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THE PROPOSED UNIFORM ARBITRATION ACT SHOULD NOT BE ADOPTED

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The primary reason why the proposed Uniform Arbitration Act should not be adopted is because, by an express provision in section 1, the Act is made applicable to "arbitration agreements between employers and employees or between their respective representatives."

My experience as an arbitrator has been confined almost exclusively to labor disputes of which I have arbitrated hundreds. Consequently, I do not purport to be able to judge whether or not the proposed Act would be a valuable adjunct to the existing arbitration law in the area of commercial arbitration. But I am convinced that, if applied to labor arbitrations, the proposed Act would do much more harm than good, and I believe that at least some of my specific objections are equally applicable to commercial arbitrations.

Distinctions Between Labor Arbitration and Commercial Arbitration

Able commentators have pointed out that there are three major factual distinctions underlying commercial arbitration on the one hand and labor arbitration on the other.[1] These are: (1) the business relations between the disputants in commercial arbitration are usually over, and in all probability they will have no future dealings especially in view of the unsatisfactory outcome of the transaction in dispute, whereas the labor relations between the employer and his employees or their representatives are a continuing process, and the parties must surmount the temporary disagreement giving rise to a labor arbitration and learn to live amicably together thereafter; (2) the matter in dispute in commercial arbitration is usually an amount of money measuring breach of contract or other alleged damages, whereas the issues in labor arbitrations may involve numerous diverse matters, many of which have little or no direct connection with money payments, *e.g.*, job evaluation, employee discipline, seniority standards, work assignments, leave of absence, union representation, etc.; (3) the basic function of commercial arbitration is to establish a private forum as a more expeditious substitute for a public trial, whereas the function of labor arbitration is to extend the process of collective

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1. See, *e.g.*, Professor Robert L. Howard's excellent article entitled *Labor-Management Arbitration: "There Ought To Be A Law"—Or Ought There?* 21 MO. L. REV. 1, 22-24 (1956).

bargaining and to displace resort to economic force in the form of strike or lock-out. These are highly significant distinctions between commercial arbitration and labor arbitration, but it is not my present purpose to belabor this point. My aim in the following pages is to attempt to demonstrate that certain portions of the proposed Uniform Arbitration Act are potentially dangerous, if applied to labor arbitrations. For a clear understanding of the ensuing discussion of specific sections it is essential that the reader bear in mind, by way of background, the interplay between voluntary labor arbitration, collective bargaining, and our cherished American system of freedom of enterprise.

Labor Arbitration, Collective Bargaining and Free Enterprise

The essence of freedom of enterprise is that each person shall be privileged to determine for himself the uses to which his property and his labor shall be put. In a highly industrialized community such as the United States, no one is completely self-sufficient. Each member of our industrial society selects some specialty by which his property or labor will be utilized to make a contribution to the total economic product, and in return for which he will receive a portion of that composite product. But there has to be some device for determining how much property or labor each specialist shall contribute and what he shall receive in return. In the United States this is accomplished by the process of bargaining. Day in and day out, in every corner of the land, free men are negotiating, dickering, contracting, buying and selling, leasing and renting, lending and borrowing—bargaining. Out of this welter of bargaining comes food, clothing, shelter, health, transportation, education, amusement, wealth, poverty, success, failure —freedom of enterprise. The essence of our free enterprise system is thus the bargaining process by which is determined what each shall contribute to the welfare of the nation and what he shall receive in return.

The perpetuation of this traditional system of private bargaining is dependant upon virtually complete freedom from governmental dictation as to the substantive terms that emerge from the bargaining process. But the bargaining process, and this traditional freedom from governmental intervention, is posited upon the existence of substantial equality of bargaining power between the participants. The strength of the free enterprise system—the fairness of the bargaining process as a national institution—presupposes a condition of give-and-take, *i.e.*, that each of the bargaining adversaries has the capacity to force the other to recede somewhat from the terms that he would most prefer.

But from time to time it becomes apparent that a significant group

of buyers or sellers does not have sufficient bargaining strength to compel a fair return for that with which it parts. This may be due to a lack of resources with which to withstand a deadlock, or because monopolistic or monopsonistic conditions have emerged. But whatever the reason, when such conditions exist, the free enterprise system is not fulfilling its function, a critical situation exists, and government will surely intervene in an effort to ameliorate the lot of those who cannot protect themselves from being imposed upon.

Such intervention may take either of two forms: The government may invade the free enterprise system and by legislative fiat establish certain economic terms instead of letting the uneven "bargaining" process run its course; familiar examples are usury statutes, and rent and price control laws during war-time emergencies. Or government may seek to combat the crises by attempting to bring about substantial equality of bargaining power in an area where by hypothesis it does not exist; this is illustrated by governmental efforts to break up monopolies into smaller competing units so that potential buyers may have several competing sellers with which to deal. Such endeavors of government to establish bargaining conditions are entirely consistent with the maintenance of our free enterprise system, and are much to be preferred, if a realistic choice exists, to governmental invasion of this system by decreeing prices, rents, wages, etc.

It is generally agreed that ever since the Industrial Revolution there has been a continuing increase in the percentage of unskilled and semi-skilled industrial workers, and that an unskilled or semi-skilled worker, acting alone, has no actual bargaining power as to the terms or conditions of his employment. But by collective action through unionization the essential elements of bargaining power can be achieved. Despite this fact, progress toward this form of bargaining power for workers was extremely slow. In 1935, after fifty years of existence, the American Federation of Labor had only three million members, and these were predominantly skilled craftsmen in the building trades. Unskilled and semi-skilled factory workers were virtually unorganized, and the inadequate buying power which they were able to obtain for their services was seen to be an economic factor of national concern, as the demand for factory products progressively lagged behind the ever-increasing supply.

