labour management agreements."[73] He complains that the management was the "master" of the meaning as well as the arbitrators and the influence of their awards led to the 'decline of ability, as an important factor, because (1) there is a tendency among arbitrators . . . whose jurisdiction it is to decide the question of realistic abilities is established by the contract . . . to join with unions on the over emphasis of seniority, even though seniority is to govern where ability is equal. (2) Arbitrators have tended to transfer the burden of proof to managements far more than the contract language intended them to be transferred. (3)

There are arbitrators' opinions which lead to standard interpretation of contract language, which would frustrate the well intentioned managements. (4) The predilections of arbitrators as "word managers and masters" do not provide a favourable climate to the employees *'ability'* factor. He referred to his inquiry into the practices in 46 companies whether senior employees attained promotions by being able and it was confirmed to be so in 81 per cent and 86 per cent of two firms. Still, he feels that there are not adequate guides to think that seniority is alone important and feels arbitrators could have special insight which the management is not capable of. . . . He could not be unaware that at best it could be a presumption as his belief is not based on facts of his own survey. He did not also show how ability is to be established. He only wants his conception done justice to, by arbitrators, trying to have a similar ability, to divine the factor of ability, which, he himself, did not make adequate effort to articulate.

Prof. Sumner Slichter, had once said :

> the determination of merit is a responsibility of management. Merit will obviously differ in various situations. An important aspect of merit is man's adaptability to get on with the people, with whom he must work. Will he be a good member of a team ? Will he add proper qualities to the team ? Management are in the best position to answer these questions. Indeed, that is why, they are hired for. The requirement that promotion must be based on seniority deprives managers the opportunity to exercise some of their most important skills. But, incidentally, whether A or B is the better man for the job does not present the kind of questions which should be referred to arbitration. This would be merely asking a neutral who is not necessarily skilled as a manager and who cannot begin to master the facts of the case, to submit his judgment, for the management judgment . . . in other words, to replace the judgment of a professional with the judgment of an arbitrator.[74]

To say Prof. Slichter's words carried great weight of authority is to say very little. He was one of Harvard's ablest men.

Jean T. McKelvy of Cornell University School of Industrial Relations had asked, "is the 'ability' factor declining as a criterion and 'seniority' becoming the prime factor ? If this is true, why is this true ? If it is so, does it really matter ? Should we then deplore results ? Does it matter, if ability as a criterion is not important at all ? Moreover the short Research of Mr. Healy is not adequate to come to the conclusions as he does." She says, "I would be inclined to soften the indictment of management with which Mr. Healy concludes and which does not seem to be well substantiated by his own preliminary findings."[75]

Mr. Gabriel Alexander from Detroit, Michigan says :

> Words like 'ability', 'merit' and 'capacity' are much less specific in their meaning than the word 'seniority'. 'Ability' is a high abstraction. Its meaning, in customary usage, is vague and resists exact definitions. Among the concepts included are physical strength, physical co-ordination, intellectual capacity, formal education, work experience, personality and character traits. I know no formula by which these concepts could be synthesised into a positive and reliable concept.[76]

Dr. George Taylor, speaking of ability as a criterion for promotion, says :

> In my experience, management has not generally been able to make these assignments on the basis of ability. In 9 cases out of 10, the foreman finds it easy to use seniority as an objective measurement for allocating the job opportunities.[77]

Security Risks, Classification and Industrial Discipline

In arbitration of alleged risks, Mr. Benjamin Roberts, refers to (i) top secrets, (ii) secrets, and (iii) confidential categories of security information, and speaks of arbitration cases in discharges for alleged security risks. The causes of discharging workers on the alleged communist grounds, loss of employee morale or opposition was sometimes held invalid and there was not much dispute about the unjust attitude of employers in discharging workers on that basis.[78]

In deciding classification problems, Mr. Harrison Handsaker, Workshop Chairman on classification problems in arbitration, reported "there was considerable difference of opinion, among arbitrators, concerning the basic principles, applying in this area".[79] Similarly, arbitrators are divided as to what approach they should have in the issues regarding industrial discipline.[80] J. Kramer says, "(i) seniority is like right to property, but private property is not an absolute right. Seniority is always a weighty factor for consideration. (ii) Exact measurement of relative ability and fitness is difficult and frequently impossible. (iii) Ability may not necessarily outweigh seniority, in all cases. (iv) Seniority may outweigh ability if ability is not of significant importance. (v) If ability is the factor, it should fairly be demonstrative, (vi) that situations of promotions and demotions are not the same, and (vii) consultation with appropriate union representatives before determining seniority will frequently avoid protest and dissatisfaction."[81]

Pension Cases

"In arbitration of pension disputes, the arbitrator is in, with both feet and neck and more. He is a member of a pension plan governing board. He may be called upon to decide questions that may range all the way from the age of a particular employee to whether he may be sued by disappointed workers. And it is a terrific responsibility for an arbitrator to face."[83]

Experience of Hawaii

In Hawaii, prior to 1949, the public utilities were governed by the Public Utilities Act, with a provision that a mediator persuade the parties to arbitrate their controversies. The Act said, "if mediation failed to settle the issues, the Board shall at once endeavour, as its final action, to induce the parties to submit their controversies to arbitration." This word 'induce' was dropped after 1949. There were proposals for territorial arbitration but they did not materialise.[84] An analysis of awards for Hawaii for the period

1944-52 was made in which 61 arbitration cases were analysed. The number of decisions in favour of employers was more than in favour of unions ; 54 per cent of the cases were in favour of employers, 31 per cent in favour of unions, 2 per cent were partially in favour of unions, and 3 per cent were particularly in favour of employers, 2 were considered not arbitrable. Both unions and employers had their own favourite arbitrators and preferred those who would give them a more favourable decision. Their preferences are based on the arbitrator's previous awards. An arbitrator who incurs disfavour won't last long. An arbitrator not liked on the mainland may be accepted in another locality, but it is not so locally. The arbitrator who wants to continue has a tremendous pressure to satisfy the parties. It is suggested that the arbitrators favour employers because it is best to do so as the employers are in a dominant position locally.[85]

Reserved Rights of Management and Labour

There are views of Management's reserved rights, as well as labour's reserved rights, in Industrial Relations.[86] Mr. Phelps, analysing the arbitration disputes as falling into those (i) relating to the routine administration of the contract, (ii) agreements in terms of generalised standards, and (iii) issues dealing with basic contract policies and collective bargaining philosophies, says, he found less consistency in the approach of arbitrators to these issues. There is sometimes an extreme view that a contract containing union recognition is an undertaking not to make any change in hours, working conditions, etc., without first discussing with the union. The union regards the rights in the contract as concessions to managements. The danger of this view is that they deny management the most important right of initiative. If the parties have not seen fit to write into their agreement, (a) a proviso that management may be free to exercise its reserved right only so long as it does so reasonably, it is not for the arbitrator to correct that deficiency unless the parties jointly request

him to do so. But, this is a habit which seems difficult for arbitrators to resist.[87]

Mr. Arthur Goldberg considers this as an extreme simplification of history, as distasteful and overlooking the degree to which collectible bargaining has modified workers' rights. Management determines the product, the machines to be used, the manufacturing method, the prices, the plant lay-out etc. But these cannot diminish the rights of workers. Each party has right to assume that changes in wages, hours, working conditions, not provided for by contract, can be made only by mutual agreement or by virtue of management exercising an exclusive right. To suggest that management can make change at will unless the contract specifically bars it is unfair and can lead to placing many bars in the contract making successful negotiation increasingly difficult.[88] Sidney A. Wolfe of New York says, unless there is a specific provision which gives the employer the right to do that which is questioned a grievance can be expected. This is almost like the union view.[89] Dr. Neil W. Chamberlain has very aptly said, "if there is any place where it would be appropriate to feel like a man in the middle as I do, it would be an arbitrator's convention."[90] He considers both the views as extreme and points out,

> "while concurring with all that Mr. Goldberg says about the state of workers in the enterprise and the desirability of recognising the moral value of workers' participation, through collective bargaining, they have their place alongside the material value of efficiency, I cannot travel quite so far along his road as to place limitations on managerial initiative, as he would place.[91]

Current criticisms in labour arbitration

Thus the managements and the unions have their own views on their respective rights and privileges and the role of arbitrator in their grievances. Impartial observers have a difficult time to find their way in the complex world of these conflicting views, plus those of the arbitrator, each having an exclusive philosophy of action for himself. This

has led to a good deal of criticism about the arbitrators and the way they go about deciding disputes.[92]

There is increasing skepticism regarding its use and an increasing discontent with arbitrators. No one denies there are weaknesses and occasional abuses in the method of administering arbitration. Complaints that it is becoming too costly, too time consuming, too formal or informal are not uncommon. Also criticisms are heard that arbitrators as a group in certain respects misconstrue the functions of arbitration process. Both employers and unions argue for a strict as well as liberal interpretation. One objects to the judicial role and the other the mediating role. Some complain that justice will not be accomplished if decisions are guided by right rules and principles, instead of by moral aims and flexible standards, capable of being used to meet each new problem on its own terms. Others complain that arbitration is too flexible and hence responsive to individual notions of justice rather than to a "Rule of Law". But the arbitrator asks, "since arbitration belongs to parties, should they not tell us what they want from arbitration and the arbitrators? If the parties know and could be expected to know what they want, one wonders why should they go to arbitration at all without applying their minds to solve their own problems themselves? This attitude of some arbitrators looks like begging the question". No one seriously doubts that there are significant resemblances in form and function between arbitration and court applied law . . . . . Whether we like it or not, the lesson of Lincoln Mill case is that the law, as Archibald Cox puts it, "moved into the sphere of grievance arbitration. Labour Relations have spilled over the judicial territory."[93] The need for some degree of stability and uniformity in plant relations is undeniable. There is also a criticism that arbitrators conceive of arbitration as an extension of collective bargaining and hence tend to mediate rather than decide. When should he mediate and when should he decide is always said to be a dilemma to the arbitrator. There are some who complain that the existence of an arbitration clause reduces

the parties' need to agree. If parties use arbitration as a face saving device, it is not considered an arbitrator's fault.[94] Inspite of all that has been said so far, the arbitrators are glad that "arbitration is expanding and flourishing. Its essential ingredients are not imposed rule, but intelligence and understanding, not authority or force, but judgment, not cynicism, but faith in men and respect for their dignity. Labour arbitration is a tool, whereby management and unions can increase their rigour, their creativeness, and voluntary collaboration. It, by no means, deserves the criticisms mentioned."[95] David L. Cole feels resistant about the criticism against the arbitrators, as according to him, labour and management should realise that trouble lies in the deficiencies in the agreement or submission they negotiate, or in their failure to reach an understanding. Most arbitration submissions contain no standards by which arbitrators may be guided. There is no basic understanding whether it should be judicial or an extension of collective bargaining.[96] If the parties could not specify it is not clear why arbitrator should not ask for clarification as to what they want and proceed on that basis rather than choosing a path of his choice or blaming them for alleged failure on his part. Somehow, this seems to be a part of the living fiction of American arbitration, whether it should be a judicial process or an extension of collective bargaining or what the parties or the arbitrators choose it to be. Some Americans do not appear to realise the need for clearcut collective bargaining, agreements where the need for arbitration itself becomes superfluous. The advocates of arbitration, in their exuberance about the expansion of arbitration fail to realise that it means an indictment on the nature of the prevailing practices of collective bargaining, as well as a slur, on the abilities of managements, unions as well as the arbitrators themselves, most of whom are university professors of distinction, who could easily work themselves out of arbitration, by concentrating their efforts to improve the quality of the American collective bargaining contracts. The disinterested

world of American scholarship has indeed a great challenge before it, in the very existence of arbitration, as a needless, time and money consuming process, which is no help to peaceful industrial relations.

The ideas on the responsibilities of arbitration are as many as there are arbitrators. An employer's representative Mr. Jessie Freiden, says, "It is an illusion to think as Mr. Cole does that there are some standards that effectively limit the area of decision.[97] He says arbitrators can't go too far. Mr. Cole himself has not distinguished between contract and grievance arbitration. The criticism comes when the arbitrator chooses, as some do, to think of it differently, as a vehicle to carry forward his personal concept of cooperation. Where enforcement of agreement yields a result that might jeopardise his ideas of cooperative enterprise, he believes himself free to fashion a different result, subordinating the contract to the dictates of what he conceives to be the necessities of a working relationship. This view of the contract, if the parties held it to be valid, would be ideal. But, it may be considered a highly sophisticated view of collective bargaining agreement. Where the parties are so much advanced, he may be justified in applying such a view, but he must feel sure of himself before he began to read into the agreement what he regards impractical results, and reads into it what he regards a more desirable result.[98] Mr. Eli L. Oliver, a labour representative says, Mr. Cole had neglected the whole matter of integrity and competence of arbitrators and only bemoans lack of respect for them from the parties and their attitudes are too much dominated to win the award. Labour management relations are highly dynamic, and an arbitrator who considers himself to be a Rock of Gibraltar is not only expendable, but is endangering the future of arbitration. In spite of all its alleged importance, it is not yet accepted as a method of settling a labour contract in any of the basic industries like Coal, Steel, Food, Railways etc. Arbitrators should first know how to conduct a hearing in a manner that will not antagonise parties....They are needlessly verbose and

some times the union had to tell the arbitrators that they would walk out unless they behave better. (2) The arbitrators fail to understand or are contemptuous of all economic and statistical evidence. (3) Some arbitrators who are economists work like economic theologians. The most disturbing feature is the way in which sometimes the same men can represent union and management as some attorneys do.[99]

To Mr. James P. Mitchell, "arbitration is no substitute for bargaining. Nor is it a substitute for thoughtful cooperative consideration of grievances by management and labour at every stage of the grievance procedure. The foreman, the shopsteward, the superintendent, the union president and the worker in the plant have to develop a day to day working relationship which provides for the settlement of their disputes. Arbitrators cannot make them healthy. Arbitration can only help heal some sores, which have not responded to other treatment, which are irritants, because they are open and festering.[100] Referring to the pitfalls of arbitrators, he says, "Many arbitrators unduly inject themselves into the case, interrupting the orderly presentation of cases, by the representatives of the respective parties.... Many arbitrators deem themselves to be self-appointed industrial statesmen and proceed in their own awards to lecture to parties, how they should conduct their collective bargaining relations. Very often, their criticisms are directed against the existing practices of the company. They fail to recognise that there is maturity in labour relations, and the parties to a collective bargaining agreement should be presumed to have carefully considered the particular contract provisions and to have been properly advised in their choice of language. When an arbitrator attempts to substitute his own judgment and wisdom to that of the parties he is exceeding his authority. Arbitrators should pay more attention to selling the losing party on the correctness of their award by a logical refutation of the position taken by the party. A hastily written award which ignores or cavalierly brushes aside the position taken by the losing side

is not the type of award which can lead to stable relationship. Arbitrators often write awards, that cannot be easily understood, either by the employer or the union. Awards should be written for laymen and not with an eye to demonstrate the erudition of the arbitrator. Arbitration awards must be applied to practical day to day employer-employee relationships. If the award becomes obtruse, by reason of imaginative academic language, then it defeats its own purpose." He cites an irrelevant digression in a general discussion going over 12,000 words, on private property, personality, primitive savagery, virtues of christian civilisation, the consequences of economic struggle, the development of intellectual and spiritual faculties, and so forth, while the issue before the arbitrator was union security and redemption of the bargaining agent, in the decision of which, his erudition got the better of his judgment. "You tell me how a poor guy can understand what all this means."[101]

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CHAPTER X

ARBITRATION AND LAW

IT is sometimes complained that there is little more than lip sympathy for the enforcement of labour awards in grievance arbitration. Why ?

Legal Enforcement of Arbitration

"The Holsum Bread Company and Teamsters Union entered into an agreement designed to cover the future relationship. Anticipating future differences as to the meaning of their agreement, they incorporated a provision requiring that any question as to the interpretation of any provision of contract would be submitted to a mutually satisfactory arbitrator and his findings will be binding." Notwithstanding this, when the employees demanded certain payments to which they thought they were entitled and the employers disagreed, the Union went to a District Court for breach of law. The Supreme Court said that in common law the agreement to arbitrate had no effect, i.e., an agreement to resolve future differences by arbitration is outside law. The agreement will not be enforced by Court. It is as good as not written.[1]

Mr. Kadish bemoans the attitude of the court.

> The lesson is rather that the burden of years is carried heavily on the shoulders of common law and the dynamic times in which we live, when centuries of change are compressed within a decade, human governments require a corresponding dynamism which is the peculiar province of legislation to furnish.[2]

In spite of growing evidence about the popularity of grievance arbitration from the days of the War Labour Board[3] the B. L. S. study indicating 73 per cent of agreements containing this provision,[4] 74 per cent as indicated by the National Industrial Conference Board of New York[5] going to 83 per cent in 1949,[6] the attitude of the Utah

Supreme Court was considered amazing because of the fact that 91 per cent of managements, 93 per cent of unions, 97 per cent of arbitrators out of the small sample survey conducted by Edgar L. Warren and I. Bernstein indicated also the popularity of grievance arbitration.[7] The only conclusion one could draw, according to him, was the courts were just inimical and afraid of losing themselves against the rising tide of arbitration. He asks how could the parties be expected to be in a perpetually bargaining position ; and after-all considering the court's costs, service and process costs, filing fees and the great time, a law suit takes, the cost of arbitration and fees are hardly a fraction thereof.[8] This is his confidence, in the face of the realities discussed earlier, confirmed as well as denied, by some American scholars, who are his fellow arbitrators. He wonders how the wisdom of the arbitrators could ever be ignored when "court decisions crystallize antagonisms—while the informal, flexible and voluntary nature of arbitration process combined with the *expertise* of the arbitrator with wisdom and authority to keep his eye on the larger issues in rendering his award, making this possible." He hates common law and judges. "Unhappily, however, the law has lagged behind the common law still rules supreme, only lightly disturbed by the introduction of statutory changes. The common law is an interloper, trespassing on sanctified judicial grounds and operating to oust the courts from their jurisdiction."

