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CATALYST: THE NATIONAL WAR LABOR BOARD OF WORLD WAR II

Benjamin Aaron*

WE ARE MEETING tonight to consider the role and the influence on subsequent events of a government agency — the National War Labor Board (NWLB) — which flourished briefly, for approximately four years, over forty years ago. They say that as one grows older, one tends to become more forgetful of recent events and to remember earlier ones with greater clarity. I find this to be true to a degree; I certainly forget recent happenings more than I used to, and I recall scenes of my early childhood more vividly than before. I confess, however, that the period 1942-1945 is for me partially shrouded in the mists of time. This comes as something of a surprise, because the four years I spent with the Board were the most exciting and rewarding of my life, and I thought I would never forget any important detail of that experience. But forget I did, although my memory has been considerably refreshed by reviewing the Board's three-volume Termination Report¹ and several articles and essays dealing with the period. Nevertheless, I must warn you at the outset that my recollections are hardly crystal-clear and may be somewhat affected by the it-snowed-harder-when-I-was-a-boy syndrome.

It has become part of the conventional wisdom of industrial relations that the institution of grievance arbitration was virtually created by the NWLB. Like much of conventional wisdom, this

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particular piece is in error. As various scholarly studies—most recently the excellent articles by Professors Dennis R. Nolan and Roger I. Abrams—have shown, labor arbitration was well established in this country by the 1930's, and its origins date back to an even earlier period. I think it is also true, however, that the Board had a profound influence on the use of voluntary grievance arbitration in collective bargaining and was largely responsible for the almost universal subsequent inclusion of grievance arbitration clauses in collective bargaining agreements. It is no coincidence that when President Truman convened a labor-management conference immediately following the end of the Second World War, the only substantive item upon which the representatives of employees and unions were able to agree was the desirability of including grievance arbitration provisions in collective bargaining agreements.4

THE NATIONAL WAR LABOR BOARD

The Creation of the NWLB

It will be useful to describe briefly the immediate events leading to the establishment of the NWLB. The Board was the successor of the National Defense Mediation Board (NDMB), a tripartite agency established by Executive Order 8716 on March 19, 1941.5 The Executive Order limited the obligation of the NDMB and the parties to disputes that threatened to burden or obstruct the production or transportation of equipment or materials essential to national defense. This represented a relatively small section of the economy. "The order specified a process of certification by the Secretary of Labor to the [NDMB] that provided to the parties, for the first time, an unequivocal determination of defense

2. See, e.g., R. FLEMING, THE LABOR ARBITRATION PROCESS (1965); Killingsworth & Wallen, Constraint and Variety in Arbitration Systems, 17 PROC. NAT'L ACAD. ARB. 56, 57 (1964)(It was a "great landmark" in 1940 when General Motors and the UAW set up a permanent arbitration system. However, 1940 was not "Year One" in labor arbitration. In fact, permanent arbitration systems with "quite long histories" pre-dated the GM/ UAW System.).


urgency. The order was based on the concept that the primary approach to the settlement of labor-management disputes would continue to be collective bargaining, even in crucial defense plants. The NDMB was to seek to obtain a settlement in cases certified to it through mediation. If mediation failed, the NDMB was empowered to issue formal recommendations for the settlement of the dispute and to make them public; but the parties were not required to accept the recommendations. As previously noted, the NDMB was tripartite in structure, and the willingness of labor and management representatives to serve on it committed them to the responsibility for working out peaceful solutions to industrial disputes.

The NDMB operated with a relatively high degree of success for about eight months; it eventually foundered on the union-security issue in the "Captive Mines" case, involving United Mine Workers of America and the steel industry. When the NDMB voted, nine to two, to reject the union's demand for a union shop in the captive mines, similar to that provided in the Appalachian Mines Agreement, the CIO members of the Board resigned in protest, and the NDMB in effect ceased to function.

Between early November and December 7, 1941, labor policy in the United States was in a state of suspension. Various legislative proposals intended to solve industrial relations problems in defense industries were introduced in Congress, but action on the proposals was deferred after the attack on Pearl Harbor. Instead, the President, on December 12, issued invitations to organized labor and industry to select twelve representatives for a wartime industry-labor conference to be convened in Washington on December 17, 1941. The conferees met from December 17 to 23. They eventually agreed to three basic points: (1) There would be no strikes or lockouts; (2) All disputes would be settled by peaceful means; and (3) The President would set up a War Labor Board to...
handle those disputes. The employer representatives wanted to include a fourth point freezing all present union-security arrangements and were unwilling to accept the first three points without it. Union representatives refused to accept the proposed fourth point. When this situation was reported to President Roosevelt, he characteristically responded with a letter to the conferees congratulating them on their "agreement" on the first three points. The President also observed that "Government must act in general. The three points agreed upon cover of necessity all disputes that may arise between labor and management." The Conference then adjourned.

On January 12, 1942, the President issued Executive Order 9017, establishing the National War Labor Board. The Board was tripartite in structure, consisting of four representatives each of the public, employees, and employers. The employees' four representatives consisted of two from the AFL and two from the CIO. The procedures for adjusting and settling labor disputes were set forth in the Executive Order as follows: The parties were first to resort to direct negotiations or to follow the procedures provided for in their collective bargaining agreement. If the dispute was not settled in this manner, the Department of Labor was to be notified, if its Conciliation Service had not already intervened in the dispute. If the dispute was not settled promptly by conciliation, it was to be certified by the Secretary of Labor to the Board. Once the Board assumed jurisdiction, it was to determine the dispute, by the use of "mediation, voluntary arbitration, or arbitration under rules established by the Board."

