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### Arbitration of Disputes over New Labor Contract Terms

Alan V. Friedman

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## NOTES

### *Arbitration of Disputes Over New Labor Contract Terms*

#### INTRODUCTION

Voluntary arbitration in labor relations has been effectively employed in ninety to ninety-five per cent of all collective bargaining agreements as a final step in grievance procedure. However, it has rarely been used in determining new contract terms.<sup>1</sup> Reaching agreement on the terms for new or reopened contracts remains a major unsolved problem in labor relations. Because this latter area is at the heart of most strike activity,<sup>2</sup> negotiation of a new contract without outside assistance is generally thought to be the best way of arriving at an agreement. However, voluntary arbitration may offer a solution when direct negotiation fails and mediation and conciliation prove ineffective, or when a strike is imminent or in progress.

Voluntary arbitration is a private procedure that can assure the parties of peaceful settlement of disputed contract terms. The initial agreement to arbitrate stands as an example of responsible bargaining. It is not imposed on the parties, but is a private procedure that can be shaped to meet their particular needs while serving public interest both in preserving industrial peace and preserving a free voluntary system of bargaining. It must not, however, be considered a panacea; it is only a method to be used as a last resort. It should not be employed as an alternative to free collective bargaining, but should be regarded as an adjunct to that process.

Labor and management must find an alternative to the wasteful, economy-crippling strikes and lockouts that emanate from failure to agree on contract terms, or else, as the imposition of compulsory arbitration in the 1963 railroad dispute indicates,<sup>3</sup> the government will. That legislation was the first of its kind in peacetime, and, though limited to specific issues, may represent a major failure in the free collective bargaining system.<sup>4</sup> Furthermore, it indicates a trend toward more government intervention with its attendant ills, some of which are eventual

1. See *Basic Patterns in Labor Arbitration Agreements*, 34 Lab. Arb. 931, 937 (1961); 2 COLLECTIVE BARGAINING NEGOTIATION AND CONTRACTS, BUREAU OF NATIONAL AFFAIRS § 5:71; U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1381, ANALYSIS OF WORK STOPPAGES 1962, 6 (1963).

2. Bergan, *The Role of Law in Labor Relations*, 13 LAB. L.J. 892, 894 (1962).

3. Pub. L. No. 88, 88th Cong., 1st Sess. (Aug. 28, 1963).

4. See N.Y. Times, Aug. 29, 1963, p. 1, col. 1; N.Y. Times, Sept. 1, 1963, p. 9, col. 6.

government determination of wages and other terms of employment, as well as prices.

If, on the other hand, voluntary arbitration is to be accepted as a better solution, the traditional arguments against its use must be overcome. The purpose of this note is to demonstrate that much of the criticism of voluntary arbitration is unwarranted, for the parties may so frame their submission agreement and so constitute their arbitration panel that an award reflecting adequate standards can be forthcoming on a wide scope of subjects. This note will also discuss the enforceability of awards in this "interest"<sup>5</sup> or "quasi-legislative"<sup>6</sup> type of arbitration.

#### PERSPECTIVE ON THE WORK STOPPAGE PROBLEM

The number of work stoppages, the number of workers involved, and the number of man-days lost are all significant indicators of the extent of industrial disputes which cannot be resolved through peaceful collective bargaining. Though there has been a large fluctuation both in the number of man-days idle and the number of workers involved, this fluctuation is considerably reduced when "major work stoppages" — strikes involving over 10,000 workers — are separated from the totals.

During the 13-year period from 1947 to 1959, 268 of the more than 53,000 recorded work stoppages involved 10,000 or more workers. These major strikes accounted for 247 million man-days of idleness, or slightly more than half (53.5 per cent) of the total direct strike-related idleness registered over this period. The number of workers involved, including duplication (*i.e.*, workers involved in more than one stoppage in any one year or over the 13-year period), amounted to 11,700,000, or two out of every five involved in all work stoppages. In 1959, the year of the 116-day steel strike, major strikes accounted for 73.7 per cent of the total man-days idle. In the three following years, however, major strikes accounted for only 31.2 per cent of total man-days idle.<sup>7</sup>

Beginning in mid-1960, the Bureau of Labor Statistics classified strikes according to the status of union-management agreements at the start of the stoppage. The figures for 1961 and 1962 are extremely interesting. They show that disputes arising out of the renegotiation of agreement terms, either at the expiration of the agreement or through the exercise of reopening privileges, account for about four-fifths of the

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5. See note 16 *infra* and accompanying text.

6. *Ibid.*

7. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1339, ANALYSIS OF WORK STOPPAGES 1961, 8 (1962); U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1381, ANALYSIS OF WORK STOPPAGES, 1962, 8 (1963).

total idleness due to strikes. However, disputes where the parties had no previous dealings, while accounting for 15 per cent of the total stoppages in those years, accounted for only an additional 6 per cent of the total idleness.<sup>8</sup>

How are these figures relevant to the present study? First, they indicate that voluntary arbitration may be useful in the three situations contributing to over four-fifths of the total idleness due to strikes; namely, negotiation of a first agreement between the parties, creation of a new agreement where the previous one has terminated, or renegotiation under a reopening clause. Second, the figures indicate that "major strikes" contribute to a large portion of the total idleness, but that this trend has been reduced in recent years. That reduction may be due in part to the adaptiveness of arbitration to labor problems apart from bargaining agreements.