Statutory Position in Different States

There are many legal hurdles in the way of arbitration. (1) In 9 states the common law doctrine still prevails either by virtue or lack of statutory change or statutes which incorporate the common law doctrine (Alabama, South Dakota, Missouri, Nebraska, Mississippi, North Dakota, Oklahama, Vermont and South Carolina) ; (2) The remaining states and the Federal Governments[9] have statutorily altered the common law to make agreements to arbitrate existing disputes enforceable and irrevocable, although 9 of

these require that the "submission agreements be first made a rule of court", (Arkansas, Idaho, Indiana, Kansas, Maine, Montana, Tennesse, Virginia and West Virginia). Many of these states have created new requirements, unknown to common law according to Mr. Kadish, viz., that the dispute might be such as could be the subject of a legal or equitable action[10]; (3) Thus the agreements to arbitrate the terms of a new contract or to resolve a dispute, apart from a contract are in these states rendered no more enforceable than they were at common law; (4) Further, only 18 states, i.e., Arizona, California, Colarado, Connecticut, Delaware, Louisiana, Massachussets, Michigan, New Hampshire, New Jersey, New York North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin make future disputes clauses enforceable; (5) But, seven out of these plus the Federal Government *exclude* future dispute clauses in collective bargaining agreements from the operation of their statutes. So, only in 11 states, i.e., California, Colarado, Connecticut, Delaware, Lousiana, Massachussets, New Jersey, New York, North Carolina, Pennsylvania and Washington, do the minimum requirements of workable labour arbitration law prevail—enforcement of future disputes, clauses and submission agreements without regard to the justiciability of the dispute.[11]

Plea to Invoke Section 301 of Labour Management Relations Act

Some, like Mr. Kadish would wish to invoke help of the controversial Section 301 of Labour Management Relations Act of 1947 by outstretching it to Section 301 (a), which grants jurisdiction to United States District Courts for suits of violation of contracts between unions and employers in industry, affecting commerce, without any jurisdictional problems. But, he regrets "the answer turns on a variety of perplexing legal issues, regarding the interpretation of this section, on some of which, no court has passed, on which lower courts have passed upon differently and/or none on which, the Supreme Court has yet spoken."[12]

Otherwise, the solution from the existing federal law on the issue is bleak. Since United States Arbitration Act has been held inapplicable, there is no explicit statutory authority, providing for enforcement of such agreements. Moreover, the old federal common law rule has held that the future dispute arbitration agreements are not sufficiently enforceable,[13] except by relying on Section 301(a) and interpreting the intent of the legislation to be to that effect.

Dorothy Dodwell similarly deplored that, "there is an appaling lack of effective law concerning the enforcement of collective bargaining agreements, generally in this country".[14] The same view was expressed by Charles Gregory :

> Congress and the State Legislatures have so far refrained from spelling out any procedures for the enforcement of collective agreements. Procedures are left to courts and judges have most rudimentary notions about what is required.[15]

He seeks support from Dr. Neil Chamberlain describing "judicial process as one philosophically suspect of liberty, property and contract with an almost metaphysical blending of the three into one to achieve a constitutional holy trinity honoured by the sanctum of due proces."[16] Enforcement of awards by common law procedure is governed by common law rules. Since some courts do not recognise the validity of the Contract Law to arbitrate future disputes and an Arbitration Clause in a collective bargaining agreement is in the majority of cases held to be of this type, awards rendered pursuant to such a contract, must be based on a submission of the particular dispute to arbitration, if the award is to be enforced in such a jurisdiction.[17] In common law, arbitration awards may either be the subject of an action at law on the award or a suit in equity to set aside or obtain a decree of specific performance on the award.[18] The difficulty is, as pointed by these authors, an award is neither a contract nor a judgment, but it partakes the nature of both. The Federal Arbitration Act provides

that awards may be confirmed by Court order and gives power to the Federal District Courts to do so, but adds, "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to arbitration and shall specify the court" such action may be taken within one year.[19] This means there should be a provision in the Arbitration Clause that upon the failure of either party to comply with the award, the aggrieved party may seek enforcement proceedings in the Federal District Courts." Prof. Gregory felt anxious saying:

> the arbitration awards must be enforced judicially, for, if the losing party can successfully defy an award, the whole procedure would be jeopardised. He went to the extent of saying that "even if a court disagrees with the arbitrators' award in a case, either on a statement of facts or the issue, his interpretation of the evidence offered or his construction and application of the contract, that does not mean that the court is right and the arbitrator is wrong. The award should still be enforced, if the court finds that the arbitrator has not abused his authority as defined by the statutes and the award should stay on, even if the court believes, that an arbitrator has made a decision on an issue, which it believes not to have been arbitrable, at all, under the agreement.[20]

He feels :

> after all the arbitrator should be quite capable of deciding that matter himself. If he is honest and sufficiently clear-headed, he will recognise the nature of such an issue and will not hesitate to deny a decision on merits.[21]

Prof. Robert L. Howard, posed the same question. "Labour management arbitration, there ought to be a law or ought there ?"[22] To him, "the whole procedure becomes a part of the privately created machinery which the parties voluntarily set up for the settlement of grievances, in their day to day relations. So long as it is kept on a wholly voluntary basis, it seems clear that it will continue to serve its intended purpose. It is the willingness of the parties to honour their agreement, to accept the arbitration process as controversies arise, and their *willingness* to honour their agreements to accept the arbitration awards as final and

binding, that makes the whole system effective and acceptable to the parties on any long range basis." It is a process which the parties have formulated for themselves and which is merely the capstone of their grievance settlement procedure. They have no purpose to submit their disputes to adjudication of any public or governmental agency, either judicial or administrative, but only to that one privately created machinery, which exists only by virtue of their agreement and from which it derives its power." It is important to keep in mind that the authority of the arbitrator rests not upon any law or administrative order, but upon the voluntary agreement of the parties. Arbitration process is said to be a purely voluntary arrangement between the parties, a culminating step in a privately created procedure for settlement of grievances, the determination of which the parties, as the sole creators of their machinery, have expressly agreed shall be final and binding, stands in clear contrast.[23]

He did not consider it necessary to make awards enforceable at common law, as it is a danger to the continued effective development of voluntary labour management arbitration. He asks :

> where do we want to go in our labour relations ? Do we want more or less government control ? Are we to have more or less government intervention in the handling of industrial relations ? Do we want to extend governmental intervention, lending itself to a snowballing process or do we want the parties to exchange their own relationships, including the final disposition of their grievances, through their own privately devised procedures ? Do we want to start the process of converting privately regulated relationships in the settlement of grievances and disposition of controversies by private voluntary arbitration into a government controlled relationship, either administratively or judicially, or should we take cognizance of the tremendous strides that have been made in the past twelve years, in developing and implementing machinery for the processing and settlement of grievances, and their final disposition by private arbitration, free from government control, take cognizance of the pride in the far-reaching contributions the parties have made and are making towards indus-

> trial peace, through wholly private process and permit the experimental development to continue wholly unhampered ?[24]

George W. Taylor, giving evidence before the Uniform Law Commission emphasized :

> the less of law the better ; the soundest policy is to keep the government out of the field and to encourage the parties to set up and rely finally upon their own macrinery.[25]

Dr. Alexander Frey of the Law School of University of Pennsylvania, suggested to the Commission :

> to keep legislation to the minimum and probably to no further than to revise errors in draftsmanship of arbitration clauses.[26]

Another witness said :

> the essence of arbitration process is that it lends to a quick, final and binding decision which is designed to be the end-point and not the starting-point of a dispute.[27]

There was an opposite voice too which declared :

> unless the arbitrator's award is made as final as possible, you will defeat the whole thinking of arbitration and you start your round of litigation. We are trying to avoid that litigation and find a speedy end to the difficulties of the parties.[28]

A well-known student of the problems suggested that "the only people who oppose legislation are Professors and Arbitrators."[29] He quoted those who oppose legislation, "as bulls in the China shop of labour arbitration."[30]

Prof. Howard, concludes saying :

> the major concern of all interested in this problem should be to avoid any action that might weaken the effective operation of a voluntary arbitration or discourage its development as a more effective agency for the promotion of industrial peace.[31]

Supreme Court Judgment about Section 301 *of Labour Management Relations Act*

The debate on the need for and against legislation enabling arbitration awards to be enforced went on and continued,

till finally the Supreme Court gave a decision in Lincoln Mills' case making Section 301 (a) applicable to the enforcement of awards as desired by Mr. Kadish and others for sometime. But when the decision ultimately came, again several arbitrators started strongly condemning it as most unwanted, in spite of persuasion from some of their ablest colleagues in the field of law asking them to accept it as inevitable. The post Lincoln Mill decision views hence shall be reviewed in brief here.

Justice Douglas has arrived at the conclusion in the Lincoln Mills' case that Section 301 (a) of the Taft Hartley Act "supplies the basis upon which Federal District Courts may take jurisdiction, (over suits to enforce arbitration provisions in collective agreements). and apply the procedural rule of Section 301 (a) and the Substanttve Law to apply In suits under Rule 301 (a) is Federal Law, which the courts must fashion from the point of view of our national labour laws."

Benjamin Aaron deplored this decision, in spite of his respect for judiciary, because he says :

> I am convinced that from my reading of cases that most judges are poorly informed about industrial relations at the plant level and apply to arbitration cases that come before them, principles or attitudes that are generally inimical to the arbitration process and to the best interests of the parties.[32]

He is allergic to the criticism of defects in arbitration and the high costs. He is surprised as, to him, "after all, the arbitrators' fees are not as high as medical and hospitalisation fees and still there are complaints that they are exorbitant." He is grieved to note that "while deciding issues of arbitrability, courts have tended to dispose off merits too, as in Cutler Hammer to Warrior and Gulf Navigation co."[33]

Arbitrability and Arbitration

When Mr. Aaron inquired of the parties, why they do not want to submit issues of arbitrability to arbitrators instead

of to courts, he was shocked to hear the answer of managements and the unions. "Arbitrators have an indecent itch to dispose off other people's problems and (2) no arbitrator will ever pass up a chance to make a few extra dollars."[34] He wonders how such a monstrous allegation could be made against arbitrators, when of all the thirty volumes on reports of labour arbitration he had only seen 57 decisions in which arbitrators found the issues submitted were not arbitrable. He does not say what percentage they form of all the thousands of cases reported. All the same, even that small figure is an indication of a ray of hope.

He recalls Harry Schulman, who said, addressing at the University of California, Berkely, "arbitration is a procedure forever consciously—directed—not merely to the redress of past wrongs, but to the maintenance and improvement of the parties' present and future collaboration. Its authority comes not from above, but from their own consent. They can shape it and reshape it. If they are dissatisfied with the Tribunal, they can replace it without instigating a war in the political arena".[35] He wants the issue of arbitrability also to be decided by the arbitrators themselves and "not to insist that it should be tried by a court. A safe and simple procedure would be to submit it to an arbitrator with the understanding that even if he rules that grievance is arbitrable, he will have no jurisdiction to decide the case on merits." He almost implies, "arbitrators are ominiscient—judges go home". He is very much worried about "the challenge of Lincoln Mills' case to the profession of arbitrators which is no less apparent. It is to demonstrate that the merits of industrial self-government outweigh its imperfections and that arbitration despite its weaknesses and abuses, offers far greater hope than litigation for the development of sound labour management relations, in a free enterprise system."[36]

Conflicting opinions on Supreme Court's decision

David E. Feller, Associate General Council for Industrial Union Department (A.F.L.—C.I.O.) Textile Workers' Union

of America vs. Lincoln Mills of Alabama, 353, U.S. 448, 463 (1957), thinks that the decision fortifies rather than weakens the arbitration process as feared by Aaron and others. He says (i) no case is made out to the proposition that it is healthier for the arbitration process to allow the parties the freedom to ignore their agreement than it is to compel them to abide by it."[37] He continues, "(ii) judicial enforcement of awards seems to be far more important to a judicial recognition, than they are mere nullities. If they are complied with, well and good. Otherwise, is it not better ?" (iii) The only question would be of jurisdiction —State or Federal. The Lincoln Mills' case would permit, where there is no State Law, its enforcement under the Federal Law in Federal Courts. In fact, this decision and the atmosphere of the Federal Courts is far more conducive than District State Courts. (iv) If arbitration awards are enforced under Sec. 301, it is far more desirable than under State Laws. (v) Implicit in the Lincoln Mills' case holding that arbitration under collective bargaining is enforceable because it is quid proquo to the agreement not to strike, is a judicial recognition of this critical conception.[38] He considers Archbold Cox's fear, that this decision might also lead employers not to implement grievance arbitration which is too far-fetched a fear, which is not supported by experience. Mr. Cox suggested to Mr. Aaron in a letter dated 17th October 1958, that "the courts will never be able to understand the arbitrators' approach until arbitration world has developed a coherent explanation of the philosophy of contract arbitration", which means, there is none at present. But, Mr. Aaron looks to be an inconoclast and a convinced defender of the divine theory of rights of arbitrators and their infallibility. He questions, "while no one could reasonably doubt the advantages in developing a common philosophy of arbitration that can be made comprehensible and acceptable to the judiciary, that praise-worthy objective is more easily commended, than accomplished. Fundamental difference of opinion, in certain key problems in arbitration exists even among us, and if we look beyond our group,

the more numerous these become. Even if arbitrators and Industrial Relations Practitioners were to develop a coherent philosophy of arbitration, the task of interpreting them to judges and persuading them to adopt it would be formidable. Mr. Aaron does not see any wisdom, either in those who think that the Lincoln Mills' decision is good, or agree with his colleagues like Mr. Cox who, recognising the realities, whether they like them or not, ask him to get ready for the new environment with a coherent workable philosophy of arbitration, to make it intelligible to the judges. His problem is, "is it ever possible for the arbitrators to educate the most unintelligent judges, who could never hope to understand the complexities of arbitration, which, according to him, it is the privilege of arbitrators alone, to understand ?"

Even Mr. Archbold Cox does not completely seem to like the Lincoln Mills' decision. He says,

> When the Wagner Act was passed in 1937, no action was taken to enforce awards and was left to the goodwill and confidence of both the parties. The arbitration of grievances is not a substitute for the law suit but for the strike.[39]

He refers to Harry Schulman who held the view that law should stay out of grievance arbitration.

> "The arbitration is a means of making collective bargaining work in preserving private enterprise in a free government when it works fairly well. It does not need sanction of law of contract or the law of arbitration. It is only when the system breaks down completely that courts' aid is invoked. But, the courts by a sporadic action, restore the parties continuing relationship and their intervention in such a way may seriously affect the growing system of self-government. I suggest the law stay out, but not the lawyers."[40]

"The changes wrought by Sec. 301 and the Lincoln Mills' case decision, bring the courts for better or worse into grievance adjustment, by providing a forum in which to compel or resist arbitration and they seem likely to bring in their wake, influential decisions upon the interpretation and significance of collective bargaining agreement."[41] The

Lincoln Mills' decision has established three fundamental rules :

(i) Sec. 301 requires the judiciary to develop a Federal Substantive Law of Collective bargaining agreements, derived from the provisions of the National Labour Relations Act. General Legal Principles and their appropriate sources.

(ii) One of the rules embodied in this Federal Law of Collective Bargaining Agreement is that all agreements to arbitrate disputes arising under the agreement are binding and enforceable by a decree of specific performances.

(iii) The Norris Laguardia Act which restricts the power of the Federal Courts to issue injunctions in labour disputes is not applicable to a union suit for a specific performance of an employer's promise to arbitrate.

These rulings establish the machinery necessary for the effective judicial enforcement of agreements to arbitrate and arbitration awards, except when a union resorts to a strike upon an arbitration grievance.[42] These are all substantial gains from the decision. Having said this, Mr. Cox also holds that "the new judicial remedy keeps a company or union with overwhelming economic power and few scruples from violating its contract obligations, but there were exceptional situations and those who have always performed their obligations voluntarily might suppose for a time that they could continue to eschew the courts and thereby ignore legal developments. He said, "I submit, if this course is followed the world of arbitration will eventually face the impact of external events in the same way as the ostrich seeks to escape its enemies by hiding its head in the sand."[43] Referring to the very unsettled nature of arbitration decisions, he says, "we have not laboured at the administration of collective bargaining agreements for about two decades, without some generalisations upon which the unbiased can agree, even though partisan interests may preclude unanimity. Perhaps only a few rules have developed, but, I

submit, there are attitudes, approaches and even a number of flexible principles. More effort, 'will have to go' into distilling generalisations from the emorphous mass of opinions before the courts can be expected to use them. . . . If the professional arbitrators and labour lawyers who work with them can surmount these obstacles, the industrial jurisprudence which they have been developing, might give wisdom and vitality to conventional law." He is also not sure of the effects of the decision.

> This section 301 and Lincoln Mills' decision have given Federal Courts power to shape the future of grievance arbitration. They may strengthen the institution by putting the force of law behind the arbitration clauses and the ultimate award. They may also stifle and distort it, by excessive intervention.[44]

"The record thus far is not encouraging. There is a wide distressing gap between a judicial conception of the function of arbitration, and the views of the profession." He reinforces the line of thinking of Harry Schulman, advocating a wide latitude of interpretation to arbitrators, calling the parties as friends in a going concern, and not litigants in a court of law, without having anything to do with each other thereafter. He defines how the arbitrator gives his decisions, as below :

(i) Meaning must be poured into general phrases by the evaluation of complex interests and the development of subordinate rules.

(ii) Arbitrators frequently fashion remedies for breaches of contract agreement without a shred of contract language to guide them.

(iii) It is equally clear that grievance arbitration sometimes involves the application of substantive doctrines which are not mentioned in the collective agreements.

(iv) Like many commercial contracts, collective bargaining improves enforceable obligations which are not expressed in words. The preceding examples involve familiar aspects of arbitrators' functions under the

> standard clause concerning interpretation and application of collective agreements by resort to materials outside the four corners of the agreement."

He does not want the arbitrator to decide the issues of arbitrability. "I am persuaded that the conventional arbitration clause is not agreement to have an arbitrator to interpret its meaning, thereby determining his own jurisdiction."[45] But, he considers the application of Culter Hammer Doctrine, strictly limiting the interpretation to the meaning of the contract and not to the intent, would be dangerous. It would be unfortunate if the Federal Courts hold as the New York Court did, "that mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words, cannot make an arbitrable issue. If the meaning of the provisions of the contract, sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.[46]

According to Nathan P. Feinsinger,

> in adopting Section 301 of the Taft Hartley Act, the Congress decided that collective agreement was a contract to be enforced by the Federal Courts. In Lincoln Mills, case, the Supreme Court reassured that the agreement to arbitrate is the quid proquo for no strike clause and concluded that if one should be judicially enforced, typically by an award of damages, so should the other, typically by a Decree of Performance.[47]

Benjamin Aaron fears that its effect is more to disconfabulate, than to compose, though Cox is more optimistic. The arbitration process can benefit from the orderly procedures of law, but most of all it needs wisdom and wisdom is not the exclusive privilege of any single discipline.