The Mission of the NWLB

The Board's mission was straightforward and easily stated: to prevent interruptions of any work that contributed to the effective prosecution of the war, to avoid all strikes and lockouts, and to make sure that all disputes were settled by peaceful means. The task once embraced, however, proved to be a formidable one, and

10. Id. at 49.
11. Id. at 50.
12. Id.
14. Id.
15. Id.
16. Id.
as the record shows, the Board was only partially successful in its efforts. In the years 1942 through August, 1945, there were 4,357 stoppages of concern to the Board involving over three and one-third million workers and resulting in over 23.5 million man days idle.\textsuperscript{17} On the other hand, only a very small percentage of production days were lost, with the figure never rising above 0.17 percent.\textsuperscript{18} This record is remarkable because it was achieved in a period of rapid union organization growth. During a period when the bargaining power of individual workers and unions increased very rapidly, living costs rose sharply, and the management of many plants did not accept the idea that unions were permanent participants in industrial relations decisions.\textsuperscript{19} It seems safe to conclude that without the Board the strike record would have been much worse.

The Operation of the NWLB

As previously mentioned, the structure of the Board was tripartite. In his introductory comments to the NWLB Termination Report, former Board Chairman George W. Taylor expressed the view that the tripartite composition was:

\begin{quote}
virtually indispensable to a Board charged with the responsibility for finding answers to the host of problems which came before it and for which no precedents were available . . . . The participation of labor and industry representatives in evolving workable and acceptable solutions to complex problems was of vital importance not solely in the disposition of cases but in the formulation of general policy.\textsuperscript{20}
\end{quote}

Taylor rejected the argument of some critics that the Board should have consisted of only representatives of the public.\textsuperscript{21} He conceded that the time and effort which had to be spent in reconciling differences between Board members, and which frequently threatened to break up the Board, could have been devoted to more constructive ends. However, he pointed out that the "recurrent crises in the work of the Board were usually a rather accurate reflection of the tenseness over an issue which existed in a plant or

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\item[17.] 2 NWLB Termination Report, supra note 1, at 822, 825, 827. The 4,357 stoppages included strikes, lockouts, and work stoppages.
\item[18.] Chalmers, supra note 6, at 52.
\item[19.] Id.
\item[20.] 1 NWLB Termination Report, supra note 1, at xvii.
\item[21.] Id.
\end{itemize}
in an industry involved in a particular case or which prevailed in the country generally over a basic policy." In his view, these issues converged at the Board's conference table, and the task was to find solutions which would "take" and which would not be followed by crises at the workplace. "The very fact that representatives of labor and industry participated on an equal basis with public members in the work of the Board served to assure disputants that their interests were fully considered in any action."

Taylor also thought that the tripartite structure of the Board had important implications for the principle of voluntarism in industrial relations. As he put it:

The fact remains . . . that War Labor Board activities rested upon a voluntary no-strike, no-lockout agreement and upon day-by-day voluntary acceptance by labor and by industry of the Board policies. The right of withdrawal from the Board which labor and industry members possessed was an assurance, therefore, that voluntarism in labor relations would be preserved even while the war was being fought. The task of keeping the Board intact was not merely a burden arising from an organization defect, as some critics maintain. It was a vital part of the preservation of voluntarism in a nation engaged in a battle against totalitarianism.

One of the first issues confronting the NWLB was whether it should lay down, at the outset, certain basic principles to which it would adhere without variation or compromise. Like its predecessor, the NDMB, the Board opted to develop principles on a case-by-case basis; but unlike the NDMB, the Board had the responsibility to go beyond mediation and actually settle all unresolved disputes that were referred to it. Therefore, the adoption of some substantive principles of dispute settlement became unavoidable. Those principles relating to grievances and arbitration included the following:

A. Grievances can best be settled by the prompt initial attention of those in the plant who have intimate knowledge of the dispute. The exact procedure for such attention to grievances must be adapted to the needs of the plant and can best be

22. Id.
23. Id. (Allowing the crisis of war-time labor relations to take place in the Boardroom instead of the workplace prevented interference with "maximum production and the prosecution of the War.")
24. Id.
25. Id. at xviii.
worked out by the parties themselves.

B. Grievance procedures should provide for the final and binding settlement of all grievances not otherwise resolved. For this purpose, provisions should be made for the settlement of grievances by an arbitrator under terms and conditions agreed to by the parties. If the Board finds it necessary to order an arbitration clause, it prefers the permanent arbitrator setup, but it will order this type of arbitration only when the employer has expressed no serious opposition or where exceptional circumstances warrant a permanent arbitrator despite management opposition.

C. If the parties cannot agree upon an arbitrator within a specified period of time (usually 10 or 15 days), the Board will appoint one.

D. Even in the absence of established grievance procedures, the Board will expect all parties to settle grievances through direct negotiation and, if necessary, voluntary arbitration. Where the company or union seeks to have a case involving a grievance certified to the Board, the Board will consider the grievance, if at all, primarily from the point of view of the establishment of effective grievance machinery within the plant. As a rule, the Board will refer such unsettled grievances to an arbitrator.

