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## AMERICAN LABOR ARBITRATION: THE EARLY YEARS\*

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This article is part of a work in progress, a book on labor arbitration to be published by West Publishing Company under the title AMERICAN LABOR ARBITRATION. A second article, covering the history of labor arbitration from the Second World War until the present day, is in preparation and will appear under the title *American Labor Arbitration: The Maturing Years*. The authors wish to thank Professor Thomas Terrill of the University of South Carolina Department of History for comments on an earlier draft and William T. Carlson of the University of South Carolina Law School class of 1984 for his general assistance.

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INTRODUCTION

When an employer and a union representing its employees disagree over the meaning or application of a collective bargaining agreement, their normal recourse is to arbitration. They could, if they wished, so order their relationship that such disputes would be fought with the weapons of law or economic pressure, but overwhelmingly they choose arbitration instead. Every year tens of thousands of labor disputes proceed to arbitration, and in all but a fraction of the cases the arbitrator's award is the last word on the controverted issue.

Despite the importance of labor arbitration to contemporary labor relations, surprisingly little has been written on the history and development of this dispute resolution process.<sup>1</sup> That is doubly unfortunate: first, because no institution can be effective without a firm sense of self-identity which requires knowledge of its past; and second, because a better understanding of arbitration's development and of the alternative roads that were explored may help in understanding both the potential and the limits of this unique dispute resolution procedure.

This article seeks to fill a portion of the void in our knowledge of labor arbitration's history. It does so on two levels. On one level it is descriptive: it surveys the development of labor arbitration in its formative years, showing how it became the primary method of resolving contractual disputes and how it came to have its present distinctive form. A later article will describe the changes in labor arbitration during and after World War II.

On another level this article is suggestive. By gathering and reexamining information, it seeks to suggest fresh approaches to recurring questions. Two of these questions should be stated at the outset so that the reader may reach his or her own conclusions as the story unfolds: (1) To what degree is labor arbitration an autonomous system of self-regulation, created and operated outside the realm of positive law? (2) To what degree was labor arbitration mature and accepted before the Second World War?

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1. No definitive history of labor arbitration in the United States has yet been written. The standard work to which all students of the subject must refer is the brief monograph by E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* (1952). Witte's work is quite good as far as it goes, but is now dated and out of print. The best short survey of labor arbitration's history may be found in R. FLEMING, *THE LABOR ARBITRATION PROCESS* ch. 1 (1965).

Any discussion of this topic must begin with a terminological clarification. The history of labor arbitration is inextricably entwined with that of collective bargaining and the broader history of labor. Only relatively recently has labor arbitration been defined as the voluntary, private adjudication of disputes arising under a collective bargaining agreement by a neutral third party.<sup>2</sup> For most of the nineteenth century, "arbitration" was interchangeably described as negotiation undertaken in a conciliatory spirit, adjudication by a joint labor-management body, and referral to a neutral third party. Disputes over the terms of new agreements were not distinguished from those concerning the interpretation of existing contracts.<sup>3</sup>

By the early 1900s, however, arbitration was relatively well distinguished from collective bargaining, and disputes over new agreements were differentiated from those over existing agreements.<sup>4</sup> Nevertheless, these arcane distinctions were appreciated only by labor specialists, and some confusion persisted well into the twentieth century. Accordingly, the first three sections of this article discuss "arbitration" in its broadest sense, while later sections concentrate on its more limited modern sense.

#### BACKGROUND AND EARLIEST EXPERIENCE

Although British and American systems of labor relations differ greatly today, British experiments with industrial arbitration influenced the formative years of arbitration in this country.<sup>5</sup> As early as the seventeenth century there was in England a process approximating labor arbitration, apparently a novel adaptation of the already familiar commercial arbitration.<sup>6</sup> Labor arbitra-

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2. See A DICTIONARY OF ARBITRATION AND ITS TERMS 135-36 (K. Seide ed. 1970). "Interest" arbitration, concerning disputes over the terms to be included in a collective bargaining agreement, is distinct from "grievance" or "rights" arbitration, involving disputes over the interpretation or application of existing agreements. The focus of this article is on the more common form of arbitration, grievance arbitration.

3. M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 98 (1970). A few early experts in the field did recognize that a binding decision by a neutral party was the essential element of any arbitration system, but such clarity of conception was unusual. See, e.g., 12 MASS. BUREAU OF STATISTICS OF LABOR ANN. REP. 6-8 (1881) (report of Joseph D. Weeks) [hereinafter cited as Weeks Report].

4. M. DERBER, *supra* note 3, at 98.

5. One early writer credited Great Britain with many of the labor dispute resolution mechanisms used in the American mining industry:

We have adapted [the British ideas and methods] to suit our needs and in some respects improved upon them, perhaps, but we certainly owe the initial impulse toward practical adjustment to the British workers who had been trained in an industrial environment where the folly of strikes and the futility of strong-arm methods had been learned by hard experience.

A. SUFFERN, *CONCILIATION AND ARBITRATION IN THE COAL INDUSTRY OF AMERICA* 269 (1915).

6. The Journeymen Hatters of seventeenth century London often chafed at price controls imposed by the city's court of aldermen. On one occasion, when prosecuted for violating those controls, the Hatters obtained a writ of certiorari to remove the case from the Lord Mayor's session to the Assizes, where Lord Chief Justice Holt referred the dispute to arbitration. The arbitration award that followed was a victory for the Hatters, giving them an increase in rates and an end to all legal proceedings. This event was an aberration, however, and did not

tion gained statutory recognition, if not practical application, at the beginning of the nineteenth century.<sup>7</sup>

The earliest arbitration agreements often did not survive the enthusiasm of their original sponsors; however, as collective bargaining spread throughout the industrialized areas of England in the last half of the nineteenth century, British employers came to realize that unions were there to stay. As a result employers frequently experimented with conciliation and arbitration schemes as ways to avoid strikes.<sup>8</sup> Voluntary bipartite or tripartite arbitration boards often resolved wage disputes,<sup>9</sup> employing surprisingly sophisticated arbitral theory<sup>10</sup> and procedure.<sup>11</sup>

Although American experts were familiar with British arbitration experi-

truly involve a dispute between employers and workers. S. WEBB & B. WEBB, *THE HISTORY OF TRADE UNIONISM* 29 (1920 & photo. reprint 1975) [hereinafter cited as S. WEBB].

7. Amendments to the Combination Act, 1799, 39 Geo. 3, ch. 81, provided for reference of wage disputes to arbitration, but these provisions were never put into force. S. WEBB, *supra* note 6, at 71. Repealed in 1824, the Combination Acts' arbitration provisions were replaced with an elaborate new procedure. 1824, 5 Geo. 4, ch. 96. This new law was little more used than were its predecessors. E. WITTE, *supra* note 1, at 4. The existence of this new law was known in the United States, as shown by the Philadelphia reprinting of an English book which contained a detailed summary of the Act. W. WATSON, *A TREATISE ON THE LAW OF ARBITRATION AND AWARDS* 219-28 (Philadelphia 1848) (3d ed. London 1846).

8. H. PELLING, *A HISTORY OF BRITISH TRADE UNIONISM* 118 (3d ed. 1976). For a detailed description of the operation of boards of conciliation and arbitration in the North of England during this period, see Watson, *The Peaceable Settlement of Labor Disputes*, in CONTEMP. REV. 730, 732-41 (May 1890).

9. A number of these arrangements are described in J. JEANS, *CONCILIATION AND ARBITRATION IN LABOUR DISPUTES* (1894). See also Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309, 341 n.106 (1945) (citing examples). By 1844, the miners' association of Great Britain and Ireland was sufficiently convinced of arbitration's worth to make an arbitration scheme one of the objectives in a major strike. A. SUFFERN, *supra* note 5, at 272.

10. Some of the statements and rulings of Sir Rupert Kettle, a well-known arbitrator of the 1860s and 1870s, have a distinctly modern sound. Once, when asked whether arbitration boards would tend to raise wages, he responded in a manner that would please any modern proponent of interest arbitration: "[T]hese boards will fix, with business-like accuracy, the market value of a given kind of skilled labour at a particular place and time." J. JEANS, *supra* note 9, at 35-36. Another time, when declining demand for iron caused employers to seek a cut in wages, the employers offered to show Sir Rupert their records so that he could verify the company's financial condition. He declined the offer on the ground that reviewing the employers' books would imply that employers had a right to ask their workmen to share the owners' losses. *Id.* at 39-41.

As a lawyer and a judge, Kettle sought to follow a judicial model, first ascertaining the relevant rules from the parties' agreement and, if necessary, from natural law principles of political economy, then applying these rules to the facts of the case. While characterizing this theory as dangerously fallacious, a contemporary critic noted that "Mr. Kettle's awards fail entirely to carry out this view. They are remarkable for very vigorous analysis and skillful unraveling of complicated facts, but in no sense are they deductive applications of the truths of political economy." H. CROMPTON, *INDUSTRIAL CONCILIATION* 28 (1876).

11. In a Northumberland mining dispute in 1875, for example, the case was argued on the basis of written statements which were discussed by the parties representatives. Accountants submitted information on labor costs and prices during a previous year as the basis for comparison. The arbitrator finally awarded a wage reduction of 10-12% rather than the 20% sought by the employer. A. SUFFERN, *supra* note 5, at 277-78.

ments,<sup>12</sup> there is no evidence that American employers and unions directly copied their English counterparts. Arbitration in this country developed along parallel lines, undoubtedly influenced by the British experience but largely in response to industrial America's needs.

### *The Earliest American Experiments*

Antecedents of modern labor arbitration can be found in America as early as 1640. Colonial courts in New England and New York often called on "indifferent" men, sometimes chosen from the same trade, to arbitrate disputes concerning wage rates or the quality of work done.<sup>13</sup> The Dutch court of burgomasters and schepens in New Amsterdam referred litigation involving wage suits to "good men" or arbitrators who were either appointed by the court or selected by the litigants.<sup>14</sup> The practice continued in New York City under English rule.

