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## Arbitration of Terms for New Labor Contracts

### Erratum

PAGE 1306, PARAGRAPH 2: change "(3)" to "(2)." PAGE 1307, PARAGRAPH 1: change "(4)" to "(3)."

# Arbitration of Terms for New Labor Contracts

Dallas M Young

*The utilization of arbitration as a means of settling labor disputes has increased greatly in recent years, especially in the interpretation of terms of existing contracts. Professor Young concentrates on the other category of labor disputes — the writing of new labor contracts. Three situations are used for the author's case study: governmental boards with all dispute-resolving power; publicly owned-and-operated service industries; and small, privately owned corporations. After discussing examples of the successful use of arbitration in writing terms for new labor contracts in each of the three types of power structures, Professor Young concludes that the full potential of arbitration in the resolution of new contract disputes is not being realized but states that if and when the demand for such service increases, competent arbitrators are prepared to accept the challenge.*

**I**N A SPEECH to the National Academy of Arbitrators in January of 1963, Secretary of Labor W Willard Wirtz stated:

Neither the traditional collective bargaining procedures nor the present labor disputes laws are working to the public's satisfaction, at least so far as the major labor controversies are concerned. It doesn't matter any more really, how much the hurt has been real, or has been exaggerated. A decision has been made, and that decision is that if collective bargaining can't produce peaceable settlements of these controversies, the public will.<sup>1</sup>

THE AUTHOR (B.Ed., Southern Illinois University, A.M., Ph.D., University of Illinois) is a Professor of Economics at Western Reserve University and a member of the National Academy of Arbitrators, and has served as an Impartial Umpire for the Cleveland Transit System.

Public demands for resolution of our strike problems are even greater in 1966 than they were in 1963. Long and costly disputes in the maritime and newspaper industries have disturbed many persons. Shorter but aggravating stoppages by urban transit workers and by teachers have added fuel. If strikes occur on the railroads and on the airlines, pressures could increase rapidly for federal and state anti-strike laws.<sup>2</sup>

<sup>1</sup> Wirtz, *The Challenge to Free Collective Bargaining*, in *LABOR ARBITRATION AND INDUSTRIAL CHANGE* 296, 301 (Kahn ed. 1963)

<sup>2</sup> *Ed. Note*: After the preparation of this manuscript, the airlines strike did occur, and Congress did prepare a bill. However, the subsequent settlement of the strike reduced the pressure for Congressional action and the bill never reached a final vote.

## I. ARBITRATION OF NEW-CONTRACT TERMS AS DISTINGUISHED FROM GRIEVANCE ARBITRATION

Specialists and practitioners have been searching for new and improved methods and techniques which will bring voluntary resolutions of the disputes. In general, they have agreed that passage of a compulsory arbitration law is not the solution. One tool which has been under consideration, and in use, is the arbitration of "interest disputes" or, preferably, of "new-contract terms."

Labor disputes have been classified into two categories. Disputes involving the interpretation of a collective bargaining agreement have been termed "rights" disputes,<sup>3</sup> and disputes requiring a determination of the terms and conditions of the agreement have been termed "interest" disputes.<sup>4</sup>

The word-combination "interest dispute" has not become well established in the labor-arbitration and labor-relations literature of the United States.<sup>5</sup> Until the glossary or word-coinage specialists come up with something better, this author suggests that the term "interest disputes" be abandoned in favor of "new-contract terms."

In commenting about the use of arbitration to determine disputed terms for new labor contracts, some writers have left the impression that it is used relatively rarely.<sup>6</sup>

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<sup>3</sup> See TROTTA, LABOR ARBITRATION 34 (1961).

<sup>4</sup> *Ibid.*

<sup>5</sup> It is not included in the indices of 1-44 Labor Arbitration Reports (1946-1965) or in 61-1 to 65-2 Labor Arbitration Awards (1961-1965) or in the 1961 cumulative index for volumes 1-13 of the Industrial and Labor Relations Review. Neither UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES (1946) nor KELLOR, AMERICAN ARBITRATION (1948) use the term. Professors Cohen (COHEN, LABOR LAW (1946)) and Gregory (GREGORY, LABOR AND THE LAW (2d rev. ed. 1961)) also do not employ the term. A spot check with seven (six lawyers and one economist) of the thirteen Cleveland, Ohio members of the National Academy of Arbitrators showed that five had never heard "interest dispute" used in reference to labor arbitrations, that one guessed it might be a dispute over whether interest should be required in back-pay awards, and that another had heard the term employed once in the context used by Trotta. See text accompanying notes 3 & 4 *supra*. See Handsaker, *Arbitration and Contract Disputes*, in CHALLENGES TO ARBITRATION 78 (McKelvey ed. 1960).

Without becoming involved in a contention of words, the highly respected arbitrator and lawyer, Professor Robert E. Mathews, wrote that grievance arbitration was a very different matter from the arbitration of new contract terms. The question for the arbitrator, or arbitration board in "grievance arbitration" is not what the terms of the parties' relationship *should be* but what they *are* under the contract already in effect. LABOR RELATIONS AND THE LAW 361 (Mathews ed. 1953).

Furthermore, the frequently cited Bureau of National Affairs' Labor Arbitration Reports includes selected cases under the classification of "Amendment, termination, or reopening of contracts and terms in new contracts." 1-20 Lab. Arb. ¶ 94.109 (1946-1953); 20-44 Lab. Arb. Awards ¶ 94.102 (1954-1966).

<sup>6</sup> Professor Maurice S. Trotta stated that 95% of the issues which were arbitrated (1953); 20-44 Lab. Arb. Awards ¶ 94.102 (1954-1966).

A high percentage of cases falling in one of two classifications may be an eye-catching statistic, but it must be used with care. Professor Maurice S. Trotta's ninety-five per cent figure for "rights" disputes may have been true in 1961.<sup>7</sup> Was it so high twenty years earlier? Did it reflect a normal growth which followed an extremely important earlier breakthrough? Could Professor Morrison Handsaker have been asking whether our experience with the arbitration of new-contract terms is of greater significance than the numbers suggest?<sup>8</sup>

Will the demands of the years immediately ahead place new emphasis on the arbitration of terms for new labor contracts? If so, where can we look for guidance?

## II. CASE STUDIES ON ARBITRATION OF NEW LABOR CONTRACTS

Researchers and practitioners may gain insights from the discussion which follows. Three types of situations are discussed. The first deals with an *all* dispute-resolving power; the second concerns a publicly owned-and-operated service industry; and the third deals with a small, privately owned corporation. The following three case studies on past implementation of new-contract term arbitration are intended to be suggestive rather than exhaustive; more attention will be given to the first two situations.

### A. Governmental Use — the National War Labor Board

Let it be admitted from the start that the National War Labor Board (NWLB) was not an arbitration board, as such. It was far

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were "rights" not "interest" disputes. TROTTA, *op. cit. supra* note 3, at 34. Mathews wrote:

This has been the practice in the local transit industry for many years. But this is not a general practice, and there is still, except in the East, comparatively little resort to arbitration in the settlement of new contract disputes.