F. Such grievance procedure problems as time limits, written versus oral presentation of grievances, the number of union grievance men, and payment for time spent in handling grievances will be determined on an individual case basis.26

It can thus be seen that the Board wanted to avoid its involvement in individual grievances, and to that end it required the parties, voluntarily whenever possible, to establish their own machinery to settle private disputes. Any other course would have proved disastrous, for the Board would then have become inundated by thousands of relatively minor conflicts growing out of countless collective bargaining agreements.

**Grievance Arbitration Under the NWLB27**

As previously noted, by 1942 the institution of labor arbitra-

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27. See generally 1 NWLB Termination Report, *supra* note 1, at 104, 105-1322 (This chapter is about the grievance procedure. It describes "Board action with respect to the numerous problems which obstructed the attainment of effective grievance
tion was already well established. Influenced, I think, by the experience of two of its public members, George W. Taylor and Wayne L. Morse, the Board favored the establishment of permanent arbitrator arrangements, with the understanding that the word "permanent" meant only for so long as the arbitrator continued to be acceptable to both sides. The parties, however, remained free to opt for ad hoc arbitration if they so desired.

The question whether or not an issue was subject to the contract grievance procedure was raised in numerous dispute cases before the Board. The Board did not ordinarily define in detail what was to be considered a grievance. In a 1942 case involving Montgomery Ward and Company in which management prerogatives had been a contested issue, the Board ordered a clause that spelled out the meaning of "grievance" in detail:

Grievances, within the meaning of the grievance procedure, shall consist only of disputes about working conditions, about the interpretation and application of particular clauses of this agreement, and about alleged violations of the agreement, including alleged abuses of discretion by supervisors in the treatment of employees. Changes in general business practice, the opening or closing of new units, the choice of personnel (subject, however, to the seniority provision), the choice of merchandise to be sold, or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with their supervisors, shall not be the subject of grievances and shall not be arbitrable. If any question arises as to whether a particular dispute is or is not a grievance within the meaning of these provisions, the question may be taken up through the grievance procedure and determined if necessary by arbitration.

We see here an early treatment of an issue that would assume so much importance more than twenty years later: the duty to bargain over management decisions that "lie at the core of entrepreneurial control."

28. See, e.g., Automatic Transportation Co., 13 War Lab. Rep. 733 (1944)(The Directive Order was at times very brief and did not set out the dispute in detail.).
30. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964)(Stewart, J., concurring)("In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not 'with respect to . . . conditions of employment.' Yet there are other areas where decisions by management may quite clearly imperil
Grievances subject to the grievance procedure are generally limited by the Board to the interpretation and application of the agreement between the parties.\(^3\) In a few cases, however, the Board included any grievance over working conditions, regardless of agreement coverage.\(^2\) The Board rejected the notion of a single, ideal grievance procedure, believing that procedures had to be tailored to fit the needs of a particular plant or establishment. For example, it did not attempt to prescribe the number of steps in a grievance procedure; it simply stressed the importance of not having too many steps and of having different persons involved at each step.

The Board also strongly favored a step, immediately prior to arbitration, at which top union and management officials could discuss unsettled grievances. In *General Chemical Company*\(^3\) it explained:

> It is because the Board has seen such a large number of grievances quickly disposed of in conferences between company presidents and high union officials that it has amended the panel's recommendations on grievance procedure in the instant case to provide for a submission of a grievance to the president of the company, or his representative and to the president of the federal union or his representative for settlement by them if possible before the issue is carried to arbitration.\(^4\)

Another recurring issue faced by the Board involved the right of individuals, as distinct from the right of the union, to present and settle grievances. Board decisions on this issue anticipated the decisions in *Hughes Tool Company*\(^3\) and the proviso to section 9(a) of the amended National Labor Relations Act (NLRA).\(^3\) It took the position that individual employees, whether union members or not, should have the option of either dealing through the union or taking up their grievances by themselves with management at the first step of the grievance procedure, but that in sub-

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31. *E.g.*, Mills Novelty Co., 14 War Lab. Rep. 654, 655 (1947)(upon finding the grievance subject to the grievance procedure the Board spelled out a four step procedure to follow in order to reach a settlement between the parties).


34. *Id.* at 392.

35. *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

sequent steps a union representative was to participate in the settlement of any grievances. In *Douglas Aircraft Company*,\(^{37}\) the company claimed, on the basis of the Ninth Circuit decision in *North American Aviation*,\(^{38}\) that it had the right to continue a separate grievance procedure, established prior to the union's certification, for the handling of grievances presented directly by individual employees. Under this separate procedure, grievances would be negotiated or settled without participation by the union. In this case the Board did not defer to the NLRB, as it had in some previous cases; instead, it denied the validity of the dual grievance procedure, and directed the use of a single procedure as agreed to by the parties, with the following addition:

Individual employees or groups of employees may continue personally to present grievances to the Company but the union will be notified of all such grievances and the company will negotiate with the Union concerning the disposition of such grievances, except those involving exclusively some question of fact or conduct peculiar to the employee or employees lodging the grievance and not involving an interpretation of the collective agreement or a matter properly the subject of a collective agreement and except those grievances which the Union agreed may be adjusted without notification to it or without its participation.\(^{39}\)

Despite the fact that under the NLRA employers have no legal obligation to deal with unions representing only a minority of their employees, for a limited period the NWLB sometimes directed the establishment of a grievance procedure for minority unions for their members, in the interest of protecting war production, when no recognized or certified union existed. These situations usually involved conflicts between rival minority unions or charges of employer unfair labor practices, and the Board's action was usually designed to preserve the peace until the NLRB had disposed of the case. Following a conference with the NLRB in May of 1943, however, the Board announced that, henceforth, grievance procedures for minority unions would be ordered only in exceptional circumstances. It reiterated this policy in January of 1944.