An instance of judicial labor arbitration occurred in eighteenth century Massachusetts:

At a church meeting at Wareham on Buzzard's Bay, held in 1761, a complaint was lodged by Benjamin Norris against Benjamin Fearling, in which Norris contended that both parties had agreed to submit a dispute regarding compensation for a fishing voyage to the Reverend Ruggles of Rochester and to "stand by his judgment." Fearling later reneged, refusing to settle unless a court judgment were procured against him. Accordingly he was suspended by the church meeting "till he should give Christian Satisfaction."<sup>15</sup>

A few years later a private arbitration tribunal organized by the New York Chamber of Commerce resolved a dispute over seamen's wages.<sup>16</sup>

Apart from these early instances, arbitration was more popular in theory than in practice. In short, there was more talk than action. Public declarations of the desirability of labor arbitration were numerous in the nineteenth century. In 1829 the Constitution of the Journeymen Cabinet-Makers of Philadelphia provided that a member appointed to arbitrate differences between an-

12. For example, Eckley Cox submitted a paper on British arbitration boards to the Social Science Association of Philadelphia, which was published in the *Penn Monthly* of March, 1871. Joseph Weeks submitted an influential report to Pennsylvania Governor John F. Hartranft describing the English boards of arbitration. Weeks' report received much wider circulation when later incorporated in an 1881 Massachusetts Labor Commission report on *Industrial Conciliation and Arbitration*. E. WITTE, *supra* note 1, at 4-5.

13. R. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 210 (1965).

14. *Id.* In fact, not all of the arbitrators appointed were men. In 1662, two women, Sara Roeloftzen and Metjie Greveraats, were appointed to resolve a dispute over wages allegedly due Nanneke van Gelder for making linen caps. These "good women" were the first women labor arbitrators appointed in this country, but they never rendered a decision. The plaintiff refused to appear before the arbitrators and Sara Roeloftzen declined to have anything to do with the matter, "as she will not be opposed to either one party or the other." The suit was allowed to proceed before the court without arbitration. Aiken, *New Netherlands Arbitration in the 17th Century*, 29 *ARB. J.* (n.s.) 145, 155, 160 (1974).

15. R. MORRIS, *supra* note 13, at 210.

16. F. KELLOR, *AMERICAN ARBITRATION* 4 (1948 & photo. reprint 1972).

other member and his employer must report on his success at the society's next meeting.<sup>17</sup> This suggests that such appointments may have been common. In the late 1860s the president of the Iron Molders International Union, advocating compromise, conciliation and arbitration, called for a convention of employer and employee representatives to resolve such issues as shop rules and apprenticeship.<sup>18</sup> The principal labor federation of the 1860s, the National Labor Union, early resolved that each trade assembly should appoint an arbitration committee to which all disputes between employers and employees should be referred. The Industrial Congress of the National Trade Unions of 1874 took a similar position, though declaring that it would be "impudent" to seek legislation to force employers to arbitrate.<sup>19</sup> In 1876 and 1878, Pennsylvania's Governor Hartranft urged the establishment of a court of arbitration composed of judges and representatives of labor and management.<sup>20</sup> In the 1880s, the Knights of Labor joined the chorus of arbitration advocates, seeking arbitration so strikes might be rendered unnecessary.<sup>21</sup>

Numerous proposals for compulsory arbitration laws were made following the bitter and sometimes bloody labor disputes of the 1870s and 1880s. Labor union leaders vigorously fought such proposals. One vigilant opponent was Samuel Gompers, president of the American Federation of Labor, who stated: "I regard no public service of mine of greater importance than my efforts extending over forty years to prevent the enactment of legislation of this character."<sup>22</sup> Gompers was willing to accept voluntary arbitration if workers had equal bargaining power with their employers, and if employers who relied on cheap labor to compete effectively were put out of business.<sup>23</sup> By 1901 even ardent capitalist Andrew Carnegie endorsed the concept of voluntary arbitration with a binding decision by competent third parties.<sup>24</sup> So great was the enthusiasm of economists, ministers and social reformers for arbitration in

17. 1 J. COMMONS, *HISTORY OF LABOUR IN THE UNITED STATES* 336-37 (1918 & photo. reprint 1966).

18. J. GROSSMAN, WILLIAM SYLVIS, *PIONEER OF AMERICAN LABOR* 170-71 (1945).

19. 2 J. COMMONS, *supra* note 17, at 165.

20. M. DERBER, *supra* note 3, at 80-82.

21. The Knights' Declaration of Principles listed as one of the organization's objectives: "To persuade all employers to agree to arbitrate all differences which may arise between them and their employees, in order that the bonds of sympathy between them may be strengthened and that strikes may be rendered unnecessary." (quoted in Jensen, *Notes on the Beginnings of Collective Bargaining*, 9 INDUS. & LAB. REL. REV. 225, 229 (1956)). However, by "arbitration" the Knights of Labor meant "the peaceful settlement of disputes and not a referral to a third party for settlement." T. BROOKS, *TOIL AND TROUBLE* 57 (rev. 2d ed. 1971).

22. 2 S. GOMPERS, *SEVENTY YEARS OF LIFE AND LABOR* 149 (1925 & photo. reprint 1967). See generally *id.* at 131-50; Gompers, *The Limitation of Conciliation and Arbitration*, 20 ANNALS 27-34 (1902). Gompers gave short shrift to public interests which purportedly justified compulsory arbitration: "The public has no rights which are superior to the toilers' rights to live and to their right to defend themselves against oppression." L. REED, *THE LABOR PHILOSOPHY OF SAMUEL GOMPERS* 121 (1966).

23. M. DERBER, *supra* note 3, at 50.

24. Carnegie preferred that these third parties be drawn from the ranks of retired businessmen and former union presidents. M. DERBER, *supra* note 3, at 66-67.

this period that one historian accurately termed it the "middle class panacea" for labor conflict.<sup>25</sup>

The years following the Civil War witnessed numerous attempts to translate words into action. Arbitrations to set wage rates occurred every few years. The first wage arbitration occurred in 1865 with the iron puddlers of Pittsburgh. Although the arbitration resulted in a wage increase, it apparently did not involve any neutral outsiders.<sup>26</sup> Occasionally arbitration boards provided for an outsider's decision in case of a deadlock, but these provisions were seldom used.<sup>27</sup>

One of the first recorded cases involving arbitration of collective bargaining disputes by neutral outsiders took place in 1871. The Pennsylvania anthracite coal mining industry and union selected Judge William Elwell to settle disputes concerning interference with the works and the firing of workers because of their union connections. Holding that both sides had erred, the arbitrator's decision must have been satisfactory because they later let him decide the "bill of wages."<sup>28</sup>

Three years later another judge was selected to arbitrate a wage rate dispute in the Ohio coal industry. The judge ruled in favor of the employers' collective proposal to lower wages by more than twenty percent. One company nevertheless offered to pay higher wages if the union would abandon one of its demands. After the union accepted this proposal, employees of other companies similarly sought to bypass the arbitral decision. In the end all employers were forced to pay higher wages, and in the process "the practice of joint conference and arbitration was destroyed for a decade."<sup>29</sup>

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25. Akin, *Arbitration and Labor Conflict: The Middle Class Panacea, 1886-1900*, 29 HISTORIAN 565 (1967). By the 1880s and 1890s the first of what has become a mountain of American publications on labor arbitration began to appear. See, e.g., J. WEEKS, *LABOR DIFFERENCES AND THEIR SETTLEMENT* (1886); Gladden, *Arbitration of Labor Disputes*, 21 AM. J. SOC. SCI. 147 (1886) (discussing European systems of labor arbitration and urging the adoption of arbitration in this country); Note, *Arbitration in Contests Between Capital and Labor*, 28 AM. L. REV. 595 (1894) (describing the press discussion of compulsory arbitration after recent railroad strikes as the "most insane drivell").

26. See UNITED STATES BUREAU OF LABOR STATISTICS, *RESULTS OF ARBITRATION CASES INVOLVING WAGES AND HOURS, 1865 TO 1929*, cited in 29 MONTHLY LAB. REV. 1052, 1054 (1929) [hereinafter cited as *RESULTS OF ARBITRATION CASES*]. This case is commonly but erroneously cited as the first instance of labor arbitration in the United States. See, e.g., E. WITTE, *supra* note 1, at 11. Because no neutrals sat on the arbitration board, it is more accurately described as the first recorded award arising out of a collective bargaining dispute.

27. E. WITTE, *supra* note 1, at 11. Some of these very early arbitration awards are mentioned in C. MOTE, *INDUSTRIAL ARBITRATION 192-94* (1916).

28. This bill of wages, or schedule of pay for work in the mines, was violated by the employers after a few months. *Id.* See also A. SUFFERN, *supra* note 5, at 209-11; Weeks' Report, *supra* note 3, at 33-41. Weeks' report is the best contemporary discussion of arbitration in coal mining largely because the author was a participant in many of the events he described.

29. N. WARE, *THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895*, at 33 (1929 & photo. reprint 1959). See also A. SUFFERN, *supra* note 5, at 12 ("In fact, the whole episode was rather a severe blow to the principle of arbitration and contributed largely to the decline of the union."); E. WITTE, *supra* note 1, at 11-12. The employers were led by Mark Hanna, later a powerful United States Senator and President of the National Civic Federation. See *infra* note 131.

A third arbitration attempt in the coal industry collapsed in 1879, revealing a serious flaw in these early arrangements. Pennsylvania coal miners established a bipartite Board of Conciliation and Arbitration whose first matter was specification of a new wage scale.<sup>30</sup> After the Board deadlocked, the judge selected to arbitrate refused to serve and the parties could not agree upon a replacement. Because no provision existed for choosing an arbitrator when the parties could not agree, the joint board system broke down in Pennsylvania and the experience was repeated elsewhere.<sup>31</sup>

In the 1880s, several arbitration provisions were negotiated but never implemented.<sup>32</sup> Nineteenth century employers remained bitterly opposed to labor organizations, their natural antagonism aggravated by economic pressures in this highly competitive era. They recognized unions only under great pressure, and accepted arbitration even less willingly. No more than a handful of arbitration cases on wages and hours could have occurred before 1900.<sup>33</sup>

### *State Boards of Arbitration*

The 1870s were extraordinarily turbulent years for labor relations. The resulting strife prompted state governments to take the first hesitant steps to encourage amicable resolution of disputes. Several states adopted laws to facilitate arbitration between 1878 and 1885, and by 1900 twenty-five states had legislation on the subject.<sup>34</sup> The earliest statutes provided for local boards of arbitration, typically court-appointed on joint application of employers and employees, but these laws were used only in a few cases.<sup>35</sup>

30. This Board was established under the influence of Joseph Weeks, whose report on arbitration had so impressed Pennsylvania Governor Hartranft and was later published in Massachusetts. See *supra* note 12.