The National Joint Board for the Settlement of Disputes in the Construction Industry, the 1958 Miami Agreement of the AFL-CIO unions dealing with jurisdictional disputes, and the Missile Sites Commission<sup>9</sup> are examples of the useful function to which arbitration has been adapted to prevent major stoppages.<sup>10</sup> It is worthy of mention that noted arbitrators are also participating in a significant trend in major industries to engage in what Secretary of Labor Willard Wirtz has characterized as "creative bargaining."<sup>11</sup> This is a system calling for the parties to study jointly, during the period a contract is in effect, the major problems which cannot be thoughtfully dealt with in those hectic bargaining days just before the expiration of a contract. An example of these forward looking programs that should help to decrease the percentage of total idleness contributed by work stoppages from their industry, is the Joint Human Relations Research Committee now operating in the steel industry. Joint studies are also being carried out in the automobile, electrical, rubber, longshore, and other major industries. Many of these programs employ neutral parties as advisors, consultants, or fact-finders. This enhances the opportunity for protection of public interest which, after all, is best protected by having differences settled without work interruption. Finally, these programs often provide some means of arriving at an agreement through either a more orderly presentation by the parties of their positions, or in some cases, by ultimate reliance on voluntary arbitration.

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8. *Ibid.*

9. EXEC. ORDER NO. 10946, 26 Fed. Reg. 4629 (1961).

10. Address by Chairman of the National Labor Relations Board, Frank W. McCulloch, Labor Arbitration Institute, Boston University School of Law, April 25, 1964.

11. Address to the National Academy of Arbitrators, Feb. 10, 1963, in 109 CONG. REC. 2288 (daily ed. Feb. 18, 1963).

## BACKGROUND: DEFINITIONS AND DEVELOPMENT OF ARBITRATION

*Defining and Distinguishing Terms*

The distinction between collective bargaining, mediation, fact-finding, and arbitration is best understood if each is considered as a stage in the negotiating relationship between labor and management.<sup>12</sup> Collective bargaining is the first stage and arbitration the last.

Mediation is the method of bringing the parties together thereby helping them to reach a solution by themselves. The mediator does not determine the solution; rather, he acts as a catalytic agent, bringing the parties together and offering suggestions and advice. Conciliation has come to mean the same thing as mediation, though formerly it involved a more active attempt by the third party to help the parties to the negotiations agree.<sup>13</sup>

The Federal Mediation and Conciliation Service, established by section 202 of the Labor Management Relations Act, is an independent agency whose services have proved helpful in avoiding strikes or lockouts. In fiscal 1962, the Mediation Service participated in 2,313 instances of contract negotiations, or 7 per cent of all contracts negotiated. In a total of 5,339 joint-meeting cases it aided in fiscal 1962, settlement was achieved without strike or lockout.<sup>14</sup> The National Mediation Board, created under the Railway Labor Act, performs a similar function in the rail and airline industries. At the present time, forty-three states and the District of Columbia also have some kind of mediation service.<sup>15</sup>

At the fact-finding stage of negotiations, a designated board is given the opportunity to investigate the matter; the findings are then reported with or without recommendations. This statutory method usually has the added prohibition of restraining the parties from resorting to strikes and lockouts until the report is made. However, the disputants need not accept the findings of the investigators, and once the report is made these economic weapons may once again be employed. Thus, neither mediation nor fact-finding can assure industrial peace because the parties still control settlement.

Arbitration is the method by which a dispute is settled according to the binding decision of a neutral third party. The person or panel acting as arbitrator is either chosen by the parties or appointed by statute. However, if arbitration is imposed upon the parties by the government, it is compulsory. Arbitration may be further divided into

12. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 3 (2d ed. 1960).

13. U.S. DEP'T OF LABOR, *GROWTH OF LABOR LAW IN THE UNITED STATES* 229-30 (1962); Note, *The Peaceful Settlement Of Disputes Over Contract Terms*, 58 NW. U.L. REV. 556 (1963).

14. 15 FED. MED. AND CONCILIATION SERVICE ANN. REP. 2 (1963).

15. Note, *The Legal Framework of Public Intervention In Industrial Disputes*, 35 NOTRE DAME LAW. 654, 674 (1960).

two categories: (1) grievance arbitration, also called "rights" or "quasi-judicial" arbitration, since the dispute is over rights created by contract and the duty of the arbitrator is to interpret the contract; and (2) contract, or "interest" or "quasi-legislative" arbitration, in which the arbitrator's function is not to merely interpret the terms of an existing agreement, but to establish future conditions. The issues involved in the latter classification are usually more important to the parties than those involved under "rights" arbitration.<sup>16</sup> Voluntary arbitration is considered an adjunct of collective bargaining, but it is poles apart from compulsory arbitration since in the latter method the parties have no choice in either the procedure or the choice of arbitrators, unless the statute so provides.

### *History and Development of Arbitration*

The growth of private arbitration of labor disputes has been one of the most significant factors in the development of industrial peace in this country. Any attempt to trace its beginnings takes one back prior to the establishment of a legal order in society.<sup>17</sup> But,

at times it [arbitration] seems almost to disappear by reason of having been superseded by a system of law that involves the compulsory submission of disputes to authority, rather than the voluntary selection of and submission to an arbitrator.<sup>18</sup>

It has been said that arbitration was first used by the ancient Egyptians. Likewise, it was often resorted to in the classical age of the Greek city-state, both to resolve congestion in the courts and to settle territorial disputes. The system as it is applied to disputes in this country, however, is a recent development.

Labor arbitration developed in the United States along with the industrial revolution. Obviously, the concept of "rights" arbitration which has become a normal part of labor relations today, could not have become so until the collective bargaining contract also became a normal part of the industrial scene. Thus, rights arbitration grew up with the labor movement. It has further grown as an aid to the principle of free collective bargaining. The strongest impetus to the use of arbitration in this country was supplied by the creation of the National War Labor Board which arose as a result of the need to maintain production for the World War II effort. The economic weapons of strike and lockout gave

16. ELKOURI & ELKOURI, *op. cit. supra* note 12, at 30-31; Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 533 (D. Mass. 1956), *aff'd*, 241 F.2d 787 (1st Cir. 1957), *cert. denied*, 355 U.S. 817 (1957); CCH LAB. L. REP., UNION CONTRACTS ARBITRATION ¶ 57002 (1961).