Faced with this crisis, Congress did not invade the free enterprise system by establishing detailed regulations concerning terms and conditions of employment, thus depriving employers and employees alike of the privilege of negotiating these substantive provisions. Instead the Congress sought to bring unorganized workers within the free enterprise system by facilitating the development of labor unions through which they might act collectively. The enactment

of the National Labor Relations Act in 1935 is comparable to the passage of the Sherman Act in 1890. Both were significant legislative efforts to defend and preserve the free enterprise system by attempting to provide for the acquisition of bargaining power by a substantial segment of the citizenry confronted with a take-it-or-leave-it situation.

During the past two decades, due very largely to the operation of the National Labor Relations Act, there has been a tremendous increase in unionization,[2] especially among unskilled and semi-skilled workers. Through organization for collective action they have achieved a bargaining capacity that has made them a party to the philosophy of the free enterprise system. The vast majority of workers can now bargain collectively as to the terms and conditions of their employment. In *any* bargaining process the basic power of each party to force concessions lies in his ability to refuse to do business on the other fellow's terms. Suppose Smith wants to sell Blackacre to Jones for not less than $10,000, and Jones wants to buy it from Smith for not more than $8,000. Smith argues that Jones could not buy a comparable piece of land for less than $11,000, and Jones replies that Smith could not get more than $7,500 from any other buyer. If neither is willing to recede from his position, what happens? Does the government step in and set a "fair" price at which Smith must sell and Jones must buy? Certainly not. Smith and Jones part company and each seeks a satisfactory deal elsewhere. After an interval of investigation and reflection, one or both may conclude that the other's position was not entirely unreasonable, further negotiation may result, each may alter his original demand to some extent, and a bargain may be reached.

In union-management bargaining the basic power of the parties is essentially the same as that in the Smith-Jones negotiations. If an impasse is reached, the workers in the bargaining unit may decide in concert temporarily to withhold their services, *i.e.*, to strike, or the employer may decide temporarily to withhold job opportunities from these workers as a body, *i.e.*, to lock out. There are, however, two major differences from the Smith-Jones situation. If Smith and Jones do not reach an agreement, there are other potential buyers or sellers with whom each may negotiate. But in a modern large-scale manufacturing establishment if a thousand workers strike or are locked out, they cannot as a united group find another employer, and the

2. It can be conservatively estimated that there are now in effect in the United States approximately 100,000 collectively bargained agreements between unions and employers and that more than ninety percent of these agreements include a grievance procedure that terminates in arbitration. See Warren and Bernstein, *A Profile of Labor Arbitration*, 4 IND. & LAB. REL. REV. 200 (1951); Taylor, *The Voluntary Arbitration of Labor Disputes*, 49 MICH. L. REV. 787 (1951).

employer cannot find another body of employees.[3] Secondly, if Smith and Jones do not agree, neither suffers a great detriment, but in a strike or lock-out, the adverse effect on each side is tremendous: the workers lose their total earnings for they cannot in the future sell their present unexpended labor, and management's loss of profits and of competitive position may be a staggering blow. Furthermore, in many industries there is another danger of which both unions and management are poignantly aware, and with which Smith and Jones are not confronted. If a strike or a lock-out is prolonged, the resulting loss in production may cause such a detriment to the public that the government may find some basis for intervening and by governmental fiat decreeing the terms upon which labor relations between the parties shall be resumed. This is the worst thing that can happen not only to the employer and his unionized employees but also to the public, for this is just as serious an invasion of freedom of enterprise as if the government had dictated to Smith and Jones how much of Blackacre must be conveyed and at what price.

For the reasons indicated above, in collective bargaining the pressure upon both union and management for agreement is very great, and yet each side is reluctant to resort to economic force, although without at least the realistic threat of strike or lock-out neither may be inclined to recede from a favored position. In many instances the consequence is that, in order to avoid deadlocks, the parties incorporate into their ultimate agreement provisions that both union and management quite consciously realize are vague and uncertain. "No employee shall be discharged except for just and reasonable cause." "In layoffs if skill and ability are equal, seniority shall prevail." "Overtime shall be apportioned among the employees on an equitable basis." By agreeing upon such general propositions, and many others like them, the parties avoid prolonged hasseling over specific situations, and deliberately transform their agreement into a code of principles rather than a legalistic contract such as a conveyance, lease, bill of sale, etc.

The use of such deliberate lack of precision and details as a device to avoid strike or lock-out and the consequent danger of governmental dictation could, of course, only postpone the evil day. Sooner or later a situation will arise in which union and management are in adament disagreement as to whether or not there was "just and reasonable" cause for discharge, or skill and ability were "equal," or overtime had been apportioned on an "equitable" basis. In the face of such an impasse, strike and lock-out again come to the forefront. But, anticipating this very eventuality, labor and management today include in the overwhelming majority of their agreements some provision for

3. The fact that a few strikers may be able to find temporary work and that the employer may be able to hire a scattering of replacements does not alter the essential correctness of this statement.

arbitrating subsequent unresolved disputes concerning the interpretation and application of the terms of their agreement.[4] Viewed realistically, such arbitration is in effect a continuation of the collective bargaining process. The arbitrator's award has the same binding effect upon the parties, as if they themselves had formulated its terms by negotiation and had incorporated them into an agreement between them. Thus it appears that arbitration of labor grievances, like collective bargaining, is one of the bulwarks of the free enterprise system without which there would be grave danger of "creeping socialism" and the eventual establishment of a governmentally planned economy.

The Proposed Act Usurps the Right of the Disputants to Control the Selection of Their Arbitrator

To one who sincerely believes in the importance of labor arbitration as an institution that contributes to the preservation of our American system of free enterprise, section 3 of the proposed Act is especially repugnant. This section reads as follows:

> If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named by the parties.