Arthur Ross turns the searchlight on to fundamentals and says :

> we should ask what is the special character of arbitration as a dispute settlement procedure ? To what extent have the aims been accomplished ? In what way are we failing to realise them ? Then, we might ask what further contribution

law can make towards achieving the full potentialities of labour arbitration.[48]

He does not feel happy about the invasion of Section 301, because "while judicial hostility towards arbitration has declined considerably in recent years and the support of law has been helpful in many cases, it is important to ensure that the adoptive, inventive quality of arbitration is not smothered in the maternal embrace of Section 301". He is not unaware of the defects of arbitration as he remarked, "there is no doubt that some parties arbitrate too much, chronically, promiscuously. Arbitration becomes a mill rather than a court of last resort, issues multiplying through the process of continuous division and subdivision. Another disturbing tendency is the unnecessary dilatory and expensive character of many arbitration cases. Many months pass before cases are referred to arbitration ; many delays in selecting adhoc arbitrators, overloaded dock-sheets in umpire systems, excessively elaborate exchange of briefs, poorly prepared representatives who convert the hearings into exploratory operations, excessive postponement of hearings and briefs. The combined result of all these is the average length of time between the filing of the grievance and an award rendered increases 50 per cent as evidenced by cases dealt between 1946-56. The average is 200 days. The greatest problem to-day, therefore, is not to ask more people to adopt arbitration clauses or persuading them to use them or convincing them to accept unwelcome decisions. The need is rather to restore some of the traditional values of arbitration, which have been thrown into jeopardy. He has pointedly questioned, "can we offer to give a relatively quick, inexpensive method of resolving disputes with an assurance of substantial justice ? Are we really willing to work ourselves out of a job, as we like to claim ? Can we pull arbitration out of the bottlomless pit of trivial and bloodless disputes, which lie at the end of the grievance procedure ? Can we regain a bit of inventive quality given to arbitration by George Taylor, Harry Schulman and Bil Leiserson" ? He touched

the crux of the problem with some heart-searching, unlike many of his colleagues, who would never come out of their imaginary towers of perfection, while dealing with arbitration.

William Simkin advocates the same attitude when he said, "we must all work at a job, something more than to earn a living". (i) A primary function of arbitration is to avoid actual arbitration cases. (ii) An agreement reached by parties is always better. (iii) The essence of arbitration clause is that risks and hazards of arbitration are less than economic force. (iv) A major strength of American industry and its collective bargaining is the fact of its diversity. Development of a body of common law is desirable within the confines of the agreement. (v) Selection of arbitrators by mutual consent is important and they should be free to drop him, if they don't like him. (vi) He should crowd over into areas reserved for mutual agreements. (vii) Unless the parties want a formal procedure he should have informal hearings. (viii) He should have sympathetic understanding ; he should not try to find a compromise or palliative to avoid an unpopular decision. (ix) If his opinion is desired, he should write it out clearly and intelligently. (x) Increasing cost of arbitration costs of transcript, legal fees, time off, expenses of representatives of parties, show a substantial threat to arbitration. (xi) Trend towards delayed decisions is dangerous. (xii) Arbitrators should have a responsibility to organise their personal lives, by alternate sources of income or by other deeper moral resources, so that their vision is not obscured by the needs of more business, or by the fear of the consequences of decisions.[49]

Russel A. Smith thinks alike with Charles Gregory who considers the Lincoln Mills' decision, as a wise one. "We will be better off, with a developing federal common law, including arbitration, than if we had legislation on these subjects. Gregory says, "this whole thing is a unique legal situation. What better and unique answer to this

need could be imagined, than the roving commission which the Supreme Court had assumed for itself and the lower Federal Courts. In a fluid quasi-legislative fashion they may conduct experiments in this field and can produce something eventually, that is bound to be revolutionary and no doubt a triumph in law-making".[50]

Arbitrability and Arbitrators' Jurisdiction :

According to Jules Justin,

> If the court initially decided the arbitrability of a dispute, then the question of jurisdiction of the arbitrator to make a contract of agreement is no longer a problem for the parties or the arbitrator. If the court finds that the particular dispute is non-arbitrable, it cannot go to arbitration. If the court holds the issue as arbitrable, that decision binds the arbitrator as well as the parties.[51]

Connecticut Board of Mediation as well as the Boards in New Jersey and New York help the parties to solve the questions of abitrability, when either of them raise an issue about it, by framing the issues and asking them to submit to arbitration and if they refuse, may appoint one according to their authority. "Using courts rather than arbitrators to decide arbitrability questions is supported by the argument that it is the most effective way, if not the only way to discourage a stream of irresponsible grievances outside the contract via arbitration" says Harold W. Davey. "To the extent we, as arbitrators, are guilty of temptation to enlarge improperly our jurisdiction, as defined by the contract, we must assume some share of the problem."[62]

Mr. Saul Wallen thinks that the impact of arbitration on unions and managements is not inconsiderable and far less than what the managements and unions feared. Though Unions and Managements should come to their own decisions, the third party should tell them, what they negotiated really means. There should be a specific effort to make sure that the written word actually expresses the agreed upon content.[53]

Noble Braden, referring to the fears of the common law, says :

> the Commissioners and the Uniform State Laws also adopted a uniform arbitration law which was unanimously approved by the American Bar Association. It was a result of five years of study. I hear a number of comments on the grounds on which the award could be vacated but not any comment on other new and interesting provisions included in the law. As to the grounds, on which an award may be questioned, may I suggest, that it does little more, if anything, than recite grounds for questioning an award, which is now in effect under common law.[54]

But still, Jessie Freidin thinks that,

> courts are very unintelligent and slow to acknowledge that the arbitration of labour disputes, whether grievances or new contracts, are not a substitute for litigation.[55]

According to him, "the courts are insensitive to the peculiar characteristics of labour disputes." He would caste his vote in favour of arbitration on the ground that he is as capable as a judge in deciding the question of contract interpretation, and he will bring to bear upon it, and the manner and language of its decision, important considerations that he is normally more capable of weighing." He hates the courts vacating awards for exercising excessive jurisdiction by arbitrators, and this is shocking to him, because the courts, he thinks, do not know the techniques of industrial relations. That is why, he wants the issue of arbitrability too to be decided by the arbitrators themselves than by the courts, whatever anyone might have to say against it."[56] Noble Braden does not share such a robust optimism about arbitrators. Their knowledge of procedures sometimes seems to be simply shocking. In New York, in one case the court directed the removal and replacement of an arbitrator, named by a union, on a tripartite board, because he was the Vice-President of the National Organisation.[57] In another case, the court removed an arbitrator because his impartiality was challenged by one of the parties.[58] Even the logical knowledge of the requirements

for a hearing has been found lacking, in some very eminent arbitrators which is startling. "A well-known attorney and a professor of law who was an arbitrator and was a Fifth Member of an Arbitrator Board delayed hearing, when he found all persons asking for the other person to be expected. After two hours he started hearing evidence, discovering himself to be the wanted member for whom he was waiting so far."[59]

It is common practice for labour arbitrators, proceeding without rules and standards, to make independent investigations, and confer with the parties separately without disclosing the information so obtained.[60]

The importance and need for a judicial approach is repeated in two more New York Court of appeal decisions.[61]

> "It appears, therefore, that the parties to a labour contract must face the problem of deciding whether they want arbitration as a judicial process with its established procedures, or some other process of adjusting their disputes. If some other process is desired, it may be called adjustment, mediation or settlement of an impartial chairman. Arbitration must not be confused with collective bargaining, mediation or adjustment."[62]

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CHAPTER XI

SOME SPECIAL TYPES OF ARBITRATION

BESIDES the Grievance Arbitration, which is discussed so far, there are other types of Arbitration too, practised in the United States, viz., (i) Compulsory Arbitration in Public Utilities, (ii) Contract Arbitration as in San Fransisco Hotel Industry, the Laundry Industry of New York and Dairies in Hawaii, (iii) Wage Arbitration in Transit Industry, (iv) Voluntary Arbitration in the Electrical Contracting Industry, (v) The Adjustment of disputes in National Railways by the Adjustment Board, (iv) Arbitration of Jurisdictional Disputes in the Building and Construction Industry, (vii) Arbitration of Jurisdictional disputes in American Federation of Labour-Council of Industrial Organisations, and (viii) Umpire Systems in General Motors, Ford Motors, John Deer Corporation, Bethleham Steel Company, etc., which will be reviewed now.

In defence of compulsory Arbitration

"Compulsory Arbitration might be defined as a system which requires by law that disputes be submitted to an outside agency for adjudication and settlement."[1] "Advocates of compulsory arbitration in the United States have not for the most part desired to provide the machinery for settlement of every labour dispute. The impossibility of doing so is manifest for in recent years there has been an average of 4000 to 4900 strikes and in addition over 50,000 collective agreements, negotiated annually between labour and management."[2] The Public Interest Argument has been as that of Senator Ferguson who said, "Labour disputes should be settled where our domestic disputes are settled—in court. Basically, they are the same. The difference is in the handling of issues. Industrial disputes are still settled on the basis of economic power, which side can outstrangle the other in an economic show-down ?

Now-a-days, these strangle-holds cover such wide areas that the public neck is usually included. A time has come to settle them on the basis of justice and submit them to the real discipline of a civilized society."[3] This amounts to compulsory arbitration in basic industries like Steel, Coal, Oil, Gas, Shipping, Rail Roads, Electric Power, Telephone and Telegraph. I see no other remedy when the nation is faced with the monopoly of either labour or management which can paralyse the financial life of the country."

Prof. Sumner Slichter too said, "the public has been remarkably slow to assert its rights. Sooner or later, the country will have to develop a well-planned public policy to guard its interests against serious stoppages in certain key industries. Obviously, the country cannot put off immediately, frankly facing its problems of strikes and lockouts, which interrupt essential services. Government policy should be based on a declaration of the rights of the community, i.e., a Bill of Public Rights. This will help to give the policy the moral support which any policy needs to be successful."[4]

The theory is that the public has an interest in continuous production in essential industries, devoid of strikes and lockouts. Industrial peace is supposed to be promoted in those industries by requesting labour and management to give up the privilege of striking or conducting lockout and return for the settlement of dispute by a third party. Thus, the public welfare and government interest in continued functioning of such industries are assured. The interests of the parties are to be protected by the impartial and reasoned treatment of both parties by a disinterested body who will make decisions fair to all."[5] The other advantages claimed for public compulsory arbitration are : (i) protection of the public, (ii) informed public opinion, (iii) nationwide standardisation of wages and working conditions, and (iv) elimination of geographical and companywide differentials which are all considered illusory.

Opposition to compulsory Arbitration

Compulsory arbitration is opposed on the ground that "(i) it will destroy collective bargaining, (ii) decisions imposed by parties themselves rather than by outsiders are far more satisfactory, (iii) strikes are no more injurious to employers or employees or public when called to enforce union demands, than low union morale and non-co-operative behaviour of the workers when they are forced to continue in their employment under what they feel an unjust award."[6] Even these agreements seem to be exaggerated, as every award is not going to be unjust and there is anyhow the acceptance of an outsider's judgment even in grievance arbitration which is secondary and not a primary arbitration. As such, opposition to outside intervention appears to be a philosophical contradiction and inconsistency. Anyway, many more arguments that compulsory arbitration is undemocratic, it would become a political football, would encourage litigation and delay, involve time, expenses and with all that does not settle the disputes adequately are also advanced.

The National Association of Manufacturers said the same thing.

> (i) Compulsory arbitration would be deciding by someone, who does not know the background, (ii) it would impair American personal freedom, (iii) individual freedom, (iv) freedom for management, and (v) freedom for labour."[7]

Secretary of Labour, Schivellenbach said,

> "I know how impatient the people are when government fails to suppress a strike. I cannot forget, however, that it was the same impatience with strike that caused the Italian people to take their first steps along the totalitarian road, which led them to discontent and despair. Management and labour should not forget the fact that if they fail us now they will be first to pay the price. America must have a free industry, a free labour."[8]

Mr. Walter Ruether said, "labour as well as management is opposed to compulsory arbitration, because we do not

believe it is desirable in a democratic society, to place in the hands of a third party, to whose selection, labour and management we have not agreed, the power to arbitrability to fix wages, hours, etc. Such a measure would be a wrong step towards the creation of a super state that would limit to an increasing degree, the rights of individual citizens."[9]

Trial of compulsory arbitration was made for public utilities like transport, communications, telephones, canals, etc. Some states provide fact-finding and some for seizure by state government. Pennsylvania, Florida, Indiana, Kansas, Michigan, Missourie, Nebraska, Wisconsin and New Jersey, have all gone out and made compulsory arbitration laws.

Some states have patterned their laws after Indiana, where upon a request from either side, the Governor can appoint a Conciliator from a permanent panel of ten members. He does this, when collective bargaining fails to settle disputes in essential industries like Electricity, Gas, Water, Telephones, Transport. If the conciliator cannot settle it within a period of 30 days, then a 3-member Board of Arbitration is appointed from a panel of 30. They must, in deciding the contract, set the wages and conditions of work on par with those already in effect for similar work in the same labour market area or neighbouring areas in the state. The terms of arbitration stick unless the state courts say there is something wrong with the terms. While this law sounds like compulsory arbitration, the arbitrator is actually a fact-finding authority. His job is to determine just what the rates are in the labour market. He does not rely on his conscience, he has a guide to go by. It can work as long as it is limited to a small proportion of industry."[10]

William Green, President of American Federation of Labour said, "it is clear beyond doubt that compulsory arbitration will not work in any country with a strong tradition of democracy. Australia had, for example, compulsory

arbitration for 40 years, and yet it is the most strike-ridden country."[11]

For an almost exhaustive bibliography of opinions against compulsory arbitration this section refers to an attitude survey indicating the abhorrence of American public opinion.[12] Rupert McClaurin, speaking of Compulsory Arbitration in Australia, showed the same aversion. "Inasmuch as the judges are rarely acquainted with the industry, arbitration tends to become a battle of wits of opposing advocates. The record of compulsory arbitration in eliminating strikes has been disappointing. As judges are those who are trained as lawyers, some of the atmosphere of the law courts is bound to prevail."[13]

Will the compulsory arbitration statutes survive the attacks on their constitutionality ? Compulsory arbitration of contract negotiations disputes will be considered as disputes involving contract rights are customarily settled peacefully by voluntary arbitration.[14]

Compulsory settlement of contract negotiations in labour disputes is distinguished by compulsion both as to submission and as to adherence to award. Without the former, there is the customary form of voluntary arbitration, and without the latter, compulsory conciliation is the proper terminology.[15]

Thomas Kennedy attaches a near religious significance to collective bargaining in saying, (even if one is not an adherent to this sect the situation he paints is exaggerated), "a system, which discourages parties, from settling disputes at an early stage, and between themselves, is at the least, inefficient and at the worst, it might even foster disturbance, it seeks to prevent."[16]

"Right to strike" approach by unions has never been recognised in the United States. Even Justice Brandis, in his dissent from Duplex Printing Press Company *vs.* Crown Deering said, "that the right to strike must be abridged by the legislature, which while limiting individual and group

rights of aggression and defence, may substitute process of justice for the more primitive method of trial by combat."[17]

In Dorchy *vs.* Kansas too, he held for the majority of the court, "that neither the common law, nor the 14th Amendment confers the absolute right to strike".[18] Also a distinction drawn between "strike" and "quit" and "picketing" too was held not valid.[19]

History of compulsory Arbitration

The beginnings of compulsory investigation in industrial disputes could be traced back to 1915 Statute of Colorado, requiring compulsory investigation of industrial disputes, during which strikes and lockouts were forbidden. But, acceptance of the recommendations of the Investigating Body was not binding and the parties can resort to economic warfare, after the report was made. Minnesota, Michigan and Wisconsin have passed similar laws requiring cooling off periods. (ii) Railway Labour Act requires submission of disputes involving negotiation questions and new contracts for a Mediation Board and in the event of no settlement, the postponement of action, pending the report of the Fact Finding Body, the recommendations of which may be rejected and a strike ensue. Issues involving terms of existing contracts are subjected to compulsory solutions through reference to adjustment boards composed of representatives of parties. Thus, in the Railway dispute the interests of the parties in making the terms of the contract are free from compulsory final action, but the rights arising from contractual relations must be arbitrated. But more of this later on. (iii) Another example of compulsory arbitration was Kansas Industrial Relations Court which act was passed and enforced from 1920 to 1923 requiring arbitration of disputes arising in industries affecting public interest. According to this law, disputes in foods, clothing, fuel, mining, in transportation of these products in public utilities and in common carriers were required to be submitted to 43 judges composing an Industrial Court, the decisions of which were binding. Strikes, boycots or other

acts resulting in interference with production were forbidden. The right of individuals to cease work was recognised. (iv) Of great significance were the developments in the States which developed statutes designed to limit or prohibit work stoppages in public utilities. Twelve States have enacted legislation of this sort, i.e., Florida, Indiana, Massachussets, Michigan, Minnisotta, Missourie, Nebraska, New Jersey, Pennsylvania, Texas, Virginia and Wisconsin. Their different methods of administration, coverage and enforcement have a marked similarity, in that they attempt to set up a substitute for settlement of disputes by direct economic coercion in services affecting public interest. Nine out of twelve of these States provide for compulsory arbitration if other means fail to produce a settlement. In Missourie and New Jersey, compulsory arbitration is combined with State seizure and operation of the facilities, while Massachussets and Virginia rely on seizure without arbitration and Texas tries to eliminate strikes by forbidding picketing for the purpose of interfering with the continued operation of services.[20]

"On May 20, 1949, the Supreme Court of New Jersey declared the State Law for Compulsory Arbitration of labour disputes in public utilities unconstitutional and reversed the decision. The statute was struck down because it did not lay down adequate standards for the guidance of the arbitration boards. Soon after in all emergency sessions, this defect was remedied and amended in June, 1949".

The Kansas Law in 1920 was the result of a nationwide coal strike. In New Jersey, a dispute in Electricity and Gas brought about these Statutes. The Governor declared, "no uncontrolled power—be it labour, business or government, be permitted to threaten the lives and the security of the people." Commenting on the extreme inter-dependence in a modern industrial community, he expressed the belief that the result was placing, "small groups in a position to threaten the lives of thousands of innocent people, without respons-

ibility on the one hand and redress on the other. There is no right at any time to strike against the security, welfare and lives of people—Heat, Light, Power, Transportation, Water, Food are the life essentials of the people."

The Maryland Public Utilities' Act was passed to avert the Baltimore City Transport strike in the public interest, when all efforts at negotiation and mediation by the Federal Service too, failed with allegations and counter-allegations of the unions and managements.[21]

Voluntary Arbitration in Electrical Contracting

The Council for Industrial Relations for the Electrical Contracting Industry of the United States and Canada, was the creation of joint action initiated on April 30, 1920, by the National Electrical Contractors' Association and the International Brotherhood of Electrical Workers.[22] It has five officers including Chairman, Vice-Chairman, Secretary and Treasurer. The Council personnel are five from the International Brotherhood of Electrical Workers. Anyone can refer cases to adjudication of the Council by submitting Blank Questionnaire answered and by sending the representatives to substantiate the briefs they send. Quarterly meetings of the Council are held at the time and place to be determined by the Chairman and shall be called by written request to the Chairman by three members. A quorum shall consist of three representatives of each organisation.