17. See Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132 (1934).

18. UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES 4 (2d ed. 1961).

way to the "no-strike, no-lockout" pledge and to arbitration of labor management disputes.<sup>19</sup> That policy of exchanging industrial peace over agreement interpretation for the no-strike and no-lockout pledges has carried over so that nearly all collective bargaining agreements today have provisions for the arbitration of grievances.<sup>20</sup> Arbitration of new contract terms, on the other hand, has not met with the great favor that has been accorded to "rights" arbitration.

### COMPULSORY ARBITRATION

Any argument in favor of increased use of voluntary arbitration in contract dispute settlement must also necessarily discuss compulsory arbitration. It has been suggested that this is an unwise approach, *i.e.*, that the assumed threat of compulsory arbitration is *not* a sound argument for voluntary arbitration and that each dispute should be considered on its own merits.<sup>21</sup> The "which would you rather have" approach seems to have validity in view of Congress' imposition of compulsory arbitration on the parties in the 1963 railroad dispute.<sup>22</sup> When efforts to get the parties to agree to a voluntary arbitration procedure failed, this unprecedented action in the form of the first federal compulsory arbitration statute in peacetime was taken in order to insure that a strike would not take place; or, at least not until the enforcement procedure in the award ended or until issues not handled by the arbitration board were negotiated. The neutral members of that statutorily created arbitration board left no doubt of their preference for voluntary arbitration over compulsory arbitration. They stated:

We wish at the very outset to record our regret that in this case the leaders of the railroad industry and the railroad operating unions were unable to agree upon some method of resolving their differences which would avoid the need for Congressional intervention. The great virtue of arbitration as it has developed in this country's labor relations has been the fact that it was a *voluntary* procedure, created and shaped by the disputing companies and unions themselves and thus responsive to their peculiar problems, values, and needs. It is unfortunate that the parties in this case, though finally agreeing in principle to arbitration, failed to agree upon the terms and procedures of an arbitration agreement and thereby abandoned to Congress an opportunity and responsibility that should rightly have been theirs.<sup>23</sup>

19. See Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945).

20. See note 1 *supra*.

21. See Waddleton, NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 13TH ANN. MEETING 92 (1960), wherein Professor Handsaker's speech on "Arbitration and Contract Disputes" is discussed.

22. Pub. L. No. 88, 88th Cong., 1st Sess. (Aug. 28, 1963).

23. Opinion of the Neutral Members (Benjamin Aaroh, James J. Healy, Ralph T. Seward), National Mediation Board, Arbitration Board No. 282 (Nov. 26, 1963).

Compulsory arbitration represents a final rejection of a competitive economy philosophy in which industrial disputes are resolved through free collective bargaining.<sup>24</sup> The late President Kennedy stated that compulsory arbitration cannot be reconciled with a free enterprise economy.<sup>25</sup> Also, Secretary of Labor Wirtz has observed: "Collective bargaining is industrial democracy. We have to make it work."<sup>26</sup> And yet, as in the railroad dispute, whenever a critical strike threatens, thought immediately turns to forced settlement through compulsory arbitration. The characteristic of this procedure is that the parties are required by law to submit their dispute to a statutorily created arbitration board whose award binds the disputants in future dealings. Moreover, the parties are required to terminate all forms of self-help such as strikes or lock-outs.<sup>27</sup>

A form of compulsory arbitration legislation was established at the federal level in wartime,<sup>28</sup> and is found today in the grievance settlement procedure under the Railway Labor Act.<sup>29</sup> Although no state provides for compulsory arbitration of labor disputes in private industry, a few do provide for it in certain public utilities.<sup>30</sup> Four of the fifteen states that had regulated public utilities in this manner ultimately had their statutes declared invalid.<sup>31</sup> The key decision in this area is *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd.*<sup>32</sup> There, the Supreme Court invalidated the

24. See KELLER, *ARBITRATION IN ACTION* 7 (1941).

25. KHEEL, *THE PROS AND CONS OF COMPULSORY ARBITRATION* 13 (1961).

26. See note 11 *supra*.

27. Note, *The Peaceful Settlement Of Disputes Over Contract Terms*, 58 NW. U.L. REV. 556, 576 (1963); Sturges, "Compulsory Arbitration" — *What is it?* 30 FORDHAM L. REV. 1, 4, 10 (1961).

28. War Labor Disputes Act (Smith-Connolly Act), 57 Stat. 163 (1943), 50 U.S.C. § 1501 (Supp. 1944). Prior to the enactment of this act, the President, by EXEC. ORDER NO. 9017, 7 Fed. Reg. 257 (1942), had provided for the National War Labor Board to settle disputes through "mediation, voluntary arbitration or arbitration under rules provided by the Board."

29. 45 U.S.C. § 152(3)(i). Under the Railway Labor Act, the railroad and airline industries, both regulated by the federal government, are subject to rather complicated procedures before management or labor can call a lockout or strike over terms and conditions of a new contract. The tendency might be for management to accept the terms offered by the government because they are government regulated, while labor need not accept the terms.

30. Since World War II, thirteen states have established procedures for mediation and arbitration of labor disputes in public utilities. Most of them either absolutely prohibit strikes and lockouts, or permit them only after all procedures outlined in the law have been complied with. Those states are: Florida, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Virginia, and Wisconsin.

31. Statutes in Florida, Indiana, Kansas, and Wisconsin have been declared invalid. See *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *State of Florida ex rel. Lee v. Henderson*, 32 I.R.R.M. 2169 (1962), *aff'd*, 65 So. 2d 22 (Fla. 1953). The New Jersey statute was declared unconstitutional for failure to provide sufficient standards to an administrative agency. See *State v. Traffic Tel. Workers' Fed'n*, 2 N.J. 235, 66 A.2d 616 (1949).