31. E. WITTE, *supra* note 1, at 12. See generally A. SUFFERN, *supra* note 5, at 17-19; Weeks Report, *supra* note 3, at 49-54.

32. Examples include that between Philadelphia shoe manufacturers and the Knights of Labor in 1885 and a similar arrangement in Brockton, Mass. See N. WARE, *supra* note 29, at 203-05. The text of an agreement between the Knights of Labor and the shoe manufacturers of Portsmouth, Ohio, has been preserved. 2 ARB. J. (n.s.) 254-55 (1947). The phrasing is ambiguous, but Rule Number 4 of the agreement ("The Employees shall remain at work pending a grievance") may be the first known negotiated "obey now, grieve later" provision.

33. One study by the Bureau of Labor Statistics reported only 54 arbitration cases on wages and hours from 1865 to 1914, and 22 of these were railroad disputes which took place after passage of the Erdman Act of 1898 and the Newlands Act of 1913. RESULTS OF ARBITRATION CASES, *supra* note 26, at 16-17.

34. Maryland was the first to adopt a statute in 1878, followed by New Jersey in 1880, Pennsylvania, Kansas, Iowa, New York and Massachusetts in 1883, and Ohio in 1885. Two helpful surveys on the early period are G. BARNETT & D. McCABE, *MEDIATION, INVESTIGATION AND ARBITRATION IN INDUSTRIAL DISPUTES* (1916 & photo. reprint 1971); H. KALTENBORN, *GOVERNMENT ADJUSTMENT OF LABOR DISPUTES* 171-217 (1943). A 1943 study by the Department of Labor presents a useful summary of state arbitration statutes and their operation not long before the federal government's labor legislation began to pre-empt the field. D. ZISKIND, *LABOR ARBITRATION UNDER STATE STATUTES* (1943).

35. The only instances in which these laws were used before 1890 involved the coal industry in the Fifth Judicial District of Pennsylvania, where an arbitration tribunal existed from 1883 to 1885, and in Massachusetts, where three cases were recorded during the 1880s. E. WITTE, *supra* note 1, at 7-8. See also H. KALTENBORN, *supra* note 34, at 171.



Other statutes established permanent arbitration boards, the majority of which never functioned. Of those that did, many quickly sank into obscurity. The picture is starkly illustrated by the 1901 statement of the secretary of the Illinois State Board of Arbitration:

The commissioner of labor [of another state] wrote me that they had no arbitration law at all; so I enclosed him a copy of the law of his State, and he then wrote me that he had overlooked it, that he had forgotten about it, that they had an arbitration law, and that members had been appointed under the law, but that he was not able to locate them or tell anything about their whereabouts, that they had never had a case.<sup>36</sup>

A few state boards were more active, but only the Massachusetts board engaged in a significant number of arbitrations.<sup>37</sup> Its Board of Arbitration and Conciliation, created in 1886, was initially ineffective because intervention was permitted only after written request from the parties. Few such requests were received. In 1887 the law was amended to permit the Board to intervene on its own initiative. At first the Board handled more arbitration than mediation cases, but by 1900 mediation cases were in the majority. Arbitration once again predominated from 1915 until 1938.<sup>38</sup>

In its early years, the Massachusetts Board's work was concentrated in a few industries. In 1913, for example, the Board made eighty awards in the boot and shoe industry, where labor agreements required unresolved disputes to be submitted to the Board, and only seven arbitration awards in all other industries combined. By urging parties to submit disputes to arbitrators of their own choosing, the Massachusetts Board gave a small assist to the development of the modern private arbitration system.<sup>39</sup> Other state boards did even less than the Massachusetts Board.

In general, however, early state laws had little direct impact on the development of labor arbitration.<sup>40</sup> They are nonetheless noteworthy as indi-

36. H. KALTENBORN, *supra* note 34, at 171 (adds that "such a description could be applied with reasonable accuracy to still other states in the period after 1900").

37. The only state boards to handle as many as 10 cases were New York (409 disputes between 1886 and 1900), Massachusetts (419 between 1886 and 1904), Ohio (160 cases from 1893 to 1903) and Illinois (36 cases from 1895 to 1900). Almost all of these cases were mediation proceedings, and the percentage of settlements was small. See G. BARNETT & D. McCABE, *supra* note 34, at 92; E. WITTE, *supra* note 1, at 8.

38. H. KALTENBORN, *supra* note 34, at 187-88.

39. G. BARNETT & D. McCABE, *supra* note 34, at 92-94.

40. The story of these early state statutes more appropriately belongs to the history of labor mediation than that of labor arbitration. Whether or not they were effective in fostering arbitration, they provided one extremely important precedent for the labor relations legislation of the next century. Most of the nineteenth century laws contain "majority preference" provisions which limited access to the statutory arbitration machinery to unions representing a majority of the workers. This preferred status for majority unions led directly to the most fundamental principle of modern American labor law, the "exclusivity principle," according to which only the union designated by the majority could negotiate on behalf of any employee. See Schreiber, *Majority Preference Provisions in Early State Labor Arbitration Statutes—1880-1900*, 15 AM. J. LEG. HIST. 186 (1971).

cations of the sort of governmental encouragement which provided a favorable climate for privately negotiated arbitration agreements. The main impetus for labor arbitration has consistently come from labor and management, but they were never entirely free from governmental influence.

### THE PIONEERING INDUSTRIES

Arbitration gained early acceptance in those American industries that were especially vulnerable to economic losses occasioned by strikes. Developments in the railroad industry are particularly significant because federal arbitration law developed most rapidly in this area and thus provided a model for other industries. The coal, newspaper and clothing industries also were important in shaping American labor arbitration.

#### *Railroads*

The first and most significant federal efforts to resolve labor disputes took place in the railroad industry.<sup>41</sup> Since railroads clearly engaged in interstate commerce, there was no serious constitutional impediment to federal intervention. Moreover, railroads were critical to the national economy. Before the modern highway system, railroads were the only practical means of long distance transportation. Raw materials and food flowed from farms to cities; farm machinery and consumer goods were shipped from cities to farms; and manufactured goods of all sorts were transported from one city to another. Finally, because railroad employees were among the first to organize nationally, disputes could, and often did, affect the entire nation.

### The Arbitration Act of 1888

The first federal law on railroad labor disputes was the Arbitration Act of 1888.<sup>42</sup> Reacting to a drastic increase in strikes, President Grover Cleveland recommended to Congress in 1886 the creation of a permanent board for voluntary arbitration of railroad labor disputes.<sup>43</sup> Instead Congress passed the Arbitration Act of 1888, providing for ad hoc arbitration boards which parties could use if they so agreed. Voluntary arbitration, however, was not used at all during the ten years the law was in effect.<sup>44</sup>

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41. On the history of federal attempts to establish an effective system of resolution for railroad labor disputes, see E. Sigmund, *Federal Laws Concerning Railroad Labor Disputes: A Legislative and Legal History, 1877-1934* (1961) (unpublished Ph.D. dissertation, University of Illinois Department of History). Shorter discussions can be found in H. KALTENBORN, *supra* note 34, at 37-72; H. MILLIS & R. MONTGOMERY, *ORGANIZED LABOR* 730-48 (1945) [hereinafter cited as H. MILLIS]. The modern experiences with grievance adjustment and interest dispute resolution in the railroad industry are well covered in Aaron, *Voluntary Arbitration of Railroad and Airline Interest Disputes*, in *THE RAILWAY LABOR ACT AT FIFTY* 129 (C. Rehms ed. 1977); Seidenberg, *Grievance Adjustment in the Railroad Industry*, in *id.* at 209.

42. Ch. 1063, 25 Stat. 501 (1888) (repealed 1898).

43. One commentator notes that President Cleveland blamed "the discontent of the employed" on "the grasping and heedless exactions of employers." E. Sigmund, *supra* note 41, at 8.

44. E. WITTE, *supra* note 1, at 8-9.

The 1888 law provided that the arbitration board would consist of three members: one chosen by each of the parties and a third selected by the other two members. All three board members were required to be "wholly impartial and disinterested."<sup>45</sup> This impartiality requirement made it difficult to find qualified arbitrators familiar with the problems of the industry.

A more fundamental problem with the 1888 law was that voluntary arbitration lacked a constituency in the railroad industry at the time. Railroad unions increasingly relied on strikes and boycotts, while railroad companies preferred court orders.<sup>46</sup> When one side favored arbitration, the other generally did not. Eugene Debs, leader of the American Railway Union during the 1894 Pullman strike, vainly sought arbitration under the 1888 law, sending representatives to meet with the Pullman Company's vice-president. "[T]he great man told them to tell Debs to go to hell; there was 'nothing to arbitrate.'"<sup>47</sup>

The Pullman strike points out another critical flaw in the 1888 law. The unusual violence arising out of this dispute forced President Cleveland to appoint an investigatory commission. By the time the appointments were made, however, the walkout had been crushed, and the commission had no influence on the outcome of the strike.<sup>48</sup> Only a commission in existence when the dispute arose would have been able to act quickly enough.

#### The Erdman Act of 1898

President Cleveland's investigatory commission did produce one positive result. It recommended that a permanent strike commission be established with power to prevent strikes and discharges during an investigation.<sup>49</sup> Congress, receptive to these suggestions, eventually passed the Erdman Act of 1898<sup>50</sup> to replace the 1888 Arbitration Act. The new law dropped the impartiality requirement and established permanent machinery for voluntary arbitration. As under the prior law, an arbitration board was appointed for each case. If the partisan arbitrators failed to agree on a third person, the Commissioner of Labor and the Chairman of the Interstate Commerce Commission (ICC) were empowered to make the appointment.<sup>51</sup>

The law did not get off to a promising start. Soon after its passage, the Brotherhood of Railroad Trainmen attempted to invoke its mediation provisions, but the railroads flatly declined the offer of mediation services. No further attempt to use the law was made until 1906.<sup>52</sup> From 1906 until 1913,

45. H. KALTENBORN, *supra* note 34, at 37. Most modern tripartite boards include partisan members in order to ensure full and fair consideration of the parties' positions and thus they are not expected to be impartial.