The question of time limits for action on grievances was addressed by the Board in a number of cases. In general, it took the

\(^{38}\) NLRB v. North American Aviation, Inc., 136 F.2d 898 (9th Cir. 1943).
\(^{39}\) Douglas Aircraft, 24 War Lab. Rep. at 60.
position that grievances had to be settled with dispatch, and that the failure to do so engendered many disputes that would otherwise not have arisen. As with other aspects of the grievance procedure, however, the Board recognized that there was no magic formula, and that different time limits might have to be provided for different types of grievances. The important point was to have a reasonably prompt and certain time in which to complete a particular step of a given procedure.

With respect to the scope of the arbitrator’s authority, the Board preferred that this matter be left to the mutual determination of the parties. In general, however, the Board found it necessary to spell out the arbitration clause. It usually defined the arbitrator’s jurisdiction to cover all grievances or disputes concerning the application or interpretation of the collective bargaining agreement. In a few instances a provision was added specifically excluding disputes over new agreements (“interests” disputes).

In cases in which special conditions existed, the Board spelled out in detail the scope of arbitration. In one case, for example, the arbitrator was given authority to determine whether changes in work standards should be subject to redetermination, but the actual determination of new standards was to be referred to a special committee of three qualified engineers, one each to be designated by the company, the union, and the United States Department of Labor. In another case, the Board upheld the company’s contention that disputes over promotions and transfers should not be arbitrable because of the hazardous nature of the plant’s operation. The Board said in part:

> In some agreements, the duties and responsibilities of “the third man” are almost without limit. In others, definite restrictions are agreed upon by the parties themselves. In the present case, the hazardous nature of plant operation demands that promotions and transfers be excluded from the arbitration process.

In the first Chrysler case, the Board refused to order arbitration of new rates because it was reluctant to break new ground too quickly. At the same time, it did direct arbitration of disputes involving the equalization of rates for men and women performing comparable work. In regard to the new rates issue, the Board

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42. Id. at 373.
stated:

The Board is . . . in full accord and sympathy with the objective sought by the panel in recommending final determination of disputes over new rates by a continuing impartial umpire. On the other hand, it is fully cognizant of the fact that in the development of the impartial umpire arrangement in the mass production industries, the setting of new rates has rarely been within the jurisdiction of the umpire. In the judgment of the Board, the interests of a voluntary acceptance by the parties of a genuine impartial umpire arrangement would not be well served by directing the use of an umpire and by starting the development of such machinery through the establishing of new rates.44

As previously mentioned, the Board had a preference for arbitration systems employing a permanent umpire rather than ad hoc arbitrators. In the second Chrysler case,45 the Board ordered a permanent umpire system over the strong objections of the company. In its opinion explaining the reasons for its decision, the Board stated in part:

In some agreements, each unresolved grievance is submitted to an “arbitrator” whose tenure is limited to one or several issues. Such a system works best where the parties have developed a satisfactory collective bargaining relationship. Even in such cases, there have been shortcomings over such ad hoc “arbitration.” Different “arbitrators” may provide somewhat varying interpretations; coming “cold” into a situation, they lack understanding of the existing relationships; and experienced persons are frequently not available for ad hoc work. These defects are most compelling in large organizations. In consequence, an increasing number of agreements provide for a continuing, named umpire or impartial chairman. His jurisdiction varies in different agreements depending upon the determination of the parties. The umpire acts as a one-man board finally to resolve grievances, subject to his jurisdiction, by reference to agreement terms. The impartial chairman heads a board consisting of representatives of unions and management. Action on his part on grievances under his jurisdiction is called for only if the representatives of the parties are unable to agree.46

Another problem encountered in connection with the establishment of an arbitration system was the procedure for the selec-

44. Id. at 453.
46. Id. at 554.
tion of the arbitrator. The Board generally gave the parties the opportunity to select their own arbitrator, but because deadlocks frequently occurred, it was often obliged to appoint one if the parties could not agree within a specified time. Initially, the Board designated some agency other than itself (e.g., the American Arbitration Association) to appoint an arbitrator in case of deadlock, but in September of 1943, it announced that, henceforth, it would make all such appointments itself unless the parties agreed to the delegation of this authority to some other organization or individual.