32. 340 U.S. 383 (1951).



Wisconsin statute on the grounds that Congress, through the Taft-Hartley Act, had preempted the field of regulating strikes in industries "affecting commerce," and held that even public utilities whose activities were confined to a single state came within the definition of industries "affecting commerce." The Court reasoned that federal labor legislation contemplates continued collective bargaining, even after a strike is started, and thus no state requirement for compulsory arbitration could be upheld. The dissent argued that there is no *right* to strike against the general welfare.<sup>33</sup>

As a result of this decision, states having similar statutes have been reluctant to enforce them.<sup>34</sup> The decision in the Wisconsin case therefore ended the post-war boom of state compulsory arbitration legislation that had arisen to deal with strikes whose toll on total work time reached 1.6 per cent in 1946, a total not reached since.

Several proposals have been made that the National Labor Relations Act be amended to return full authority in the public utilities labor relations area to the states.<sup>35</sup> Congress made a step in this direction in the 1959 Labor-Management Reporting and Disclosure Act.<sup>36</sup> Section 701 of that act, which amended the Taft-Hartley Act, in effect returns jurisdiction to the states over all matters rejected by the National Labor Relations Board because of their relative unimportance to interstate commerce. The monetary limitations set by the Board for its jurisdiction returns at least the smaller employers to state control.<sup>37</sup> But, unless the Court reverses its previous view, or unless Congress enacts enabling legislation, it seems that states may only control strikes in publicly owned utilities and hospitals.<sup>38</sup> Also, public employees are prohibited from striking by the federal government and by many states.<sup>39</sup>

33. *Id.* at 404-05.

34. See KHEBEL, *op. cit. supra* note 25, at 31-33.

35. See Heiges, *State Labor Legislation for Public Utilities Disputes*, 61 PUB. UTIL. FORT. 587 (1958); Schultz, *The Massachusetts Choice of Procedures Approach To Emergency Disputes*, 10 IND. & LAB. REL. REV. 359 (1952).

36. 73 Stat. 519-46, 29 U.S.C. §§ 401-531 (1959).

37. See UPDEGRAFF & MCCOY, *op. cit. supra* note 18, at 134-59. The desire, says Updegraff, for protection is apparently as great as before the Wisconsin decision. In 1956, Maryland enacted a statute providing for state seizure of utilities whose operation is endangered by a labor dispute. MD. ANN. CODE art. 89, §§ 14-24 (1956). See Note, *Ohio Utility Anti-Strike Law*, 58 PUB. UTIL. FORT. 912 (1956).

38. See, e.g., *Fairview Hosp. Ass'n v. Public Bldg. Serv.*, 241 Minn. 523, 64 N.W.2d 16 (1959).

39. The Labor Management Relations Act of 1947 declared it to be unlawful for any individual employed by the United States, or by any agency thereof, including wholly owned government corporations, to participate in any strike. Penalties for violations of the act include immediate discharge, forfeiture of any civil service status, and ineligibility for reemployment for three years by the United States or any such agency. 29 U.S.C. § 188 (1947), as amended, 69 Stat. 625 (1955) (now 5 U.S.C. § 118p-r (1955)). See *State v. Brotherhood of Ry. Trainmen*, 37 Cal. 2d 412, 213 P.2d 857 (1951), *cert denied*, 342 U.S. 876 (1952), holding that a strike does not constitute a violation of equal protection. See also *Cleveland v. Divi-*

Congress has the power to enact federal compulsory arbitration from its power of control over interstate commerce. Thus, in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R.R.*,<sup>40</sup> involving a 1963 award in the railroad dispute, the district court held that the government may "regulate persons engaged in a public calling or in a calling coupled with a public interest."<sup>41</sup> The opinion noted the expanded concept of commerce and compared the compulsory legislation in the instant case to that in *Wilson v. New*.<sup>42</sup> The *Wilson* case challenged the constitutionality of a federal statute fixing an eight hour day on all railroads and providing that compensation of employees should not be reduced below the then standard day's wage, pending investigation by a Presidential Commission. The Supreme Court held:

Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of standard on that subject resulting from the dispute between the parties or as to the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration . . . .<sup>43</sup>

The district court also found in the *Locomotive Firemen* case that Congress did not lack authority to delegate its legislative power to make the determinations required of the compulsory arbitration board.<sup>44</sup> The court of appeals affirmed the decision and certiorari was denied by the Supreme Court.

Compulsory arbitration, while almost universally repudiated as the antithesis of free collective bargaining, may be used more frequently in dealing with national emergencies either on an *ad hoc* or permanent basis if an alternative procedure, such as voluntary arbitration, is not found.<sup>45</sup>

The following arguments have been leveled at compulsory arbitration:<sup>46</sup> (1) It discourages the making of offers and counteroffers in collective bargaining negotiations when the parties know that they are merely fighting over the levels at which the arbitrators will start. (2) The parties will tend to list a great many demands for negotiations, dropping none, in an effort to influence the arbitrators on the important issues by their losses on the minor ones. (3) Compulsion may outlaw

sion 268, *Amalgamated Ass'n of St. Elec. Ry. Employees*, 84 Ohio App. 43, 81 N.E.2d 310 (1948).

40. 225 F. Supp. 11 (D.D.C. 1964), *aff'd*, 55 L.R.R.M. 2517 (Feb. 20, 1964), *cert. denied*, 377 U.S. 918 (1964).

41. 225 F. Supp. 11, 21 (D.D.C. 1964).

42. 243 U.S. 332 (1917).

43. *Id.* at 352.

44. 225 F. Supp. 11, 22-23 (D.D.C. 1964).