LABOR RELATIONS AND THE LAW, 361 (Mathews ed. 1953)

Handsaker, on the other hand, observed that

Although the general attitudes of unions and management is a negative one, often including the view that "you just can't and don't arbitrate contract cases," there has been, nevertheless, over the years a small but, it seems to me, fairly significant number of contract cases being arbitrated. Many of these were in transit and public utilities but significant numbers occurred also in retail trade, painting and publishing, and textiles. It is noted that contract arbitration has been used most in industries where the product is transitory and where the loss of markets brought about by strikes is often irretrievable. Although there has been a decline in recent years in its use in transit and printing, there are nevertheless a fair number of cases in these and a variety of other industries. See Handsaker, *supra* note 5, at 81.

<sup>7</sup> See note 6 *supra*.

<sup>8</sup> *Ibid.*

more, in that it was a presidentially appointed, and later congressionally empowered, body which made and administered policies on labor disputes and wage stabilization. In the almost four years of its existence, this semi-judicial body undoubtedly ruled on and wrote more terms for new labor contracts than any organization before or since its existence.

(1) *Environment in Which the Board Was Created.*—After the outbreak of World War II in Europe and before the entry of the United States into the war, there was an increase in the number of strikes. President Franklin D. Roosevelt established the National Defense Mediation Board (NDMB) on March 19, 1941.<sup>9</sup> Emphasis was placed on mediation efforts to assist the parties in their negotiations; to investigate, conduct hearings, and make findings of fact; and to formulate recommendations for the settlement of disputes.<sup>10</sup> The Mediation Board could also make public its findings and recommendations if it is so desired.<sup>11</sup> Such services were rendered only after strikers went back to work — an unprecedented policy, according to Chairman William H. Davis.<sup>12</sup> The tripartite NDMB was made inoperative when the labor members withdrew after the board refused to order a union shop in the captive-mines dispute.<sup>13</sup>

Ten days after Pearl Harbor was bombed, on December 17, 1941, the President invited twenty-four representatives of labor and management to confer in Washington. From this conference came agreement on three basic points: (1) there should be no strikes or lockouts for the duration of the war; (2) all labor disputes should be settled by peaceful means; and (3) the President should set up a War Labor Board to handle all disputes.<sup>14</sup> On January 12, 1942, Executive Order 9017<sup>15</sup> abolished the National Defense Mediation Board and established the National War Labor Board (NWLB). Upon its twelve members — four each from labor, management and the public — was placed the responsibility for rendering final decisions on unresolved labor disputes.<sup>16</sup>

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<sup>9</sup> Exec. Order No. 8716, 6 Fed. Reg. 1532 (1941).

<sup>10</sup> 1 NWLB TERMINATION REP. 5-7 (1947)

<sup>11</sup> *Ibid.*

<sup>12</sup> Davis, *Introductory Statements to U.S. Dep't of Labor*, 1 NWLB TERMINATION REP. xiii (1947).

<sup>13</sup> See YOUNG, UNDERSTANDING LABOR PROBLEMS 421 (1959)

<sup>14</sup> *Ibid.*

<sup>15</sup> 7 Fed. Reg. 237 (1942).

<sup>16</sup> By December 31, 1945, the NWLB disposed of 20,800 dispute cases involving

In contrast to its predecessor, NWLB decisions were made by unanimous action, if possible; otherwise decisions were made by a majority vote.<sup>17</sup>

(3) *Controversy Regarding Its Composition.*—Tripartitism was both criticized and defended. Some said that an all-public board could have made decisions much more quickly and efficiently and that the time and effort which were spent in attempting to reconcile differences could have been given to more constructive ends. Dr. Taylor disagreed:

In my judgment, the tripartite composition was virtually indispensable to a Board charged with the responsibility for finding answers to a host of problems which came before it and for which no precedents were available. The agreement that *all* labor disputes were to be settled by the Board gave it a jurisdiction not only over wages, hours, and working conditions under an unprecedented economic situation but also over certain organizational questions, jurisdictional disputes, union security, and many other like issues. Some of these issues had commonly been considered to be non-arbitrable. Yet they were to be settled by the War Labor Board during the war without recourse to strikes or lockouts. It soon became apparent that the work of the Board centered about solving problems rather than determining arguments.<sup>18</sup>

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12.5 million employees. Garrison, *Introductory Statements to U.S. Dep't of Labor*, 1 NWLB TERMINATION REP. xii (1942).

The contribution of the NWLB in maintaining industrial peace is sufficiently important to warrant brief introductions of the public members: William H. Davis, Attorney-at-law, Chairman; George W. Taylor, Professor of Economics, University of Pennsylvania, Vice-chairman; Frank P. Graham, President, University of North Carolina; and Wayne L. Morse, Dean of the School of Law, University of Oregon. Each man was experienced in labor relations. Chairman Davis had served as a member of the President's emergency board under the Railway Labor Act in 1937, as a member of the presidentially appointed committee which investigated labor relations in England and Sweden in 1938, and as chairman of the NDMB. Vice-chairman Taylor, while serving on the faculty of the Wharton School of Finance and Commerce, had been impartial chairman for the hosiery industry and impartial umpire for General Motors and the United Automobile Workers. President Graham had served on the National Advisory Council on Social Security and had shown keen interest in labor relations in the South. Dean Morse had been arbitrator for the maritime industry on the west coast and had handled disputes in the lumber and paper-products industries of the Northwest. The success of the NWLB depended, in a large measure, on the integrity and ability of these men — two lawyers and two academic nonlawyers. See YOUNG, *op. cit. supra* note 13, at 422.

<sup>17</sup> Chairman Davis stated it thusly:

There were significant, and even crucial, cases in which the decision by the Board was by majority action, with the labor members or the industry members united in vigorous dissent. But from the beginning, all members of the Board accepted majority rule. After the deciding vote the minority in every case joined with the majority making the Board's decision effective. It was the unswerving adherence to this democratic rule that made the tripartite Board a truly effective instrument of voluntary self government. Davis, *supra* note 12, at xiv-xv.

(4) *Issues Faced by the Board.*—Twenty-eight volumes of *War Labor Reports*<sup>19</sup> contain decisions and materials relating to terms for new labor contracts.<sup>20</sup> From this large reservoir of experience and information only a limited number of issues need be mentioned, each of which has amazing timeliness more than twenty years later.

