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The future of labor arbitration and the viewpoint of the lawyer with reference thereto depend very largely upon the arbitrators and their procedures, conduct and decisions. Of course, the parties and their counsel are under a duty, in the words of the Code of Ethics and Procedural Standards for Labor-Management Arbitration prepared by the American Arbitration Association and the National Academy of Arbitrators and approved by the Federal Mediation and Conciliation Service, "to approach arbitration in a spirit of cooperation with the arbitrator and should seek to aid him in the performance of his duties." Nevertheless, the arbitrator, like the judge, must have the strength and independence and courage to decide justly, and so function as to gain and retain the respect and confidence of all concerned with arbitration, including the public, which has rights and interests which should be recognized.

Lawyers are accustomed to the greater predictability and certainty of judicial decisions, and to the right of appeal from the decisions of trial courts. They wish to be able to advise their clients whether the position of a company or union will be sustained on an appeal to an outsider, whether he be a judge or an arbitrator. This may, in part, explain the widespread use and popularity of industrial courts in Central and South America. The advocate who is accustomed to fixed rules and procedures in the somewhat technical and formal atmosphere of the court room finds it difficult to adjust to a proceeding conducted by an arbitrator who does not follow court procedure. Nevertheless, lawyers know that there is need for a flexible, informal and friendly private juridical system which can render a final decision. It is generally known that courts are not always the best forum in which to settle industrial controversies which often present issues requiring expert knowledge. Besides, time usually is of the essence if industrial unrest and uncertainty are not to affect the productivity and well being of the industrial family which inhabits each plant or establishment. The existing congestion of court calendars prevents early consideration of labor-management issues. The Supreme Court of the United States in *Burchell v. Marsh*[1] expressed its approval of arbitration at a time when there was little labor arbitration as follows: "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity."

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1. 58 U.S. (17 How.) 344, 349 (1854).

This concept is again expressed in a later decision by the then existing Court of Appeals of the District of Columbia (now U.S. Court of Appeals for the District of Columbia Circuit) which states: "It is the policy of the law, as expressed by both English and American courts, to uphold the peaceful, swift, and inexpensive method of terminating litigation by arbitration. 'And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties.' "[2] In *Mercury Oil Refining Co. v. Oil Workers Int'l Union, CIO*[3] the following appears: "Arbitration is designed to settle controversies and disputes between parties by a method other than through the regularly established tribunals of justice. Its purpose is to eliminate future disputes and litigation." To the same effect is the opinion by Judge Kenyon which reads: "Arbitration is favored by the Courts. It is a mode of settling disputes less expensive and more expeditious than court procedure. In these days of long drawn out litigation and ever-increasing expense of trial, it may well become a special favorite of the law."[4]

The task of adjusting human relations, economic needs and requirements and social controls in this industrial age so as to give effect to the expectations and needs of civilized man with a minimum of friction, lost motion, and waste should be handled by specialists. The trained and experienced lawyer who represents labor and management in the settlement of their differences is such a specialist, who can and will do much to shape the future of arbitration and industrial dispute settlement.

The latter may be accomplished without arbitration. The Labor-Management Relations Act[5] recognizes the desirability of settlement by the parties at the bargaining table. It is obvious that both parties need the guidance of a lawyer because bargaining must be conducted within the framework of the law. As stated in section 1 of the Act, industrial strife may be substantially minimized by recognition under the law of legitimate rights and that neither employer, employees nor labor organizations have any right to engage in acts or practices which jeopardize public health, safety or interest. Consequently, the first step should be to consult an experienced lawyer in labor problems and in labor law in time to prepare for negotiation, mediation, fact-finding or arbitration as thorough preparation is essential to success. The next step is to bargain in good faith and attempt to settle any

2. Campbell v. Campbell, 44 App. D.C. 142, 153 (1915), *cert. denied*, 242 U.S. 642 (1916).
3. 87 F.2d 980, 982 (1951).
4. Wabash Ry. v. American Refrigerator Transit Co., 7 F.2d 335, 351 (8th Cir. 1925).
5. 61 STAT. 136 (1947), 29 U.S.C.A. §§ 141-97 (1956) (hereinafter cited as LMRA).

and all disputes which may arise upon a mutually satisfactory basis. Facts and persuasion should replace table pounding, intemperate outbursts, and personalities. The parties usually are educated to the point where they will settle issues upon their merits if settlement is desired. At least some reliance should be placed upon the intelligence and judgment of the employee as well as of the union and the employer.