The Council differs from so-called arbitration Boards in that it prefers to be a Court of Justice and not merely a Court of Arbitration. (i) The Council views with disfavour sudden changes in wages as unfair to employers in contract commitments. For this reason, it discourages retroactive wage advances unless requested by both disputants. It reserves the right to render decisions, making sudden changes or retro-active changes, unless in special cases, the facts appear to warrant such action. (ii) Industrial enter-

prises as a source of livelihood for both employers and employees, should be conducted with due consideration to all persons dependent upon them. (iii) The public interest, the welfare and prosperity of the employer and employee required adjustment of industrial relations by peaceful methods. (iv) Regularity and continuity of employment, should be sought to the fullest extent possible and should constitute a responsibility resting on employers, employees and the public. (v) The right of workers to organise is recognised. (vi) Industrial harmony and prosperity will be most effectively protected by adequate representation of parties. (vii) Whenever agreements are made with respect to industrial relations, they should be faithfully observed. (viii) Such agreements shall contain provisions for interpretation in the event of a controversy. (ix) Wages should be adjusted with regard to the purchasing power of the wage and the right of every man to have a living, to accumulate, to have competence, to reasonable hours of work, a decent home and the enjoyment of proper social conditions in order to improve the general standard of citizenship.[23]

Arbitration by the National Railroad Adjustment Board :—

Railroad Industry Arbitration is both regionwise and industry-wise, as against the non-Railroad Industry, confined to localities, (2) Only one created by the federal statute and administered under government auspices, (3) the only programme which was in the inception desired by the union and not by the management.[24]

The Board was created statutorily in 1934 in the hope that it should work as a collective bargaining agency rather than an arbitration of last resort as it turned out to be. Before the First World War, system-wise bipartisan boards existed for settlement of grievances and disputes with no provision for deadlocks. During World War I, the Director General had three Boards on the same lines with deadlocks to be referred to him, but really, none were ever referred. After the war, the government control and operation ceas-

ed and in 1920 they were taken over by the private carriers. The Transportation Act 1920, created the Railroad Labour Board, a tripartite agency expected to resolve all disputes over terms of new agreement, but also cases involving grievance arbitration from the bipartisan boards, the parties may establish. In 1926, Railway Labour Act was passed insisting the Railway Boards of Adjustment shall be created by agreement bargaining. The opposition of unions and lack of details as to how these boards should be organised, local, regional and national basis, failed to enforce the system. About three hundred bipartisan boards which were created had also no forum for cleavages to be referred. In 1934, the Railway Labour Act did three important things. (i) It created added provisions in 1926 Act to strengthen collective bargaining, (ii) It created National Railroad Adjustment Board, National in scope and included final decisions and deadlocks to be decided by referees, (iii) spelled out clear procedures and organisation for the adjustment of this kind of railroad labour disputes."

The main Board sits in Chicago with composition of 18 National Labour Organisation Representatives and 18 Representatives of Carriers, organised into four divisions. (i) First division of five labour and five carrier representatives having jurisdiction over disputes involving train and yard service employees, (ii) Second division similarly composed, has jurisdiction over Shop employees, (iii) Third Division, same composition, has jurisdiction over sleeping car conductors and other sleeping car and dining car employees, train despatchers, telegraphers, clerks, freight and express handlers, signal men, maintenance way employees, (iv) The fourth division, composed of three labour and three management representatives, having jurisdiction of disputes over employees, involving carrier employees, water-transportation, plus all other employees, not covered by the above three.

The labour and carrier representatives are to be selected by each party and compensated. (i) Disputes arising out of grievances over interpretation and application of collec-

tive agreements are to be referred to the appropriate rail division, (ii) parties in a given dispute may be heard by a division in person or chosen counsel or other representatives, (iii) a division must give due notice of call to all parties, (iv) any division may designate two or more members to hear and make findings, (v) any division can settle a dispute by a majority vote, (vi) in case of a deadlock, between labour and management representatives, a neutral member may be chosen to sit with them and give award. If they fail to choose one, they should notify the Federal Mediation Board who would appoint him, fixing and paying his compensation, (vii) awards are to be binding on Board and they are not to be in writing, except money awards, (viii) if the award is in favour of the employees, the employer should pay, failing which, a suit can lie in a Federal District Court, within two years, (ix) any division is entitled to establish regional adjustment boards to act instead and in accordance with its procedures and rules, (x) nothing in the Act was to prevent a carrier or a group thereof and an organisation and group thereof to create directly a similar group or Regional Board of Adjustment for the purpose of settling grievances and contract interpretation disputes, (xi) each division is to select a Chairman and Vice-Chairman and a Secretary, the first two officers alternating annually between the Union and the Carrier Group.

According to the experience of the Act, the Board meets at least once a month. The divisions are important units. The members on both sides are Vice-Presidents of the unions and high level carriers. Referees are of legal training, which is criticised as a defect. Very often, the Federal Mediation Board has to find them. By and large, individual union employees are allowed to bring disputes for decision. Each party is allowed a chance to file a statement and later on, no new additions, not contained in the original, are allowed.

In the first division, the referee's findings are on a legal form. In the second division, because of numerous com-

plaints, he hears and his award is read by the Secretary. The parties may argue to change his opinion, but he does not usually change. In the third division, the procedure is the same as in the second division, but representation by outward counsel is allowed.

The types of cases are regarding discharges or dismissals, time lost, compensation claims due to alleged grievances of wrong classification, the interpretation of the 40-hour week etc. There is loss of common law in this industry than in courts, or in the labour relations of other countries.[25]

Arbitration of Jurisdictional disputes, The A.F.L.C.I.O. no Raiding Agreement :

This is a private arrangement of unions to limit their areas of *"organising jurisdiction"* as against the public policy arrangements to recognise the bargaining agent of workers as per the procedures of the National Labour Relations Board, under the Taft Hartley Act.

Article 3, Sec. 4 of American Federation of Labour—Council of Industrial Organisations Constitution, spells out the constitutional situation applicable to all unions, not to raid existing collective bargaining relationships. David L. Cole, is the arbitrator and he renders two types of decisions, (i) one is a decision in which they are bound by a no-Raiding agreement, and (ii) another under the Constitutional provisions. Even though there are no-Raiding Agreements by signature, he renders the decision by recommendation to the Executive Council. His decisions may be ignored, as it happened in the case of Metal Workers' Union which did not pay notice and got elected by the National Labour Relations Board procedure, and became the bargaining agent. This is an anomalous position which has to be considered seriously.

Mr. Cole himself said that the system worked well, but in two respects, i.e., (i) it deprives workers full freedom of choice in the election of their bargaining agent, (ii) it

serves to extract and strengthen the position of leadership in the unions by eliminating competitive elements.[26]

Contract Arbitration :

There is the prevalence of contract arbitration, as for example, (i) Wage Arbitration in Transit Industry, (ii) Hotels in San Francsisco, (iii) Laundries in New York, and (iv) Dairies in Hawaii.

(i) *Wage Arbitration* :

Wage Arbitration is neither a panacea nor a cipher. There is no risk in concluding, that not more than 2 per cent of general wage changes in collective bargaining are arrived at through arbitration in peace time.[27]

The first recorded case was in 1871, in Pennsylvania Anthracite Coal Industry, between the Committee of Board of Trade and the Committee of the Workmen's Benevolent Association, followed by another Coal Wage Arbitration in Ohio, within three years. According to the Bureau of Labour Statistics, there were not more than 54 awards in wage cases for the half century, following the civil war. The American Newspapers' Association and Printing Trades, created a continuing contract arbitration in 1901. In New York, it was followed by the same trade in the years 1907-13. The Shoe Industry in Massachussets had its first wage board in 1885. The first Arbitration Commission was in Anthracite Industry in 1902. During 1915-20, the Transit Industry adopted it. New York Book and Job Prining Industry had 23 private cases between 1917-22. During the period 1945-50, a total of 209 awards are reported as follows :[28]

Union Transit	37
Heat, Light, Power and Water	19
Whole Sale and Retail Trade	19
Water Transportation	17
Printing and Publishing	11
Textile Mill Products	11

Communications	8
Electrical Machinery, Equipment and supplies	7
Construction	6
Apparel	6
Food and Kindred Products	6
Furnitures and Fixtures	6
Machinery	5
Services	5
Others	43
and, unclassified	3

(ii) *San Francisco Hotel Industry* :

(i) In the Hotel and Restaurant Industry in San Francisco, there is both contract arbitration and grievance arbitration from 1937 onwards, by single arbitrators, tripartite Boards and tripartite adjustment Boards.[29]

(ii) There are three bargaining groups, two for hotels, one for restaurant and 7 local craft unions, two international unions, a local joint executive board and several hundred individual employers, are brought together in these contracts, (a) there is a minor use or arbitration to settle grievances in Restaurant Industry, (b) very extensive use of contracts and grievance arbitration in big hotels, (c) and more moderate use of grievance and contract arbitration in small hotels.

(iii) There are two types of hotel associations, (a) representing those which have kitchens and dining rooms, (b) hotels which do not have food departments. Seven different local unions affiliated to two international unions represent the Hotel and Restaurant Industry.

(iv) *Parties in bargaining units*: (1) Big Hotel Employers' Associations, (2) Small Hotel Owners' Associations and (3) Golden Gate Restaurant Association.

In 1937, there was a big strike on 1st May ending on July 28, 1938. In the beginning 19 hotels including the city's

biggest ones were closed for 89 days. In the Restaurant Industry, collective bargaining was absent from 1937 to 1941, due to employers' weakness.

Parties negotiate and all unsettled disputes are submitted to arbitration and sometimes the parties in advance agree that any matters open for negotiation and not settled, would be sent to arbitration.

Van D. Kennedy accounts the rise of contract arbitration, to (a) the open hostility between employers and unions, where collective bargaining could not take place. (This sounds strange in view of the para above where it was his opinion that the parties go to arbitration, only after exhausting collective bargaining), (b) strikes and lockouts are costly to both the parties. Business once lost cannot be captured and workers too, do not have enough resources, (c) another influence was, the existence of groups bargaining in hotels, the diversity of interests and view-points, the difficulty of agreeing and the heavy cost of not agreeing increased the attraction for contract arbitration. (These are applicable to several other industries too.) (d) Employment of professional counsels by unions and employers also led to the dependence on arbitration (e) a final factor responsible for the contract arbitration was said to be the prevalence of the compulsory wage stabilisation and the dispute settlement government machinery during the part of the period. (f) this came to be known as the West Coast style of arbitration with verbatim reports, professional transcripts, examinations and cross examinations of witnesses.

(v) *Six-man Wage Boards*:—Most of the hotel agreements have six-man Wage Boards, with a seventh impartial chairman. This tripartite board hears hearings from professional counsels, representing both the sides ; besides representatives of each side on the Board also serve the interest of their parties.

(vi) *Time Limits*—The big hotels' agreements require the Wage Board decisions to be rendered within ten days

of submission. The small hotels' agreements contain this requirement and add other time limits. When a case is being heard, each party has four days within which to submit its brief, within ten days after the conclusion of hearing. In 1941, small hotels' agreement allowed a total time limit of three weeks' hearing.[30]

(vii) *Selection of arbitrators* :—Big hotels in 1937 agreement provided five names of San Francisco Lawyers to be selected by lot to work as Chairman. If he refused, another list of five would be chosen. The Small Hotel Agreements provide that if they cannot agree on a Chairman, they are to request the Chief Justice of California Supreme Court to give a list of seven names. The parties shall draw lots to decide which side shall strike the first name, off the list, and then they will alternate in striking names, until one person is left who will serve as Chairman.

(viii) *How the issues are decided* :—The experience of the War Labour Board was taken as the basis, as it was the first time when Basic Istitutional Relationships to date on union security, control of housing and grievance procedures were submitted, to a third party decision. The union achieved a major gain in the form of maintenance of membership and a fuller control of hiring, which would have been highly unlikely through collective bargaining at that time. Wage determination was based on (a) employer's ability to pay, (b) the pace and direction of the industry and the requirements of a fair wage ; substantial wage cuts were taken by hotel employers in depression. In 1938, Wage Board reduced wage scales in Food Department by 5 per cent, but ordered a number of increases to 6 classifications in House Keeping Department. The general factors to determine wage increases were, (i) the past profit and loss record, (ii) present solvency and future prospects of the industry, (iii) the traditional position of industry in the wage pattern in the area of the industry, the temper and expectations revealed by the parties, the trend of wages in the area in the industry, in the nations, the manner in

which the respective parties have fared on the other items in disputes, the arbitrator's sensibility to the reactions of the parties and his own interest in future arbitration work.

In 1938, the award required employers to notify unions all job vacancies and to obtain lists of available union members, before hiring non-union employees. The other provisions gave unions rights to investigate the reasons for the discharge of union members. In 1945-46 proceedings, the sick leave, enforcement of health services, sub-contracting, designation of shops stewards, enforcement of health regulations were there, besides sub-contracting and assigning work. From 1937 to 1946, in the big hotels and from 1937-43 in small hotels, arbitration played a more important role than direct collective bargaining in determining contract terms. (1) Apart from union security, professional hiring and contract administration provisions, virtually all other contract matters were arbitrated. (2) Parties usually submitted to contract arbitration many matters which reflected only minor disagreement. (3) It was also the practice to submit issues to arbitration two or more times because of the disagreement in principle. (4) The quality of the contract written too was very good.

(ix) *Collective Bargaining and Contract Arbitration*:— Contract arbitration has the quality of collective bargaining than of compulsory arbitration. Most of the arbitration occurred as a result of the parties agreeing to arbitrate before undertaking negotiations. The advantages were, (i) to tranfer the power to a third party reduces power considerations as a determinant. The arbitrators might be charged with showing caprice, partiality, but not with bowing to the superior power of either of the parties, (ii) the criterion that it adversely affects the collective bargaining position is not proved.

Two accepted criticisms were (a) it took long to obtain decisions though it did not alter their attitude to arbitration, (b) the cost of contract arbitration was very burden-

some, 11000$ for 1938 came to 15,000$ for initial proceedings in 1947. Contract and grievance arbitration from 1937-46 cost 1,30,000$ towards arbitrator's fees, counsels, witnesses and transcripts.

(x) *Arbitration of grievances* :—Grievance arbitration has not played nearly as substantial a role in that industry as among the hotels, there having been only five arbitrated grievances disputes since 1941.

(xi) *Tripartite Boards* :— The principle has been agreed to in Hotel Industry while in Restaurant Industry, it was a single arbitrator. In the Hotels, the decision was by a majority vote on a seven-man Board. They submit the decisions to both Union and Employer Members and they register their concurrence. The Restaurant Industry agreements have provisions for adhoc arbitrators.

(xii) *Time Limit for Decisions* :—The big hotels require the decision to be within 10 days of submission. The small hotels require the Chairman to convene the Adjustment Board within 10 days of submission of a case.

(xiii) *Selection of Arbitrators* :—(a) The Restaurant agreement provides that if the four-man Adjustment Board cannot agree on an arbitrator, the United States Department of Labour will be asked to nominate one. (b) When the parties to a small hotel agreement cannot agree on a Chairman, they must return to the nominations of two court judges, as outlined earlier.

(xiv) *The Bipartisan Board* :—This is for hotel and restaurant industries, to remove bargaining stalemates to a plane of sufficient detachment and the final step of grievance procedure. The agreement says, "in the big hotels, all complaints, disputes and grievances, arising between the parties to this agreement and all questions of interpretation and application of this agreement between the parties which cannot otherwise be adjusted shall be submitted to an Adjustment Board. The Adjustment Board consists of two members appointed by each side and the Board shall meet

within 24 hours after a request by either party. Not more than one week shall elapse between the filing of any complaint to the Adjustment Board and submission to the Board."[31]

(xv) *Assessment* :—Contract Arbitration in San Francisco Hotel Industry has some special features : (a) The grievance arbitration declined in four or five big hotels and virtually none in small hotels and only five in restaurants. This is also because of the use of effective bipartisan boards with union officials and employers. (b) According to Mr. Van D. Kennedy it indicated that Contract Arbitration could be effective only where the parties cannot mutually negotiate due to complexities. But such assessment does not seem to follow his own analysis of the Hotel and Restaurant Industries, which has been discussed so far. It is rather curious how he could not persuade himself to see its success, as compared with collective bargaining in other sectors of the industry when he says, (c) "This experiment also shows that it meets with the multi-employer and multi-union needs, more than in situations where a single employer is bargaining with a single union." (d) Contract arbitration operates more satisfactorily where the issues affecting power relationships are avoided. (e) The trend was favourable in San Francisco Hotel Industry. (f) Contract arbitration which occurs by predetermination under reopening provisions of contract differs from contract arbitration, which is decided upon by two parties after they have negotiated and failed to reach an agreement."[32]

Industrial Arbitration in Laundries :—

In the New York Laundry Industry permanent arbitration system worked well.[33] The union was founded in 1937. The workers are mostly unskilled, except drivers. They ultimately set up a system of 3-Member Arbitration Board with an impartial Chairman and it worked well.

Sydney Hillman, President of the Amalgamated Clothing Workers of America gave his support to the supervision of laundry workers local. To avoid misconstruction, abuse,

evasion, the Impartial Chaiman's decision was found to be binding. If either party did not abide by his decision, they did not want to go to court but resorted to direct action.

In 1937, 10 per cent wage increase was granted which went upto 25 per cent and later 50 per cent. One hundred and sixty five job classifications, with minimum rates of pay, weekly and hourly rates, and weekly hours of 44 per week were finalised.[34]

Arbitration in Hawaii :—

In Hawaii, the Dairymen's Association is the only institution which provided for arbitration of contract terms. Besides them, there are only three cases so far, i.e., (i) The Tuna-Packers, (ii) The Dairymen's Association, and (iii) Honolulu Gas Company are the only ones who have primary arbitration. Others could have come but for the opposition of the employers' council.[35]

Arbitration of Jurisdictional Disputes In the Building Industry .[36]

The National Joint Board for Building and Construction Industry was created effective May 1, 1948. The Board is composed of four regular representatives on the Contractors' side, two from General Contactors' Association, and two from National Speciality Contractors. On the Union side, two are drawn from the general trades and two from the speciality tades. There are four alternates on each side ; they customarily come and participate in the weekly meetings of the Board.