(a) *Union Security.*—The wide gap between managements' desire to keep an open shop and the unions' wish for a closed shop gave rise to many and varied solutions. At the time of the *Bituminous Coal Operators' (Captive Coal Mines)* case,<sup>21</sup> President Franklin D. Roosevelt said: "I tell you frankly that the Government of the United States will not order nor will Congress pass legislation ordering a so-called closed shop."<sup>22</sup> Notwithstanding the President's statement, a presidentially appointed arbitration board, with Dr. John R. Steelman serving as chairman, granted a union shop.<sup>23</sup>

NWLB decisions on union security, however, did not go beyond maintenance of membership. Three cases demonstrate the evolution of that policy. In *Marshall Field & Co.*<sup>24</sup> the Board ordered the parties to execute a contract which provided

(1) that, as a condition of employment, present and future members of union who individually authorize in writing check-off of dues shall remain members of union in good standing; (2) that company will not interfere with right of employees to join or engage in union activities or discriminate against or coerce employees because of union membership; and (3) that union will not coerce any employee into joining union or will not engage in union activities on company time and property.<sup>25</sup>

In *Ryan Aeronautical Co.*,<sup>26</sup> the public members almost obtained unanimity of the Board on the inclusion of a maintenance of membership provision by creating a fifteen-day escape period before the effective date of the rule. In *Little Steel Cases*<sup>27</sup> the majority

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<sup>18</sup> Taylor, *Introductory Statements to U. S. Dep't of Labor*, 1 NWLB TERMINATION REP. xvii (1947).

<sup>19</sup> See 1-28 WAR LAB. REP. (1942-1946).

<sup>20</sup> Topics range from A to W (Absenteeism to Work Standards), and industries covered range from A to Z (Advertising to Zinc)

<sup>21</sup> No. MB-2023 (Nov. 11, 1941).

<sup>22</sup> 1 NWLB TERMINATION REP. 82 (1947).

<sup>23</sup> *Id.* at 82 n.5. Coal industry board members dissented.

<sup>24</sup> 1 WAR LAB. REP. 47 (1942). The board vote was 6-5, with one industry member concurring and another dissenting.

<sup>25</sup> *Ibid.*

<sup>26</sup> 1 NWLB TERMINATION REP. 85 (1947). Two of the four industry members concurred and two dissented.

<sup>27</sup> 1 WAR LAB. REP. 325 (1942).



opinion, industry dissenting, explained the reasons for the maintenance of membership provision.

In this case the Board protects the rights of the majority and the minority, rejects the union's demand for a union shop and compulsory check-off, and rejects the companies' demand for no change in present union status. The Board decides in favor of the voluntarily accepted maintenance of membership and check-off of those members of the union who are in good standing on the fifteenth day after this directive order, or who may thereafter voluntarily join the union. This provision is not a closed shop, is not a union shop, and is not a preferential shop. No old employee and no new employee is required to join the union to keep his job. If in the union, a member has the freedom for 15 days to get out and keep his job. If not in the union, the worker has the freedom to stay out and keep his job. This freedom to join or not to join, to stay in or get out, with foreknowledge of being bound by this clause as a condition of employment during the term of the contract provides for both individual liberty and union security.<sup>28</sup>

(b) *Wage Stabilization*.—Even before the responsibility for stabilizing wages had been given to the NWLB, it rendered a key decision in July of 1942. By an 8-4 vote, with labor dissenting, the foundation was laid on which the wage stabilization superstructure was built following congressional passage of Public Law 729<sup>29</sup> and Executive Order No. 9250.<sup>30</sup> A second part of the *Little Steel Cases*<sup>31</sup> contained this statement:

For several years prior to January 1, 1941, wages and cost of living were relatively stable. Wage rates and prices did change, but within narrow limits. Earnings had, therefore, a rather constant purchasing power. Workers knew pretty well what their money would buy. Early in 1941, both wage rates and cost of living started to move upward. By May, 1942, the cost of living index had risen by approximately fifteen per cent.<sup>32</sup>

Since the steelworkers had had increases of 11.2 per cent between January, 1941, and May, 1942, they were given an additional 3.2 per cent.<sup>33</sup>

In spite of the fact that the nation's cost-of-living index moved up slowly — an additional fifteen per cent between July, 1942, and August, 1945 — the NWLB refused to allow wage adjustments

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<sup>28</sup> 1 NWLB TERMINATION REP. 87 (1947)

<sup>29</sup> Tit. A, sec. 1, 77th Cong., 1942.

<sup>30</sup> 7 Fed. Reg. 7871 (1942). See YOUNG, *op. cit. supra* note 13, at 425-26.

<sup>31</sup> 1 WAR LAB. REP. 325 (1942)

<sup>32</sup> Directives, Orders and Opinions of the National War Labor Board in the "Little Steel" case at 16, July 16, 1942.

<sup>33</sup> *Ibid.* The opinion was written by the economist member of the Board.

under the escalator principle. The public and management members had insisted that further wage increases would have resulted in higher prices and more inflation. Their labor counterparts sometimes suggested that the continued use of the "Little Steel" formula was inaccurate — the word should have been spelled steal.

(c) *Fringe Benefits*.—While the NWLB was holding the line on wages, it received an increased number of disputes over fringe benefits. Gradually, policies were developed and effectuated which have had a continuing impact on our economy. The vacation issue is an example. Prior to World War II short vacations with pay were common for salaried workers, but few hourly paid employees were given time off — even without pay. In *Phelps Dodge Corp.*,<sup>34</sup> the union demanded "a full 7-day vacation with pay for an average week's earnings."<sup>35</sup> The company insisted that the policy which it had introduced in its plants in 1940 and 1941 (a three-day vacation for employees who had been with the firm more than one but less than two years, four days for those who had been there from two to three years, and five days vacation for employees of three years or longer) should not be changed.<sup>36</sup> By the end of the war, approval of vacation clauses of "one for one to five and two for five years or more"<sup>37</sup> was virtually automatic in both dispute and voluntary cases. Board members believed

that vacations should be taken if possible, since they increase the physical well-being and morale of workers, thereby leading to increased production. However, the Board recognized that war production requirements would not always permit workers to take time off for vacations. For this reason, employers were permitted to pay workers a bonus equivalent to their vacation pay in lieu of a vacation period in spite of the contention by many employers that such a payment was in reality a wage increase. The Board took the position that the establishment of the vacation principle, regardless of whether vacations could actually be taken, was the primary consideration.<sup>38</sup>

(d) *Grievance Procedure*.—Among the many terms written by the NWLB for new labor contracts were those which set up and gave power to grievance procedures. Strikes and lockouts which resulted from disputes over existing contract clauses or disciplinary

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<sup>34</sup> 1 WAR LAB. REP. 29-35 (1942).

<sup>35</sup> *Id.* at 33.

<sup>36</sup> *Ibid.*

<sup>37</sup> This is a customary expression among economists used to describe the ratio between weeks of vacation and years of employment.