Only after it becomes apparent that an agreement is unlikely, should notification be made to the Federal Mediation and Conciliation Service within thirty days after a written notice to the other party of a desire to modify or terminate a labor agreement.[6] Thereafter the lawyer should cooperate with the mediator assigned to the dispute and see that his client knows that there exists a duty to participate fully and promptly in such meetings as may be undertaken by the mediator.[7] Furthermore, all concerned should know that the mediator is the friendly advisor of both parties, that he cannot and does not decide issues or be partial to either side, and that his usefulness depends upon the degree to which both parties trust and confide in him. Ideas can be tried out with him without being exposed to hasty or ill-conceived reactions from the other party. Because the mediator possesses information not known to both parties he can be very helpful in such matters as the timing of proposals, awareness of the limitations on and needs of both parties and reduction of personality and status conflicts and reactions. Unlike arbitration there is no risk of an unworkable or unacceptable decision for a "refusal of either party to agree to any procedure suggested" by the mediator "shall not be deemed a violation of any duty or obligation imposed by this Chapter."[8] Also, the Federal mediator is prohibited by a specific regulation from disclosing confidential matters or information received in joint or separate mediation meetings.[9]

During the course of collective bargaining with or without mediation, arbitration or fact-finding may or may not be deemed appropriate, depending upon the circumstances including the public interest, the cost of coercive tactics and the kind of issues which exist. Arbitrators, like mediators, are useful to the extent that both parties trust their discretion, impartiality and judgment.

It has been said that lawyers may hesitate to utilize arbitration because the fees of litigation may be larger than in arbitration, but the customary guides to the amount of the fee apply to arbitration as much as to counselling or litigation. Few companies and unions would

6. See § 8(d)(3) LMRA, 61 STAT. 140 (1947), 29 U.S.C.A. 158(d)(3) (1956).
7. § 204(a)(3) LMRA, 61 STAT. 154 (1947), 29 U.S.C.A. 174(a)(3) (1956).
8. § 203(c) LMRA, 61 STAT. 153 (1947), 29 U.S.C.A. 173(c) (1956).
9. 22 FED. REG. 162 (1957), amending 29 C.F.R. § 1401.2 (1949).

assert that the issues to be arbitrated are unimportant, or that insufficient preparation is wise, or that saving money is their major interest.

Lawyers are fully aware that they are engaged in a learned profession for which they have been long and carefully educated and trained. They know that they have a duty to do everything within their power to keep their clients out of controversies, whether they be grievances, arbitrations or litigation in the courts.

Besides, lawyers and their clients in labor and management are fully aware of the cost of industrial warfare not only to the participants but to the general public whose interests deserve more consideration. They are seeking workable and acceptable alternatives. Therefore, lawyer's fees in arbitration are a minor consideration when compared with the costs of strikes and industrial unrest or litigation.

Consequently, it is not because of personal reasons that lawyers may be reluctant to advise their clients to arbitrate interests or even rights. No one believes that arbitration is a catholicon for the solution of industrial problems as there is always the human equation. Parties and their lawyers can seek to limit the scope of arbitration, but if the arbitrator exceeds his authority an expensive and delaying appeal to the courts may be unavoidable. And if he indulges in unsolicited but well meant advice he may harm the relationship between the parties. Arbitrators are not hired as consultants and few of them possess the background knowledge and the experience needed for wise counselling. There are arbitrators who are strict constructionists, others who are liberal in their views. Some seem to be able to read implications into an agreement which enlarge or restrict the rights of the parties. Other arbitrators fail to write short, clear, concise, easily understood opinions. One arbitrator will modify a discharge which another will sustain because of differing views concerning industrial discipline. A few arbitrators prefer to mediate rather than arbitrate and many apologize to or express sympathy with the loser, thereby implying that the winner is somehow at fault.