The only problem which concerns the Board was the problem of work assignment—which trade shall perform which work ? Who shall instal a metal window ? Who shall lay a laternal sewer pipe ? The National Joint Board has created agreement between the Building Construction Industry Trades Department of A.F.L. and the Associated General Contractors. It comprises 19 international unions and 7 National Speciality Contractor groups. This agreement, first signed in 1948, has been modified and expanded from

time to time.

The National Joint Board formalised a set of rules, known as 'procedural rules', which set forth the standards, which a contractor must follow in making an assignment of work. In particular, it specifies that he must assign the work instead of trying to get a decision ahead of making an assignment. He is required to look into the 'Green Book' which constitutes the decisions and agreements of record, to look over a variety of agreements that exist between the unions and if none apply to assign the work according to prevailing practice in that locality. In any case, he must make specific assignment of work. The Union is then required to stay at work and if it desires to protest about that assignment to the Board it should do so through its International President. The first level of operations are under Prof. John T. Dunlop's Immediate supervision. Each day wires are sent to Board about stoppages of work or misassignments of work by contractors or changes in assignment by contractors. These communications must be answered and answered promptly by wire or telephone, since jobs may be shut down, as much as men believe, they are deprived of the rightful appointment. During 1954, the Board handled 511 stoppages, besides 1500 to 1700 specific problems.

The second level of operation is the making of decisions on a particular dispute, on a particular job, or what we call, 'Job Decisions'. The responsibility is of the Board alone. To have a decision made, somebody must ask for it. The union which asks the decision is the one which did not get the assignment from the contractor. That union presents its case to the Board and the other union gets 5 days to present its position.

In 1954, the Board met 40 times including 47 days, rendered a total of 500 actions in different jobs, throughout the country, 267 of which might be called 'job decisions'. The Board holds hearings after a joint decision is made on an appeal and that time will review the decisions the Board has made.

In addition, the National Joint Board will receive an appeal from any of the three cities of the United States which has powers to make its own initial decisions under long-standing local machinery, the three cities being, New York, Chicago and Boston. More than 99 per cent of the activities of the Board are unanimous, and in all the years the Board has been in existence, the Chairman, Dr. John T. Dunlop found it necessary to break the tie only once.

The third level of operations of the Board is making a national decision, or the mediation of a national agreement. A separate procedure is available to make national decisions and over the years seven or eight national decisions have been made. Dr. J. T. Dunlop thinks that national decisions were not the way to settle disputes, except as a very last resort. So, the policy was with the full support of the Board to set up committees of two unions and sitting down and negotiating agreements between them.

The points which should be emphasized are (i) this is a joint Board unlike the C.I.O. Plan for problems considered in American Federation of Labour—Council of Industrial Organisations, 'No Raiding Agreement'. The employers are a wider part of the Plan. They create as many problems as the unions do, and it is only fair they should participate in the solutions, (ii) as time has gone on, the way the agreements worked has changed. The parties did not understand fully the problems first. The most fundamental thing that Board has done has been to serve as a Forum in which the representatives of the industry are compelled to understand and study their own problems.[37]

Arbitration of Grievances in Bethelham Steel Co :—

In 1953, the compliment of workers in this company which is the second largest producer of iron and steel as well as the largest fabricator of structural steel and a leading American Ship-Builder, was 1,57,000 workers. The steel plants are in Illiniois, New York and Pennsylvania.[38]

(i) *Four Steps in Grievance Procedures* :—(a) A written presentation of the grievance by the employee or the union steward, to the foreman. If not settled, he appeals to departmental superintendent. Otherwise, it is closed. (b) Discussions with the departmental union steward and departmental superintendent at the next step to decide in a few days, with appeal to plant management representative within a specified number of days. If not appealed, the demand is settled. Third stage is, with management representative and the Grievance Committee and the Plant Union Representative. Fourth stage is two union representatives and two company representatives discuss the complaint and if still not decided, there is fifth stage, when it is sent for arbitration within a specified number of days.

Grievances may be job classification, wage rates, work assignments, vacation, work schedule, improper job attitude or improper work performance, management prerogatives and responsibilities, standards of company administration, inability to perform a job etc.[39]

National Long Shoremen's Board

International long Shoremen's Association and Water Front Employees' Union of Seattle, Washington have set up this Board.[40]

The Board was for Long Shoremen, Gang Boses, Hatch Tenders, Drivers, Winen Drivers, Donkey Drivers, Boom Men, Burton Men, Sack Turners, Side Runners, Bruntmen, Jitney Drivers, and any other persons doing long shore work. According to their contract, six hours shall constitute a working day and 30 hours a work-week. The first 6 hours, 8 to 5 P.M. is trade time and after that, it is overtime. All work on legal holidays shall be overtime. Meal time shall be one hour, between 11.00 A.M. and 1.00 P.M. and if they are required to work for five hours continuously, without any meal hour, they should be paid twice overtime. The basic rates shall not be less than .95 cents per hour straight time and $ 1.40 per hour of over-

time. All engagements shall be through Halls established by Labour and Management jointly—decasualisation by Labour Relations Committee at each Port who will decide all matters pertaining to this effect.[41]

Umpire System In General Motors

In General Motors, the Umpire System was accepted in 1940 as a quid proquo to strike and vice versa as there were several wild cat strikes during the period of 1937-40.[42]

Walter Ruther supporting the Umpire System says, "You have to work out something to handle individual grievances. On individual grievances, we have the shops where they are not going to discriminate against the workers. When you reach the stage of an impartial umpire, you have reached the stage of building up. At the closing stage, workers have the impartial umpire and have more gains without having a strike of 12,000 workers as in Chicago. I do not want to lie down 90,000 workers because two workers are laid off. lie down 90,000 workers because two workers are laid off. This is a case for the umpire. Let him decide it. Let us accept it. Even if it goes against, it is going to be binding. We have got to go by it."[43]

In General Motors the word 'Umpire' signified a specific and limited form of arbitration by a single person.[44]

(2) *Developments since* 1940 :—(a) The Grievance procedure laid down that the function of the umpire should be to make a decision in all complaints of discrimination against union activity or membership and in all cases of alleged violation of the terms of the section of the agreement. Recognition, Representation, Grievance Proceedings, Seniority, Disciplinary lay off and Discharge, Call in Pay, Working hours, Leave of absence, union bulletin boards, strikes and stoppages, any alleged violation of written local or national wage agreements that may be hereafter executed between the parties. (b) In 1941, the umpire was restricted, not to order that way, in cases of violation of strikes and

stoppages. (c) in 1950, this restriction was removed and he was allowed the discretion as to penalty in stoppage cases, as well as other disciplinary cases. (d) Similarly, the Umpire had no power to establish or change a wage, but it was changed in 1948 agreement when the parties expanded the umpire's jurisdiction to establish new rates for jobs if the parties were themselves unable to resolve their differences.

3. *Operation of the System* :—First level is between the Committee men and a Departmental Foreman. Step two, referal to the Union Shop Committee for presentation to local management. Step three, appeal to the Corporation and the International Union and Step four, the umpire for impartial decision.

4. *Screening of Umpire Appeals* :—Though there is no provision in the National Agreement, requiring cases to be screened before actual presentation, General Motors and the Union each engage in a careful and unilateral screening procedures. In 1942, at the instance of Mr. Ruther, the International Executive Board created a Board of Review consisting of three Executive members and gave it power to decide by majority vote, which of the appeals sent by the various regional directors be sent to the umpire. In 1953, a permanent Board of four was created for this purpose with four international representatives, three of whom constitute a quorum. From 1952-58, there were about 10,800 cases in appeal to the umpire by the unions' regional directors. Of these, only 4 % were heard and decided by the umpire. About 55 % were screened out by the union, as above described, before they were scheduled for hearing.[45]

Dr. George Taylor was the Umpire for sometime with an assistant, to hear some grievances. The office of the umpire was located at Detroit Nine geographical districts were located and a National Circuit Programme was arranged, primarily depending on the needs of the unions, and the number of complaints. The proceedings are very informal, devoid of legislative embellishments. Witnesses are not

sworn, no stenographic records are kept. The umpire expects them to tell the truth. Each party is permitted to cross-examine and if an important credulity issue is at stake, such examinations may be extended. The Umpire participates in the questioning. Seldom a case takes more than half-a-day to present it, while in 1951, four cases were presented in a day.

5. *Awards* :—Awards were always given in writing, with all the facts and conclusion stated, but they were not open to public. They are delivered simultaneously to both.

6. *Appraisal of the Umpire System* :—The General Motors and the United Automobile Workers have an enviable record of settling their grievances. First, the umpire decisions have emphasised the primacy of collective bargaining, over arbitration. Second, the umpires have repeatedly ruled against any person who in the umpire's opinion interfered with or obscured the orderly investigation and consideration of grievances. Third, by carefully adhering to the proof presented and refusing to accept evidence or argument not made known during the prior steps, the umpires have encouraged the parties to make careful early study of their petitions. Fourth, by refraining from tendencies to mediate and by adhering on the whole to precedents, the umpires have established a fairly high degree of predictability, as to the outcome of disputes, over interpretation.[46]

John Deer—U. A. W. Permanent Arbitration System

Permanent arbitration of the judicial type with that of a single umpire, has been an integral part of the contract administration, in the John Deer Chain of Farm Equipment Companies since 1946. The United Automobiles, Aircraft and Agricultural Implements Workers of America, American Federation of Labour—Council of Industrial Organisations is the union concerned.[47] John Deer, ranks second to International Harvester Company in Farm Equipment Field. Both parties firmly support judicial arbitration. The per-

manent Arbitrator's jurisdiction is very carefully defined In 1950-55 contracts, he was precluded from ruling on piece rates and rates on new jobs. In 1955-58 contracts exclude four types of grievance arbitration from his jurisdiction, i.e., (i) changes in existing incentive standard, (ii) rate changes for new hourly paid jobs classification, (iii) establishment of new incentive standards, and (iv) occupational rates for new incentive job classification. The stages of grievance decision are divided into five steps, somewhat on the lines in General Motors and it has worked well with both the parties, though some more improvements are not wanting in its administrative aspect, in some minor details. But, on the whole, it is considered an excellent working model of grievance arbitration of the judicial type.[48]

Arbitration Commission In Pittsburgh Plate Glass Company

The latest of the experiments in arbitration, by way of 3-man independent Commission, is that of the Pittsburgh Plate Glass Company, Pittsburgh, to resolve certain issues, submitted to them by the management and the United Glass and Ceramic Workers of North America A.F.L. - C.I.O. - C.L.C. The work of the three impartial arbitrators constituting a commission is considered a unique instance in contract arbitration in recent times.

The background of negotiations concerning the present contract provisions under arbitration began in September 1958. Before agreement was reached, a strike ensued, which lasted from October 6, 1958 to February 1959, at which time, the parties reached an agreement on contract. However, certain issues upon which agreement had not been reached, were covered by a supplemental agreement, and subsequent memorandum is provided for an Arbitration Commission. As a part of the strike settlement, the company and the union have agreed to submit certain issues for a final and binding decision by a 3-Man Arbitration Commission jointly selected by both the parties. Dr. Paul N. Lehoczky, Dr. Charles A. Myres and Dr. Patrick J. Fisher, are the three very distinguished Academicians and Labour experts, who

were chosen to constitute the commission with Dr. Lehoczky, who was for sometime in the steel enquiry in the Steel Strike in 1960, as the Chairman. Any of the two members are empowered to make a final and binding decision, which completely disposes of one of the issues submitted to it, under Section 2 of Supplemental Agreement No. 6. If on any issue, no two members of the Commission agree on a decision completely, disposing of that one, then the Chairman shall be empowered to make a final and binding decision, without the joinder of either of the two members of the Commission.

The issues to be submitted for final and binding submissions by the Commission are (a) what changes, if any, shall be made in the language of Section 18 of the Labour Contract or the practices thereunder, relative to the operation of the incentive system, it being understood that the Commission shall have no auhority to change the guides, used by the parties prior to Section 25, 1958, in determining whether the rate on a new or changed job, pattern, part or size was in fact a proper rate ? (b) what changes, if any, should be made in the language of Section 27 of the Labour Contract or the practices thereunder, with respect to speed of operations and restrictions upon production ? (c) The question of the number if any, of full time company paid grievance men and time study men at the Ford City, Crystal City, Creighton, Cumberland, Henryette, Mt. Vernon and Clarksburg Plants. The Commission will also determine the method of payment for compensating any full time men.

Pending the decision of the Commission, the method of payment and the number of full-time men of each plant location will be the same, as it was just prior to the strike. (d) What, if any, changes should be made in the Seniority Programme in effect at the Creighton operations, just prior to the strike ? (c) They lay off of security programme at Creighton, intended to make the problems already dealt with in the Plant Security Agreement at other plants in

these negotiations, will be resolved by the Commission as a part of the seniority matter covered in para (d) above, it being understood that in cases of conflict between the terms of any lay off, security programme ordered by the Commission and the terms of the labour contract, the terms of the lay off of Security Programme will control. (f) What disposition shall be made of the company's proposal for specific man-power cuts, as set forth in its attachment to its letter to Mr. Reiser, dated October 24, 1958, as revised ? In reaching its decision, the Commission will have authority to determine whether wives of employees who are retired at the option of the company between the ages of 63-65, under the accelerated pension programme agreed to by both the parties should receive extra benefits from the company.[49]

This arbitration is the biggest in the Glass Plate Industry in the United States and has been attracting a good deal of attention in view of the size of the company, the number of employees affected and the vital importance of the industry in the national economy.

The first issue submitted to the Commission was "what changes, if any, should be made in the Seniority Programme in effect at the Creighton Plant operations, just prior to the strike ?"

In a very well argued Award of 20 pages, the Commission referring to the seniority rules, introduced at Creighton from September 10, 1957, by the management consequent of the union's unilateral notice on June 12, 1957, cancelling the existing seniority rules, noted that the seniority rules introduced by the management were in no way violating the master agreement, but suggested certain modifications in work allotment, by use of bid cards, on which the senior employees were asked to indicate their preferences in order of importance, whenever they arise and the company may allot them jobs if they are more than three days' duration on this basis and the preference indicated is the same as the type of the vacancy. If the worker has been consulted and he turns it down, then the company may offer it to some-

body else. The Director in his talk said, that though in a majority of the cases, the workers turn down the offer when consulted, if there is a lapse in consultation, they probably complain promptly and get paid for it.

The Commission thus has done equal justice to both management and union in upholding on the one hand seniority rules with minor modifications and on the other, it has also considered the workers' right of job opportunities, by instituting their right to indicate preferences with obligation on the part of the management to notify them of all the vacancies, above a certain minimum duration.

The second issue submitted to the Commission was regarding incentives and changes to be made in Section 18 of the Contract.

The questions were whether the management have the unilateral rights to decide, what, if any, jobs are to be placed on incentives and whether this exclusive decision of the company can be challenged by the Union ? Whether a job warrants being placed on incentive system will depend on a host of factors like, (1) the frequency of product runs, (2) the size of the individual firm, (3) the work content of operations, (4) the variations in product characteristics, (5) other technical characteristics, (6) the developmental status of any given product, (7) the developmental status of the process involved.

Therefore, the Commission suggested amendment of Section 18 to include in 18, (a) Piece Rates, Bonus Rates, Incentive Rates and/or values as promptly as possible after the work is completed. (b) The company guarantees base rates under the incentive system and each day's earnings shall stand for itself. (c) In setting incentives or bonus rates or changed jobs or operations, the company will take the necessary studies in determining the payment plan to be used and the incentive or bonus rate to be applied. The results of the studies and the proposed rates will be discussed by the union in an effort to reach an agreement on

new rates. If no agreement is reached, the rates proposed by the company will be put into effect and the union, if aggrieved, will have the right to process it through Grievance Procedure. Before or after the incentive system proposed by the company has been placed into effect, a representative of the union may make studies of the jobs for discussions with the company, in an endeavour to work out a settlement. However, such studies shall not limit the company's right to initiate new or changed incentive rates as soon as they are ready to instal these rates, etc." This is a fair and equitable award, which, while recognising the management's rights to introduce changes unhampered by union's obstinacy, it has also recognised the legitimate grievances, if any, of the workers, who, if aggrieved, are safeguarded in their interests to take up their rights, but, based on factual analytical study of the operations of the system, which is very well set to instill a sense of responsible understanding as a pre-requisite to process their grievance, through the operation machinery. The decision of the Commission on the third question submitted to it is equally happy and is on the same lines of square deal to both the parties. To illustrate, the third question was, "what changes, if any, should be made in the language of Section 27 of the Labour Contract or the practices thereunder with respect to speeds of operations and restrictions upon production."

The Commission had decided in its Award that the company shall determine at what speed an operation should be run and give the union a seven days' notice of its intention, along with the proposed bonus schedule at the increased speeds. During the seven-day period, the company will give consideration to any fair contention of the union regarding the anticipated hardship to the workmen and consider their request for any additional compensation demanded, if the increased speeds of operation were never previously established. If mutual agreement is not reached at the end of seven-day period, the company may introduce a change for a trial period of three weeks and during that

period the employees shall give full production. If during the negotiations in the three-week period also no agreement is reached, then, the production should revert to pre-trial period and the question shall be arbitrated."

Here again, the rights of the management to initiate the change with due notice and opportunities to discuss and negotiate by the union are conceded, while the union's right to protest and not to go with the operations after the three-week trial period, unless their difficulties are fairly solved, is also emphatically recognised. All the three decisions are well-balanced, fair and equitable and welcomed by both management and union. A union paper at Pittsburgh seems to have very appreciatively hailed them, as "decisions with heart", as a tribute to the excellent work of the Commission, in such a complicated technical analysis. The three other problems submitted to the commission also are said to have been decided, to the complete satisfaction of both parties, according to the information received during my talks with one of the arbitrators, who happened to visit India recently in August 1962.

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CHAPTER XII

SUMMARY AND CONCLUSIONS

IDEOLOGICALLY arbitration came to be regarded as a hall-mark of American civilisation, with its love of voluntarism, of freedom and abhorrence of governmental intervention in labour management relations. Primarily, grievance arbitration which was the by-product of the emergency situations that were inevitable in a war effort and suggested by the War Labour Board as an instrument to interpret ambiguities, if any, in its awards, has been converted to a peace-time permanent feature of industrial relations, with excellent public relations, ascribing to it the virtues of expeditious, inexpensive, informal, completely independent, voluntary decisions by arbitrators voluntarily chosen, voluntarily appointed, voluntarily agreed to, by the parties to accept the awards of these experts.