46. E. Sigmund, *supra* note 41, at 10.

47. L. ADAMIC, DYNAMITE 118 (rev. ed. 1934). "He added that the strikers meant no more to him than 'men on the sidewalk.'" *Id.*

48. E. Sigmund, *supra* note 41, at 22.

49. *Id.* at 24.

50. Ch. 370, 30 Stat. 424 (1898) (repealed 1913).

51. E. WITTE, *supra* note 1, at 9-10. See also E. Sigmund, *supra* note 41, at 30.

52. H. KALTENBORN, *supra* note 34, at 38-39. A typical response was the following:

The question of what compensation shall be paid to its employees is of such grave importance that the officers of \_\_\_\_\_ Railroad do not feel that they can in any manner

however, the law was used in sixty cases, of which twenty-seven were settled by mediation and seven by arbitration.<sup>53</sup>

The lesser use of the arbitration provisions may be attributed to various deficiencies of the Erdman Act. First, the Act's limited coverage did not include unorganized employees. Second, the arbitration process itself was problematic. The two arbitrators selected by the parties seldom agreed as to the third. As a result, the task of choosing the third arbitrator generally devolved upon the Commissioner of Labor and the Chairman of the ICC. To avoid the appearance of partiality, these officials frequently chose prominent figures unacquainted with railroad issues, many of whom declined to serve. Anyone who accepted generally decided the case, since the partisan arbitrators were necessarily divided. Railroads and unions alike became dissatisfied with an arbitration system in which one person unfamiliar with the industry made decisions affecting millions of dollars and thousands of workers.<sup>54</sup>

This dissatisfaction prompted railroads to insist on extrastatutory arbitrations, as they did in a major dispute in 1912. Instead of the statutory three-man arbitration board, the railroads demanded and received a seven-man board with one representative from each party and five neutrals, appointed in a manner different from that of the statute. Because the railroads won an important victory in that case, they lost interest in following the statutory scheme.<sup>55</sup> The unions, on the other hand, distrusted extrastatutory boards because these boards could not require an oath for testimony or punish perjury.<sup>56</sup>

When the unions later refused to engage in further extrastatutory procedures, the railroads were forced back into the statutory realm. Arbitration of a 1913 dispute involving firemen resulted in a standardized working day and substantial wage increases. Dissatisfied with that result, railroads refused to use the Erdman Act procedure in subsequent disputes with conductors and trainmen. This impasse nearly precipitated a strike which would have halted rail traffic throughout the nation.<sup>57</sup> Congress quickly responded to this threat and passed a third railroad labor bill, the Newlands Act.<sup>58</sup>

### The Newlands Act of 1913

The major change introduced by the Newlands Act was the creation of a permanent three-member Board of Mediation and Conciliation which could offer its services to disputing parties without their written request. The Board

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relinquish their duty and right to determine it, according to their best judgment, nor by any act of their own subject the interests which are intrusted to them to the judgment of any other tribunal than themselves.

*Id.* at 37 n.7.

53. *Id.* at 39. Several cases involving application of the law are discussed by E. Sigmund, *supra* note 41, at 43-46. On arbitration under the Erdman Act, see generally Neill, *Mediation and Arbitration of Railway Labor Disputes in the United States*, 24 BULLETIN OF THE BUREAU OF LABOR 1 (No. 98, Jan., 1912).

54. E. Sigmund, *supra* note 41, at 50.

55. *Id.* at 50-54.

56. *Id.* at 55.

57. *Id.* at 56.

58. Ch. 6, 38 Stat. 103 (1913) (repealed 1926).

was also authorized to interpret a collective agreement when the parties so requested — not quite binding grievance arbitration, but not far from it. The parties to an interest dispute could select a three-member arbitration board, but if they did not, a six-member arbitration board would be established with the Board of Mediation and Conciliation appointing any necessary public members. As under the Erdman Act, arbitration awards could be appealed to the federal courts.<sup>59</sup>

This Act was slightly more successful than its predecessor. From 1913 to 1917, the Board of Mediation and Conciliation settled fifty-eight of the seventy-one controversies in which it served. Six cases were settled by mediation and arbitration and the rest by mediation alone.<sup>60</sup> The Act proved useless in 1916, however, when the unions declared that their demand for an eight-hour day was not an arbitrable question. A strike was set for September 4th; on August 29th President Wilson appeared before Congress to ask for legislation; and on September 2nd Congress responded with the Adamson Act which mandated a basic eight-hour day.<sup>61</sup>

From 1917 to 1920, the federal government took control of the railroads and operated them under a Railroad Administration. Railroad and union relations were relatively harmonious in the years during and immediately after World War I. This harmony may be attributed to the war effort or to collective bargaining innovations such as the ban on anti-union discrimination, negotiation of national labor agreements, and establishment of national adjustment boards to resolve contract interpretation disputes.<sup>62</sup> After the War, many agreed on the need for amendments to the Newlands Act, though not on the shape the amendments should take.<sup>63</sup>

### The Transportation Act of 1920

Eventually Congress passed the Transportation Act of 1920,<sup>64</sup> creating a new tripartite, nine-member Railroad Labor Board to perform both mediation and arbitration functions. The statute pleased neither management nor labor.<sup>65</sup> Although parties could establish their own adjustment boards, if they did not or if the boards could not resolve disputes by mediation, the Railroad Labor Board heard the matter. This approach approximated compulsory arbitration but fell short because Board decisions were not legally enforceable.<sup>66</sup>

The Board was deluged with cases, handling almost 14,000 in its five-year

59. E. Sigmund, *supra* note 41, at 60-62.

60. H. MILLIS, *supra* note 41, at 733.

61. Ch. 436, 39 Stat. 721 (1916) (current version at 45 U.S.C. § 65 (1976)). See H. MILLIS, *supra* note 41, at 733-34. See also Berman, *The Threatened Railway Strike of 1916: The Adamson Act*, 1 *FEDERAL LEGISLATION TO END STRIKES* 63 (1947).

62. See Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, in *THE RAILWAY LABOR ACT AT FIFTY*, *supra* note 41, at 6.

63. The Senate, for example, passed a bill providing for compulsory arbitration, but it failed in the House. *Id.*

64. Ch. 91, 41 Stat. 456 (1920) (tit. III, which contained the labor sections of the law was repealed in 1926).

65. Rehmus, *supra* note 62, at 6.

66. H. MILLIS, *supra* note 41, at 6.

existence. By making the Railroad Labor Board an adjudicative body, Congress ignored earlier experience showing that mediation was a more efficacious method of resolving interest disputes. Moreover, the Board's adjudicative decisions carried no force and often were simply ignored.<sup>67</sup> While most disputes were resolved satisfactorily, the heavy caseload coupled with unfortunate Board appointments convinced unions and employers alike that the Board was a failure and should be replaced.<sup>68</sup>

Railway executives and union officials began a series of conferences aimed at drafting a new law. Both sides disliked the National Board's intervention, and wanted to emphasize conciliation and collective bargaining instead. They reached general agreement and proposed legislation to Congress. The resulting Railway Labor Act of 1926 largely embodied the principles agreed to by employers and unions.<sup>69</sup>

### The Railway Labor Act of 1926 and the 1934 Amendments

The Railway Labor Act of 1926, with significant amendments added in 1934,<sup>70</sup> still governs labor relations in the railroad and airline industries. Experience under that law helped create the modern system of private sector labor arbitration, and its practice in those industries remains a significant part of all labor arbitration. The arbitration aspects of the Railway Labor Act thus merit further consideration at this point.

The 1926 Act sharply distinguished between interest and grievance disputes and established separate procedures for their resolution. A five-member Board of Mediation handled unresolved interest disputes, and if mediation failed, the Board then tried to persuade the parties to agree to arbitration by a tripartite three-to-six-member board. The neutral members of this board were appointed jointly by the parties, or by the Board of Mediation if the parties could not agree. The arbitration board's decision was filed in district court and became binding unless appealed. If either party refused arbitration, the President could appoint an emergency investigation board which made findings and recommendations, but which lacked power to bind the parties. This system of resolving interest disputes worked reasonably well until the Depression.<sup>71</sup>

The resolution system for grievances did not work as well as that for interest

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67. H. KALTENBORN, *supra* note 34, at 46.

68. H. MILLIS, *supra* note 41, at 736-37. The most detailed discussion of the work of the Railroad Labor Board is found in E. Sigmund, *supra* note 41, at 125-66.

69. Ch. 347, 44 Stat. 577 (1926) (amended 1934) (current version at 45 U.S.C. §§ 151-88 (1976)). See also H. MILLIS, *supra* note 41, at 737.

70. Ch. 691, 48 Stat. 1185 (1934) (current version at 45 U.S.C. §§ 151-88 (1976)).

71. H. MILLIS, *supra* note 41, at 739-41. On the voluntary arbitration of interest disputes under the Railway Labor Act, see Aaron, *supra* note 41, at 129. Emergency boards are discussed in Cullen, *Emergency Boards Under the Railroad Labor Act*, in *THE RAILWAY LABOR ACT AT FIFTY*, *supra* note 41, at 151. Use of voluntary interest arbitration is relatively rare, apparently because of the availability of emergency boards. H. NORTHRUP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES* 58-59 (1966).

disputes. The unions had been satisfied with the national adjustment boards established during World War I and understandably wanted that system preserved in the new law. The railroads, just as naturally, opposed the national boards and sought local or system boards instead. Some railroads still had company unions which would be frozen out of any share in national boards. The 1926 law left the issue of national or local boards in limbo, stating simply that "boards of adjustment shall be created by agreement between any carrier or carriers as a whole and its or their employees."<sup>72</sup> Difficulties often arose in creating adjustment boards, and many unresolved grievances festered. The Board of Mediation's decision to hear grievance cases only on appeal from adjustment boards further complicated the situation.<sup>73</sup>

The 1934 amendments addressed these grievance resolution problems by establishing a single organization, the National Railroad Adjustment Board (NRAB), to settle grievances.<sup>74</sup> Today the NRAB functions in four divisions,<sup>75</sup> each composed of representatives from management and labor. Grievances can also be resolved outside the NRAB framework. Individual carriers and unions have established various special adjustment boards and supplemental adjustment boards to lighten the caseload in a NRAB division.<sup>76</sup> In addition, amendments to the law in 1966<sup>77</sup> authorized establishing "public law boards" to further reduce backlog in the NRAB. Public law boards could be created on request of either railroads or unions to resolve disputes otherwise referable to the NRAB.