The Board was asked to review arbitration awards on two grounds. The first was an allegation that the arbitrator had exceeded his jurisdiction or had failed to follow proper procedure. The second was a contention that the arbitrator’s award was unreasonable and without merit. In the leading case on the issue of reviewing arbitration awards on the merits, the parties defined the scope of arbitration, but also stipulated that either party could request the Board to review the arbitrator’s decision. In denying the company’s request for review, the Board said in part:

There is . . . no requirement that arbitrators’ awards in non-wage matters should be reviewed by the . . . Board and there are cogent reasons why such awards should not be so reviewed. Such a review . . . if it became generally necessary, would doubly retard the war program by increasing the . . . time required for their settlement. Final arbitration of labor disputes by persons acceptable to both parties has been developed as an important and vital part of [sic] industrial relations program of this country . . . . [This procedure] would be weakened into impotency should encouragement be given to the making of the awards of such arbitration subject to . . . Board review.

Here again, the Board anticipated future legal developments, namely, the 1960 decision by the Supreme Court in Enterprise Wheel & Car. However, the Board’s principal concern was the effective prosecution of the war, and was, therefore, somewhat different from that of the Court.

In the case of awards on wage issues, some review was required under the wartime wage stabilization program. In November of 1943, the Board adopted a revised arbitration policy. An

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48. Id. at 469-70.
arbitrator, whether or not appointed by the Board:

was required to file his award on a wage issue with the Board at the same time that it was issued to the parties. The Board would review the award in the same manner as it reviewed a voluntary wage agreement. If the Board found that the arbitrator had obviously erred in applying the Board’s wage stabilization policy, the Board might refer the case back to the arbitrator with “appropriate advice in regard to the policies of the Board which [were] involved.” The arbitrator was then free to modify his award and resubmit it to the Board for approval. 50

At the same time, the Board refused to disturb arbitration wage awards for reasons other than an impermissible departure from wage stabilization policy requirements, thereby reinforcing its stand that arbitration awards were, in general, to be final and binding.

Some objections to arbitration awards were on procedural grounds, including claims that the arbitrator had exceeded the scope of the arbitration submission or had violated some other rule. At issue was whether the Board should assume jurisdiction of such questions or leave the parties to their judicial remedies. At first, the Board usually assumed responsibility for the acts of an arbitrator it had appointed, but rarely intervened in cases involving private arbitrators. In Smith and Wesson, 51 however, the Board announced that, henceforth, if a dispute over the procedural aspects of an arbitration award was certified to it by the United States Conciliation Service, the Board would review the award and modify it to the extent necessary to rectify the procedural errors of the arbitrator, but without prejudice to the rights of the parties to proceed in the courts.

A closely related question concerned the enforcement of awards, because here, too, the parties had an available forum in the courts. In September of 1943, the Board issued a policy statement on enforcement of arbitration awards to the effect that it would enforce the rights and obligations of the parties under the award by issuing an order embodying those rights and obligations “regardless of the fact that there may be available other procedures for enforcement.” 52 The Board made clear, however, that its determination of the matter would:

50. 1 NWLB TERMINATION REPORT, supra note 1, at 407.
52. 1 NWLB TERMINATION REPORT, supra note 1, at 412.
constitute a final adjudication unless and until a tribunal of competent jurisdiction issues rulings contrary to those of the Board. The action of the Board in no way prejudices the right of a party to appeal to a court of competent jurisdiction from a . . . declaration [by the Board] of the rights and obligations flowing from the award.

The rules of procedure adopted in November of 1943, "retained the essence of the September 1 statement," but extended it to cover cases involving "allegations that the arbitrator had exceeded his jurisdiction."

As can be seen, the Board generally did not challenge the jurisdiction of the courts in those cases in which the courts had traditionally provided judicial remedies. In some instances, however, such as the dual grievance procedure issue raised in Douglas Aircraft, the Board elected to disregard the interpretation of the section 9(a) proviso of the NLRA rendered by the Court of Appeals for the Ninth Circuit in North American Aviation and to insist upon only one grievance procedure negotiated by the exclusive bargaining representative. Relations between the Board and NLRB were not without tension, because some issues considered by the Board, such as the rights of minority unions to present grievances and carry them to arbitration, were arguably within the exclusive jurisdiction of the NLRB. The War Labor Disputes Act (Smith-Connelly Act) of 1943, however, required the NWLB to conform to the provisions, inter alia, of the NLRA. The Board observed that requirement and occasionally met with members of the NLRB to resolve any problems that arose between the two agencies.

Summary and Conclusions

From the foregoing it is evident that the National War Labor Board, although it did not invent the system of grievance arbitration that now prevails in this country, certainly was responsible for its broad acceptability and rapid expansion in the years immediately following the conclusion of the Second World War. In its decisions, the Board was governed by one overriding principle: to do everything possible to promote the effective prosecution of the war by eliminating strikes and lockouts affecting war production.

53. Id.
Grievance arbitration was the chosen instrument with which to achieve the result. In some instances, as in *Montgomery Ward*, the Board deferred to the employer's determination to retain its managerial prerogatives, but in other cases it ordered the arbitration of disputes over equal pay for comparable work, thus anticipating the Equal Pay Amendment to the Fair Labor Standards Act by about twenty years. The Board also helped establish the principle that arbitration decisions not flawed by procedural irregularities or arbitral misconduct must be enforced even if the arbitrator arguably misconstrued the collective bargaining agreement.