45. Fleming, *The Search for a Formula*, in *EMERGENCY DISPUTES AND NATIONAL POLICY* 207-17 (1955).

46. See Dash, *The Academy and Public Opinion*, in *NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 13TH ANN. MEETING* 1, 9 (1960).

strikes, but it cannot prevent them from occurring, especially when there is great resentment over an award. (4) The parties are usually given no opportunity to choose the outsiders who will settle their dispute or give them the criteria that are an integral part of many voluntary arbitration proceedings. (5) As Senator Taft once argued that "if we impose compulsory arbitration . . . I do not see how in the end we can escape a collective economy."<sup>47</sup> The more often the government legislates in this manner, the more uniform the application of economic criteria for all industries. This leads naturally to wage and price controls. (6) It is impossible to divorce the imposition of compulsory arbitration from politics. The political climate might easily jeopardize the interests of one of the parties by playing a significant part in shaping the arbitrator's award.

## VOLUNTARY ARBITRATION FOR WRITING NEW CONTRACT TERMS

### *Use of Voluntary Contract Arbitration*

A survey conducted at the University of California shows that 91 per cent of management and 93 per cent of unions approve of voluntary arbitration for settling grievances. However, only 31 per cent of management and 47 per cent of unions approve of its use in writing the terms of contracts.<sup>48</sup> The approval of contract arbitration registered in the survey is not reflected in the number of contracts actually providing for such arbitration. A soon to be published study of virtually all major agreements in effect in the United States in 1961<sup>49</sup> reveals that an overwhelming majority of the contracts contained no reference to arbitration of contract terms. Some of the contracts specifically banned such arbitration. Those that stipulated binding arbitration of new terms or provided for arbitration of economic issues under reopenings accounted for less than 6 per cent of the contracts studied and of the workers covered by them. A few of the agreements provided for arbitration of new terms or issues arising under reopenings if both parties agreed.

Provisions for arbitration of disputes over new contract terms are found mainly in public transportation (local and suburban transit), utility, and construction contracts. Provisions for arbitration of disputes over reopening of economic issues are concentrated in a small number of industries with long-term contracts, such as apparel, restaurants and hotels, services, transportation (maritime, local and suburban transit, and longshoring), public utilities, and retail trade.

47. 93 CONG. REC. 3835-36 (1947).

48. Warren & Bernstein, *A Profile of Labor Arbitration*, 16 LAB. ARB. 970, 971-72 (1951).

49. Forthcoming publication of the U. S. Bureau of Labor Statistics. The agreements studied accounted for nearly all agreements covering 1,000 or more workers each, exclusive of railroad and airline agreements.

The Bureau's analysis of work stoppages in 1961 and 1962 gives additional information as to the use of arbitration in writing contract terms. In 1961, there were 171 work stoppages in industries where the contract was either the first between the parties, a renegotiation (expiration or reopening), or where the issue was to be settled after work resumed. In 1962, there were 161 such cases. In 1960, arbitration was to be used in 50 of the 171 cases, while in 1962, it was to be used in 49 of the 161 cases.<sup>50</sup>

### *Criticisms*

The similarity between compulsory arbitration and voluntary arbitration is so obvious that it cannot be ignored by even the most partisan advocate of the latter method. It follows, therefore, that the criticisms will be much the same for both procedures. It should be noted first, however, that the assumed ills encountered in both compulsory and voluntary arbitration are more easily cured in the latter system since the parties have more control over the role the process will play, both in method and in scope, in settling their dispute.

As noted previously, one of the objections to arbitration of contract terms is that it is a deterrent to free collective bargaining. The contention is that so long as the parties have reason to believe an issue will be compromised by an outsider, the incentive for good faith bargaining is lost. Moreover, in the course of normal collective bargaining the parties are encouraged to produce new solutions to contract problems. Arbitration, on the other hand, might have a stifling effect upon the inventiveness of the parties in their private bargaining, thus shifting a responsibility which is properly borne by the parties themselves.<sup>51</sup> It is also argued that a strike is the price a country must pay for industrial democracy and that only in a narrowly defined "national emergency" should neutrals take part in the bargaining process.<sup>52</sup>

Further criticism is that arbitrating new contract terms is too risky, because the arbitrator is without the clear guides or standards of a collective bargaining agreement to guide him in legislating his award. There is a basic difference, the critics say, between declaring the rights of grievance claimants by interpreting existing agreements, and permitting an arbitrator to rely entirely on his own sense of discretion and economic under-

50. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1339, ANALYSIS OF WORK STOPPAGES 1961, 7 (1962).

51. Handsaker, *Arbitration and Contract Disputes*, in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 13TH ANN. MEETING 78-79 (1960); Note, *Quasi-Legislative Arbitration Agreements*, 64 COLUM. L. REV. 109, 113 (1964).

52. Seidman, *National Emergency Strike Legislation*, in SYMPOSIUM ON LABOR RELATIONS LAW 473, 474 (1961); See also *United Steelworkers of America v. United States*, 361 U.S. 39, 62 (1959) (dissenting opinion).

standing of the interests involved in writing contract terms. Thus, along with the risk of unpredictability goes the risk of a bad decision of major significance.<sup>53</sup> For example, an extreme award with regard to wages may bankrupt a company or, on the other hand, "sentence the workers to a seriously substandard wage for the life of the agreement."<sup>54</sup>

To those who point to arbitration's success in England and other countries, the argument is made that while England's official record of deterring strikes may be good, there are so many "unofficial" strikes due to dissatisfaction with contract terms that the advantages of arbitration are negated. Furthermore, in England the acceptance of an award from the Industrial Court is voluntary, as is the submission of the issue by the parties.<sup>55</sup> In this country, such a system would be said to be nothing more than fact finding with recommendations. Here, the arbitration process demands that for the most part the awards be enforceable.<sup>56</sup> An additional point raised by detractors might be that the public interest, whatever that may be, should be reflected in an award setting contract terms. Hence a public body, it is said, such as is created by compulsory arbitration legislation, is in a better position to interpret that interest.