Therefore, lawyers and their clients are very cautious about selecting an arbitrator. It is difficult to know in advance that he will be wise, judicious and impartial. Unless they have known and had experience with a particular arbitrator they must rely on hearsay or the reading of his relatively few published opinions. The losing party is often unwilling to have an arbitration decision published and as a result many of the most illuminating as well as controversial decisions are not published. Less than one-half of the decisions filed with the Federal Mediation and Conciliation Service are published. Also, hearsay concerning an arbitrator's competence and impartiality is frequently as unreliable as is other hearsay, because unions, employers

and employees are inclined to react to an arbitrator on the basis of whether they won or lost a decision.

For these and other reasons there is much misinformation in circulation concerning arbitrators and their decisions. It is not unusual for the Federal Mediation and Conciliation Service to be told that Arbitrator "A" is pro-union and also pro-management, that professors from particular institutions or members of certain professions should be excluded and that acceptable arbitrators are not acceptable because of one or two adverse decisions. Of course, there are arbitrators who make mistakes even as there are judges and lawyers and management and union leaders and other people who are not infallible. A 1947 mistake should not influence the choice of an arbitrator in 1957. All of us profit from our mistakes. The number of experienced, independent, impartial and acceptable arbitrators is not so large as to permit of arbitrary rejection. Furthermore, arbitrators on the federal roster must be and are qualified as well as generally acceptable to those who utilize its arbitration facilities.

Labor arbitrators are as much aware of their position of trust and responsibility and are as concerned with the soundness of their decisions as are judges, referees, examiners, members of boards and commissions, and other public officials in judicial or quasi-judicial positions. Many serve as a contribution toward peaceful industrial relations and at a sacrifice of time, convenience, and their customary standards of compensation. Half of the arbitrators on the active roster of the Federal Mediation and Conciliation Service are lawyers. Unlike public officials, a private arbitrator is employed and paid by the parties who utilize him to decide a dispute. There are no appellate arbitration tribunals and stare decisis does not and should not apply to arbitration. Unless and until rights, duties and principles of industrial relations are established and verified by long experience, arbitrators should not adhere to the decisions of even the most experienced arbitrators.

It is, therefore, obvious that the lawyer will continue to look with favor upon the arbitration of labor controversies only so long as the arbitrator and the arbitration process meet the needs of our industrial civilization.

To the lawyer, arbitration is a means to an end. If the end is beneficial, the legal profession will continue to assist in perfecting and improving arbitration and will encourage even greater utilization of arbitration as a method of deciding rights under existing contracts.

The arbitration of interests, however, is so contrary to the experience of the lawyer, so fraught with unpredictable consequences, so wide open and lacking in standards and safeguards at the present time that it will be utilized by lawyers with great reluctance as a

last resort and in exceptional circumstances. If an outsider is under consideration as an aid to settlement of a dispute involving a change in a labor contract the mediator and the mediation process at the present time have more appeal to the careful lawyer than have the arbitrator and the arbitration procedure because the mediator has no power to decide an issue. His function is purely advisory whereas the arbitrator makes an award which is usually conclusive of all questions of fact and law.

The future of labor arbitration depends upon all who participate therein, including the arbitrator, the parties and their counsel; and upon how effective arbitration is in settling disputes acceptably without resort to strikes, lockouts, and other coercive activities. In the final analysis, neither the arbitrators, the lawyers nor their clients will decide the future of labor arbitration. Public opinion will be the final arbiter because unnecessary work stoppages and needless losses and irresponsible denial of needed or desired services, commodities or utilities will not and should not be tolerated by the American people.