Labor arbitration is exclusively a consensual matter, and the danger in this section is that it destroys the completely voluntary nature of the arbitration process. Section 3 indefensibly discriminates against unions and employers with respect to the extent to which they are to be left free to agree or to disagree as a result of their exercise of the traditional bargaining process. In the first place, this section stipulates that if the parties have entered into an arbitration agreement without providing a method of appointment of arbitrators, "the court on application of a party shall appoint one or more arbitrators." I assume that people do not just agree to arbitrate, without *any* reference to the process of selecting the arbitrator, and that therefore when this section refers to the "absence" of a method of appointment of arbitrators, the draftsmen are referring to the absence of a conclusive or definitive method. It so happens that from time to time in collective bargaining negotiations one of the parties (or possibly both) is faced for the first time with the idea of arbitrating grievances, and, while willing to agree in principle to such arbitration, is unwilling to venture too far out on this untried limb. So the parties agree on a

4. See note 2 *supra*.

limited arrangement that they call arbitration, viz., that in the event of an unresolved grievance each party shall designate an arbitrator and these two shall endeavor to agree upon an unpartial third, with the unexpressed understanding that if the two arbitrators cannot agree upon a third, the arrangement fails and they are right back where they would have been, if they had not included any provision for arbitration in their agreement.

If I understand section 3, in the event that the two arbitrators become deadlocked over the selection of a third, either party can apply to a judge[5] and have him appoint an arbitrator who would have the same powers as if he had been named by the parties or by the arbitrators designated by them. This is a horrendous invasion of freedom of contract, where, as in my hypothetical case, the intent of the parties was that there should be no arbitration unless the two designated arbitrators were able to agree upon a third. Even if we assume that the failure of the parties expressly to provide a definitive method of selecting an impartial third arbitrator was inadvertent and not deliberate, the state has no right, especially at the request of only one of the parties, to attempt to counteract a defect (but not a reformable mistake) in their agreement.

Moreover, arbitration is purely voluntary—it is not a process that the parties have to agree to—and arbitration without an arbitrator is impossible. Hence, if in their "agreement" they have not voluntarily agreed upon an arbitrator, or at least upon a sure procedure for selecting him, they have not in reality entered into an arbitration agreement. If Smith and Jones sign an instrument in which Smith agrees to sell and Jones agrees to buy Blackacre at a price to be thereafter mutually agreed upon, have they entered into an enforceable agreement to buy and sell Blackacre? At most they have agreed to *try* to agree upon a price, and if they try and fail, they have carried out their undertaking. Should we authorize by statute either party to apply to a judge for the appointment of a Master to decree a price at which they must buy and sell Blackacre? An alleged agreement to arbitrate without provision for the definite selection of an arbitrator is illusory, and is not in legal contemplation an agreement to arbitrate. This portion of section 3 is therefore paradoxical. By its express terms it is applicable only to "arbitration agreements," and yet the very condition that is a *sine qua non* to invoking this portion of the section, namely, the failure of the parties to designate an arbitrator, or a definitive process for selecting him, precludes the transaction from

5. Section 18 of the proposed Uniform Arbitration Act provides that "An initial application shall be made to the court of the (county) in which the agreement provides the arbitration hearing shall be held. Otherwise the application shall be made in the (county) where the adverse party resides or has a place of business or, if he has no residence or place of business in this State, to the court of any (county)."

being an arbitration agreement, and consequently leaves nothing upon which this portion of the section can operate.

The next portion of section 3 deals not with those situations in which the parties fail to agree upon an arbitrator but with situations in which the agreed method does result in the designation of an arbitrator, but for some reason he will not or cannot serve. Here again the proposed Act authorizes a judge upon application of one of the parties to appoint an arbitrator. The most fundamental situation to which this portion of section 3 is applicable is that in which the parties agree upon X as arbitrator and with his consent name him in the agreement for its duration. X serves as arbitrator for several months and then dies. If the arbitration agreement contains no provision for this contingency, the death of X terminates the agreement. Should the parties be able to agree on another arbitrator, they will thereby enter into a new arbitration agreement, but if they cannot agree on an arbitrator, their arbitration venture is over, at least for the time being.

Yet section 3 says that in such a situation "the court on application of a party shall appoint one or more arbitrators." It is hard to imagine a more drastic interference with freedom of contract and freedom of appointment. The parties may have anticipated that during the life of their contract they would have various disagreements over the operation of a new job evaluation plan about to be installed. So they jointly designated X as arbitrator because he was a recognized expert on matters of job evaluation. And yet, upon X's death, section 3 would empower a court upon request of only one of the parties to appoint a successor to X who may know little or nothing about job evaluation. During the war one of the cases I mediated for the War Labor Board involved a prolonged dispute between a multi-plant corporation and a union representing the employees at one of the plants over the union's demand that the terminal step in the grievance procedure should be a stipulated arbitration provision. The corporation's position was that it was opposed as a matter of principle to arbitration. Finally the corporation offered to accept the grievance procedure desired by the union if the union would agree to accept Mr. M., the corporation's executive vice-president, in its main office, as the arbitrator, and the dispute was settled on this basis. The union representatives explained to me that while they regarded this as a spurious form of arbitration, nevertheless they felt they had achieved an important forward step because the union had been seeking for years to acquire the right to appeal to the main office from certain decisions of local management. If during the life of this agreement Mr. M. had died or retired, it would completely transform the original intention of both parties to the agreement, if a court were to appoint as a successor to Mr. M. a complete stranger to the corporation; and yet this is what

could happen, if the union invoked section 3 of the proposed Act.

Perhaps the proponents of this section will concede that the section may result in the parties to an abortive arbitration agreement being compelled to accept as an arbitrator a person not agreed to by at least one of them, but will argue that such "compulsory arbitration" is preferable as a matter of public policy to strikes and lock-outs, the only alternate methods of resolving labor disputes. But since arbitration is a consensual matter, "compulsory arbitration" is a contradiction in terms. If there be those who believe that the public interest demands that government be authorized to dictate to both unions and management the terms upon which labor disputes must be settled, let them openly advocate this and not employ a phoney "arbitration" device as an entering wedge. Certainly, if the state is to be authorized to brush aside the freedom of enterprise of some labor disputants, there is no justification for applying this compulsion only to those unions and managements that happen to have negotiated an ineffective attempt to arbitrate.