Although its tripartite structure lent weight to its decisions, the Board had to deal on a regular basis with internal tensions between labor and industry members, to say nothing of occasional differences between the AFL and the CIO members, and the constant threat that one or more groups of members might resign from the Board, thereby putting an end to its effectiveness. That the Board survived this peril and succeeded so well in its assigned mission was due in part to the public-spiritedness and patriotism of the partisan members and even more so to the enormous ability and tact of its public members, and to the devotion and loyalty of a gifted and totally committed staff.

**Evolution of the Arbitral Process: Arbitrable Quality and Efficiency**

The Legacy of the NWLB

In the period immediately following the conclusion of the Second World War, the use of labor arbitration increased rapidly. Union membership continued to rise, and the enactment of the Taft-Hartley Act in 1947 eventually led to the creation of a federal common law of labor arbitration that inspired judicial enforcement of both agreements to arbitrate and most arbitration awards. These developments were accompanied by an increase in the number of available arbitrators. As Nolan and Abrams subsequently observed, "Perhaps the Board's most important contribution to modern labor arbitration was the development of a body of

experienced arbitrators, many of whom remained active after the War. The founding, in 1947, of the National Academy of Arbitrators helped to institutionalize the practice of labor arbitration and to build up a cadre of experienced arbitrators generally acceptable to both unions and employers.

The NWLB's preference for permanent umpires, as opposed to ad hoc arbitrators, was reflected in the post-war establishment of new permanent umpireships in a number of major industries. Inevitably, however, the larger number of businesses for which permanent umpireships were not feasible led to a much greater use of ad hoc arbitrators.

Among the permanent umpires, none had greater influence on the development of labor arbitration than Dr. George W. Taylor. His views included the belief that mediation by the umpire could and should play an important role in resolving certain kinds of disputes between the parties. This philosophy was sharply opposed by J. Noble Braden, Tribunals Vice President of the American Arbitration Association (AAA), who believed that an arbitrator's role was a purely judicial one, and that at the first indication that the parties might be interested in settling the dispute without a formal arbitral ruling, the arbitrator should withdraw. Failure by the arbitrator to do so, he argued, would constitute a breach of professional ethics. The disagreement between these two authorities led to the publication of a series of articles in which they presented their respective views.

In succeeding years, it appears that the acceptable practice has gone even beyond the scope envisioned by Taylor. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, adopted originally in 1951 and revised in 1972, implicitly accepts the idea that an arbitrator may, if the parties so desire, "both . . . mediate and . . . decide or submit recommendations regarding residual issues, if any."

Arbitrators are free to

decline a mediation role; on the other hand, the Code provides:

An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.63

Taylor's beliefs about the use of mediation and arbitration were based largely on his own experiences as a permanent umpire in a number of industries. He thought the umpire should strive to "get into the bloodstream" of a particular industry or enterprise and to become thoroughly familiar with its problems, so that he could better assist in the solution of labor-management disputes by whatever means seemed most appropriate in the particular case, including mediation. I doubt, however, that he would have indiscriminately indorsed mediation by ad hoc arbitrators who have had no prior relationship with the parties.

The Maturing Arbitration Process: Some Perceived Problems

About a decade into the post-war period, labor arbitration practice had developed to the point that some arbitrators and labor and management practitioners began to sound the alarm about what they described as "creeping legalism" in arbitration. As one respected arbitrator put it: "A frustrating kind of legalism has crept into labor relations because the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation, with all the canons of construction familiar to the law of contracts."64 Similarly, the American Arbitration Association, in its official publication, The Arbitration Journal, stated that the trend toward "creeping legalism" had already gone so far "that unless it is reversed there is serious danger that arbitration will lose the very characteristics of speed, economy and informal-ity that cause companies and unions to prefer this method of grievance settlement above all others."65 These charges have been

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63. Id. at pt. 2, § F-2-c.
made periodically and are frequently heard today.

In a piece entitled "Labor Arbitration and Its Critics," published in 1959, I discussed the charges of "creeping legalism". Having reviewed that article recently, I see no reason to change what I wrote then. I regretted the use of the invidious epithet "creeping legalism" because it suggests something stealthy and unwholesome — a condition to be resisted as strongly as "creeping subversion," another popular target of the 1950s. What I suggested was that we concentrate on the particular practices or attitudes under attack, and that we identify and evaluate them before determining whether they are creeping, toddling, or galloping. My point was that labor arbitration is a protean institution, assuming a number of different forms, and that if some arbitrators have "come to function like a judge," it is probably because the parties have opted for that type of system. After all, the official position of the AAA, as then stated by Noble Braden, was that the arbitrator’s function should be limited to "the judicial determination of disputes."

Concerning the formality of arbitration hearings, and the frequent charge that the proceedings were tending more and more to resemble judicial trials, I deplored the recourse to the use of such generalizations, arguing that no single person or organization had enough information to warrant making so sweeping an indictment. My own experience, which has been substantially consistent in the intervening years, was that arbitration proceedings are seldom more formal than those conducted under the voluntary labor arbitration rules of the AAA, and are frequently less so. In any case, I concluded that formality versus informality is not the issue — the important question is whether the procedure adopted effectuates the purposes of the arbitration. Those purposes vary considerably, depending upon the relationship between the parties, the type of arbitration system they have developed, and the nature of the question to be arbitrated. Accordingly, the arbitration proceeding may range in character from an extremely informal session, resembling a collective-bargaining negotiation, with the arbitrator serving primarily as a chairman or moderator, to a formal hearing in which the arbitrator is called upon to rule on various procedural matters, such as the admissibility of evidence and the scope of cross-examination. Although my own preference has always been

67. Id. at 606.
for a proceeding that falls about midway between those extremes, I have participated in quite successful arbitrations in which the procedures were either so informal as to be almost anarchic or so formal as to resemble a judicial trial.