<sup>38</sup> 1 NWLB TERMINATION REP. 348-49 (1947)

actions could be just as serious and long-lasting as those over new contracts. Consistent with its charge to resolve all disputes by peaceful means, the Board wrote into some contracts provisions for grievance procedures, one of which was arbitration. In such instances, the NWLB's progeny arbitrator was not given the new-contract-writing power of its parent. In *Reynolds Metal Co.*,<sup>39</sup> August 29, 1942, the Board ruled that the new contract (written by the NWLB) must include the following provision:

All disputes, differences, and grievances between the parties arising under the terms of this agreement, but not including any desired or proposed changes in other terms of this agreement shall upon written notification by either party to the other, promptly be submitted to arbitration. <sup>40</sup>

Almost a year later, in *Wilson Athletic Goods Mfg Co.*,<sup>41</sup> a decision stated that "It is agreed that any differences arising incident to negotiations of terms of a new agreement are not covered by this section, the sole purpose of which is to make grievances arising out of and during the term of this agreement subject to arbitration."<sup>42</sup>

### *B. Use of New-Contract Term Arbitration in Public Industry*

The Cleveland Transit System is a publicly owned-and-operated business which has had a very long tradition, sometimes disturbing and sometimes distinguished, in the arbitration of terms and new labor contracts in the urban transit industry. As a matter of fact, the industry has also made frequent use of old-contract-term grievance and discipline arbitrations.<sup>43</sup>

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<sup>39</sup> 2 WAR LAB. REP. 496 (1943)

<sup>40</sup> *Id.* at 497

<sup>41</sup> 10 WAR LAB. REP. 367-74 (1944)

<sup>42</sup> *Id.* at 368.

<sup>43</sup> When speaking of most industries it would be naive, if not ridiculous, to credit one person with the growth of arbitration. This is not so in urban transit. William D. Mahon — who served for 52-½ years as international president of the Amalgamated Transit Union prior to his retirement in 1946 — was the chief advocate and architect of the judicial-like method of resolving labor disputes. See Young, *Fifty Years of Labor Arbitration in Cleveland*, 83 MONTHLY LAB. REV. 464 (1960)

Professor Alfred Kahn wrote that Mahon held a strong conviction that his union should settle all possible disputes without causing the public to suffer the inconvenience of a strike, and he fought consistently to make and keep arbitration the "cornerstone" of the union. At an early date the International constitution was drawn so that no authorized strike could be called by any local division until after it had offered to arbitrate. Although this provision has by no means eliminated strikes by the Amalgamated it has, along with the attitude of the leadership, led to a large number of arbitrations in the industry and to a relatively low strike rate. KUHN, *ARBITRATION IN TRANSIT* 5 (1952) No one on the company side exercised such pro-arbitration influence. Even though the management associations in the industry looked with favor on arbitration, the resolution of labor disputes remained in the province of the individual company.

Examination of labor-relations agreements in sixteen of the nation's largest cities<sup>44</sup> shows that all have some kind of terminal reference point. Some systems use arbitration sparingly and only for resolving personal grievances; others submit contract-interpretation disputes with the specific limitation that the arbitrator has no power to add to, subtract from, or modify the existing agreement; and only a very small number provide for arbitration of terms for new contracts.<sup>45</sup>

For sixty years Cleveland has given its arbitration boards and its impartial umpires the power to rule on existing-contract discipline and on new-contract disputes.<sup>46</sup> In practice, if not in theory, the city has invested the appointees with power which is probably unmatched in the urban transit industry and in few, if any, other

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<sup>44</sup> Atlanta, Baltimore, Boston, Chicago, Cincinnati, Cleveland, Detroit, Kansas City, Los Angeles, Milwaukee, Minneapolis, New York, Philadelphia, Pittsburgh, St. Louis, and Seattle.

<sup>45</sup> See Young, *supra* note 43, at 465.

<sup>46</sup> On December 22, 1906, the Cleveland Electric Railway Company (one of several predecessors of the Cleveland Transit System) entered into a labor-relations agreement with the Amalgamated, Division 268. The agreement contained the following provisions:

Section 2. The Company agrees to meet and treat with the duly accredited officers and committees of the Association upon all questions arising between them and should any dispute arise between them, which cannot be mutually adjusted, the same shall be submitted, at the request of either party, to the Board of Arbitration as provided for in this agreement, and, during such submittal, the conductors and motormen shall continue the operation of the company's cars.

Section 3. For the purpose of settling disputes which cannot be mutually adjusted between the company and the Association, there shall be selected a Board of Arbitration composed of three disinterested persons, one to be chosen by the Company, one to be chosen by the Association, and the two, thus selected, to select the third arbitrator, the finding of the majority of said Board of Arbitration to be final and binding upon the parties hereunto. Either party hereunto shall name its arbitrator within fifteen days after having received written notice from the other party hereunto, and either party failing to so name its arbitrator, shall forfeit its case.

The two arbitrators selected by the parties hereunto shall meet from day to day, after their selection, for the purpose of selecting the third arbitrator, and, after a period of ten days, if the third arbitrator has not been selected, the representatives of the company and the representatives of the Association, with the two arbitrators selected, shall meet and see if it is not possible to agree upon a third arbitrator, and make such other arrangements concerning the arbitration as they deem advisable. If no agreement as to the third arbitrator can be reached within ten days after the matter has been referred to the representatives of the company and the association, then the third arbitrator is to be appointed by the Judge of the United States Court of the district in which Cleveland is situated.

Each party hereunto shall bear the expense of the arbitrator of its own selection and the parties hereunto shall jointly pay the third arbitrator. This portion of the agreement was reproduced from the original in the files of the Cleveland Transit System.

industries. Even though the 1942 Cleveland city charter has retained in the Transit Board the ultimate right to review, amend, or reject the umpire's decisions, not one of the decisions has been modified or overruled.

(1) *Ad Hoc, Tripartite Boards*.—Between 1906 and 1942 — while transit in Cleveland was privately owned but publicly regulated — disputes resolved by *ad hoc* boards included six on wages, one on scheduling, and two on discipline.<sup>47</sup>

(a) *Wages*.—Disputes over wages were referred to arbitrators in 1910, 1923, 1924, 1934, 1936, and 1942. In the 1910 dispute the arbitration board, consisting of a judge and certain members of labor and management, considered only the wage rate and unanimously recommended a wage increase.<sup>48</sup> By startling contrast, the 1924 arbitration dealt with almost everything.<sup>49</sup> In that dispute the Cleveland Railway Company (another CTS predecessor) invoked arbitration on wages and working conditions. The union, Amalgamated, Division 268, demanded that the arbitration board be increased from three to five members. While the five-man board was weighing the evidence, one of the company members on the arbitration board charged that the chairman was biased and announced that the company would not abide by the decision. This member asked for the appointment of a new board and withdrew from further discussions. The chairman and two labor members awarded a twelve cent increase and a paid time-allowance of fifteen minutes for completing accident reports.<sup>50</sup> Strike threats were met with temporary restraining orders. The litigation ended when the Supreme Court of Ohio refused to review a lower court decision which declared the award null and void because the board had ordered a closed shop and because there had been fraud.<sup>51</sup> For nine years the company refused to recognize the union. Thereafter, however, other wage issues were arbitrated.<sup>52</sup>