Finally, as far as section 3 is concerned, its phraseology is confusing. For instance, it says that "when an arbitrator appointed *fails* to act," and his successor has not been "*duly* appointed," the court "*shall* appoint" one or more arbitrators. Does this mean that the court has no discretion under the indicated circumstances, and in response to an *ex parte* application *must* appoint an arbitrator (or any number of them), even though at the time the other party may be seeking in good faith to negotiate as to the selection of a new arbitrator? Surely if a court is to be given such power, the statute should spell out (as in the Norris-La Guardia Act) the procedures to be followed and the facts to be found by the court as a condition to the exercise of the power.

The Proposed Act Undermines the Completely Voluntary Nature of Labor Arbitration

My initial comments have been directed to section 3 because the most important element in any arbitration proceeding is the selection of the arbitrator. There are, however, other portions of the proposed Act that are almost equally, although perhaps less manifestly, objectionable. Section 2(a) reads as follows:

> On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

This section vividly demonstrates that the draftsmen of the proposed Act were essentially concerned with the problems of commercial arbitration, and that they were either unaware of or ignored the basic distinctions between commercial arbitration and labor arbitration, when they stipulated that the Act should be equally applicable to both.

As pointed out heretofore, commercial arbitration is usually a one-shot affair between the parties. They cannot exert economic force upon one another in an effort to induce compliance. Their only recourse is to a forum in which a decision will be rendered in favor of one party or the other. They conceive of arbitration as a quasi-judicial proceeding, differing from a lawsuit only in that the outcome is speedier; they can pick their own umpire (he will usually be far more familiar with the workings of the industry and its problems than the average judge); and they can stipulate as to the standards to be applied in resolving the dispute.

Labor arbitration, on the other hand, is but one phase of a continuing relationship between the parties. When a business bargains collectively with its employees the objective of both employer and union is to establish a pseudo-government for their industrial community with their own constitution (trade agreement), their own legislature (committee structure) and their own judiciary (the arbitration process). If problems arise within this industrial framework, the parties traditionally prefer to settle them in their own way and do not want courts or other organs of government to intervene. So long as the bargaining powers of the union and of the employer are relatively equal, they will settle their irreconcilable differences by resort either to economic force or to arbitration. Neither side will institute court proceedings against the other for alleged breach of contract. A lawsuit is the last resort of a union or employer where one or the other has become so weak that the conditions for collective bargaining are unfavorable. The effect of such a suit is to worsen the already frayed relations between the parties, and realistic collective bargaining is likely to terminate until one side or the other is substantially reorganized.

Preliminary to a discussion of the fundamental objection to section 2(a) it should be noted that the term "refusal to arbitrate" needs clarification. Let us return to the situation in which union and employer have agreed to arbitrate grievances concerning the interpretation and application of their contract, and that the stipulated process for selecting the arbitration board is for each party to name an arbitrator and for those two to agree upon a third. Suppose the union asserts a grievance and the employer refuses to name an arbitrator. Is this a "refusal to arbitrate" to which section 2(a) is applicable, or is this a situation in which "the agreed method fails" and to which

section 3 concerning the appointment of arbitrators is applicable? If the former, then the court acting under section 2(a) might order the employer to appoint an arbitrator. Thereafter, if the employer complies, the two arbitrators may not be able to agree upon a third. Then proceedings would have to be instituted under section 3 to obtain from a court (not necessarily the same court) the appointment of a third arbitrator. Let us suppose that now the recalcitrant employer refuses to appear or participate in any way in the hearing called by the board. Is this a "refusal to arbitrate" to which section 2(a) is applicable? One would suppose so, except for the provision in section 5 that "the arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear."

If the employer is still determined not to subject himself to an arbitration award concerning the issue raised by the union, at this point he would apply to a court, under section 2(b), to "stay" the proceedings. Section 2(b) says that "on application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." The employer might now claim that the issue raised by the union is not arbitrable, *i.e.*, that there is no agreement to arbitrate this issue. If the court grants the employer's motion for a "stay," the union is entitled, under section 19(2) of the Act, to take an appeal. Incidentally, the Act provides no right of appeal from a court order compelling a party to proceed with arbitration. If the union wins on appeal and the "stay" is set aside, the arbitrators may proceed to a hearing and award. But even if the award is in favor of the union, the employer is not done yet. He may apply to a court to vacate the award, and section 12 enumerates six grounds upon which an award may be vacated by court order. Among these are such potentially controversial matters as that the award was procured by "undue means," that among the arbitrators there was "misconduct prejudicing the rights of any party," that the arbitrators so conducted the hearing "as to prejudice substantially the rights of a party," and that "the arbitrators exceeded their authority." This last is not necessarily identical with, but can be very closely related to, the issue of arbitrability. If the motion to vacate the award is granted, the union is entitled, under section 19(5) to appeal, and if the court refuses to vacate the award, it is required, under section 12(d) to "confirm" the award, and under section 19(3) the employer may appeal from this confirmation of the award. If the court vacates the award and this is sustained on appeal, the court may under most of the circumstances set forth in section 12(a) order a rehearing before new arbitrators, and the merry-go-round begins again.

This complex and cumbersome procedure is utterly inappropriate

to labor arbitration. In almost twenty years of arbitrating I have never known one of the parties to a labor arbitration agreement simply to refuse to abide by the agreement. The refusal to arbitrate a given matter is invariably accompanied by an explanation. At times it is alleged that the required antecedent steps in the grievance procedure have not been followed, or that the claim has not been asserted within the stipulated time limit, or that the same matter has been conclusively determined in a previous case. But most frequently the reason assigned for a refusal to arbitrate is that the issue raised is not arbitrable, *i.e.*, that the dispute does not concern the interpretation and application of the terms of the agreement between the parties and therefore is not within the scope of the arbitration agreement. How should such a controversy be settled?