As an aftermath of the war, arbitration influenced collective bargaining agreements, considered usually imperfect and vague, with a lot of loop-holes left to be filled in course of time as need arose, by calling in an arbitrator who would be occasionally telling the parties what they should have meant, thought and done under the circumstances, and what they should do, whenever he was called upon to make up their minds which they found too difficult to do, either intentionally for fear of a strike or a lock-out or due to a temporary tiredness, at a particular stage, to push the bargaining further.

Arbitration may take the form of *ad hoc* Boards, Tripartite Boards, Umpires, Contract Arbitrators, very rarely permanent grievance arbitrators or members of mediation boards or those that appointed them or the emergency boards or the fact-finding boards. Of all these, grievance arbitration accounts for 97 per cent of the total arbitration work, to interpret the difficulties that arise from contract language either within the limits imposed by the submission agree-

ment or as per the wide latitude the arbitrators preferred to assume otherwise. Nobody has ever felt, except the few who are not taken seriously, that it is unethical not to implement the contract and there is uniform acceptance of the vague, incoherent, un-understandably loose contract language as a necessarily inevitable natural phenomenon of collective bargaining, an ethic of industrial relations. None would see how it could be otherwise. No one seems to argue why the unions and the managements should be inept to face their own problems more courageously while bargaining and why the problems they would not have the courage to face they should throw in the lap of a third and expect him to solve them and accept them, as what they man, who is more ignorant about them than themselves could have or would have done themselves. While they do not want the third party intervention in collective bargaining, their acceptance of a decision adjudicated by a third party, is not philosophically inconsistent to them, because they themselves have chosen the third party, and not anyone else. This, has ultimately created a concensus and this has led to acceptability. The clients are rewarded in their applause and the arbitrators as artisans in their craft. What only the parties should never forget to do, is to protect themselves from the invisible clauses, they are anyhow supposed to write. They are there, all the time. They have to only insert an arbitration clause and leave the prospective difficulties arising out of collective bargaining agreement to future arbitration.

The American Arbitration Association, the Federal Mediation and Conciliation Service, State Boards of Mediation, Courts, Municipalities, the National Academy of American Arbitrators, have all large panels of names of arbitrators, in thousands, who are available all over the country, on call, to go into action any time, and the costs are paid by both the management and the union. From time to time, there is a stock-taking of the growth of arbitration and the arbitrators are heartened to note the dimensions to which it has grown. Efforts never abate to highlight the virtues

of arbitration through press, conferences, publications and public relation policies.

Professors, Lawyers, Labour Consultants, a few Industrial Engineers and almost everyone connected with the War Labour Board, have all found a place in one panel or another and there is no lack of adequate service. Their fees vary from $25 to $250 per day. The total cost includes transcripts, stenographic records, witnesses, briefs, lawyers, arbitrator's fees, his travelling and maintenance, the attorney's fees, the hotel charges of the arbitrator, transport charges, the transport charges of the parties and their stay, their back-pay for attending the proceedings, the study and award writing charges of the arbitrator, the fees of administration for clerical assistance, for rooms, etc., by the American Arbitration Association.

The parties have freedom to choose a single arbitrator or a 3 or 6-Man Board or an Umpire, any system they choose. The members of the N. A. A. say, "they do not solicit business but are available" and in fact, they found of late the parties ask and insist on nominating arbitrators only from their sophisticated body. Experience has shown that cases sometimes take as much as 200 days to dispose off, the cost of arbitration with all attendant charges as mentioned above, exceeding the arbitrator's fees and crippling the weak parties. But some of the arbitrators prescribe that if at all the parties want arbitration they should go first rate, engage the best lawyers and pay whatever it costs, should not grumble about stenographic records, or transcripts, or witnesses, or anything else, whatever might be the costs. Some say, the arbitrator should visit the plant, however insignificant the complaint is, whether there is need for it or not. Even Supreme Court Judges in America have found these extravagances needless and pleaded for a humanitarian approach in arbitrators taking notes as English Judges do, to minimise costs and to avoid wastage, on useless transcripts which are of no value and which no one reads. But, judges as per arbitrators are not only not

intelligent, but very stupid and ignorant of plant level labour-management relations which the visiting arbitrators alone would and could understand. Complaints of unethical practices of dumping needless opinions, lengthy awards, round-about travels, enormous and deep studies at the cost of the parties and learned long discussions over hundreds of pages, clouding the issues are brought to their notice with proofs of letters regarding the same in writing, but the arbitrators are sceptical of such complaints, still, as according to them, they could never arise, as they were never told so by the parties.

Should a judicial approach with reliance on other awards, for persuasive force be the procedure, or should every arbitrator set a model of himself ? There are very strong and fundamental differences of opinion on these aspects, some emphasizing the former and some considering it too obstructionist and derogatory to their dignity, wisdom, propriety and sense of importance to follow others, as they are, "The Self-styled Industrial Statesmen" (as Mr. Mitchell would call them) to be a model each to himself. The arbitrators blame the parties for not telling them what they want properly, for not setting up standards and then accusing them for what they have done. One wonders whether this is after all fair ? When they are appointed as arbitrators, is it not their duty to ask clarification ? They consider themselves to be the private judges, the authorities on facts and law. Some do not think it necessary to call in outside experts, even for technical matters. They assume they can make the same judgments as the outsiders and as such there is no need to call them and make it more expensive. Anyhow, they presume, the parties do not want them. They would decide on ability, on seniority, on pension plans, even on arbitrability and provide a living philosophy by effectuating the contract and telling the parties how to live with it in perpetual peace. Some of them would avoid other's awards as poison. Judges are jealous of their importance and act as interlopers, but they could not care less. They feel sure of their own competent

understanding of labour relations, which they think the judges would never be able to do. If the contract is not clear, they assume, they could interject their own notions, fill the gap, and patch up the differences. Each one of them has an individual approach to the problem of arbitration before him to the Arbitrators, the diversity in their approach is the central core of their philosophy ; unanimity is a curse.

For sometime, there was a lament over the indifference of courts to enforce the awards and the reluctance of the State to frame adequate legislation to protect them from the violation of erring parties. There was an anxiety that instead of separate legislation, it would have been better, if Section 301 of Taft-Hartley Act was interpreted by the Supreme Court widely to cover them. When this ultimately happened in the Lincoln Mills decision, there was again an opposition and unconfirmed fear, that this would now open the flood-gates of violation. Some would argue, anyhow to face the harsh realities of the courts invading the realm of arbitrators and to be prepared to construct a coherent philosophy of arbitration, intelligible enough to the courts. But, others would think it a useless task and fruitless to think that of all the people, judges could be expected to understand and appreciate even that refined, codified, elegant and highly sophisticated wisdom, which they had neither the equipment, nor the training nor the desire nor the inclination to understand, like the arbitrators who consider themselves omniscient.

CHAPTER XIII

A REVERIE

ALTHOUGH arbitration is not without some advantages, the case to the contrary also seems persuasive, because it has often proved to be an enemy of understanding as in Grievance Arbitration. Neither the Unions nor the Management nor the Arbitrator (quite naturally) has any precise view of the problem. The arbitrator assumes a variety of ills, correspondingly less certain of the remedies ; but he has always some prescriptions to be readily administered. Unless he lives with the problems or understands them properly either he has the wrong remedy or an indifferent decision enforced on the parties, because of their willingness to accept.

The practice of arbitrators interpreting the contract agreement is only an aftermath of the Second World War. Prior to that perhaps managements and unions never wanted the arbitrators to tell them what they thought of, in their collective bargaining. Have the unions and the managements developed a special ineptitude in bargaining, not to know their own minds, as an effect of the war ? It is hard to think so. The American Unions and Managements are very powerful institutions, well-staffed with experts, who understand what they talk. Surely, they only know best what their problems are and what they have discussed at every stage. How can anyone who is not familiar with what happened in between or at the time of discussion of the issues, even if he is invited, feel justified and confident to interpret what they must have thought of, just because each party tells him what they presumed to be their position at the time of discussion and what their intent was ? Is it not human and natural to each party to remember what is convenient and forget what is not ? If American voluntarism insists on free collective bargaining and abhors third party intervention, would not the acceptance of

voluntary imposition of adjudication on what they must have meant, appear more inconsistent than to have him as Chairman, or observer, or participant at the time of original negotiations, as it does happen in the needle trades, hotels in San Francisco, etc. ? Would this not be a philosophical contradiction and inconsistency ? Is it still correct because it is a system voluntarily selected, voluntarily appointed, voluntarily accepted and voluntarily enforced ? If the unions and the managements do not understand their contract and this luxury of misunderstanding or not understanding with no solutions to be had by themselves, is regarded as a virtue, would it be a grave mistake for a foreign observer to be sadly depressed about it ? Is it necessary to make an understandably war-time emergency, suggested by the War Labour Board, an all embracing panacea, to bless incoherent, incomplete, unintelligible, collective bargaining and to sanctify it ? Would it not be more appropriate to make the unions and the managements realise that it is no good, adopting an escapist attitude, but that they should try and squarely face the knotty problems, they come up against in the process of collective bargaining, without agreeing to leave them to be spelled out by an outside arbitrator in due course, whose decision they would prefer to accept than themselves arriving at it ? After all, even the best of arbitration would not be a substitute to effective and successful collective bargaining, which is highly cherished in the United States. The best of arbitrators are the busiest of the professional experts, as Academicians or lawyers and arbitrators and they do not need mere arbitration for their living as they never depend on it. They could easily work themselves out of it, if they chose. But, the problem is, with the thousands of arbitrators and the thousands and thousands of collective bargaining agreements, which are going to be interpreted by them, where the damage is going to be immeasurable. More so, in view of the lack of any agreed views, on procedure and attitudes, except to throw the ball at the parties and accuse them of not precisely telling them what they want

of them, not being able to define their own stands properly, etc. ? Are there any intelligible standards apparent to the parties ? If they were able to find them, they would solve their own problems, rather than ask someone else to do it. No doubt, some agreements set the limits, but all do not. Even if they did not define what attitude the arbitrator should adopt, is there anything to prevent the arbitrator from asking the parties ? Why should they not do it ? Would it not be more essential urgency, to impress upon the parties to improve upon the quality of their collective bargaining and make efforts to that end, which would have a more salutary effect than repeatedly reminding and emphasizing, "you after all could not have done better, the invisible clauses are always there, but you leave them to us". Somehow, this is a situation, which is very puzzling. It is difficult to understand why the unions, the management and arbitrators too, should not worry about it more, in the interest of really useful and strong collective bargaining. If there is a deadlock, why not leave these issues to be negotiated again and make collective bargaining the only medium, and if they still fail, resort to a trial of strength ?

Because the collective bargaining contracts are so forbidding or at least seem so, because they yield few hard tests of what exists and what does not, they afford the arbitrators a luxury, not given by the written word. Within a considerable range of ideas, he is permitted to believe what he pleases. He may find whatever view he has most agreeable with his case. Would this be real arbitration ? We have been confronted with ample proof of this. It is just not an empty fear. In consequence, there is bound to be, in the interpretation, a never ending competition between what is relevant and what is merely acceptable. While all strategic advantages lie with what exists, all practical advantages lie with what is acceptable. All unions and managements applaud what they like best. The test of audience approval, far more than the test of truth, seems to influence the comment. If the clients reward them with

acceptance, the arbitrators consider themselves the artisans qualified in the craft. Would this sort of concept of conventional wisdom, threading itself through the fabric of social ethics be strong enough to be relied upon in defence of arbitration ? True, the hallmark of conventional wisdom is its acceptability. Arbitration thus has become a religious right. If it chooses to remain with the familiar and the comfortable, it is in danger of obsolescence. It is at present articulated on high levels of sophistication. Any challenge to its frame-work may appear irrelevant or at best mule-headed, with the large literature, the wide diffusion of the profession of arbitration, the defenders are able to say, anyone who criticises just does not understand its intricacies. The march of events might prove to be the fatal enemy of such a self-righteous approach. It is for consideration whether the world of arbitration, in addition to its being its own defender, should not sit up and take a look at itself in the light of changes that are bound to occur in the light of Lincoln Mills' decision, when the Supreme Court itself enters that field and touches their actions.

Rapid war-time growth of arbitration should not lull the arbitrators in their positions of heartening comfort, as they have most often expressed. On the other hand, it may look very strange if it is said whether it should not be looked upon, as an exceedingly disturbing situation, from the viewpoint of the emergency of collective bargaining agreements, negotiated by the parties themselves. Why should a clause for interpretation of agreements arrived at in the emergency of war-time, without adequate time for negotiations and to avoid difficulties later, be considered, an inevitable instrument, long after and continue without the parties trying to have collective agreements as satisfactorily as possible ? One might say, it is a *quid proquo* and it is impossible even to write a perfectly understandable agreement any time. So what else can be done ? This somehow is not very clear and cannot be correct. Settlements of disputes are arrived at in India too, with no such rush for interpretations, even in a far less developed state of collective bargaining.

American scholars with intimate personal acquaintance of Indian affairs, like Prof. Charles A. Myres, should be able to appreciate this dichotomy, and unravel what it is that causes this inevitability in the United States, which does not occur anywhere else. This is indeed a very baffling and fundamental situation. While umpireships, arbitration commissions, contract arbitrations have well-defined rules and a very useful purpose, the role of *ad hoc* arbitrators, the wide extremes between a judicial approach and the extension of collective bargaining approach make them embark upon solutions, not called for. It is true that the cream of arbitrators may not be more than 20 all over the country, some of whom the author has the pleasure of knowing personally well, like Dr. Charles A. Myres, Dr. John T. Dunlop, Dr. George Taylor, Mr. Saul Wallen, Dr. Arthur Ross, Dr. Solomon Flink, Dr. Donald White and many others in reputed American Universities. Reading the awards given by them and discussions with them has indeed been a great delight. It is possible to be in agreement with some of the views of a few like Messrs. Archgold Cox, Dr. Arthur Ross, Noble Braden, Jules Justin, Fred Holly, David Cole, Nathan Feinsinger, Gabriel Alexander, Harold Davey, Harold Roberts, P. S. Davis, Loyd Blair, late Sumner H. Clichter, Neil Chamberlain, etc. They would recognise the need for a cautious and careful approach, some respect for the previous awards broadly, at least for their persuasive value, a rigorous respect for the original terms of the contract, the recognition of the realities like the place of law in arbitration, and the need to make arbitration a more coherent system. There are others like Professors Benjamin Aaron, William McFerson, who do not see any need for limiting the powers of the arbitrators and would love to arbitrate and arbitrate away, the way they like. Arbitrators like Mr. Benjamin Aaron, would even arbitrate clauses that do not exist in a contract (as discussed earlier) to the utter consternation of their own colleagues, without any hesitation. (See his own views on use of past in arbitration, 'In Arbitration Today') Mr. McFerson has a variety of interesting, though uncon-

vincing, reasons for not following an award or giving any attention to it, but wants some labels put on past awards, as on poisonous drugs against their use, which he pleads is meant for safety of all. He is terribly worried about the prospects of anybody ever thinking of using them, and is anxious to build a safety wall. Both of them would decide even the issues of arbitrability themselves and consider the arbitrator a rule into himself. There are some like Prof. Robert H. Skilton, Harry Schulman, George Taylor, who believe that collective bargaining agreements are never perfect and arbitration has a justification to have effectuating influence. It is not known whether Schulman and Dr. Taylor were not generalizing from what was suitable and, desirable in an umpireship as befitting *ad hoc* arbitration and in doing so whether they were conscious of the various hazards one has to face in the process of present day arbitration world, which is not a lake of lotuses, where one can swim around in bliss, without doing damage to the rest, in the process.

There are some arbitrators who do not consider any problems out of their realm of competence, be it ability, wage incentives, classification problems of industrial engineering or any other conceivable difficulty. Some are robust optimists in their insights to determine ability, even in the face of lack of evidence, from their own research findings, not to speak of the concern of their colleagues to rely on seniority as a more comprehensible concept.

There are serious complaints about the gradual disappearance of the original virtues of expeditious disposal, informality, inexpensiveness and availability of expert arbitrators. On the other hand, the cases prolong for years, tend to rival courts in the paraphernalia of transcripts, stenographic records, time and study costs of arbitration, the travel costs of arbitrators, their maintenance along with that of the parties, their counsels, their witnesses. One wonders whether the proceedings could not avoid these needless costs, the arbitrators taking notes on hearings, going to the plants where they can hear the parties and

decide the issues on the spot, as far as possible. Would it not be advisable, not to allow their erudition to get the better of them, and issue strictly relevant, sensible, short judgments inexpensive and expeditious, which would enhance their prestige ? The best, ablest, most conscientious and sophisticated scholar-cum-arbitrators feel helpless to persuade their colleagues who hold diametrically opposite views and would never agree on what is the best way to arrive at a common agreement and workable philosophy that is so essential. How best could they be brought to order ? Who would bell the cat ?

Some of the arbitrators are upset again when the much awaited interpretation of Section 301 of the Taft Hartley Act came at last in the Lincoln Mills' decision. Many, for long thought this might happen, and when it did, read unconfirmed and baseless fears into its consequences. When a few like Prof. Cox asked them to stop lamenting, sit and prepare a coherent philosophy of arbitration from an emorphous mass of decisions, few were willing to sign up.

If the able intellectuals who are themselves arbitrators know the existing defects, and try to persuade their colleagues to see their view-point, with little or no enthusiastic support and the majority are content to feel themselves super-intelligent, too impatient, too busy and too important to educate the judges, a foreign observer would not venture to find it possible to rouse more enthusiasm for reform of this very disturbing scene.

Even the question of reform of the existing methods of arbitration, like the practices, procedures, costs, delays, and all other attendant issues are very baffling. Even at the risk of looking frightful misanthropes, it might not deter some observers to ask, (1) "Is there really a need for arbitration, is there at all ?" Especially so, when the whole frame-work and further developments have all been towards grievance arbitration ? (2) Is it after all necessary to have vague, incoherent, incomplete collective agreements and then develop a nation-wide institution, in the name of

arbitration, for solving these self-created problems, in no better or no worse way, than by the parties, but with the addition of heavy expenses, with inordinate delays, but, with the label of voluntarism, accepting all the while, self-imposed compulsion to accept the third party decision, to a hypothetical 'might have been', with perfect complacency ! (3) Why not the world of American arbitration bestir itself ? (4) It is difficult to appreciate how the A. A. A. or N. A. A. or F.M.C.S. or any other agency could feel happy about the growing volume of arbitration of grievances, to the extent of 97 per cent and more. Does it not remind one of the nostalgic memories of doctors gloating over increasing ill-health eating into the roots of public health, because whatever might be the effects of ill-health on the nation, they, as doctors, are available on call and incidentally to gain ? Should not the arbitrators who are scholars, professors, feel concerned at this growing rate of arbitration which in fact is a severe indictment on the health of the collective bargaining agreements, and instead of feeling happy over its big business aspect, also think of some efforts to eliminate the need for grievance arbitration, which in other words, means better collective bargaining ? (5) Where is the inevitability of grievance arbitration ? It is not even (zero point zero one per cent) 0.01 per cent in countries like India and it is amazing, how it could have grown to the extent of 97 per cent and yet, does not disturb the American scene of managements, unions, arbitrators, government and public at large.