(b) *Scheduling*.—Typical of the non-wage arbitrations was one which involved layover time.<sup>53</sup> The contract stipulated that

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<sup>47</sup> From the files of the Cleveland Transit System (unpublished)

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> See Young, *supra* note 43, at 466-67

<sup>53</sup> *Ibid.*

"All schedules shall be arranged so as to give not less than a four-minute layover at the end of each trip."<sup>54</sup> On a particular line the board found that despite an honest endeavor by the motormen and conductors to run on schedule, eight out of ten trips were not completed in time to allow the four minute layover. By unanimous action the board ruled that two runs should be added to the schedule, and this was done.<sup>55</sup>

(c) *Discipline*.—Only two discipline cases were referred to arbitration between 1910 and 1942.<sup>56</sup> In 1913 four men were charged,<sup>57</sup> but only one was found guilty. The board ruled unanimously that the punishment was not unreasonable.<sup>58</sup> In 1924 an employee was discharged for "turning over found money to a claimant on his car, thereby breaking a company rule."<sup>59</sup> The arbitrators "found that no evidence of dishonesty was apparent but that indiscretion was shown and recommended reinstatement . . . and as a disciplinary measure that no pay be allowed for the period since his discharge."<sup>60</sup>

(2) *Federal Labor Boards*.—During both world wars transit disputes in the United States, as well as disputes in other industries, were resolved by War Labor Boards.

(a) *War Labor Board I*.—During 1918 a far-reaching, new-labor-contract decision<sup>61</sup> was rendered by a board co-chaired by William Howard Taft<sup>62</sup> and by Frank P. Walsh.<sup>63</sup> A thirteen cent per hour increase was approved for motormen and conductors (increasing the hourly rate from thirty-five to forty-eight cents). Premium pay was to be allowed when swing or split shifts were not completed within fourteen hours.<sup>64</sup> Sunday and holiday runs were to be

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<sup>54</sup> *Ibid.*

<sup>55</sup> See Young, *supra* note 43, at 465-66.

<sup>56</sup> *Ibid.*

<sup>57</sup> The record does not indicate what charges had been made against the men.

<sup>58</sup> See Young, *supra* note 43, at 466.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Employees v. Cleveland Ry.*, Docket No. 31, N.W.L.B. (July 31, 1918).

<sup>62</sup> At this time Mr. Taft was the former President of the United States; he was later to become Chief Justice of the United States Supreme Court.

<sup>63</sup> Mr. Walsh was subsequently a United States Senator. He is noted for his activity in the realm of wage and hour legislation.

<sup>64</sup> The formula for computing the premium pay provided for fifteen minutes for the fifteenth hour, thirty minutes for the sixteenth hour, forty-five minutes for the seventeenth hour, and sixty minutes for the eighteenth and successive hours.

straight runs of not more than eight hours. Significantly, and with irony which is amazingly timely even after the New York City transit strike in 1966, the board's opinion stated that

The wages provided for in this award are a very substantial increase from the rates now paid. The street railway is operated under a contract for service at cost in which the fare was advanced from 3 cents to 4 cents upon the auditor's showing. [U]nless the fares are increased, the company will not be able to meet the great increase of operating expenses.

*We have recommended to the President that special congressional legislation be enacted to enable some executive agency of the Federal Government to consider the very perilous financial condition of this and other electric street railways of the country, and raise fares in each case in which circumstances require it.*<sup>65</sup>

The Taft-Walsh board, with the help of the United States Department of Labor, also mediated a "battle of the sexes."<sup>66</sup> In spite of increased wages the company said that it could not find enough men to operate its cars. On August 27, 1918, female conductors were hired. The union, Amalgamated, Division 268 protested. On September 4, the union served notice that if the women were not removed that same day the men would strike. When a committee for investigation was appointed, service continued. On September 21, the committee reported that the labor market was not so tight as to necessitate the use of women conductors and recommended that they be removed by November 1. The women appealed to War Labor Board I (WLB) and to the union. The termination date was delayed to December 1. On threat of a male strike, the WLB ordered the women removed by January 3, 1919, and the women again appealed. The board ruled in March of 1919, that women be allowed to continue work.<sup>67</sup> Yet both the company and the union refused to comply. Apparently the pressure for women's suffrage, which had been so strong in the nation's capitol that it was to have won passage of the nineteenth amendment only several months later, had not made much of an impact on the hinterland.<sup>68</sup>

(b) *War Labor Board II.*—During the period immediately after our entry into World War II, negotiations for both a new labor contract and for the purchase of the transit system by the city were under way. Arbitrator Aaron Horvitz, a famed New York

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<sup>65</sup> *Employees v. Cleveland Ry.*, Docket No. 31 N.W.L.B. 2-3 (July 31, 1918). (Emphasis added.)

<sup>66</sup> From the files of the Cleveland Transit System (unpublished)

<sup>67</sup> *Ibid.*

<sup>68</sup> See Young, *supra* note 43, at 468.

attorney, was serving as chairman of an *ad hoc* committee when the sale was effectuated. On May 20, 1942, the Horvitz board had awarded a twelve and one-half cent per hour increase;<sup>69</sup> the predecessor company had paid the increased wages for the period March 1 through April 28.<sup>70</sup> Cleveland officials decided that the city, as new owner of the system, could not enter a contract with a union and refused to give legal force and effect to the arbitration award. But to avoid a strike, the Cleveland city council allowed a ten cent increase on July 10 and on October 5 granted the additional two and one-half cent increase.<sup>71</sup> A court of appeals held that the award was a contractual liability of the city and that the employees should receive retroactive pay from April 29.<sup>72</sup>

In 1944 an advisory opinion was sought from War Labor Board II.<sup>73</sup> Accordingly, the regional board recommended a two and one-half cent increase for two-man operations but no increase for one-man operations. Premium pay of one-half time was granted operators who worked a seventh consecutive day. Overtime pay for all actual working time after forty-four hours per week and for spreads over eleven-and-one-half hours per day were also approved.<sup>74</sup>

(3) *Single, Impartial Umpires.*—The City of Cleveland purchased the transit system in 1942.<sup>75</sup> After a short operating experience under the Division of Municipal Transportation, Department of Public Utilities, the city charter was amended so as to place responsibility for supervision, management, and control in a transit board.<sup>76</sup> Furthermore, the amended charter provided that

the salary or compensation of employees under the transit system shall be in accordance with the prevailing rates of salary or compensation for services rendered under similar conditions of employment and of vacation, sick leave, and retirement for like employment in industry generally and without reference to other departments or divisions of the city of Cleveland.<sup>77</sup>

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<sup>69</sup> From the files of the Cleveland Transit System (unpublished).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> See Young, *supra* note 43, at 467

<sup>73</sup> Young, *supra* note 43, at 468.