Ideally, in the arbitration provision of the grievance procedure the parties should spell out the method to be followed when the arbitrability of an asserted grievance is questioned. Occasionally, an arbitration agreement expressly stipulates that if arbitrability is questioned this issue shall be subjected to a specified arbitration procedure. But the vast majority of arbitration agreements are silent as to this contingency. Where an arbitration agreement does not provide either expressly or by reasonable implication how an issue of arbitrability is to be settled, it is to this extent defective. I do not believe that an arbitrator who has been authorized by the parties only to render awards within a defined area of substantive disputes has the right, without the *mutual* consent of the parties, to resolve procedural conflicts concerning his own jurisdiction. Here again there is no agreement to arbitrate. The parties have in effect said that the arbitration procedure they establish is to apply only to those issues which they jointly accept as arbitrable, and to no others. How can their fragmentary agreement legitimately be construed otherwise, and so construed, by what constitutional authority may a court order a person to carry out his "voluntary" agreement to arbitrate, when this forces him to go beyond that to which he has agreed? And yet section 2(a) of the proposed Uniform Arbitration Act says that, if a person has denied the existence of an agreement to arbitrate a specific issue, the court many nevertheless order him to arbitrate that issue. This is a gross violation not only of the principle of freedom of contract but also of the bargaining process upon which the free enterprise system is founded.

One may well suggest that the foregoing analysis provides a party to a bona fide arbitration agreement with an opportunity to avoid his obligation to arbitrate a grievance that is clearly within the terms of the agreement merely by capriciously contending that the grievance is not an arbitrable one. Theoretically this is possible, but practically

it is not. The assumed situation amounts to a flagrant and deliberate breach of a portion of the union-employer agreement, and the outcome would be no different from that which would result from a similar breach of any other significant provision in the collectively bargained contract. This would depend on the economic strength of the respective parties. If the union was the victim, if it regarded the employer's conduct as a serious repudiation of collective bargaining, and if it was prepared to risk its economic power, it might strike, contending that the employer's repudiation of his obligation released the employees from a no-strike clause, if such existed. If the union did not feel inclined to strike, it might charge the employer with a violation of section 8(a) (5) (breach of duty to bargain collectively) of the National Labor Relations Act, it might seek specific performance of the contract provision under section 301(a) of the Labor-Management Relations Act, or it might invoke common law remedies for breach of contract. The draftsmen of the proposed Uniform Arbitration Act offer no explanation as to why the arbitration segment of a collectively bargained agreement should be singled out for a special statutory treatment not applicable to the other portions of the agreement.

If the refusal to arbitrate is not a deliberate breach but based upon a sincere belief that the asserted grievance is not within the scope of the arbitration agreement, the situation is vastly different. In a typical union-employer agreement, practically all the obligations are those of management. Hence the grievance procedure including arbitration deals almost exclusively with claims asserted by the union on behalf of employees against the employer. Employers do not have to agree to arbitration as the eventual solution of such unresolved grievances any more than they have to agree to a month's paid vacation for every employee. The fact that at least ninety percent of all union-employer agreements today provide for some form of arbitration as the terminal point in the grievance procedure demonstrates that both unions and employers have concluded that it is to their mutual advantage to settle these disputes in this way rather than by resort to economic force or to judicial proceedings.

When a union sincerely believes that it is contractually entitled to have a given dispute arbitrated, and when the employer with equal sincerity believes the union's demand for arbitration oversteps the agreed boundary, this is no occasion for a strike or a lock-out or for injecting a court or an administrative agency into the relations between the parties. Where, as assumed, there is good faith on both sides, the procedure in reality is that the parties negotiate, and in practically every such case one side or the other abandons its contention as to arbitrability, or both agree to submit the issue of arbitrability to arbitration. Where I have been named by the parties as an arbitrator

of grievances, I have often been confronted by an employer's initial contention that the asserted grievance is not arbitrable, but I have never been involved in a case in which the employer refused to submit this issue to arbitration. Usually, although not always, the parties, after vigorously presenting their respective arguments on the matter of arbitrability, will authorize me to reserve my judgment on this issue, and will proceed at the same hearing to present their respective cases on the underlying substantive grievance.

Thus far I have sought to emphasize that a statutory procedure for the compulsory appointment of an arbitrator in a labor dispute or for compelling arbitration of a labor dispute is either an invasion of freedom of contract, or is unnecessary, or both. There are two other major drawbacks to such a statute. First, the very existence of such an available procedure tempts its use. For the maintenance of high morale and sound labor relations there is no substitute for the travail of painstaking, persistent, forthright collective bargaining between unions and employers. Even a prolonged strike or lock-out at times clears the air and for an indefinite period thereafter induces a greater degree of reasonableness on both sides. During the war collective bargaining languished because one side or the other in contract negotiations would speed the dispute to the War Labor Board. The Railway Labor Act has had a blighting effect upon real collective bargaining in the railway industry. Most of the court cases involving attempts to enforce labor arbitrations have arisen in states like New York that have arbitration statutes similar to the proposed Uniform Arbitration Act.[6] Labor arbitration is part of the process of collective bargaining, and it is just as important that the parties should be left alone to thrash out among themselves their disagreements over arbitration procedures, as it is that they should be unconstrained in any other area of the collective bargaining process.

Secondly, the "voluntary" aspect of labor arbitration is frequently completely destroyed when a court determines the arbitrability of a given grievance, because in many instances it is impossible to separate this issue from the substantive issue, which by agreement of the parties was to be decided, if at all, by an arbitrator of their own choosing. To illustrate let us assume a union-employer contract that contains, inter alia, the following not uncommon provisions: the bargaining unit includes all production and maintenance employees except supervisors; all members of the bargaining unit "shall become and remain members of the Union on the thirtieth day following the beginning of such employment, or the effective date of this contract, whichever

6. "Many have inclined to the judgment that the presence of a statute in New York over a period of many years with its numerous bases for court intervention, in effect inviting resort to the courts by any disgruntled party, is largely responsible for the unfortunate experience in this regard in that state." Howard, *supra* note 1, at 20.