Grievances today are usually referred by mutual consent to the appropriate NRAB division and settled there by majority vote. If, as frequently happens, a majority cannot be obtained, the division may select a referee to make the award. When the division cannot agree on a referee, the National Mediation Board may make an appointment. A similar approach is used in the case of supplemental boards and public law boards. A division's award, with or without a referee's assistance, is binding upon the parties and enforceable by the federal courts.

The most significant change made by the Railway Labor Act in handling grievances is that strikes over certain grievance disputes are banned.<sup>78</sup> The Supreme Court interpreted this provision as prohibiting strikes over "minor" disputes, and permitting enforcement by injunction when necessary.<sup>79</sup> This compulsory arbitration provision conflicts with the general pattern of voluntary

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72. Ch. 347, § 3, 44 Stat. 577, 578 (1926) (codified as amended at 45 U.S.C. § 153 (1976)).

73. H. MILLIS, *supra* note 41, at 738-39.

74. 45 U.S.C. § 153 (1976) (original version at ch. 691, § 3, 48 Stat. 1185, 1189 (1934)). The amendments carefully spelled out the Board's jurisdiction, membership, and procedures in case of deadlock. *Id.*

75. 45 U.S.C. § 153(h) (1976).

76. For a summary of the various boards of adjustment, see Seidenberg, *supra* note 41.

77. Pub. L. No. 89-456, §§ 1-2, 80 Stat. 208-09 (1966) (codified as amended at 45 U.S.C. § 153 (1976)).

78. Either party may submit an unresolved dispute to the NRAB, whose decision is final and binding upon both parties. Ch. 691, § 3(m), 48 Stat. 1185, 1189 (1926) (current version at 45 U.S.C. § 153 (1976)).

79. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957).

arbitration of interest disputes under the Railway Labor Act and of grievance disputes under other federal laws.<sup>80</sup>

While the Act's grievance resolution procedure has been reasonably successful in preventing strikes, the length of time it takes has prompted many complaints. The NRAB's heavy workload is not a sign of success, but rather a signal that parties are failing to settle disputes on their own. One reason for this failure is that the NRAB's services are free to the disputants, as are those of system, regional, and special boards of adjustment. If the parties were required to bear the cost of arbitrations they would have a stronger incentive to settle minor disputes.<sup>81</sup>

The history of governmental attempts to avoid labor disputes in the railroad industry illustrates arbitration's potential benefits and limitations. One lesson stands out from this experience: settlements of fundamental disputes cannot be imposed on unwilling parties even through arbitration by a skilled third party. Mediation may resolve many disputes and some parties may be encouraged to trust interest arbitration, but attempts to do more are likely to prove futile if not counterproductive. A second lesson is that grievance arbitration is most effective when it occurs within a lasting structure rather than a procedure invented anew with each dispute, and when it is used at the parties' expense after serious negotiations have failed.

### *Coal Mining*

Although the railroad industry was the largest economic sector to experiment with labor arbitration, experiences in other fields were of equal consequence for modern labor arbitration. This section and the next two discuss industries that used labor arbitration before it became common to do so. The most significant of these were the coal, newspaper and clothing industries.

The importance of coal mining<sup>82</sup> to Pennsylvania's economy no doubt inspired the 1879 establishment of a Board of Conciliation and Arbitration for the Coal Mines of Western Pennsylvania. The Board's initial lack of success was caused by the parties' inability to agree on a neutral arbitrator to resolve a wage dispute. In 1883 and 1885, labor and management did agree and umpires set wage scales; however, both decisions dissatisfied the parties and after the 1885 decision the board ceased functioning.<sup>83</sup>

For several years thereafter there was sporadic union activity but little labor arbitration. A five-month strike in Pennsylvania's anthracite coal fields in 1902 led to what one scholar considers the most famous of all American arbitration

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80. NRAB has been termed "the only administrative tribunal, federal or state, which has ever been set up in this country for the purpose of rendering judicially enforceable decisions in controversies arising out of the interpretation of contracts." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937).

81. See H. NORTHROP, *supra* note 71, at 71-72.

82. On the early use of arbitration in the coal industry, see *supra* text accompanying notes 28-31. On labor relations in bituminous coal, see Fisher, *Bituminous Coal*, in *HOW COLLECTIVE BARGAINING WORKS* 229 (H. Millis ed. 1942 & photo. reprint 1971). The same author discusses labor relations in anthracite coal. *Id.* at 280.

83. E. WITTE, *supra* note 1, at 14.



cases.<sup>84</sup> After the strike had continued for some time with no prospect of settlement, President Theodore Roosevelt threatened to have the United States Army take over the mines and operate them as a receivership.<sup>85</sup> The mine owners bowed to the pressure and asked the President to establish a strike commission; however, they refused to accept any labor members on the commission. Roosevelt creatively circumvented the owners' stipulation by appointing the Grand Chief of the Brotherhood of Railway Conductors, "not as a labor representative, but as an eminent sociologist."<sup>86</sup> Although the strike ended with the appointment of the Anthracite Coal Strike Commission, the issues of union recognition, restructured wage scales and shorter hours remained unresolved. In March 1903 the Commission issued its report, which granted many of the mine workers' demands but did not grant recognition of their union.

The Commission's report resulted in the establishment of a permanent, bipartisan Anthracite Board of Conciliation to interpret and apply the Strike Commission's award. Because of complex wage issues and divergent practices among the mines, this award had to be drafted in general terms. The Commission's plan provided for a judicially appointed umpire in cases where the Board could not agree on an interpretation.<sup>87</sup> Since the Board rarely agreed, its main functions were to hold hearings, gather evidence, and refer the dispute to the umpire.<sup>88</sup> Usually the parties employed a permanent neutral umpire and thus did not need one to be specially appointed.

Although the Anthracite Board experienced great difficulty with many of its earlier cases,<sup>89</sup> it retains significance as the first permanent mechanism for

84. *Id.* at 21. For a discussion on the details of the 1902 strike, see A. SUFFERN, *supra* note 5, at 246-61.

85. See F. DULLES, *LABOR IN AMERICA* 193 (3d ed. 1966) (Roosevelt secretly planned "to put the army in the field with orders to its commanding general to dispossess the operators and run the mines as a receiver, and dispatched Secretary of War Root to inform J. P. Morgan, as the real power behind the operators, that this was his alternative if arbitration was still refused.").

86. *Id.*

87. E. WITTE, *supra* note 1, at 22. The umpire would be appointed by a judge from the United States Third Circuit. *Id.*

88. Fleming describes the distinctively judicial nature of the anthracite umpire:

He does not attend the hearings, does not live in the anthracite region, and receives the testimony and briefs by mail. He is expected to fulfill an exclusively judicial function and to give as literal an interpretation of the agreement as possible. He may, however, render substantive decisions where the terms of the contract are vague, ambiguous, or conflicting. Such decisions are important for they become binding precedents. Thus, anthracite experience with grievance arbitration of a strictly adjudicatory nature has been sufficiently satisfactory to keep it going although the idea was originally imposed by outside force.

R. FLEMING, *supra* note 1, at 4.

89. Nicholls, *The Anthracite Board of Conciliation*, 36 ANNALS 366, 370-72 (1910) (Congressman Nicholls was a member of the Board). From 1903 to 1912, 200 cases were brought before the Conciliation and Arbitration Board, most in its first three years. Twenty-five of these were referred to an umpire. A. SUFFERN, *supra* note 5, at 256-57.

interpreting trade agreements.<sup>90</sup> The anthracite experience set a pattern for the coal mining industry early in this century;<sup>91</sup> but, like the railroad experience, it also furnished an example of arbitration's potential benefits for employers and employees in other industries.<sup>92</sup> In both the railroad and anthracite industries government pressure caused adoption of the arbitration system. Subsequently, however, the parties themselves became firmly attached to that method of dispute resolution.

### *Newspapers*

The introduction of linotype in the newspaper industry before the turn of the century alarmed many workers since one linotype operator could set as much type as five hand compositors. Severe competition, fostered by the new technology and the emergence of newspaper chains, forced employers to reduce printing staffs and drive hard bargains with the printing unions. These actions, in turn, prompted a wave of defensive strikes. The costs of these strikes in lost sales and prestige soon caused publishers to acknowledge arbitration's desirability as a means of averting further interferences with publication.<sup>93</sup>

Although printing unions had endorsed arbitration as early as 1871,<sup>94</sup> the first major newspaper industry agreement incorporating an arbitration provision was not signed until 1901, following a year-long series of discussions.<sup>95</sup>

90. Edwin Witte noted a half century after the Commission's establishment that the Commission's award "is still the basic agreement between the Anthracite Operators and the United Mine Workers, to which all subsequent agreements are amendments." E. WITTE, *supra* note 1, at 22-23. More pertinent are Witte's evaluations of the Board of Conciliation: "The Anthracite Conciliation Board was the first permanent machinery ever established in this country for the interpretation and application of what amounted to a trade agreement, and the umpire's decisions in its functioning the real beginning of this type of arbitration." *Id.*

91. See, e.g., L. BLOCH, *LABOR AGREEMENTS IN COAL MINES* 112-13 (1931).

92. Nevertheless, the grievance arbitration system in coal may be suffering from old age and other infirmities. See Note, *The Current State of Grievance Arbitration in the Coal Industry*, 82 W. VA. L. REV. 1401 (1980).