Perhaps the greatest drawback to increased use of voluntary arbitration is found in the "deeply ingrained" attitude of labor and management against it,<sup>57</sup> rather than in their logical objections to it. Both sides feel that their interests will somehow be prejudiced by an arbitrator who lacks a complete understanding of the issues,<sup>58</sup> and that it is not likely that they will have an arbitrator who understands those issues.

### *Advantages*

One of the principal advantages of the voluntary arbitration process is the ability of the parties to control it. If wisely employed, voluntary arbitration can meet many of the disadvantages considered in the preceding paragraphs.

Professor Handsaker forcefully argues that "interest" arbitration should be used only as a last resort measure just before a work stoppage

53. Handsaker, *Arbitration and Contract Disputes*, *op. cit. supra* note 51, at 85.

54. Handsaker, *Changing Role of Arbitration and Changing Issues*, N.Y.U. 14TH ANN. CONF. ON LABOR 183 (1961).

55. Address by L.G. Johnston, "The Arbitration of New Contract Provisions," Conference on Critical Issues in Arbitration, Western Reserve University, April 6, 1963.

56. See note 79 *infra* and accompanying text.

57. KHEEL, *op. cit. supra* note 25, at 13-15.

58. In Speilman, *Labor Disputes on Rights and on Interests*, 29 AMER. ECON. REV. 302 (1939), the author states that he would not advocate arbitration for disputes over principles; nor would he arbitrate when the general principles upon which the settlement is to be based are agreed upon. In such cases, he states, an arbitrator can do little more than give expression to his subjective preference in the matter. This is the traditional argument against arbitration. It appears, therefore, that Speilman thinks a contest of strength is the only solution.

might occur, thereby minimizing any deteriorating effect upon the preceding collective bargaining negotiations.<sup>59</sup> The parties, he further argues, would not be anticipating the arbitration and would therefore be more likely to bargain in good faith than if voluntary arbitration were contractually provided for long in advance of any breakdown in negotiations. An argument inconsistent with the foregoing is that inclusion of an arbitration clause to determine contract terms, if the parties fail to agree, will have a positive effect on their negotiations because of the inherent distaste of the parties for such arbitration.<sup>60</sup> Of course, if that distaste is so great it is unlikely that such a clause would have been initially agreed upon.

The argument that contract arbitration is too risky may be met on a policy ground that the possible economic loss to both parties, as well as to the community, from a work stoppage is a risk to be weighed against peaceful settlement by an arbitrator who is also operating in an inherently risky process.<sup>61</sup> On balance, the wiser choice is the arbitrator, especially if the risks to that process are further minimized by the parties. Additionally, the cost of arbitration is negligible as compared to the potential cost of a work stoppage. Professor Handsaker suggests the limited submission agreement, and the choice of a tri-partite board which includes an experienced neutral arbitrator, as an effective method of reducing these risks.<sup>62</sup>

Granting that the arbitrator in "interests" disputes must be given more leeway than in the normal grievance arbitration, the parties may, nevertheless, limit his jurisdiction. The parties may also limit the number of issues submitted, or indicate the general principles which the arbitrator must follow (similar to grievance arbitration). Furthermore, they may require the arbitrator, in light of the evidence presented, to apply those principles. This is not as simple as it sounds, for the argument may be valid that if the parties could have agreed on all aspects of a submission agreement, they probably would have agreed on the contract terms in question. But even in those cases where a limited submission agreement is not made, the arbitrator has a wealth of guidelines and standards to aid him.

The tri-partite arbitration board might have the effect of ensuring a decision close to that which would have been collectively bargained for, because the views of the partisan members of such a panel would influence the neutral's position. This is especially true when the neutral is

59. See Handsaker, *Arbitration and Contract Disputes*, in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 13TH ANN. MEETING 18-19 (1960); Handsaker, *Changing Role of Arbitration and Changing Issues*, N.Y.U. 14TH ANN. CONF. ON LABOR 183 (1961).

60. TRIPP, *WAGE-REOPENING ARBITRATION* 82-83 (1952).

61. Handsaker, *op. cit. supra* note 51, at 84.

62. *Id.* at 85.

not authorized to make an award in the absence of a majority and is then required to compromise an extreme position in order to gain the support of one or more of the partisans.<sup>63</sup>

An additional safeguard lies in choosing an arbitrator in whom the parties have confidence. Probably the best choice is an arbitrator with considerable arbitration experience and knowledge of the particular industry calling upon him.

Since it is alleged that one of the "risks" in voluntary contract arbitration is lack of standards, it should be emphasized that even without a restrictive submission agreement, the arbitrator has available to him all the accepted standards<sup>64</sup> which the parties themselves might have used. This substantially reduces the risk of a decision having an illogical basis. However, this is not to say that the burden on an arbitrator is not substantial in contract cases, or that arbitrators are geniuses who naturally apply the standards wisely.<sup>65</sup> But standards are available, and as one arbitrator has said: "The function we set for ourselves at the outset [is] . . . to determine what the parties, as reasonable men, should themselves have agreed to at the bargaining table."<sup>66</sup>

One of the most important standards employed is "prevailing practice."<sup>67</sup> In a wage determination, for example, this entails consideration of wages paid in comparable jobs in other plants in the area, and a consideration of wages of comparable jobs in other plants within the same industry. However, there may be reasons why a particular employer should be required to pay more or less than prevailing rates. Some of these reasons include differences in skill and training of the individual, differences in responsibility, steadiness of employment, hazards and other undesirable conditions of work, geographical differentials, fringe benefits, wage leadership, and historical differentials. If no prevailing practice exists, there is an extra burden of proof on the party seeking to improve contract terms.