is later, all to be enforced and applied in accordance with the provisions of section 8(a) (3) of the Labor-Management Relations Act of 1947, as amended"; a grievance procedure limited to matters concerning the interpretation and application of the contract, the final step in this procedure being arbitration; B.A. Jones with his acquiescence is named in the contract as the sole arbitrator. Let us further assume that a month after the effective date of this contract the union demands that employee, F. T. Root, be discharged because he has not paid any initiation fee or dues to the union and hence is not a member of the union as required by the union shop provision. The employer refuses to comply on the ground that Root is a supervisor, and that therefore he is not a member of the bargaining unit and not subject to the provisions of the contract. The union replies that the actual work that Root has been doing is that of a production worker and not a supervisor. After the preliminary stages of the grievance procedure fail to produce agreement, the union submits the matter to B.A. Jones. The company notifies the union that, if Jones sets a time and place for a hearing, it will not appear before him with respect to this matter, because the grievance procedure applies only to members of the bargaining unit, and since Root is a supervisor, the issue raised by the union is not within the scope of the arbitration provision in the contract, and hence Jones has no jurisdiction over this dispute.

Under section 2 of the proposed Uniform Arbitration Act, in the foregoing situation the union might apply to a court for an order directing the employer to proceed with arbitration, and the employer might apply for an order staying arbitration. If the employer, instead of asserting non-arbitrability, had concurred with the union in presenting the grievance concerning employee Root to arbitrator Jones for determination, the issue before Jones would have been whether with respect to the union shop provision Root's job was that of a production worker or a foreman. If a court undertakes to determine the issue of arbitrability, it cannot divorce this question from the question of Root's status. The court will have to hear testimony as to the exact nature of Root's work and interpret and apply the contract terms "production worker" and "supervisor" in the light of this testimony. But the parties have agreed that only arbitrator Jones is to interpret and apply the terms of their contract. Whether the court ultimately decides that the issue is arbitrable or that it is not arbitrable, in either case it will in effect be deciding the underlying substantive issue, thereby usurping the contractual function of arbitrator Jones, and leaving nothing for him to decide even if the employer is ordered to proceed with arbitration. Any person familiar with labor arbitration will readily picture many other situations similar to the foregoing illustration, in which a court, in the guise of merely settling

a procedural issue as to arbitrability, will actually be passing upon the substantive factual issue involved in the union's alleged grievance. Many judges are less competent to deal with complex issues of labor relations than experienced arbitrators chosen by the parties, and where statutes impose this decision-making function upon the courts, the results are often deplorable.[7]

The Proposed Act Hampers the Arbitrator By Legalistic Procedural Requirements

The objectionable features of the proposed Uniform Arbitration Act as applied to labor arbitration are not limited to the respects indicated above in which it invades the freedom of contract of unions and employers and destroys the essential voluntary aspect of labor arbitration as an institution. It goes so far as to dictate to the arbitrator the manner in which he shall conduct himself. Section 5 requires arbitrators to *serve* notice "personally or by registered mail" upon the parties of the time and place of the hearing "not less than five days before the hearing." I have never "served" a notice of hearing upon either party. Such notice is invariably given by an ordinary letter or by telephone. Although labor arbitrators insist upon a reasonable degree of order and decorum at the hearing, they seek to avoid the formality of a courtroom, and they would be loathe to begin the proceedings by creating the atmosphere of distrust that the use of registered mail or formal service implies.

Frequently, in a labor arbitration hearing no lawyers are present: often the arbitrator is not a lawyer, and the union's case is presented by a union officer and the company's by a company official. In any event, the legal rules of evidence are not applicable to the presentation of testimony. But section 5(b) projects a legalistic note into the proceedings by stipulating that "The parties are entitled to be heard, to present evidence *material* to the controversy and to *cross-examine* witnesses appearing at the hearing." Section 7 gives the arbitrator power to subpoena not only witnesses but also books, records, documents, and other evidence, and provides for the taking of depositions. This section even goes so far as to legislate that witnesses at labor arbitrations shall be entitled to the same fees as witnesses in court.

Section 8 provides that the arbitrator shall deliver a copy of the award to each party "personally or by registered mail." It is not my custom to send awards out by registered mails, and I think the parties with whom I deal would be somewhat indignant, if I did. This section also authorizes a court, upon application of one of the parties, to fix the time within which the arbitrator shall make his award, if a time

7. *Cf.* Mayer, *Judicial "Bulls" in the Delicate China Shop of Labor Arbitration,* 2 LAB. L. J. 502 (1951), and *Arbitration and the Judicial Sword of Damocles,* 4 LAB. L.J. 723 (1953).

limit is not set forth in the arbitration agreement. Does this mean that the arbitrator will be in danger of being penalized for contempt of court, if he does have his award ready by the date set by the court? Labor arbitrators, as a whole, are extremely diligent and conscientious persons, who are at least as interested in the public service aspect of their work as in any fee that may be involved. In fact, labor arbitrators are constantly seeking, by the manner in which they conduct hearings and write opinions, to bring about better relations between the parties, thus minimizing the need for their services in the future. Labor arbitration is an art, and the less the parties and the arbitrator are surrounded by artificial requirements and restrictions, the finer the product can be.

Sections 12 and 13 are probably the most baneful portions of the proposed Act. These sections authorize courts to vacate, modify or correct arbitrators' awards. One of the essential elements of arbitration is that the award of the arbitrator is final and binding upon the parties. But section 12 of the proposed Act materially weakens this basic principle by empowering a judge to vacate an award on such vague and controversial grounds as fraud, corruption, undue means, evident partiality, prejudicial misconduct, and that the arbitrator exceeded his powers.

Despite the high esteem I have for labor arbitrators, I, of course, recognize that they may make mistakes, and that some may occasionally even be guilty of fraud. However rare such occurrences may be, is it not well to guard against their happening by formulating grounds upon which, on appeal, courts may set aside an arbitrator's award? I think not. The fraud, corruption, misconduct, etc. provisions have little or no applicability to labor arbitrations. For example, let us suppose that an arbitrator accepts a bribe in a discharge case and directs the employer to reinstate the discharged employee with full back pay. If the employer discovers the fraud promptly, he will refuse to carry out the award, and the union will not seek the aid of any sheriff to enforce it. If he discovers the fraud after having complied with the award, the employer would probably re-discharge the employee and demand from him a return of the back pay. In this case, and in most instances, self-help is more effective than an appeal to a court to vacate the award.