It is scarcely surprising that the use of lawyers in arbitration came under early and heavy attack, particularly from unions, which were often not represented by legal counsel. Some employers, however, also shared this antipathy to the use of lawyers in arbitration. I remember one company official who refused to have anything to do with them and referred to the entire profession as "a bunch of stipulating bastards." Many of the objections to lawyer participation in labor arbitrations are really targeted against practices associated with lawyers, for example, the insistence upon a verbatim transcript of the proceeding and the filing of prehearing or posthearing briefs. A more cogent criticism, it seems to me, is that some lawyers are so devoted to "winning" cases for their clients that they lose sight of an important purpose of grievance arbitration, which is to settle problems without destroying the relationship between the parties. As a member of the legal profession, I may be somewhat biased in favor of lawyers, but I am not blind to their faults. Like the little girl in the nursery rhyme with a curl in the middle of her forehead, when they're good, they're very, very good, and when they're bad, they're horrid. But is not that description equally true of doctors, engineers, generals, or prize fighters? I see no justification for saying that simply because some lawyers or consultants impede arbitration hearings with needless and irritating formalities, or poison the atmosphere by resorting to unnecessarily combative tactics, it is an act of bad faith or lunacy to allow any of them to participate. In any case, the dispute over the role of lawyers in labor arbitration is purely academic. Like death and taxes, lawyers will always be with us.

Another common complaint about labor arbitration, which has grown in intensity with each passing year, is the delay in disposing of cases. One of the prime virtues claimed for arbitration is that it offers a speedy method for resolving disputes. This is becoming less and less apparent. In 1958, Arthur M. Ross published an article in which he compared a sample of cases from 1945-1946 with a sample from 1955-1956. He found that in the intervening period the approximate average increase in the amount of

time between grievance and hearing was twelve percent; between hearing and decision, sixty-five percent; and between grievance and decision, fifty-two percent. Whereas in 1945-1946, “two thirds of the grievances were finally disposed of within four months” after filing, ten years later only about a third were solved that quickly; thirty-seven percent were dragged out for more than six months. In 1955-1956, only forty-four percent of the arbitration awards were issued within thirty days of the hearing; a decade earlier the corresponding figure was seventy-two percent. With minor variations, this trend has continued to the present.

Of all the sins of labor arbitration, excessive delay has always seemed to me to be the most besetting and the least forgivable. We must understand, however, that employers, unions, and arbitrators all share the responsibility for delays in the arbitration process. The more successful arbitrators tend to schedule more cases than they can handle promptly, although the Code of Professional Responsibility states: “It is a basic professional responsibility of an arbitrator to plan his or her work schedule so that present and future commitments will be fulfilled in a timely manner.” In most instances, the parties put very little pressure on arbitrators to render prompt decisions.

In any case, arbitrators are not exclusively in control of the time factor, either before or after the hearing. Some parties negotiate interminably over the time and place of the hearing or over the terms of the submission after the dispute has been submitted to arbitration and the arbitrator has been selected. Similarly, after the hearing, an arbitrator cannot prepare his decision until the briefs and transcript, if any, are submitted. Inasmuch as the parties’ representatives are frequently overworked, they tend increasingly to agree upon longer periods in which to submit their post-hearing briefs. What once took no more than a week to ten days on the average, has now been extended to about a month or more.

The increased costs of arbitration have also come under heavy attack. In my opinion, the concern over rising costs is entirely justified, but much of the discussion about the causes and remedies of these rising costs seems to be wide of the mark. I do not believe that the average per-diem fee of arbitrators is exces-

69. Id. at 264.
70. Id. at 263.
71. Id.
sive, although in a number of individual cases it may be relatively high. In every profession some practitioners charge considerably more than the majority of their colleagues; among arbitrators, the number who do so is certainly not relatively greater than the corresponding number of lawyers, doctors, or architects. Moreover, there is no mystery about the identity of these arbitrators, and the parties who employ them do so with full knowledge of the extra expense involved. That the high-priced arbitrators are all in constant demand suggests that their services are deemed to be well worth the cost.

It cannot be denied, however, that some arbitrators allow hearings to proceed longer than they should, take too much time in preparing their awards, or worse, charge for more time than they have spent. There is no excuse for such practices, just as there is no place in the profession for those who engage in them. Fortunately, the number of such offenders, so far as we know, is relatively small. The parties themselves are in the best position to control arbitration costs by avoiding needless or trivial arbitration, by preparing cases more efficiently, and by refusing to tolerate wasteful delays.