An arbitrator might also consider as standards the cost of living and the ability of the employer to pay.<sup>68</sup> The latter should be carefully construed in light of the performance of the company over a period of years. It is interesting to note that it is not an unfair labor practice for an employer to refuse to allow the union to see his books unless it pleads in-

63. ELKOURI & ELKOURI, *op. cit. supra* note 12, at 60.

64. For a general discussion of this area see ELKOURI & ELKOURI, *op. cit. supra* note 12, at 442 and cases cited therein.

65. See RAO, *MEDIATION CONCILIATION AND ARBITRATION U.S.A. AND INDIA 195* (1963); Address by Northrup, *National Association of Manufacturers, 68th Congress of American Industry* (1963), in 54 *L.R.R.M.* 83,85 (1964).

66. *Twin City Rapid Transit Co.*, 7 *Lab. Arb.* 845, 858 (1947).

67. See generally McLaughlin, *Custom and Past Practice in Labor Arbitration*, 18 *ARB. J.* 205 (1963).

68. ELKOURI & ELKOURI, *op. cit. supra* note 12, at 455.

ability to pay.<sup>69</sup> Sometimes the special competitive nature of an employer's business may also be taken into consideration. Wage patterns,<sup>70</sup> that is, the wages paid in related industries, might also be considered. Basing an arbitral award on the productivity of the particular company with regard to wages has also been the basis of some decisions.<sup>71</sup>

Although maintenance of take-home pay is a much attacked standard,<sup>72</sup> it has been used in a situation where shorter hours are requested in order to keep everybody working, and the union demands pay equal to that formerly received by its men. The past practices<sup>73</sup> of the parties as well as their positions prior to submitting the case for arbitration will help the arbitrator understand the basic issues and the conflicting positions.

Another advantage of "interest" arbitration is that it permits the public interest to be carried out in the peaceful settlement of major industrial disputes without government intervention. Other public interests that an arbitrator might consider and which the arbitration process might serve are: (1) concern with inflationary forces, (2) ability of American industry to meet competition in world markets, and (3) the image of the United States in the world, especially that of efficient maintenance of operations.<sup>74</sup> Traditionally, it is the government that intervenes in behalf of the public interest when the situation warrants. However, there is no guarantee that the nebulous term "public interest" is best interpreted by the government. Private citizens, that is, arbitrators working with the parties involved in a dispute, are also capable of interpreting the public interest and ensuring that it is reflected in their agreement.<sup>75</sup> As Justice Goldberg, then Secretary of Labor stated: "No one has the monopoly to define the public interest; everyone has the obligation to serve it."<sup>76</sup>

Leaders in industrial relations both in and outside the government have, in varying degrees, lent their support to voluntary contract arbitration as an indication of responsible collective bargaining not outside the scope of that concept and in the public interest.

In a May 1962 report, the President's Advisory Committee on Labor-Management Policy asserted:

We reject the idea that there should be any legal requirement that disputes be resolved through compulsory arbitration. If the parties choose to submit their differences to arbitration, in which the award is final and

69. *NLRB v. Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954), *aff'd*, 351 U.S. 149 (1956).

70. See ELKOURI & ELKOURI, *op. cit. supra* note 12, at 471.

71. *Id.* at 472.

72. *Id.* at 476.

73. *Id.* at 479.

74. Cole, *U.S. Intervention Kills Collective Bargaining*, *Nation's Business*, March 1962, p. 38.

75. Brown, *The Public Interest: Who Can Judge It?*, *Nation's Business*, June 1962, p. 70.

76. Address, 50th Anniversary of U.S. Dep't of Labor, March 4, 1963.



binding, that is of course proper and compatible with the concept of free collective bargaining.<sup>77</sup>

Secretary of Labor Wirtz was even more emphatic when he complimented Pan American World Airways and the Flight Engineers, and the United Plant Guard Workers Unions on an agreement containing an arbitration clause for all future disputes. He stated:

These agreements are the product of the determination of this company and these unions to find a better way than economic warfare to settle their differences. In an industry so vital to the public welfare, this represents a significant contribution to the national interest.<sup>78</sup>

It appears therefore that voluntary contract arbitration offers the parties a controllable method of solving their disputes without government intervention in the name of the public interest. Use of this method seems to be assertion enough of the public interest which, though having a great number of elements when being defined, is principally concerned with maintenance of production. Certainly in the large industries the choice for the disputants who have reached a work stoppage stage in negotiations may now only be between ultimate compulsory arbitration or voluntary arbitration, for it seems clear that the government will not, in the name of public interest, permit production to stop.

#### *Enforcement of Agreements and Awards*

As noted previously in this discussion, the reason given by many parties for not entering into an agreement to arbitrate a future dispute over the terms for new contracts was that such a clause in a collective bargaining agreement might become a built-in deterrent to normal collective bargaining.<sup>79</sup> An additional reason is that if there is a great time lapse between entering into such an agreement and an actual controversy, one of the parties might well seek to withdraw from the agreement. The courts have traditionally been less than friendly toward the idea of enforcing "quasi-judicial" agreements to arbitrate.

Executory agreements to arbitrate were not enforced at common law and the party who sought to enforce the agreement was usually left to nominal damages.<sup>80</sup> The courts refused to enforce contracts to arbitrate future disputes on the grounds that it was against public policy to have important legal rights and interests determined without judicial safe-

77. COLLECTIVE BARGAINING, *Report by the President's Advisory Committee on Labor-Management Relations* 1 (1962).

78. U.S. Dep't of Labor Release No. 5774 (June 7, 1963).

79. Handsaker, *Arbitration and Contract Disputes*, in NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE 13TH ANN. MEETING 78-79 (1960); Handsaker, *Changing Role of Arbitration and Changing Issues*, N.Y.U. 14TH ANN. CONF. ON LABOR 183 (1961).