<sup>74</sup> *Ibid.*

<sup>75</sup> Official Statement, Relating to the Sale of the Cleveland Transportation System (March 31, 1942) in the files of the Cleveland Transit System.

<sup>76</sup> Report on Amendment to City Charter Establishing the Cleveland Transit Board, in the files of the Cleveland Transit System.

<sup>77</sup> CHARTER OF THE CITY OF CLEVELAND ch. 29 (1951)



While some metropolitan systems have searched for reasons why their employees should not be permitted to organize and bargain collectively, Cleveland's transit board permitted it. Because there was some question in Ohio about a public body entering into a contract with a union, the problem was resolved by calling the negotiated terms "conditions of employment."

Shortly after the impartial umpire system was installed, Cleveland Transit System's (CTS) General Manager, Walter J. McCarter<sup>78</sup> explained to a meeting of the American Transit Association that the

impartial umpire must be agreed upon at least 45 days prior to the submission of any wage demand or demands for change in conditions. He is paid a retainer [annual], and it is his duty to become acquainted with the peculiarities of the transit industry [whether] he ever hears a dispute or not. Any decision that he makes he has to live with in the community. If he makes a decision that makes necessary an adjustment in fare, it is his responsibility to tell the public that this decision did cause that particular situation.<sup>79</sup>

In the same speech, McCarter stressed the importance of responsible bargaining prior to resorting to arbitration.<sup>80</sup>

To protect against an impulsive dispute followed by immediate submission to the arbitrator, any grievance over contract interpretation or discipline could not be submitted to the impartial umpire until ten days after the dispute arose. Union demands for increased wages and changed conditions in new contracts would have to be given to the company sixty days prior to submission to the umpire. In addition, the parties would have to bargain the dispute for thirty days before reference to the umpire.<sup>81</sup>

Eight single umpires (seven attorneys and an economist) have served as CTS arbitrators since January 1, 1946. Terms have ranged from five months to five years. The following tabulation summarizes activities under the impartial umpire system.<sup>82</sup>

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<sup>78</sup> Mr. Carter subsequently served in a similar capacity with the Chicago Transit System.

<sup>79</sup> Proceedings of the American Transit Association 175-76 (1946). See Young, *supra* note 43, at 469.

<sup>80</sup> *Ibid.*

<sup>81</sup> Young, *supra* note 43, at 469.

<sup>82</sup> Compilation from records of the Cleveland Transit System. See Young, *supra* note 43, at 470.

## ARBITRATION BY CTS UMPIRES

<i>Period of Service</i>	<i>Discipline Disputes</i>	<i>Contract Interpre- tion</i>	<i>New Contract</i>
(1) Jan. 1, 1946 - Apr. 15, 1950 ----	0	13	1946 1947 1949
(2) Apr. 16, 1950 - Apr. 15, 1953 --	0	1	1952
(3) Nov. 15, 1953 - Apr. 15, 1956 --	0	0	1955
(4) Apr. 16, 1956 - Apr. 15, 1961 --	0	1	1956
(5) Nov. 1, 1961 - Apr. 15, 1963 ----	0	1	--
(6) Apr. 16, 1963 - Apr. 15, 1964 --	0	0	1963
(7) Nov. 12, 1964 - Apr. 15, 1965 --	0	2	--
(8) Apr. 16, 1965 - Apr. 15, 1966 ----	0	1	1965

If the predominant pattern for labor arbitration in the United States includes large numbers of discipline and contract interpretations and almost no new-contract terms, CTS is surely the exception. In twenty years, there have been no discipline cases reaching the umpire. Between 1946 and 1950<sup>83</sup> there were thirteen arbitration cases involving interpretations of existing contract sections, but there have been only six of these since 1950.<sup>84</sup> By startling contrast, only three of eleven new contracts since 1946 have been negotiated by the parties; the eight others resulted from actions by the impartial umpires.<sup>85</sup>

It should not be concluded that because there have been no discharge cases and relatively few existing-contract disputes reaching the arbitrator that there have been no such grievances. In 1959, for example, grievances reaching the Director of Personnel<sup>86</sup> or beyond included ten discharges which arose because of such issues as poor accident record, unbecoming conduct with passengers, absences, and intoxication. Seven of these discharge grievances were denied, but three of the aggrieved workers were reinstated.<sup>87</sup> Twelve contract interpretation disputes were heard involving such matters as individual wage rates and job classifications, scheduling, vacations, seniority, and local working conditions. Three of these grievances

<sup>83</sup> During this period, the umpire retainer contract permitted the parties to utilize the umpire's services for twenty days per year without any additional cost. The parties readily took advantage of this provision.

<sup>84</sup> In 1950 the fixed annual payment under the retainer contract was reduced from \$5,000 to \$3,000, but the per diem payment began with the first day, rather than with the twentieth day.

<sup>85</sup> See Young, *supra* note 43, at 470.

<sup>86</sup> The Director of Personnel is step number three in the grievance procedure. No record is maintained of grievances failing to reach this third step.

<sup>87</sup> Compilation prepared at the request of the author. See Young, *supra* note 44, at 472.

were denied. The others were adjusted satisfactorily or carried into 1960.<sup>88</sup>

Attention is directed to three decisions of the impartial umpires: one (1949) because it resulted in a five-day strike, the longest in the system's history; the second (1956) because its wage decision brought a small amount of immediate criticism from the union and none from the company<sup>89</sup> and because it contained a reduction of sick leave pay; and the third (1965) because of the larger number of issues on which the arbitrator wrote the terms for the new contract.

Paradoxically, the longest Cleveland transit strike occurred in 1949 over conflicting interpretations of an umpire's decision on the vacation clause. The walkout started at midnight December 22, 1949<sup>90</sup> If possible, the wrath of the retail industry in particular was even stronger than it was during the New York transit strike in January of 1966. The stoppage was called by the union president even though a strike should not have occurred since Ohio had a no-strike-by-public-employees law. The union president appeared before the court and was ordered to tell the men to return to work. The president complied, but the workers did not resume work. Nevertheless, no one was jailed; the chief aim was to restore service, so men were back at work on December 27<sup>91</sup> There is reason to believe that "clearing the air," while inconvenient and disturbing at the time, contributed much toward mature bargaining and better use of the arbitration process in the 1950's and 60's.

In the 1956 dispute,<sup>92</sup> after fifteen days of hearings during which the parties introduced 110 exhibits on wages and 105 on other issues, the umpire recommended the following solution: (1) a two-year agreement; (2) a wage increase of six cents per hour for the first year and six cents plus cost-of-living adjustments for the second; (3) inclusion of a dues checkoff provision; (4) reduction of sick leave from eight to six hours per day to reduce abuses which, because of modified federal income tax laws, had made possible greater take-home earnings for being sick than for

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<sup>88</sup> *Ibid.*

<sup>89</sup> However, at the start of the second year the reactions were reversed.