(6) The Universities and the various bodies of arbitration are conducting periodical surveys, only to know the growing extent and popularity of grievance arbitration, the qualifications, age, fees, experience, procedures of arbitrators, but, there is apparently little inclination or desire to dissect the causes for the emergence of grievance arbitration and its alarming growth to its present dimensions. United States is fortunately rich every way, richest in wealth and rich in the field of competent scholarship, in the field of industrial relations, having the distinction of being the only

country, where students from all parts of the world go to study these problems, as a special discipline. It is amazing with all its rich potential, there is hardly any interest in systematic research to analyse the growing failure of collective bargaining which is the other side of the Medal of ever-expanding arbitration. (7) The American managements and trade unions, unlike those in the Asian countries, are mighty pressure groups, have huge funds with which they run well-organised, well-equipped Research Departments. They could very profitably enquire and conduct research, in their own interest, to know in how many collective agreements, in each company they have to resort to arbitration, on what items, how many times, on what type of clauses and how often in the life of each agreement, they are compelled to resort to arbitration under similar issues. A comparative study of the causes and the cases that come for arbitration from each collective bargaining agreement, the frequency in its life time, the nature of the confusion of understanding of language could eliminate gradually the need for arbitration of grievances. (8) In support of free collective bargaining, it can also be said, why not the unions and the managements continue to bargain till they succeed ? If they fail to arrive at agreed solutions on some items, why not have a partial settlement, keeping the issues open for fresh negotiation, later on by themselves again and again, till they reach an agreement or agree to decide by trial of strength. Otherwise why not straight-away prosecute the erring party for breach of contract ? (9) If not, if an outsider's help is needed, is it not better to have him at the stage, where the deadlock comes, so that he would be familiar with both the view-points and then give an award, when the issues are still hot and current, than long after when he does not know what actually transpired at the negotiation stage, but is expected by both to divine what might have been, or ought to have been in their minds, at the time of negotiations and give a decision on that basis, by which they agree to abide. (10) The unions, the managements, the professors of industrial relations, the American

Arbitration Association, the National Academy of Arbitration have all a moral responsibility to themselves and to the American collective bargaining, to perfect it even at the risk of working themselves out. (11) The growing volume of grievance arbitration cannot but be a very sad commentary on the nature of collective bargaining agreements in the United States, which ought to pose a challenge to all concerned. (12) The American Universities, Departments of Industrial Relations, Research Associations of Managements and the unions as well as individual scholars could contribute quite a lot to this gigantic problem, by reducing and finally eliminating the need for this much needless institution of grievance arbitration, with all its imperfections. It may be a wholesome approach, to eradicate the disease, if possible, than to concentrate on the methods of diagnosis and cure. (13) The American Managements, unions, must assume their own responsibilities more seriously, boldly and consciously than following a philosophy of escapism in trying to throw all their knotty problems into the lap of an outsider and accept what he says, as the gospel truth. It is strangely very unrealistic, and is extremely difficult to understand the tolerance for the birth, growth and development of such an institution in the midst of very prosperous, powerful, well-educated labour management groups. (14) the possibility of eradicating or reducing the need for grievance arbitration is not an impossibility, or an idle dream, as the vast plethora of existing grievance arbitration, suggests. In India, there are thousands of agreements arrived at every day, in every state, with rarely any need for such interpretation. If it is possible in India to have clear-cut understanable agreements, there does not seem to be any difficulty to have similiar clear agreements in the United States, too. (15) The existing vast field of American Arbitration, is a built-in stabiliser for a good deal of research in the field of industrial relations in the United States in which most of the American scholars could profitably keep themselves engaged for long to come. It is equally interesting for foreign students of the problems,

if they have the possibilities to continue in the United States for such further research. There are, of course, adequate number of very competent American students of these problems with adequate financial resources from Universities, Foundations or other Bodies to encourage them to engage themselves in such a work. It is high time, they should turn the searchlight of their enquiries on their home-front too, where also, it is very very badly needed. (16) The American Professors of Industrial Relations who are the country's pride of scholarship could do a marvellous service in studying the basic causes that lead to the need and continuance of grievance arbitration much more than by forming exclusive associations of themselves as arbitrators and making efforts to introduce better methods of arbitration in a growing field which rather unhappily is looked upon with much satisfaction and complacency than With a sense of depression and unhappiness in the climate of American Collective Bargaining. They could really do a wonderful service by preaching and practice, by their persuasive force, as practising arbitrators-*cum*-professors, at the citadels of knowledge. As said earlier, a joint concerted affront to the malady of grievance arbitration from the unions, managements, universities, independent research bodies and scholars over a period could only bring some reasonable hope to restore American Collective Bargaining to its place of pride. (17) Considerations of judicial approach, or extenuation of collective bargaining, or the use of past practices, lowering of costs, reducing briefs, minimising delays should not continue to be the only problems or proper approaches for the study of labour grievance arbitration for all time to come as they have been all along. The unions, managements, arbitrators and government have also to re-examine the nature of collective agreements with a view to find out, whether some changes are not needed, on which the bargaining is done or not done. (18) The need for grievance arbitration may be reduced considerably, if in the collective bargaining agreements in the United States, a distinction is drawn as between collective bargain-

ing matters like wages and service conditions and on the other hand the work rules as is done in India, making the latter only the objects of arbitration, i.e., matters like late coming, discipline, punishment, etc. (19) Unless and until such distinction is made in the matters of collective bargaining in the United States, a lot of confusion persists and continues to grow by way of grievance arbitration, which often revolves around contract items too, as there is no distinction or itemisation on the issues which could be referred to the arbitrator. (20) The lack of any such distinction actually results in the arbitrator coming to fill the gaps of collective bargaining of rights, which is though not objectionable from the angle of the Indian scene and more preferable than what goes on in the United States in the name of a misnomer of grievance arbitration. (21) What is here needed is a clear acceptance of the content of arbitration, and it is contended that the American philosophy of voluntarism prevents arbitration of interests and permits only arbitration of rights, it is then, the imperative duty of the world of American Arbitration that the fences are kept high and there is no mixing of both as is actually happening when an arbitrator is being called upon to decide each and every issue in the collective agreement, irrespective of its nature and content. The field of American Arbitration is rather a confused scene. The unions, the managements, the arbitrators and the citizens, all owe it, to themselves, to make a distinction between Contract and Grievance Arbitration, and then finally decide the need for them and the roles they are supposed to play as per the rules of the game. This is an imperative must.

CHAPTER XIV

INDUSTRIAL ARBITRATION IN INDIA

LABOUR legislation in India, as in any federal constitution, is both a central and concurrent subject between the union and the states, since 1947, when India became independent.

However, the question of preventing and settling industrial disputes was engaging the attention of the Government of India from the time of Employers and Workmen's Disputes Act, 1860, which provided for speedy disposal, by Magistrates of the disputes regarding wages of workmen engaged in Railways, Canals and other public works. Breach of contract of service was made a criminal offence. This Act was repealed in 1932.[1]

The first Indian Trade Disputes Act was passed in 1929 on the model of the British Trade Unions and Trade Disputes Act of 1927. This Act provided for conciliation machinery to bring about peaceful settlement of industrial disputes and rendered litigation and sporadic strikes in public utilities a penal offence. This Act was brought into force on 7th May 1929. The Royal Commission of Labour in India suggested the need for a permanent statutory machinery for settlement of labour disputes with certain modifications. A Bill that was originally introduced in 1934 became an Act in 1938. But, the war and the exigencies proved it to be inadequate and the Act was supplemented by Rule 81 (a) of the Government of India Defence Rules. According to this, the Government could refer any dispute for arbitration and enforce the award. The enforcement of this rule benefitted labour and industry as demonstrated by diminishing industrial strikes.

As Defence of India Rules by themselves were inadequate, a new Bill was introduced on Industrial Disputes which became an Act, viz., the Industrial Disputes Act, in March 1947, repealing the Trade Disputes Act of 1929. In May 1950, the Industrial Disputes (Appellate Tribunals) Act

was passed to make provision for the establishment of the Labour Appellate Tribunal. The Act was further amended in 1951 to provide for Works Committees, in all concerns employing more than 100 workers, consisting of representatives of employers and workers in the establishment. The Act also empowers Government to appoint Conciliators, Conciliation Boards for any area or industry or Boards of Enquiry, Labour Courts and Tribunals for the settlement of industrial disputes in the State and Central sphere.

Besides the Industrial Disputes Act 1947, there are other Acts like the Bombay Industrial Relations Act 1946, the C. P. & Berar Industrial Disputes Settlement Act 1947, which are simultaneously in force in the State of Maharashtra in different regions. The provisions of these Acts and the administrative procedures are somewhat different in the methods of arbitration. One could even see slight traces in these Acts comparable to those of Taft Hartley Act of 1947 in the United States.

The Limitations of the Indian Acts

The Indian Labour Disputes legislation is restricted in scope. It is applicable only to 'workmen' who are skilled, unskilled, clerical or manual workers, whose earnings range upto Rs. 500 ($1 = Rs. 4.75 nP.), per month and not for supervisory or managerial categories.

Requirements of Conciliation and Arbitration

Managements and Unions or elected representatives of workers are at liberty to negotiate and settle their differences mutually between them. If they do not succeed there is a procedure for them to be adopted before they resort to any trial of strength. The Indian Conciliation, to this extent, is both voluntary and compulsory like the Canadian Conciliation.)

The mechanics of collective bargaining is somewhat different to that in the United States of America. The legality of the strikes and lock-outs, the procedures to be adopted in conciliation and arbitration, the different authorities

under the Act, the limits of their jurisdiction, powers, the enforcement of the agreements and settlements arrived at before them, their interpretation in case of doubt, the benefits to which the workers are entitled when they are retrenched or laid off or when an establishment is closed, the procedure to be adopted in all such closures and retrenchments are all strictly defined. Similarly, the duty of the employers not to change service conditions during the pendency of conciliation or adjudication proceedings is also indicated in Section 33 and 33(a) of the Industrial Disputes Act, 1947. Under Section 25 (f) the Act has also specified the amounts of compensation at the rate of 15 days' wages for each year of service at the time of closure or retrenchment and an amount not exceeding three months' wages in cases of closure due to losses, beyond the control of the management. The principle of 'last come, first go' has also been laid down. The employers and the unions are prohibited from introducing any unilateral changes without following the prescribed procedures under the Industrial Disputes Act 1947 or Bombay Industrial Relations Act 1946 or the C. P. & Berar Industrial Disputes Settlement Act of 1947.

The matters which came before the purview of the conciliators, arbitrators, adjudicators are well-defined in the Schedules of the Acts, like the Industrial Disputes Act 1947. Even the public utilities where conciliation when a strike notice is given is compulsory are also defined in Schedule No. I of the Industrlal Disputes Act. The public utilities mentioned in the first schedule are, viz.: (1) transport other than railway for the carriage of goods and passengers by land, water and air, (2) Banking, (3) Cement, (4) Coal, (5) Cotton Textiles, (6) Foodstuffs, (7) Iron and Steel, (8) Defence Establishments, (9) Service in Hospitals and Dispensaries, and (10) Fire Brigades.

Jurisdiction of Labour Courts

The matters which come before the labour courts are given in the second schedule to the Act as, viz., (1) the propriety

or legality of an order passed by an employer under the Standing Orders, (2) the application and interpretation of standing orders, (3) discharge or dismissal of workmen including the reinstatement or grant of relief to workmen wrongly dismissed, (4) withdrawal of any customary concession or privilege, (5) illegality or otherwise of a strike or lock-out, (6) all matters other than those specified in the third schedule.

Conciliation and Arbitration—Jurisdiction of

The matters which can come within the jurisdiction of Industrial Tribunals are (1) wages, including the period and mode of payment, (2) compensatory and other allowances, (3) hours of work and rest intervals, (4) leave with wages and holidays, (5) bonus, profit-sharing, provident fund, gratuity, (6) shift-working otherwise than in accordance with the Standing Orders, (7) classification of grades, (8) rules of discipline, (9) rationalisation, (10) retrenchment of workmen and closure of establishments, and (11) any other matter that may be prescribed.

The fourth schedule refers to the conditions of service for which a notice of change can be given and which could be brought into conciliation by the union. This refers to almost the same items, as mentioned in the third schedule.

Appointment of Conciliators, Labour Courts & Tribunals

The appointments of conciliation officers, conciliation boards, courts of enquiry and state tribunals are made by the State governments and the appointment of national tribunals which are intended to settle disputes, in concerns having branches in more than one state, by the Federal Government.

Notice of Change

The Bombay Industrial Relations Act, 1946, lays down that the conditions of service cannot be changed either by the employer or by the union without giving first notice of change by the intending party to the other, and waiting

for its reaction and exploring the avenues of mutual agreement by negotiation. The Bombay Industrial Relations Act recognises the principle of a representative union having 15 % membership from among the workers in an industry in the locality and has a Registrar of Trade Unions, to register all such unions. The concept of Representative Union, as the sole bargaining agent is a peculiar feature of the Bombay Industrial Relations Act, while there is no such concept prevalent in the Federal Act. The Bombay Industrial Relations Act again is a special Act intended for certain areas in the Bombay State with jurisdiction over textiles, silk, woollen, hosiery, sugar, transport and electricity.

The Industrial Disputes Act 1947, on the other hand, has something like the inter-state commerce clause in the Taft Hartley Act in the United States, to indicate a cleavage of jurisdiction, between the Centre and the States. Under the Central Authority are establishments like Banks, Insurance Companies, Docks and Ports, Naval Establishments, Defence and Armament Factories, Railways, Posts and Telegraphs and all other Central undertakings. While State governments are responsible for the settlement of disputes in the rest of the industries in each state through their conciliation service, Labour Courts, Arbitration and Adjudication Authorities, the Central Government has its own line of demarcation in jurisdiction over the subjects mentioned above. Thus there is a clear-cut jurisdictional distinction between the Central Government and the States, both for conciliation and arbitration, while the line of demarcation in jurisdiction, under the inter-state commerce clause in the Taft Hartley Act is very flexible in the United States. Not only the State and the Federal Conciliation Service, but even the municipalities and other private conciliation agencies together do not hesitate to intervene simultaneously in the same dispute, which could never happen in India. There are rigorous barriers between the jurisdictions of various agencies and as such there will not be any jurisdictional quarrels in inter-state and intra-state

matters of industrial disputes in India, as in the United States.

While in the Industrial Disputes Act, the State Governments alone have the power to refer a dispute to adjudication at their discretion after the failure of the conciliation proceedings, the provisions in the Bombay Industrial Relations Act give powe under Sec. 73(a) to the representative union to refer a dispute to arbitration after the failure of the conciliation proceedings without the necessity of the government to do so. In the C. P. & Berar Industrial Disputes Settlement Act 1947, the unions as well as the managements have power to refer a dispute to arbitration by themselves, without the necessity of the government referring the dispute, though government has the right to refer a dispute to arbitration either after the failure of the conciliation proceedings or directly without conciliation, if public emergency demands it. Under the Industrial Disputes Act, 1947 both the union and the management, can jointly make an application to government requesting reference of a dispute to arbitration, when the government shall have no option but to refer it.

Under the Industrial Disputes Act, the lawyers can appear in the conciliation proceedings before the conciliation officer or Board with the consent of the opposite parties. In the adjudication proceedings and arbitration before the Industrial Court, lawyers as well as trade union and management representatives, argue the cases. Statements are filed, substantiating the position of each side. Under Sec. 16 of the C.P. & Berar Industrial Disputes Settlement Act, 1947, which is a unique feature of the Act, dismissals, suspensions or removals of workmen can be agitated with demand for reinstatement with back wages before a period of six months. Here though the Act envisages the appearance of the lawyers with the consent of the presiding officer, who is the Labour Commissioner or his nominees vested with his powers or the Additional District Magistrates, in practice, it became almost a common practice for the lawyers to appear on both the

sides and conduct the cases, as in any court. There is a provision for arbitration under all these Acts, but as mentioned earlier, though references of the disputes for private arbitration is not statutorily excluded, it is mentioned that reference could be made to persons including the President of a Labour Court, Industrial Court or Tribunal and that too, by request to government, by the written appeal of the parties to the disputes. This is fundamentally different from the practice of private arbitration for grievance settlements of collective agreements in the United States. The Arbitration Machinery is all government paid and appointed and the decisions are legally binding on the parties. Any dereliction can be dealt with, on complaint by either party and after proper investigation by the Labour Department with prosecution of the erring party along with a fine upto Rs. 1,000 and imprisonment in addition, if found necessary. There is a traditional respect for rule of law even in compulsory arbitration in all the decisions delivered, though, it cannot be denied, that there are many conflicting and different views expressed by the Labour Courts, Courts of Arbitration or Tribunals on many controversial issues like bonus, provident fund, gratuity, wage scales and other service conditions.

Anyhow the decisions of the arbitrators in India have to be submitted to government and forwarded to them who will in turn confirm or can modify or alter the award, if they think fit. They have also the power under Section 9(b) of the Industrial Disputes Act to decide whether the provisions of any award shall apply to the rest of the units in any industry, if there is need for the same. The power of the government to modify an award once given by a Tribunal was so far exercised only once, in the case of the All-India Bank Tribunal Award with country-wide repercussions ending with the resignation of the Central Cabinet Minister, Shri V. V. Giri, in-charge of Labour, protesting against the decision of the Government and resulting subsequently in the appointment of a commission, which ultimately vindicated his stand.

If a settlement is reached during the course of the conciliation proceedings, the union, management as well as the conciliator, sign it and it will be in force for a stipulated period. Normally, settlements and awards are in force for one year, or till such time that either party gives a two months' notice to the other party, indicating its intention of terminating the same. In the absence of any of these arrangements, a settlement can be in force for a minimum period of six months. The same is the case with all the awards under adjudication or arbitration. During the period for which these awards or settlements are valid, the unions cannot reagitate for the same demands. If the union goes on strike or the management locks out without following the usual channels available for the settlement of disputes and without due notice by either party to the other, it is the policy of the Government, at least in Bombay, to leave the parties alone to settle the matter by trial of strength and even on request of either party they would not normally intervene and take up the matter for conciliation or reference to adjudication. This policy is not necessarily the same all over India and for the Federal Government.