80. FREIDIN, *LABOR ARBITRATION AND THE COURTS* 2 (1952); see, e.g., *Local 1111, United Elec. Workers v. Allen-Bradley Co.*, 259 Wis. 609, 49 N.W.2d 720 (1951).

guards. Furthermore, it was apparent that the courts did not want to lose business to non-judicial third party neutrals.<sup>81</sup> However, the common law rule has given way to state statutes authorizing enforcement of these agreements, but some statutes, nevertheless, either specifically exclude labor arbitration, or are limited only to justiciable controversies, thus excluding agreements to arbitrate future "interests" disputes.<sup>82</sup>

The federal courts are in disagreement over the applicability of the United States Arbitration Act<sup>83</sup> — an act designed to encourage arbitration — to labor arbitration under collective bargaining agreements.<sup>84</sup> The reason for this is that the act does not apply to "contracts of employment" of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce. In addition to the disagreement over whether "contracts of employment" include collective bargaining agreements, the question also arises as to whether workers whose work *affects* commerce are covered, or whether a covered worker must actually be engaged in commerce.

In *Boston Printing Pressmen's Union v. Potter Press*,<sup>85</sup> the court refused to enforce an agreement which had a reopening provision calling for arbitration if conciliation failed, and further provided that the agreement *would remain in force* "until all differences are settled by conciliation or arbitration."<sup>86</sup> The court found no support to enforce what it characterized as quasi-legislative arbitration. It assumed for purposes of the opinion that Congress could have given the courts jurisdiction to enforce such agreements, but that neither the United States Arbitration Act nor section 301 of the Taft-Hartley Act<sup>87</sup> conferred that authority. Both acts, the opinion stated, evidenced a concern with quasi-judicial, not quasi-legislative disputes. Interestingly, the opinion left open the question of whether Congress actually had the authority to pass legislation controlling an interest dispute, since article III of the Constitution limits the power of the federal courts to cases or controversies.<sup>88</sup> The opinion cited state court cases produced under restrictive legislation in which those courts

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81. Note, *Quasi-Legislative Arbitration Agreements*, 64 COLUM. L. REV. 109, 120 (1964).

82. See Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. CHI. L. REV. 233, 238-45 (1950). States limiting enforcement of future disputes to justiciable controversies are Arkansas, Idaho, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, and Tennessee.

83. 43 Stat. 883 (1925), 9 U.S.C. §§ 1-14 (1958).

84. See Burstein, *The United States Arbitration Act — A Reevaluation*, 3 VILL. L. REV. 125 (1958).

85. 141 F. Supp. 553 (D. Mass. 1956), *aff'd*, 241 F.2d 787 (1st Cir.), *cert. denied*, 355 U.S. 817 (1957).

86. *Id.* at 554.

87. 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958).

88. 141 F. Supp. 553, 557 (1956).

did not find disputes over *future* terms to be the "subject of an action."<sup>89</sup> One possible ground for attacking the *Potter Press* decision is that there seems to be an assumption that there was no contract even though the arbitration clause provided for the terms of the agreement to continue until an arbitration was held. The argument has been expressed that a reopening clause is part of an existing contract<sup>90</sup> and it therefore might be enforceable under section 301.

The Supreme Court, however, greatly expanded the enforceability of grievance arbitration under federal law in *Textile Workers Union v. Lincoln Mills*<sup>91</sup> and subsequent cases.<sup>92</sup> But, it has never ruled on the enforcement of agreements to arbitrate interest disputes. If the duty to arbitrate is construed in the "context of the national labor policy favoring arbitration for tests of strength between contending forces,"<sup>93</sup> perhaps the Court will finally construe the obligation to arbitrate interest disputes as a continuing contractual duty and enforce such agreements.<sup>94</sup> There seems no logical basis, in view of the broad language (including a "presumption of arbitrability") that the Court has used, to exclude enforcement of agreements to engage in contract arbitration.

Enforcement of an award in which the arbitrator has written new contract terms would not appear to cause difficulty since the award should be considered a new contract and a party may sue for its enforcement consistent with the above quoted national labor policy.<sup>95</sup>

### CONCLUSION

When the late President Kennedy asked for emergency legislation in the summer of 1963, to prevent a nationwide railroad strike, he stated that such a strike would force almost immediate shutdown of all industrial establishments which depend primarily on rail shipments; would jeopardize the fruit, vegetable, and grain crops; would disrupt mail

89. *E.g.*, *In re Buffalo & Erie Ry.*, 250 N.Y. 275, 165 N.E. 291 (1929). The New York statute now authorizes arbitration of labor controversies "without regard to the justiciable nature of the controversy." *In the Matter of Hotel Concord*, 140 N.Y.S.2d, 848, 849 (Sup. Ct. 1955).

90. *In re Buffalo & Erie Ry.*, 250 N.Y. 275, 277, 165 N.E. 291, 292 (1929) (dissenting opinion). See also Note, *The Peaceful Settlement of Disputes Over Contract Terms*, 58 NW. U.L. REV. 556, 563 (1963).

91. 353 U.S. 448 (1957).

92. *E.g.*, *Local 721, Packinghouse Workers v. Needham Packing Co.*, 376 U.S. 247 (1964); *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

93. *United Steelworkers v. Enterprise Wheel & Car Corp.*, *supra* note 92, at 596.

94. There must, of course, be a contractual obligation. See *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543 (1964), where contract rights had "vested" before the contract expired.

95. See Note, *The Peaceful Settlement of Disputes Over Contract Terms*, 58 NW. U.L. REV. 556, 568 (1963).