93. See Weiss, *History of Arbitration in American Newspaper Publishing Industry*, 17 MONTHLY LAB. REV. 15-16 (July 1923) who observed the following:

A newspaper is unlike most other commodities. It has to be produced daily and sold daily, or it is worthless. Moreover, a newspaper plant was no longer a small, inexpensive enterprise, but a business in which thousands or hundreds of thousands of dollars were invested. Consequently it was to the interest of both publisher and employee to effect some sort of an agreement which would guarantee the proprietor against strikes and boycotts on the one hand and protect printers against lockouts and sudden reductions in pay on the other.

94. The idea of arbitration had been around the newspaper industry for a long time, at least on the union side of printing. One scholar traces newspaper arbitration back to 1847, and arbitration was consistently the official policy of the International Typographical Union at least from the time of its 1871 convention. In 1884, the ITU added a provision to its General Laws banning strikes until the union had made every effort to settle the dispute by arbitration. See MacKinnon, *Arbitration in the Newspaper Business*, 3 ARB. J. (o.s.) 323-25 (1939).

95. One historian hailed this agreement as "the genesis of industrial arbitration agreements in the United States . . ." Weiss, *supra* note 93, at 19. See also Burns, *Daily Newspapers*, in *HOW COLLECTIVE BARGAINING WORKS*, *supra* note 82, at 50-51.

The 1901 agreement provided for three-member, tripartite local boards to resolve disputes. Either party could appeal an unfavorable award to a national board which consisted of the publishers' labor commissioner, the international union's president, and a third person when the first two were unable to agree. Shortly thereafter, the national board was increased to six members, three on each side, with a neutral seventh selected if the six could not agree. Local boards were increased to four members with a neutral fifth selected if necessary. The new agreement's first year was undoubtedly successful: not a single strike occurred in an office covered by the agreement, while seven strikes occurred in other newspapers.<sup>96</sup>

The agreement was renewed with minor changes in 1902, but the lack of procedures to guide arbitration boards caused two strikes the next year. The parties promptly agreed to a procedural code, and the arbitration process was once again functional. In 1904 the national board issued the first known arbitral statement of the "just cause" principle. The board ruled that a composing room foreman had the unqualified right to dismiss an employee for causes specified in the union laws, and spelled out the procedure to be used in appealing such cases.<sup>97</sup> The arbitration agreement attracted the attention of other unions in the industry and soon similar contracts were negotiated with the Photoengravers Union, the Pressmen, and the Stereotypers.<sup>98</sup>

A third agreement signed in 1907 contained significant changes. Both sides had learned that selecting a third person unfamiliar with the industry sometimes resulted in mutually unacceptable awards; therefore, the new contract dropped all impartial outsiders from local and national boards. This change led to unexpected new difficulties. Local arbitration boards either failed to agree, or passed along even minor disputes to the national board to escape the responsibility of deciding them.<sup>99</sup> These practices threatened to inundate the national board with matters of purely local importance.

To prevent this shifting of responsibility, the fourth agreement, lasting from 1912 to 1917, made local board decisions compulsory for cases covered by the agreement and subject to local jurisdiction. To prevent deadlocks, the local boards were reconstructed to include one delegate each from the union and the publishers; two independent members, one selected by each of the direct delegates; and a chairman, selected by the other four. In short, the industry returned to tripartite arbitration. This change had the intended effect and kept appeals from local to national boards to a minimum. The fifth agreement, in effect from 1917 to 1922, retained the fourth agreement's arbitration procedure but omitted the requirement of two representatives who were unconnected with the union or the industry. Thus, in 1917, the parties returned to the arbitration board form first adopted in 1901.

By the 1920s the arbitration concept was firmly embedded in newspaper industry labor relations. The favorable experience with arbitration caused

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96. Weiss, *supra* note 93, at 18-20.

97. *Id.* at 22.

98. Burns, *supra* note 95, at 56.

99. Weiss, *supra* note 93, at 24.

David Weiss, a member of the International Typographical Union, to conclude optimistically:

1. Arbitration agreements between the publishers' association and the typographical union have practically abolished strikes and lockouts in the newspaper composing room.
2. Publishers are assured continuous publication.
3. The mere existence of arbitration machinery prevents rash and hasty action on the part of both sides, and insures impartial and reasonable consideration of the issues involved.
4. Arbitration has produced a wholesome influence on the relations between newspaper publishers and labor unions.
5. Publishers and unions show a greater desire to settle difficulties informally, and directly, rather than resort to the slower and more formal process of arbitration.
6. The success of the five arbitration contracts between the American Newspaper Publishers' Association and the International Typographical Union presents a strong argument for voluntary arbitration.<sup>100</sup>

Some of this optimism proved justified by subsequent events. Although several major arbitration agreements broke down in 1922, the use of arbitration continued "almost undiminished" even without a formal agreement.<sup>101</sup>

The newspaper industry pattern contrasts with the form of arbitration adopted in the anthracite coal industry during this same period. The newspaper industry consistently rejected the idea of having a permanent chairman on arbitration boards, perhaps to preserve local parties' power. The coal industry, on the other hand, favored a permanent chairman with no local connections precisely to eliminate local influence. The newspaper industry rationalized that "the fairest decisions could be rendered by attempting to utilize as chairmen residents of the locality where the arbitrating parties reside, in order to give proper weights to the purely local considerations of the disputes."<sup>102</sup>

### *Clothing*

As with the coal industry, a major strike forced clothing manufacturers and employees to experiment with labor arbitration.<sup>103</sup> A number of characteristics made the clothing industry peculiarly vulnerable to the impact of strikes: rapid changes in styles, a piecework method of payment, extensive use of subcon-

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100. *Id.* at 33.

101. Burns, *supra* note 95, at 56-57.

102. MacKinnon, *supra* note 93, at 328.

103. The best source on labor relations in the clothing industry is J. CARPENTER, COMPETITION AND COLLECTIVE BARGAINING IN THE NEEDLE TRADES, 1910-1967 (1972), which addresses arbitration as one aspect of its broader subject. Shorter treatments of arbitration in the clothing industry include R. FLEMING, *supra* note 1, at 6-11 and E. WITTE, *supra* note 1 at 23-26. See R. MORGAN, ARBITRATION IN THE MEN'S CLOTHING INDUSTRY IN NEW YORK CITY (1940) for a thorough study of arbitration in the clothing industry in New York City after 1924, and THE CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, THE CLOTHING WORKERS OF CHICAGO 1910-1922 (1922) [hereinafter cited as THE CHICAGO JOINT BOARD] for an extensive examination of the model arbitration agreement at Hart, Schaffner & Marx.

tractors, and the problem of runaway shops.<sup>104</sup> Clothing manufacturers therefore sought a more expeditious means of dispute resolution than economic warfare. Their search for an alternative made the apparel industry "the great testing laboratory for private labor arbitration."<sup>105</sup>

The strike which acted as a catalyst to arbitration experiments in the clothing industry occurred in 1910. It involved 50,000 workers in the New York cloak and suit industry, and brought production to a standstill. The parties were finally persuaded to attend a series of conferences chaired by Louis D. Brandeis. These "Brandeis Conferences" produced the "Protocol of Peace" which ended the strike and established a dispute resolution system to prevent new strikes.<sup>106</sup>

The Protocol's dispute resolution machinery consisted of joint union-management shop committees, a Board of Grievances composed of five members from each side, and a Board of Arbitration consisting of one representative of each party and a part-time, unpaid neutral chairman. Under the Protocol, a dispute unresolved by the Board of Grievances had to be brought before the Board of Arbitration before a strike or lockout could be called. The Board of Arbitration's decision was final.<sup>107</sup>

Tensions remained high after the strike ended, and Brandeis tried to encourage dispute settlements by conciliation rather than by calling the Board of Arbitration into session. Following a near-breakdown of the system in 1914, the Board of Grievances was given a more judicial role with a full-time, impartial chairman. The Protocol continued in operation until the employers repudiated it in 1916.

The open-ended scope of the Protocol's jurisdiction contributed to the breakdown of its arbitration machinery. The grievance machinery was often forced to evaluate proposals for contract modification rather than simply interpreting existing contract terms. Arbitration proved much less suited to the former task than to the latter. Despite its brief life, the Protocol's impact was immense. It was copied by the clothing industry in many major cities,<sup>108</sup> and though these arrangements soon collapsed the concept survived and even thrived.<sup>109</sup>

104. R. FLEMING, *supra* note 1, at 6-7.

105. *Id.*

106. J. CARPENTER, *supra* note 103, at 38-54.

107. R. FLEMING, *supra* note 1, at 7. See also E. WITTE, *supra* note 1, at 24. Brandeis was chosen chairman of the Board of Arbitration and served in that capacity for four years.

108. The Protocol model was copied by other branches of the clothing industry in New York, Chicago, Boston and Philadelphia, among other places. Despite the Protocol's initial promise in New York and elsewhere, it generally lost its effectiveness as a vehicle for arbitration within a few years. E. WITTE, *supra* note 1, at 24-25.

109. The Protocol served a valuable function during its brief life.

It laid the ground work for the present vast and effective system of arbitration in all the needle trades, covering over 7,000,000 workers. Its ideological influence on American industry as a whole proved to be immense. In many ways it foreshadowed such contemporary institutions as the National Labor Relations Board, the Railway Mediation Board and even the War Labor Boards of both World Wars.

In contrast to the Protocol a 1911 agreement signed in Chicago between Hart, Schaffner & Marx and the United Garment Workers was remarkably successful.<sup>110</sup> As in New York, the arbitration agreement was part of a settlement of a major strike. The strike ended when two negotiators devised a labor agreement and named themselves the parties' future arbitrators.<sup>111</sup>

When one arbitrator resigned in 1912,<sup>112</sup> the parties selected a respected and talented neutral arbitrator, John Williams.<sup>113</sup> Williams was no dreamer. He realized that arbitration could be used profitably only where it would be "less costly to the parties in dispute than would a resort to force."<sup>114</sup> Adjusting his approach to meet the parties' needs, Williams shifted from what he termed "old fashion" arbitration, the judicial model which is now considered modern, to a mediatorial model which sought to find common ground for agreement.<sup>115</sup>

The Hart, Schaffner & Marx arbitration left a legacy of peaceful settlement of labor disputes.<sup>116</sup> The Chicago arrangement succeeded to a greater

B. STOLBERG, *TAILOR'S PROGRESS* 91 (1944). Stolberg attributes the ultimate failure of the protocol to its reliance on conciliation rather than arbitration. *Id.*

110. Much has been written about the Hart, Schaffner & Marx agreement. Among the best sources are THE CHICAGO JOINT BOARD, *supra* note 103, and THE HART, SCHAFFNER & MARX LABOR AGREEMENT: INDUSTRIAL LAW IN THE CLOTHING INDUSTRY (E. Howard, comp. 1920).