Some Recent Developments

One of the more obvious developments in labor arbitration in recent years is the sharp increase in the number of arbitrators. The founding members of the National Academy of Arbitrators numbered only slightly more than 100. Today, the Academy has almost 700 members. A far larger number of arbitrators are not members of the Academy. Several thousand arbitrators are on the rosters of the Federal Mediation and Conciliation Service and the American Arbitration Association. The large influx of new arbitrators has created a number of concerns, one of which is more or less summarized in the following excerpt from the 1987 report of the Academy’s Special Committee on Professionalism:

[A]s we read arbitration awards from day to day, we find ourselves becoming increasingly concerned over their current level of quality. Opinions are often much too long and poorly written. Arbitrators too often base their rulings on principles taken, not from the parties' agreements, problems, or needs, but from some treatise on arbitration or from published awards dealing with other parties, other agreements, and other problems. Theoretical principles are too often imposed on the parties without regard to considerations of practicability or justice. Collective bargaining
realities become obscured and play an insufficient role in the reasoning process. Self-restraint is often ignored and awards attempt to decide far more than need be decided. Of course, these shortcomings have always been with us. But the Committee sees evidence that the prevalence of this kind of opinion writing and decision making has increased in recent years.\textsuperscript{73}

Elsewhere in its report, the Committee deplored the failure of many, if not most, arbitrators to become familiar with and to adhere strictly to the Code of Professional Responsibility, and the disposition of some arbitrators to view arbitration primarily as a business. "Such a mindset," the Committee observed, "may help to maximize one's income [but] [i]t does not help to maximize one's sensitivity to Code obligations and the necessary proprieties. . . [s]elf-serving instincts must always be subordinated to the need to uphold the integrity and honor of the profession."\textsuperscript{74}

The remedy proposed by the Committee for these ills was more educational programs, not just for would-be arbitrators, but also for neophyte arbitrators who are actively engaged in the profession. The Academy now schedules an annual education conference, for members only, at which practical problems facing arbitrators are explored in depth. This continuing education program is for all members, not just the newer ones, and has proved to be very popular. The Academy has also encouraged its regional branches to devote time at their meetings to discussion of Code problems.

Concern over problems of delay has led to the increased use of expedited procedures. These have taken various forms. In certain categories of cases the arbitrator must render a "bench decision" immediately following the conclusion of the hearing. In such cases the parties usually stipulate that there shall be no transcript and, of course, no briefs. A variation of this arrangement calls for the arbitrator to submit a brief written decision without an accompanying opinion within a few days after conclusion of the hearing. In the steel industry, the parties use "apprentice arbitrators" in nonprecedent cases in which the proceedings are conducted on an expedited basis.

There has also been an increasing interest in "alternative dispute settlement" procedures which involve the use of techniques

\textsuperscript{74} \textit{Id.} at 232.
other than arbitration, such as mediation, to resolve grievances. This method has proved effective in some areas, but is not likely to replace arbitration.

Finally, we should note the increased use of arbitration in nonunion firms. Now that the emphasis in American industry has shifted from labor relations to "human resources management," employers are interested in proving to their employees that their grievances can be dealt with quickly and fairly without the intervention of a union. It is interesting that a growing number of companies have concluded that some third-party decision-maker is required to convince employees that their grievances will be fairly resolved. I have served as an arbitrator in a number of these situations and have noted an interesting trend. At first, the grievant tended to be either unrepresented at the hearing or represented only by a fellow employee with little or no experience as an advocate. More recently, the grievant has been represented either by a lawyer or by a member of management with some training as an advocate. Those in the latter group have impressed me with the vigor of their presentations and their dedication to the interests of the employee.

Whether the use of arbitrators in nonunion firms will continue to grow remains to be seen. Typically, the employer bears the entire cost of arbitration, which can be substantial, especially when the arbitrator selected has high transportation costs. Cost-conscious companies may be unwilling to assume the financial burdens of such a system. Moreover, nonunion employers may be less ready than their organized counterparts to accept arbitral awards in favor of the grievant. I think it is possible that in nonunion firms the system of arbitration will eventually be replaced by a less costly, more satisfactory system — from management's point of view — of peer review, in which no third parties are involved.

SUMMARY AND CONCLUSIONS: THE IMPACT OF THE NWLB ON GRIEVANCE ARBITRATION

The impact of the NWLB on grievance arbitration was significant in the years immediately following the end of the Second World War. During the war years, the Board's policies and decisions were the dominant forces establishing arbitration as the preferred mechanism for resolving rights disputes (grievances), and employers and unions continued voluntarily to embody grievance arbitration provisions in their collective bargaining agreements in the postwar period. In addition, the Board trained a cadre of arbitrators who were widely used in the postwar period and were influential in shaping the development of labor arbitration in the years ahead.

The NWLB, however, had relatively little impact on the substantive "common law" of labor arbitration that has accumulated over the past forty years. This lack of impact resulted because, as previously noted, the Board avoided handling individual grievances during its brief existence and left no large legacy of precedents. Nor can the various problems associated with the development of labor arbitration as an institution be attributed to the influence of the NWLB.

Evaluations of this kind are always risky, and in any case are not verifiable, but I think the members of the Board who were responsible for the formulation of its arbitration policies would have welcomed the almost universal acceptance of arbitration as the terminal point of grievance procedures in collective bargaining agreements, but would have had some reservations about the sharp increase in the number of ad hoc arbitrators, particularly those who practice full time. They would probably have deplored the growing tendency among this group to treat arbitration as a business, and would have emphasized the importance of upholding the integrity and honor of the profession.