Interpretation of Awards or Settlements

The settlements and awards which are either arrived at in conciliation by consent or given by courts of arbitration or Tribunals of adjudication are legally binding on the union and the management. If either party fails to observe the award or settlement or expresses any difficulty in implementing any of the terms on the ground of not understanding, the complaints made in this connection will be investigated by the Labour Department officials at no cost to the parties. If the officials find that either party is not implementing the settlement of the award, they would first persuade the erring party to do so, by interpreting the provisions or by referring the doubtful provisions to the Arbitration Court or Tribunal who gave the award. If, in spite of this, the charge of non-implementation continues,

the parties will have to face the penalties of prosecution, fine and/or imprisonment, as mentioned earlier. As such, complaints about interpretation of settlements or awards are comparatively very few and rare, and cannot be said to be constitute even 0.1 per cent of all the awards and settlements existing in the country. An enforcement and implementation division is also created in the Central Labour Ministry with advice to have similar ones in the States. From this view-point, it appears easy to prevent and completely stop the need for grievance arbitration in the United States too, by incorporating such penal provisions in American Industrial Relations Law, as has been suggested by some of the ablest and most respected American public men.

One aspect of the approach of the government machinery in India, towards interpretation of settlements and awards might look very interesting and instructive to the world of American arbitration. There are sometimes settlements mutually arrived at and filed in the Labour Offices. But, if later on, any difficulty arises, as to its interpretation, except using their good offices, the governmental machinery would not, usually, make any specific recommendations on the issues, as they do not know really what the content of the discussions were between the parties at the time of negotiations, and giving opinion in favour of either side, would adversely affect the other, which is considered repugnant to the implications of industrial relations law. But, this does not mean that there is no remedy for the settlement of such interpretational problems. The parties could surely go to a small causes court also for a decision.

In matters connected with discipline, discharge, attendance, etc., the Indian Standing Orders Act 1946, and the Standing Orders under the Bombay Industrial Relations Act require the unions and the managements to file their respective drafts to the Labour Commissioner and after hearing both, they are certified by him. If any breach occurs the parties could refer the matter to the State Labour

Courts. The matters under the schedules empowering the labour courts and the Industrial Courts to intervene have been already indicated in the schedules cited already. Since 1958, a code of discipline is also enforced with the consent of all concerned.

Thus, the Indian Industrial Relations system and method of arbitration are mainly intended for the purpose of contract arbitration, while the concept of grievance arbitration, as the need arises, is left solely to the jurisdiction of Labour Courts. Again, the question of grievance arbitration is strictly confined to the matters of standing orders, and very rarely to the question of interpretation of awards and settlements, which is an obviously fundamental difference, between the American and the Indian Arbitration systems.

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See also the authors forthcoming book on "Collective Bargaining and Government Regulation in India and United States of America."

CHAPTER XV

LESSONS OF AMERICAN EXPERIENCE TO INDIA

HAVING reviewed the system of arbitration in the United States and the frame-work of industrial arbitration in India, it would be interesting to inquire into the possibilities of the Indian system learning something from the American experience of arbitration as at present in existence.

While free collective bargaining could never be substituted either by contract or grievance arbitration, it is needless to emphasize the importance of strengthening collective bargaining both in the United States and India. The question of choice between compulsory contract arbitration and free collective bargaining (failing which settlement should be attempted by trial of strength) is a matter for each country to make. While in the present stage of trade union development and still conservative employer attitudes, it may not be completely advisable to abandon the experiment of the existing method of compulsory arbitration that is prevalent in India, which has not failed to benefit the workers, the managements and also help the process of national economic progress. Particularly, at this stage of rapid planned development, it would be inadvisable for India, to embark upon any other method of settlement of disputes, although the present system of industrial relations which is quite satisfactory in its framework, can be improved from time to time.

Reviewing the American experience, it would not be out of place to consider the feasibility of attempting the methods of grievance arbitration which are relatively more in tune with the existing methods in the Indian context. In this connection, if an alternative to the prevailing system of arbitration for grievances under the Standing Orders is to be chosen, perhaps, some thought on the lines of the American umpireships, now existing in big corporations like

those of General Motors, Ford Motors, John Deer Corporation, etc., with somewhat of similar grievance machinery, would be worthwhile.

Ever since India launched upon economic development through planning, there is coming into existence a huge public sector, with several public corporations and enterprises rising side by side with private sector establishments. We have in the public sector some very important organisations like the Chittaranjan Locomotives, Sindri Fertilizers, the three public sector steel plants in Durgapur, Bhilai and Rourkela, the Antibiotics factories like the one at Pimpri, the Defence Industries, the Armament Factories, the River Valley Corporations like the Bhakra-Nangal, Hirakud, Damodar Valley, Nagarjunasagar, the various electric Grids, power systems, the Indian Telephones at Bangalore, the Heavy Electricals at Bhopal, the Hindustan Shipyard at Visakhapatnam, the various industrial corporations and commissions, the Municipal and State Transport Undertakings and a variety of other public undertakings that are being created every day. These should provide opportunities for useful experimentation of the umpire system for grievance settlement, instead of the present lengthy, delayed, time consuming labour court system, or the laborious arbitration system of the industrial courts. Similarly, nationwide systems like the Railways, Posts and Telegraphs, Docks, Port Trusts, could also think of either the umpireships or the grievance machinery of the American Railway Labour Adjustment Board. Right now, when the Indian Government is contemplating the introduction of the grievance settlement machinery in the National Railways, a close attention to the Railway Adjustment Board of the United States and Canada, could be of great and instructive value. Remodelling of grievance machinery with appropriate modifications would be a worthwhile attempt, at which, the Indian Public Administration could well afford to venture to think about. There are, of course, the big organised industries in the private sector like the Jute, the Textiles, the Plantations, Oil companies, Banking and Life Insurance,

now under Government control, and the general insurance which is still a free enterprise, where too the experiment of grievance arbitration by introducing the umpire method might be more expeditious and convenient, than the existing, time consuming and costly systems. This suggestion that the public corporations should consider the application of the umpire system is made because the question of paying the umpire by both the sides which is the feature of American system may not be possible in India, where the unions have not got the same financial strength, as their counterparts in the United States. So, barring this they may be allowed the same privilege in choosing an umpire mutually acceptable to them and the management. This system may well develop into a well-defined method, and may also avoid the need to waste money in Labour Courts and on lawyers, in addition to long delayed and unsatisfactory decisions. It may also incidentally develop into well-advanced methods of personnel management in public enterprises. Seeing how the experiment works, the private industries too later on, if they wish to emulate the example, develop similar methods gradually, as substitutes to labour courts to deal with the matters under the standing orders and the other schedules, not covered by matters of actual collective bargaining.

Similarly Municipal Councils can attempt voluntary Mediation as in Toledo and Detroit in United States to decide Industrial Disputes, rather than depend on Governmental intervention.

As per the rules of notice of change procedure, under the Industrial Disputes Act 1947, and the Bombay Industrial Relations Act, 1946, perhaps, India may well consider especially under the exigencies of planned economy to allow the managements to start the changes and to refer the matters to an impartial one or two or three men, mutually agreed arbitrators who are experienced in such matters to decide the issues within a month or even earlier, as an experimental measure. It is because, the rush of work both

before the State Industrial Courts and the adjudicators is so much, that they could not give any priority to any rationalisation methods. An experimental beginning, by using, if necessary, retired adjudicators or judges of the industrial and labour courts or senior labour officials as courts of enquiry or commissions, may be useful to make an experiment, keeping the entire existing machinery in fact, to have an idea of the comparative advantages of this system.

As is being done now, even if the parties after the conciliation fails, wish to submit their issues to the private arbitration, they may also be encouraged, to do so, more and more. The lack or paucity of well-experienced and well-trained publicmen, who would undertake such a responsibility is by no means an easy handicap. The idea of building up such panels has been for sometime under the consideration of the government and this may well be pursued to avoid compulsory reference of disputes to industrial courts, labour courts, or tribunals, allowing the parties to refer the dispute to any arbitrator whom they choose and by whose award they would abide. The government may pay the costs of such arbitrators for the time-being, if the parties are not able to bear such expenses, after satisfying themselves on merits in each case.

Concerns having less than 50 workmen and not covered by the standing orders act even as revised, may be persuaded to have effective joint councils to settle matters of day to day discipline, etc., failing which they could be mostly settled by government labour officers. But, they should not be allowed to develop too many grievances. Such experiments as done by the International Brotherhood of Electrical Workers on a vaster scale in United States may well be given a trial in the private sector in India in the interest of better mutual labour management relations.

Small consumer industries, hotels, restaurants, laundries, tailoring establishments, small printing trades and those covered under the Minimum Wages Act 1948, under the

categories of sweated industries like those in Beedi-making, leather goods, tanneries, stone-breaking, oil mills, flour mills, cotton gins, hosiery, etc., besides small rubber concerns, printing cloth establishments, shops and commercial establishments, may think of having industry-wise associations. Representatives of unions and the managements may start thinking of agreeing at the outset of collective bargaining, that they should at least agree at the stage of conciliation and failing that too, to choose an arbitration commission composed of both sides with persons mutually acceptable to them from unions and managements in the same industry and accept the decision as final. It is a very difficult recommendation which by itself won't sell, but, this may have to be sponsored to the tripartite labour advisory bodies at the state and central levels, after giving in due consideration.

This might enable them not to waste their time, energy and resources on adjudication, waiting indefinitely. Many details will have to be worked out, if at all the idea is in principle, acceptable.

In view of the fact that some senior labour leaders in India, like Messers. V. V. Giri, Gulzarilal Nanda and others, are often thinking of one union, one industry basis, some understanding on somewhat similar lines like the No Raiding Agreements in A.F.L.-C.I.O. though the situation is not strictly comparable may be attempted by the major four trade union federations in India, to avoid the present tendency of each federation trying to have its union too in the same unit where there is already a union affiliated to the Indian National Trade Union Congress (I.N.T.U.C.) or Hind Mazdoor Sabha (H.M.S.) or All-India Trade Union Congress (A.I.T.U.C.) or the United Trade Union Congress (U.T.U.C.) or vice versa, not to speak of the different units of the same industry.

The necessity for retaining compulsory adjudication and arbitration under the present state of trade union growth and employer attitudes, as referred to earlier, appears to

be inevitable and the stage of free collective bargaining, as in the United States, at least, for the time being and for a distant date to come, could not be very seriously expected. In the case of public utilities, the existing position of law, intervening as soon as the strike notice is given, does not seem to need anything more, as the practice in the United States too happens to be on similar lines in certain states.[1] The public interest argument is very paramount in India and no union or management could be allowed to hold the society to ransom because of its unreasonableness, by going on a strike or by resorting to a lockout. Constitutional procedures of settling grievances are provided, without necessitating either party to forego its rights and the system seems to be what is desirable.

The concept of grievance arbitration which is 97 per cent of the arbitration practised in the United States, cannot and does not arise in the Indian context. It is considered unethical, illegal and an absolutely wrong breach of faith for either party, not to do things, as agreed to in the contract. It is rather rare to find in India the type of complaints which approximate to 97 per cent in the United States indicating the inability of the parties to understand what they have written in the collective agreements and seeking somebody's help to tell them, what they might have meant. There were, of course, some very insignificant types of situations, where one or two clauses or words which were in the awards or settlements were left to be vague even in my own personal experience and that too not more than half-a-dozen times out of thousands and thousands settlements and awards. Even in those cases, a reference of the matter by the parties to the conciliator, or the arbitrator before whom the matter was settled, gave them satisfaction and they abided by the clarification.

REFERENCE

1. Rao, Dr. A. V. R., *Mediation Conciliation and Arbitration in the United States*. See the Earlier Sections of this book.

CHAPTER XVI

LESSONS OF INDIAN EXPERIENCE TO AMERICA

AFTER a review of the American Arbitration as it works and the system of Industrial Arbitration in India, it is rather difficult to conclude that collective agreements by their very nature, whether it be in the United States or India, cannot but be vague and uncertain and there cannot be any solution, but the creation of a machinery for the purpose of grievance arbitration, as it prevails today in the United States. As discussed earlier, the experience of India belies such a belief. Knowledgeable persons with intimate acquaintance of the American and the Indian labour management relations are aware of the fact of the mighty pressure groups, the unions and managements are in the United States. They have excellent, able, experienced, leadership both in the trade unions and managements in every part of the United States. In fact, the strength of the American Trade Unions, as pressure groups, and the sophistication of the American managements in the field of business leadership is unrivalled. Both of them have well-equipped Research Bureaus, Departments of Statistics, of public relations and of educational programmes. It appears inconceivable that it is rather impossible to have perfectly understandable collective bargaining agreements in an atmosphere of such enlightenment. What is perhaps needed and needed most urgently is the realisation that collective bargaining agreements need not be considered to be naturally incoherent. Such a view does not appear to do adequate justice to the richness and maturity of American collective bargaining. American civilization, like the Indian civilization, is proud of its freedom, democratic voluntarism and free institutions. But, the concept of grievance arbitration in the guise of a voluntary agent coming making inroads into the field of traditionally free collective bargaining, appears to be a sad anathema. There seems to be an apparent confusion in

the concept of arbitration, as it is in practice in the United States. On the one side, the American unions, managements, arbitrators-cum-professors, lawyers, feel that the field of collective bargaining and the field of arbitration are two different worlds of art, apart. But, in practice, they leave the contract clauses vague, with a view to allow the arbitrator exercise his imagination to fill up the gaps which they would like to accept, as what, they themselves would have done, had they the time or the energy, or the inclination to go a head, with their collective bargaining, for some time more.

The labour specialists in the American universities, Trade union organizations, Employers' associations and government, will do well to ponder over the recurring causes in clauses of collective agreements that bring in the need for grievance arbitration and exercise their educative influence to reduce their occurence leading to their gradual disappearance, in course of time.

American Grievance Arbitration is not strictly confined to the interpretation of agreements alone. It has already been seen that the American arbitrators, in fact, advocate the extension of the collective bargaining agreement to be the objective of arbitration. Some of them do not distinguish, between mediation and arbitration. Some of them wish to decide even the issues of arbitrability themselves. There is no unanimity on the question of the Rule of law, in the enforcement of awards, or in the question of "Stare Decis", not to speak of the various unfortunate questionable methods prevailing in the field of arbitration, about which the American Arbitration World itself is not evidently quite happy. What is really more relevant is the imminent need to distinguish between collective bargaining on contract terms and arbitration for nterpretation of rights, as there is very often an inter-mixture of both, contrary to the prevailing concept of freedom of collective bargaining, which the American civilization cherishes so much. The practice is much different than the ideal, doing a lot of irreparable damage in the process.

Perhaps, the American Scholars themselves are not unaware of this very curious mixture of what ought to be, and what is, in the field of collective bargaining in the United States. Probably, it is in this context that a look at the Indian experience might prove profitable.

The Indian Arbitration and the Industrial Relations system strictly segregates the questions of collective bargaining and the questions of interpretation which can be referred to labour courts, tribunals or arbitration courts by defining them under different schedules, as discussed earlier. Here the American experience might usefully draw upon the Indian example to draw a strict line of demarcation between matters of collective bargaining and between matters of grievance arbitration as in India.

It might be worthwhile to consider and devise the three-tier mechanism in which United States, like India, should make (1) collective bargaining matters the exclusive jurisdiction and responsibility of the unions and managements, (2) grievance machinery of arbitration, that is now being used, to be confined to matters under the Indian Standing Orders Act, referring it to matters under the "work rules", as they are called in the United States, which are prevailing in various establishments; and (3) to devise an administrative philosophy in the sense of building up a coherent system of arbitration as it is now, beng practised by the cream of American arbitrators. They alone, could have a decisive influence to build it up properly and to make the thousands of their fellow arbitrators to conform to a well-defined (judicial) approach, in the sense that they would be strictly confined to the terms of the contract, and would not wander around as legislators, advisers, philosophers, guides and self-appointed industrial statesmen, as Mr. Mitchel would call them. But, if the answer is voluntarism and freedom are cardinal virtues of American civilisation and as such each arbitrator is a law to himself and could be so, then there is nothing further to be said about it. The system might as well continue to be the same it has been all along.

If not, the American Scholars and Arbitrators might also consider whether it is not worthwhile to remove the clauses and words that often give trouble in agreements, to exert influence to make unions and managements to write, as far as possible, fully self-evident, intelligible, meaningful contracts, to keep the purity of the collective bargaining untouched, and confine themselves only to secondary matters, to which the labour courts in India, at present attend to, except in specialised contract arbitration having some respect to precedents.

Irrespective of the merits of voluntary or compulsory arbitration of contract terms in India, the fact remains that there is a very clear-cut distinction between collective bargaining items and subjects referred to arbitration. Similarly, there is also clear jurisdictional barrier regarding matters that fall in the state and federal spheres. Under the American legislation too, a division of jurisdiction between the states and the federal government is visualised through the inter-state commerce clause, but, this is never strictly adhered to, with the result, there arise jurisdictional conflicts in the United States, which could be easily avoided. Also, a clear distinction between the mattes of collective bargaining and other items intended for interpretation seems to be badly missing in the prevailing practice of American Arbitration, with the result, that in the name of grievance arbitration, and in the name of opposition to third parties, intervening in collective bargaining, items of collective bargaining are often actually being decided by arbitrators in the name grievance arbitration. This appears to be a perfectly confusing situation that is continuing in the field of American arbitration. Some reorientation and rethinking on the lines of the Indian experience in these matters, for example, as mentioned in the various schedules to the Industrial Disputes Legislation in India, as discussed earlier, might prove of some value to American collective bargaining and grievance arbitration.

Ths would ultimately enable the wares of American collective bargaining to prevent the usual inroads of arbi-

trators, to make (failed) settlements of collective bargaining items, in the name of grievance arbitration, which is a misnomer. The American arbitrators may better be allowed to participate in collective bargaining, whenever deadlock arises, if ultimately, the parties feel it is better to accept the third party decision, as they are unable to reach it by themselves. This, in no way, prejudices the freedom of American collective bargaining, but would only strengthen it and help it to have a clear understanding of what it wants and makes it possible to write it out, without the need for grievance arbitration at a later stage, with indifferent consequences. Moreover this is nothing new to United States, as it is in practice in the West Coast, and in other industries elsewhere, as has already been seen.

The Indian Arbitration Law and the Standing Orders have taken in between themselves various matters of rights and interests. A reorientation of American collective bargaining and grievance arbitration with some jursdictional barriers and defined limits in the light of the Indian experience, might enable them to clear up much of the uncertainities, ambiguities and contradictions, which do not appear to be incapable of ultimate remedies, even in the prevailing set-up of American Industrial Relations.