111. The two negotiators were Clarence Darrow and Carl Meyers. J. CARPENTER, *supra* note 103, at 154-55. The neutral third man selected by the parties, Dean Wigmore of Northwestern University School of Law, was unable to serve because of illness. M. JOSEPHSON, SIDNEY HILLMAN, *STATESMAN OF AMERICAN LABOR* 60 (1952). *See also* D. Clark, John Elias Williams (1853-1919), at 45-46 (1957) (unpublished work, M.A. Thesis, University of Illinois). Later contracts were likewise largely a product of these two arbitrators. J. CARPENTER, *supra* note 103, at 155. E. WITTE, *supra* note 1, at 25, incorrectly asserts that the Hart, Schaffner & Marx arbitration board "never had anything to do with the determination of contract terms." *Cf.* G. Heliker, *Grievance Arbitration in the Automobile Industry* 43 (1954) (unpublished work, Ph.D. dissertation, University of Michigan) (Chairman of the Board of Arbitration frequently exercised his power to set new wage rates in response to economic conditions).

112. Clarence Darrow resigned because of time pressures. The Board of Arbitration received 800 cases in its first year and Darrow said that he found himself with no time left in which to practice law. D. Clark, *supra* note 111, at 46. There is reason to question Darrow's excuse. One scholar claims that "[a]lmost from the beginning, Mr. Darrow delegated his work on the arbitration board to his law partner, Mr. W. O. Thompson." G. SOULE, SIDNEY HILLMAN, *LABOR STATESMAN* 37 (1939).

113. Williams was a miner who had helped to settle several disputes in Illinois coal mines prior to the Hart, Schaffner & Marx agreement and his reputation had reached Chicago. He began work in December, 1912 and served with distinction and to the apparent satisfaction of the parties until his death in 1919. During 1914-15, he found time to serve simultaneously as a neutral in the New York cloak industry under the Protocol. D. Clark, *supra* note 106, at 57-72.

114. *Id.* at 78.

115. *Id.* at 76-77. *See* THE CHICAGO JOINT BOARD, *supra* note 100, at 58.

116. *See, e.g.,* G. Heliker, *supra* note 111, at 45. The Hart, Schaffner & Marx experience was so successful that when the Amalgamated Clothing Workers (which had broken off from the United Garment Workers and taken its place at Hart, Schaffner & Marx) organized other Chicago firms in 1919 its first collective bargaining agreement contained an arbitration clause modeled after the earlier one. In addition, the new arbitration board selected as its chairman the man who chaired the Hart, Schaffner & Marx board. *See* E. WITTE, *supra* note 1, at 26; G. Heliker, *supra* note 111, at 42, 45-46.

The new Chicago Board of Arbitration had broad powers to "mold the agreement to meet future changes in the economic climate." One contract clause provided:

degree than the New York one because of a combination of factors. For example, Hart, Schaffner & Marx was a single prosperous employer while the New York Protocol involved many small and struggling firms. The Chicago industry was also fortunate to have a succession of skilled neutral chairmen, who dealt with such sophisticated theoretical problems as the role of counsel in arbitration hearings, the clash between broad and strict theories of contract interpretation, implied rights and obligations, and the importance of precedent.<sup>117</sup> The chemistry of the Chicago bargaining relationship was yet another important factor: the parties' eager efforts to work out settlements eased the burden on the arbitration board.<sup>118</sup>

One unintended by-product of the clothing industry arbitration agreements was the training of arbitrators. Several men who had served as chairmen of arbitration boards continued to work in labor relations for many years. One of the most prominent was William Leiserson who viewed the arbitrator's role as a rigidly judicial one. Leiserson argued that arbitrators must strictly interpret collective bargaining agreements and could not make law based on their own sense of justice.<sup>119</sup> Leiserson nevertheless showed flexibility in his day-to-day work. He encouraged settlements by conciliation, and when forced to deliver a decision he would first consult union and management representatives to avoid unknowingly creating troublesome precedents.<sup>120</sup>

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If there shall be a general change in wages or hours in the clothing industry, which shall be sufficiently permanent to warrant the belief that the change is not temporary, then the Board shall have the power to determine whether such change is of so extraordinary a nature as to justify a consideration of the question of making a change in the present agreement, and, if so, then the Board shall have power to make such change in wages or hours as in its judgment shall be proper.

J. CARPENTER, *supra* note 103, at 155 n. 19.

117. See the illuminating discussion of these problems by a former Chairman of the Hart, Schaffner & Marx Board of Arbitration in Tufts, *Judicial Law-Making Exemplified in Industrial Arbitration*, 21 COLUM. L. REV. 405 (1921). A good survey of arbitration awards in the clothing industry may be found in C. ZARETZ, *THE AMALGAMATED CLOTHING WORKERS OF AMERICA* 221-44 (1934).

118. See M. JOSEPHSON, *supra* note 111, at 63; E. WITTE, *supra* note 1, at 25-26; G. Heliker, *supra* note 111, at 48-51.

119. The arbitrator, he argued, should expound or interpret the law, which is the only kind of justice he has a right to enforce. He cannot make the law on the pretense of impartially applying some abstract principles which he calls justice. He cannot say the agreement is wrong — unjust. There is no such thing as a good or bad agreement, from his official point of view. . . . He is bound by the provisions of the agreement, just as legal judges are sworn to uphold the law, no matter if they think the law is bad.

THE AMALGAMATED ILLUSTRATED ALMANAC 37 (1924), *quoted in*, J. EISNER, WILLIAM MORRIS LEISEN: A BIOGRAPHY 52 (1967). Leiserson's views were endorsed by the Supreme Court many years later. The arbitrator, the Court said in 1960, "is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from any sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

120. R. FLEMING, *supra* note 1, at 9. Other chairmen combined judicial and conciliatory functions in a different way. Dr. Harry Moskowitz, Impartial Chairman of the arbitration

The related businesses of millinery and hosiery also adopted arbitration schemes but with mixed success. The New York Milliners and the United Hatters, Cap and Millinery Workers Union adopted an arbitration agreement in 1915 which achieved little since the employers were less organized than the union. Fearing that arbitration would unduly strengthen manufacturers, the union allowed the arbitration agreement to lapse from 1921 until 1932.<sup>121</sup>

A 1929 arbitration agreement in the hosiery industry, like the Hart, Schaffner & Marx agreement, featured a permanent, impartial chairman. In contrast to the judicial approach of Leiserson and the earlier anthracite arbitration chairmen, the hosiery industry opted for "an informal, friendly atmosphere which places the chairman in the role of conciliator, mediator, friend, counselor, and only as a last resort, arbitrator."<sup>122</sup> The chairman from 1931 to 1941, Dr. George W. Taylor, was a brilliant labor relations theorist who argued as strenuously for the "mediator" model as Leiserson did for the "judicial" model of arbitration. Because the hosiery chairman's decisions were regarded as precedent for later decisions, Taylor's determinations established guidelines for questions concerning management's rights, uninterrupted production, union's rights of protest and appeal, retroactivity, control of jobs, discharges, layoffs, and promotion.<sup>123</sup>

The clothing industry's arbitration experience not only produced benefits within that industry, it also spurred some participants to encourage arbitration in other industries.<sup>124</sup> The clothing industry's experience, like that of the railroad industry, demonstrated the advantages and disadvantages of alternative arbitration models, such as interest versus grievance arbitration and "mediator" versus "judicial" arbitrators. Finally, the decisions of Taylor and other clothing industry arbitrators established substantive principles which still govern arbitrators today.

#### THE SPREAD OF THE ARBITRATION GOSPEL IN THE EARLY TWENTIETH CENTURY

The industries discussed in preceding sections were the leading innovators

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board in the New York men's clothing industry from 1919 to 1936, acted as a judge when deciding whether there had been a breach of the agreement but as an educator when it came to "effecting the acceptance of the decision to be made." R. MORGAN, *supra* note 103, at 46-48 (emphasis omitted).

121. R. FLEMING, *supra* note 1, at 9. See also D. ROBINSON, SPOTLIGHT ON A UNION: THE STORY OF THE UNITED HATTERS, CAP AND MILLINERY WORKERS INTERNATIONAL UNION 235-36 (1948).

122. R. FLEMING, *supra* note 1, at 10. See T. KENNEDY, EFFECTIVE LABOR ARBITRATION: THE IMPARTIAL CHAIRMANSHIP OF THE FULL-FASHIONED HOSIERY INDUSTRY 57-58 (1948).

123. R. FLEMING, *supra* note 1, at 10-11. T. KENNEDY, *supra* note 122, at 95-198, describes the evolution of the "industrial common law" of the hosiery industry under arbitration. Taylor's career as a labor relations scholar and practitioner is set out in INDUSTRIAL PEACEMAKER: GEORGE W. TAYLOR'S CONTRIBUTION TO COLLECTIVE BARGAINING (E. Shils, W. Gershenfeld, B. Ingster, W. Weinberg, eds. 1979) [hereinafter cited as INDUSTRIAL PEACEMAKER].

124. One example is Sidney Hillman, who received his early experiences with arbitration under the Hart, Schaffner & Marx agreement. M. JOSEPHSON, *supra* note 111, at 59-67. Hillman later was a major figure in the federal government's efforts to encourage arbitration of labor disputes as a way of avoiding strikes and lockouts during the Second World War.



in the history of American arbitration. The impact of those experiments was increased by the ideological movements which supported labor arbitration in the years before the First World War. The National Civic Federation is particularly important because it widely publicized the arbitration concept in the early twentieth century, thereby adding impetus to governmental attempts to encourage and sometimes compel peaceful settlement of labor disputes. This popular support combined with favorable experiences in the pioneering industries encouraged labor and management in other fields to experiment with arbitration. Thus by the beginning of the First World War, arbitration was no longer a novelty. It had emerged from infancy but still had a long way to go before reaching maturity.