<sup>90</sup> See Krislov, *The Cleveland Transit Strike of 1949*, 13 PERSONNEL ADMINISTRATION 25 (Nov. 1950)

<sup>91</sup> *Ibid.*

<sup>92</sup> From the files of the Cleveland Transit System (unpublished)

working; and (5) reopening of discussions at the end of the first year on the complicated scheduling problems.<sup>93</sup>

The union felt that the six-cent increase was too small; the company seemed pleased.<sup>94</sup> At the start of the second year, the six cent increase plus the arbitrator's cost-of-living formula gave the union more than it had expected. While the arbitrator's reduction of sick-leave pay from eight hours to six hours brought minor criticism from the union in 1956, the reduction was reported to have been the reason for the arbitrator's release by the union five years later.

The 1965 arbitration award<sup>95</sup> not only shows what has happened to wage rates since 1906 but also reveals that an increasing number of issues have been resolved by the impartial umpire. Motormen were paid twenty-one cents per hour in 1906; after a ten-cent increase in 1965 and another nine-cent increase in 1966, the operator's rate will be three dollars per hour in addition to a possible cost-of-living adjustment. Furthermore, the umpire cut the amount of continuous service required in order to obtain fourteen days of vacation, from three years to two years. The umpire also allowed payment for holidays even when they may fall on the employee's day off, increased the allowance for instruction from fifteen cents to twenty cents per hour, and changed the "run money" amount provided by the company from fifty dollars to seventy-five dollars.<sup>96</sup> After eighteen days of hearings and after weighing 2000 pages of testimony and 346 exhibits, the umpire made this statement:

It should be understood that the fact that I have refrained from recommending any particular request either of the Union or of Management does not necessarily imply a lack of intrinsic merit in such request, but may be due to my conclusion that the evidential detail presented in these proceedings in support of that request has been insufficient to persuade me that an affirmative recommendation ought to be made; or it may be due to my belief that further discussions or negotiations directly between the parties appear to be in order. However, any omission on my part to recommend a requested addition to or change in the Conditions of Employment is intended to be without prejudice to any presentation of the same or similar request at any appropriate future time.<sup>97</sup>

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<sup>93</sup> *Ibid.*

<sup>94</sup> Subsequently, the arbitrator learned that the parties had tentatively reached an agreement, prior to arbitration, of seven cents and five cents in a two-year package.

<sup>95</sup> From the files of the Cleveland Transit System (unpublished).

<sup>96</sup> *Ibid.*

<sup>97</sup> Cleveland Transit Sys. & Amalgamated Transit Union, Div. 268, Summary of

### C. Use by Small Private Industry

Arbitration of terms for new contracts may also be used by small, privately owned-and-operated firms. The following sample case, *Jack & Heintz Precision Indus., Inc.*,<sup>98</sup> was selected because it ended a costly eleven-week strike and because it showed how easily the parties can alter, or even reverse, their positions when conditions warrant such action. This is the type of case that David L. Cole — labor-relations arbitrator, lawyer, mediator, and statesman — may have been thinking of when he made the following assertion to a Rutgers University conference on arbitration:

When an issue over the meaning or application of a contract provision is submitted to an arbitrator, the procedure is then one similar to the judicial process. When an arbitrator is called upon, however, to decide what the terms or conditions of a contract should be, including wage rates and similar matters, we have a basically different situation. Here the parties, unable to convince one another of their respective views, constitute the arbitrator their joint agent to decide what their contract should be. In other words, after considering the facts and arguments, the arbitrator must determine what in his judgment it would have been fair for the parties themselves to have agreed upon. Obviously, in the absence of restrictions in the submission or in the existing agreement, the arbitrator must decide what factors deserve to be considered and what weight each should have. He must constantly bear in mind that he is acting as a substitute for the parties themselves. The difference between this situation and one in which he is merely construing a provision of the contract must be apparent.<sup>99</sup>

The unresolved issue in the *Jack & Heintz* case involved seniority for supervisors who were promoted from the ranks. Instead of opposing seniority, in the management tradition, the company argued for full and continuing seniority for the promoted supervisor. Instead of insisting that seniority be continued, in the labor tradition, the union argued, at first, for complete loss of seniority for the supervisor who had been a union member.<sup>100</sup> Prior to 1947 the union had bargained for the supervisors (as a part of the production unit) and had insisted that they should keep their seniority rights. Following passage of the Labor Management Relations Act

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Recommendations 1 (July 12, 1965) (On file at the office of the Cleveland Transit System).

<sup>98</sup> 20 Lab. Arb. 283 (1952).

<sup>99</sup> Cole, *The Wage Reduction Problem in Wage Determination: A Proposal*, 7 ARB. J. (n.s.) 134, 135 (1952).

<sup>100</sup> *Jack & Heintz Precision Indus., Inc.*, 20 Lab. Arb. 285-86 (1952).

(Taft-Hartley Act),<sup>101</sup> the union could no longer bargain for the supervisors nor could it expect them to continue as members. After weighing the unusual arguments, the arbitrator wrote the new contract section as follows:

A factory supervisor or foreman who was promoted from a job in the bargaining unit prior to November 1, 1952, shall, for purposes of transferring back to the ranks within the bargaining unit and subject to the seniority rules herein contained, retain all seniority he held on November 1, 1952, plus seniority credit for any additional service accumulated after November 1, 1952, and before October 31, 1953; any factory supervisor or foreman who after November 1, 1952, was or is promoted from a job in the bargaining unit shall retain seniority acquired to the date of his transfer plus seniority credit for any service rendered thereafter not to exceed a maximum of one additional year.<sup>102</sup>

Many caveats and encouragements about the use of arbitration for resolving terms of new labor agreements may be found in the records of other industries and under other laws. Professor Handsaker said that in 1959 the Federal Mediation and Conciliation Service reported twenty-seven cases in "the following industries: petroleum, aviation, chemicals, automotive, electrical equipment, retail trade, construction, dairy products, furniture, leather, machinery, printing and publishing, steel, and transportation."<sup>103</sup> The railroad transportation industry used many new-contract-writing bodies under the Railway Labor Act of 1926 (RLA).<sup>104</sup> The all-public-member National Mediation Board, after numerous patient and competent mediation efforts, has, with varying degrees of success, urged the parties to submit unresolved disputes over terms for new contracts to final and binding arbitration.<sup>105</sup> So, too, the Emergency Boards appointed by the President under the RLA and under the Taft-Hartley Act have frequently recommended the use of arbitration.<sup>106</sup>

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<sup>101</sup> § 2(3), 61 Stat. 137-38 (1947), 29 U.S.C. §§ 152 (3) (11) (1964)

<sup>102</sup> Jack & Heintz Precision Indus., Inc., 20 Lab. Arb. 283, 288-89 (1952).