Next let us suppose that an honest arbitrator is induced to make an erroneous award because of the false testimony of a corrupt witness. On the basis of after-discovered evidence an arbitrator will re-open the hearing and subsequently may even revoke his award. If the corruption were discovered by the employer before he had carried out the award, he would seek in this way to have the award vacated rather than resort to judicial proceedings. If he had already put

the award into effect, the employer's conduct upon subsequently discovering the fraud would depend on the nature of the circumstances. If the arbitrator, in reliance on false testimony, had awarded an increase in an incentive rate, the employer might reduce the rate to his former figure, but I doubt that he would demand from his employees a return of the excess, and I am sure he would not seek court help.

Of all the enumerated grounds for vacating an award, the one that is potentially the most dangerous to labor arbitration as an institution is the charge that the arbitrator exceeded his powers. I assume that this charge relates primarily either to the action of an arbitrator in asserting jurisdiction over an allegedly non-arbitrable matter, or the action of an arbitrator in setting forth an allegedly unauthorized remedy or sanction in his award. I have already discussed the undesirability of authorizing courts to determine issues of arbitrability in labor matters,[8] and I shall confine myself at this point to appeals concerning the propriety of the awarded remedy or sanction.

In the arbitration of a typical discharge case the union claims that the discharge of the employee was not for just cause and demands his reinstatement with full back pay, while the employer contends that the discharge was completely justified and should not be disturbed. After studying the record of the hearing, the arbitrator might conclude that the employee had been somewhat at fault but his misconduct was not so gross as to merit the supreme penalty of discharge, and in such an event the arbitrator's award might be that the employee shall be reinstated but without back pay. Has the arbitrator in rendering such an award exceeded his powers? Upon application of either the union or the employer would section 12(a)(3) of the proposed Act authorize a court to vacate the award on the ground that the arbitrator's power was limited to an all-or-nothing decision? If the court vacates the award on this ground, will the court not be relying on the same facts and applying the same standards as those with which the arbitrator was confronted, and will not the court merely be substituting its conclusion for that of the arbitrator designated by the parties?

It is my practice, in discharge cases such as the above, to question the parties at the outset of the hearing as to the extent on my authority, *i.e.*, whether I am limited to an all-or-nothing decision, or whether I may substitute a lesser penalty for discharge, if in my judgment this should be the appropriate decision. This at times provokes quite a little discussion among the representatives of the parties culminating in a special stipulation one way or the other (almost always both parties at once concede that the arbitrator has the broader remedial power). I am firmly convinced that my query arises out of an excess

8. See pp. 719-24 *supra*.

of caution, and that it is inherent in the power of an arbitrator to select, within reasonable limits, the remedy which he regards as most appropriate when he determines that an arbitrable wrong has occurred, unless the parties by mutual agreement have specified the remedy.

The very existence of a statute whereby the power of a labor arbitrator to decree a remedy may be challenged is undesirable. An arbitrator is usually an expert in labor relations, and the manner in which he exercises his power in a given situation is part of the art of arbitration. Occasionally he may merely mediate, at times he may conclude that a cautious, almost legalistic approach is indicated, on other occasions he may sense that a novel award may contribute most to the future labor relations of the parties. Some time ago I arbitrated a discharge case in which I concluded that the employee had been at fault but not sufficiently so to justify his discharge. My award was that he should be reinstated with full back pay, but with a loss of four years seniority. In selecting this penalty I had a very special reason. I was in effect remedying a situation that was only collateral to the instant grievance. All concerned were well satisfied with the outcome, but I am not sure that I would have ventured to impose this novel penalty if there had been danger of a statutory appeal therefrom.

An arbitration award, like any portion of a contract, can always be modified or even rejected by mutual consent of the parties, and in labor relations if an arbitrator is deemed to have overstepped the mark, the parties themselves will usually take care of the situation. Several years ago I arbitrated a case involving a large manufacturing corporation, the representatives of which insisted upon a strict interpretation of the contract provision that the arbitrator was not to add to, subtract from, or otherwise modify the agreement of the parties. The contract provided that when layoffs occurred, they should be made in accordance with departmental seniority. The company had laid off six men in a given department. The first five were unquestionably those with the least seniority. The sixth man, A, had been hired on the same day as B, and as far as the company's records revealed, their seniority was identical. The company had laid off A because it regarded B as a more efficient employee. The union contended that the company had violated the contract provision requiring layoffs to be based exclusively on departmental seniority, and that the purpose of this strict provision was to eliminate discretion, *e.g.*, a resort to alleged superior efficiency, as a factor in layoff. My award was that the company had violated the contract, and I directed that a decision should be made by lot between A and B as to which should have been laid off last, and that if A won he should receive back pay from the time of his layoff until he was returned to work. The company asked for a re-hearing at which

it conceded that I was correct in finding that it had not proceeded in strict accordance with the seniority provision, which would have required it to lay off both A and B or neither, but the company insisted that I had exceeded my authority, because there was no provision in the contract for breaking ties by drawing lots, and that by directing the use of this method I was adding to the contract. The company did not object to the tie-breaking method I proposed (it had been used informally for other purposes such as settling conflicts concerning vacation periods), but it wanted to safeguard against my decision establishing a precedent concerning the power of an arbitrator to add to the contract. So at the re-hearing the representatives of the corporation and of the union executed a special stipulation authorizing me, in the event my decision was in favor of the union, to direct the method of breaking seniority ties for layoff purposes. The parties then returned to me their copies of my original award and opinion, and after altering the statement of facts to include the special stipulation, I reissued the same award and opinion. If, in this instance, there had been an applicable statute such as section 12 of the proposed Uniform Arbitration Act, the corporation might have availed itself of it, in which event the union would have been angered, I would have been chagrined, and the arbitration process would have been impaired. The procedure actually adopted by the company not only avoided these hazards while accomplishing its objective, but also to some extent improved the atmosphere. I have been called on by the parties to arbitrate several subsequent cases, and I think we are all a bit more relaxed because of this earlier experience.