<sup>103</sup> Handsaker, *Arbitration and Contract Disputes*, in CHALLENGES TO ARBITRATION 81-82 (McKelvey ed. 1960). See also MORRISON & HANDSAKER, THE SUBMISSION AGREEMENT IN CONTRACT ARBITRATION (1952).

<sup>104</sup> 44 Stat. 577, 45 U.S.C. § 8 (1964)

<sup>105</sup> Source materials are available in NMB ANNUAL REP. (1935-1966) and in special reports involving each arbitration board. Professor Herbert R. Northrup, of the University of Pennsylvania's Wharton School of Finance and Commerce, has written extensively, constructively, and critically about labor relations in railway transportation.

<sup>106</sup> *Ibid.* See also EMERGENCY DISPUTES AND NATIONAL POLICY (Bernstein, Enarson & Fleming eds. 1955).

### III. CONCLUSION

If the preceding discussion has left the impression that the most important kind of arbitration is that which resolves disputes over new contracts, it is time to restore perspective. In the research on and evaluation of arbitration and in the effort to find the best uses for it, the number of cases of a particular type is not the most important criterion. Research for this article suggests that the types of arbitration have varied with the demands of the times and with the needs of the industries.

Following Pearl Harbor when spokesmen for labor and management recommended to President Franklin D. Roosevelt that he appoint a national war labor board which would have the final responsibility for resolving *all* labor disputes, neither they nor he made any distinction between old and new contracts. Our very best thinkers and practitioners — lawyers and non-lawyers, professionals and non-professionals from labor, management, and the public — searched for and found new ways to resolve *all* labor disputes. When the nation's health and life were threatened, the dangers from failure to resolve labor disputes outweighed the undesirability of placing limitations on the rights of private parties to make decisions. Labor-relations practices have been re-tested; new theories have been developed and tested in the course of writing terms for new labor contracts.

It was not an international war, nor the threat of one, which caused the predecessors of the CTS and the Amalgamated to agree to arbitration of *all* unresolved labor disputes in 1906. Nor could it have been the 1947 Ohio no-strike-by-public employees law<sup>107</sup> which, in 1946, caused the parties to give to an impartial umpire the ultimate power to rule on all labor disputes. From their records the parties knew that they could resolve most of their discipline and old-contract cases. Whether it was concern of the parties for the strong, negative public reactions to transit strikes at contract time, whether it was their belief that placing their arguments and evidence before their own judge was better than having a political appointee impose a decision on them, or whether it was a blend of these and other reasons, the company and the union decided to give their selected umpire the power to write new contract terms for them. Whatever the future modifications and improvements of their system, the fact remains that since 1946, as a result of a collectively

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<sup>107</sup> See OHIO REV. CODE § 4117.02.

bargained agreement, CTS and the Amalgamated Transit Union have given the responsibility for writing the terms of their new contracts to impartial umpires in eight of their last eleven agreements.<sup>108</sup>

It was not a national crisis which caused Jack & Heintz and the Machinists to arbitrate their dispute over continued seniority for promoted supervisors. Rather, it was their awareness that growing economic losses for both parties made arbitration of that clause for the new contract preferable to the extension of an eleven-week strike.<sup>109</sup>

It is sometimes forgotten that it was a similar kind of reasoning which led to the use of arbitration. In the late nineteenth and through the first two-thirds of the twentieth century, labor and management leaders searched for something which could replace the costly and inefficient work stoppages as well as the accompanying pickets and strike-breakers. Some leaders concentrated their attention on flare-ups over discharges and battles over the principles involved in the application of contract terms. In order to resolve these disputes in an orderly and far less costly manner, many of them established grievance procedure ending with final and binding arbitration. They founded the "due process clause of labor relations."<sup>110</sup> Instead of asking for, or waiting for, the development of labor courts, they developed their own procedures. They determined which disputes should go to arbitration; they selected their judge; they presented their arguments to him; they agreed that his decision would be final and binding; they paid him; and they reserved the right to criticize his decision. When accurate tools are developed for measuring the contribution which the never-talk-back, whipping-boy, *late* arbitrators have made to peaceful resolution of labor disputes, it may be surprising.

The failure to turn to the arbitration of terms for new contracts by those who have been the most frequent users of discipline and old-contract arbitration has at times been interpreted as a criticism of the former. Some advocates have cautioned against possible drift to the former. It would be well to ask why. Could it be, in part, that the arbitrators' expertise, which has made the latter work so well, has been utilized in the hard, efficient, and successful negotiations of new contracts? Might it be, in part, that the giants of

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<sup>108</sup> From the records of the Cleveland Transit System. See Young, *Fifty Years of Labor Arbitration in Cleveland*, 83 MONTHLY LAB. REV. 464, 470 (1960).

<sup>109</sup> See text accompanying note 103 *supra*.

<sup>110</sup> See YOUNG, UNDERSTANDING LABOR PROBLEMS 128 (1959).



industry and labor have used competent labor arbitrators as mediators in the pre-arbitration process<sup>111</sup> and that they have found other ways to bring neutral consultants into the ongoing process of bargaining for new contracts?<sup>112</sup> Could it be, in part, that when these methods have grown old, the parties will turn to arbitration of terms for new contracts? The important thing is that these advocates remain responsibly innovative.

There are areas in which arbitration of every kind — but especially of terms for new contracts — could have a tremendous and valuable impact. In 1966 there have been strikes by public school teachers, rumblings by hospital employees, and growing claims of pay inequalities by policemen and firemen. The warning signs are loud and clear. Those who must resolve labor disputes in these critical and sensitive areas have a number of large obstacles to overcome in the immediate future.

Arbitrators who have been empowered to write the terms for new contracts know the difficulties. They appreciate Secretary of Labor W. Willard Wirtz's statement that

interpreting a contract is an artisan's job compared with the demand in new contract development for architects. The difference is between taking things as you find them, and building something new; between being called upon for answers, and for ideas.<sup>113</sup>

When there is an increased demand for arbitration of the terms for new contracts, either at the invitation of the parties or under existing or new statutes, the body of experience will be enlarged and improved. There is every reason to believe that when labor lawyers, economists, or other specialists are requested to apply their expert knowledge — by working either as part of a lawyer-nonlawyer team (as with the National Labor Relations Board) or individually — they will accept the challenge.

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<sup>111</sup> For example, General Motors and the United Auto Workers have utilized this process. See Alexander, *Impartial Umpireships: The General Motors — UAW Experience*, in *ARBITRATION AND THE LAW* 108-160 (McKelvey ed. 1959).

<sup>112</sup> Kaiser Industries and the United Steel Workers, for example, have employed this technique. See Chamberlain, *Neutral Consultants in Collective Bargaining*, in *COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE* 83-116 (Kahn ed. 1962).

<sup>113</sup> Wirtz, *The Challenge to Free Collective Bargaining*, in *LABOR ARBITRATION AND INDUSTRIAL CHANGE* 308 (Kahn ed. 1963).