Some of the most awkward problems with which a labor arbitrator is confronted are those in which there is a violation of the contract but no express or implied indication as to the remedy for the violation in question. For example, the contract provides that in the event of a proposed layoff the employer shall supply the union forty-eight hours in advance with a list of the employees to be laid off. This provision is of importance to the union so that it may have an adequate opportunity to check the layoff list against the seniority list and assure itself that the correct employees will be laid off, or avoid subsequent difficulties by pointing out discrepancies. The union takes a case to arbitration in which it alleges that the employer violated the contract by laying off a number of employees without giving the union the required advance notice. The employer does not deny this, but contends that the correct employees were laid off, that therefore no damage resulted from the technical breach of the contract, and that consequently the arbitrator is powerless to prescribe any sanction. If the employees were still on layoff, it is conceivable that the arbitrator might direct the employer to recall them to work, and to adhere

strictly to the contract requirement in any subsequent layoff. Under section 12 of the proposed Act would a court be justified in vacating this award? Incidentally, if under section 12 a court should vacate an award on the ground that the arbitrator had exceeded his powers in decreeing a specific sanction, the court *may* order a rehearing before the same arbitrator. This would certainly put the arbitrator in an impossible position. Presumably he gave his best thought and judgment to his original award. Is he now to stultify himself by rendering a new award which he does not really believe contains the proper sanction? Suppose he had originally ordered a discharged employee reinstated without back pay. The union appeals and the court decides that the arbitrator's power was limited to an all-or-nothing award, and directs a rehearing before the same arbitrator. Thereafter the arbitrator concludes that, if he must choose between discharge and reinstatement with full back pay, the former is less unfair to the employee than the latter would be to the employer, so he now issues an award upholding the discharge. If his original decision had been in favor of the company, this would have been clearly within his authority, and the union might have accepted it without rancor. But since his original decision was in favor of reinstatement, albeit without back pay, and his present decision is in favor of discharge, although the change was forced upon him by the action of the court, the union is very likely to regard him as a vacillating heel!

I am not unmindful of the fact that the sentence in section 1 of the proposed Act that extends the statute to labor arbitrations ends in this fashion: " (unless otherwise provided in the agreement)." The purpose of the parentheses is to indicate to state legislatures a feeling on the part of the draftsmen that the clause in parentheses has an optional character and might well be omitted, if the proposed Act should otherwise be adopted. If adopted without this clause, the proposed Act, if constitutional, would so imperil the freedom of unions and employers to tailor the use of arbitration to their own needs and desires that the parties would become extremely reluctant to subject themselves involuntarily to the provisions of the Act by entering into arbitration agreements. Instead of strengthening the process of labor arbitration, the Act would have an inhibiting effect. If adopted with the clause in parentheses, it can safely be predicted that the representatives of unions and employers, in hereafter drafting arbitration provisions, will consistently stipulate that the Act is not to be applicable. In this event, the proposed Act would be rendered completely abortive, as section 20 thereof restricts its application to "agreements made subsequent to the taking effect of this act."

The arbitration step in grievance procedures should be drafted with more attention to possible contingencies, and if the proposed Act were

adopted, undoubtedly the parties would formulate their labor arbitration agreements with much greater care in an effort to minimize the impact of the Act upon their affairs. But this desirable by-product would be more than offset by the many unavoidable burdensome and inappropriate provisions of the Act.

Summary and Conclusions

So distinct are the functions of labor arbitration and of commercial arbitration that a regulatory statute, drafted with commercial arbitration primarily in mind, is by the very nature of things inappropriate for labor arbitration.

Labor arbitration is auxiliary to collective bargaining, and collective bargaining is an important part of the free enterprise system. Any statutory invasion of the bargaining process should be suspect, until it is conclusively demonstrated to subserve a paramount public interest.

The proposed Uniform Arbitration Act interferes with the freedom of the parties to a labor arbitration agreement to determine the selection of their arbitrator. It further undermines the completely voluntary nature of labor arbitration by authorizing courts to compel a person to "arbitrate," although with respect to arbitration procedure the minds of the disputants have not met. It enables judges, in the guise of merely deciding a question of arbitrability, actually to determine the merits of the underlying substantive issue in dispute between union and employer.

The proposed Act also hampers the labor arbitrator by surrounding him with legalistic procedural requirements and it subverts his authority by empowering courts to vacate, modify or correct his awards.

If the proposed Act permits the parties to a labor arbitration agreement to provide that the Act shall not be applicable, the overwhelming majority will virtually nullify the Act by so stipulating. Indeed, it is not unlikely that many able, self-respecting arbitrators will refuse to serve unless the arbitration agreement does so provide.

If the proposed Act is mandatory in its impact upon labor arbitration agreement, it will be of doubtful constitutionality and will discourage resort to labor arbitration. To the extent that it is applicable, it will promote litigation, worsen labor relations, and encourage resort to strikes and lock-outs; informed parties to labor arbitration agreements will include clauses preserving to each a right to retroactive revocation and to strike or lock-out with respect to all matters not submitted to arbitration.

The many procedural provisions of the proposed Act constitute an entirely inappropriate effort to bring the institution of voluntary labor

arbitration within the legal system of appeals and review, thereby destroying its essential character as a private forum for the final settlement of labor disputes within an industrial community.

A recent extensive survey reveals that failure to abide by the award of a labor arbitrator is practically nil,[9] and refusal to carry out an agreement to arbitrate a labor dispute is undoubtedly even more rare. No need has been shown for applying legislation such as the proposed Uniform Arbitration Act to labor arbitration, and the long-range interests of society will be best served, if this proposed Act is not adopted.

9. Howard, *supra* note 1, at 20.