### *The Role of the National Civic Federation*

The National Civic Federation (NCF) grew out of the Chicago Civic Federation. Both groups were largely the creatures of Ralph Easley, a Chicago journalist who sought to bring together national leaders to discuss the country's problems.<sup>125</sup> From the start it was a most unlikely collection of business tycoons, labor leaders, and social reformers who came together with a variety of not always consistent objectives.<sup>126</sup> One point on which they were unanimous was the desirability of substituting collective bargaining and labor arbitration for strikes and lockouts.<sup>127</sup>

The Federation's first activity was to sponsor a National Conference on Industrial Conciliation in 1900. Conference members agreed that industrial progress would be made only through voluntary conciliation, not compulsory arbitration.<sup>128</sup> To that end, a tripartite, twelve-member Committee on Concili-

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125. The best sources on the NCF are M. GREEN, *THE NATIONAL CIVIC FEDERATION AND THE AMERICAN LABOR MOVEMENT, 1900-1925* (1956), which is uncritical and a bit dated; and B. RAMIREZ, *WHEN WORKERS FIGHT: THE POLITICS OF INDUSTRIAL RELATIONS IN THE PROGRESSIVE ERA, 1898-1916*, at 65-82 (1978), which is extremely critical but completely up to date.

126. There is a lively historical debate over the objectives of the members of the NCF. The traditional view has been that the NCF represented a noble attempt to "prove to labor leader and capitalist alike that theirs was a community of interest," M. GREEN, *supra* note 125, at ix. A modern form of this beneficent view is that NCF leaders sought to provide for "the orderly growth and integration of the American trade union movement in the political economy of the country" through the use of "trade agreements" or what we now term collective bargaining agreements. B. RAMIREZ, *supra* note 120, at 77-78. Behind this co-optation thesis there is a second, related objective. Both labor and management members desired to strengthen the hand of the relatively conservative American Federation of Labor in its continuing struggle with more radical labor organizations. *Id.* at 73-76. The standard Marxist interpretation is that the NCF simply represented a new strategy on the part of capitalists who now sought to "emasculate" the labor movement rather than to "smash" it, and that they managed to delude or purchase the labor union leaders who participated. See 3 P. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 61-110 (1964). A New Left variation of the Marxist view discerns a split between the major capitalists, represented in the NCF, who felt that working with the unions was in their own interests, and smaller capitalists who remained aggressively anti-union. Zerzan, *Understanding the Anti-Radicalism of the National Civic Federation*, 19 *REV. SOC. HIST.* 194, 196 (1974).

127. E. WITTE, *supra* note 1, at 17-21, gives a good capsule history of the NCF's involvement with labor arbitration.

128. M. GREEN, *supra* note 125, at 11.

ation and Arbitration was appointed to plan further action. The Committee initially urged adoption of annual or semi-annual joint agreements and creation of joint boards of conciliation.<sup>129</sup> Enlarged to forty members, the Committee developed a "Plan and Scope" for its work. This Plan envisioned frank discussions between employers and workers and establishment of a board of employers' and employees' representatives to counsel disputing parties. The Committee Plan noted that current arbitration systems did not fully meet each party's needs; nevertheless, the committee firmly rejected compulsory arbitration.<sup>130</sup>

The second National Conference on Industrial Conciliation in 1901 adopted the Committee's plan of organization. It created an Industrial Department of the NCF directed by an Executive Committee of thirty-six prominent figures, twelve each from industry, labor and the public.<sup>131</sup> The Industrial Department was to devote itself primarily to conciliation. Its chairman was authorized to appoint a tripartite, nine-member Committee of Conciliation to bring accord to disputes of more than local significance. If the Conciliation Committee was unsuccessful and if both parties sought the Industrial Department's further assistance, the parties could then select two employers and two employees from the Executive Committee to act as an Arbitration Board. In case of a deadlock, the Board could select a fifth member from among the public representatives to resolve the dispute.

This arrangement was noteworthy because the lion was lying down with the lamb and both planned to do so again. The arbitration agreement, although tentative and halting, marked the first time representatives of capital and labor agreed on third-party dispute resolution in advance of any actual disputes. True, the Arbitration Board functioned only at both parties' request and was initially bipartite; nevertheless, its members would be outsiders to the parties' dispute, and a true neutral had the decisive last voice. Although the NCF was mainly concerned with interest disputes rather than contract interpretation questions, its work contributed to the lineage of modern labor arbitration.

The NCF's arbitration schemes had more symbolic value than practical effect. Although the Committee of Conciliation was quite active in several major disputes, the Arbitration Board was seldom used. In fact, after two years of experience, the Executive Committee decided that its members should not

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129. *Id.* at 12 (quoting Industrial Conciliation Report of the Proceedings of the Conference Held Under the Auspices of the National Civil Federation iii-iv (Dec. 16 & 17, 1901)).

130. M. GREEN, *supra* note 125, at 497-98.

131. The Chairman of this Executive Committee was Senator Marcus Hanna, of Ohio, one of the most important politicians of the day. Hanna viewed arbitration as a secondary technique to be used only "when conciliation failed, and then only when businessmen stood to lose more by a strike." Akin, *supra* note 25, at 578. See generally Hanna, *Industrial Conciliation and Arbitration*, 20 ANNALS 21, 22-24 (1902). Other members of this Committee included Samuel Gompers, president of the American Federation of Labor; John Mitchell, president of the United Mine Workers; Grover Cleveland, former President of the United States; Charles W. Eliot, president of Harvard University; Archbishop John Ireland; August Belmont, a New York financier; and Charles M. Schwab, a representative of J. P. Morgan. M. GREEN, *supra* note 125, at 502.

act as arbitrators.<sup>132</sup> The Federation actually supplied arbitrators only twice: in a 1903 strike on the San Francisco street railway system and a 1911 wage dispute in the Connecticut hat industry.<sup>133</sup>

The NCF lost much of its energy and importance after the death of its influential chairman, Mark Hanna, in 1904. Employer suspicion of unions increased and union fears of compulsory arbitration limited the Federation to conciliation activities. Responding to these developments, the NCF resolved in 1911 to strengthen the existing state boards of arbitration.<sup>134</sup> The NCF also continued its educational efforts on behalf of collective bargaining and arbitration.<sup>135</sup> In 1916, after much internal debate, the NCF appointed an industrial arbitration committee to recommend legislative proposals to Congress. The committee proposals never materialized,<sup>136</sup> and the NCF soon faced a greater problem. By the end of 1916 it was increasingly likely that America would enter the Great War. Preparations for war quickly drowned out the debate as to whether compulsory or voluntary private arbitration should be used to resolve strikes and lockouts.<sup>137</sup>

The NCF received an enormous amount of publicity before World War I, but its actual impact in the field of arbitration is difficult to judge. It supplied arbitrators in few disputes and failed to persuade Congress to enact arbitration legislation. Nevertheless, the NCF continued to preach the conciliation and arbitration gospel for many years, even as its employer members lost what sympathy they once had for unionization. The number of collective agreements increased rapidly in the early years of this century, and many contained some type of arbitration clauses. The major cause of this increase was the growth of unionism generally,<sup>138</sup> but the expanding number of arbitration provisions was partially due to the NCF's activities.<sup>139</sup>

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132. M. GREEN, *supra* note 125, at 70.

133. E. WITTE, *supra* note 1, at 19. Some of the NCF's mediation efforts are described in Straus, *Results Accomplished by the Industrial Department, National Civic Federation*, 20 ANNALS 37 (1902).

134. See generally M. GREEN, *supra* note 125, at 77-81 (describing the efforts made by the NCF in relation to existing state boards of arbitration).

135. Low, *The National Civic Federation and Industrial Peace*, 44 ANNALS 10 (1912).

136. The committee meeting did, however, provide Samuel Gompers, president of the the American Federation of Labor, occasion to voice his strong opposition to compulsory arbitration. John R. Commons, a distinguished labor historian, was indicating the need for investigation of facts supplied to any arbitration board and suggested that Congress had the power to make strikes illegal during such an investigation. Gompers, who entered the room during this speech, apparently thought the speaker was advocating a law banning strikes generally. Gompers was "thoroughly aroused," and "roared that it would be 'involuntary servitude.' . . . [C]ompulsory service would follow compulsory investigation. The workers would protest this denial of their freedom; compulsion was abhorrent to democracy." M. GREEN, *supra* note 125, at 243-44.

137. One study attributes the NCF's decline to the fact that it had successfully accomplished its task of suppressing labor militancy. Zerzan, *supra* note 126, at 204. This seems much too simplistic.

138. Statistics for this period are not very reliable; however, one thorough study based on union membership figures reported an increase from some 868,500 in 1900 to 2,773,000 in 1916. L. WOLMAN, *EBB AND FLOW IN TRADE UNIONISM* 16 (1936 & photo. reprint 1976).

139. E. WITTE, *supra* note 1, at 21.

### *To the Eve of War*

By the beginning of World War I, arbitration had become familiar in labor relations circles and had achieved some popularity with the general public, though it was not yet in everyday use. Several industries in addition to those previously mentioned experimented with arbitration. For example, the American Association of Street Railway Employees included arbitration clauses in its collective agreements early in the century.<sup>140</sup> In 1917, the Actor's Equity Association negotiated an arbitration clause in its first contract because it recognized that even brief strikes could severely harm short-lived theatrical productions.<sup>141</sup> As common as arbitration agreements were becoming, there were relatively few actual grievance arbitrations. Although one study estimated that fifty-five percent of the collective agreements negotiated between 1875 and 1920 contained arbitration clauses,<sup>142</sup> this figure must be qualified. Because few labor agreements existed then, the percentage of the work force covered by arbitration clauses was quite small.<sup>143</sup> Moreover, "arbitration" had not yet acquired the meaning it has today. Many early ostensible arbitration clauses really only referred to negotiations or to bipartisan grievance boards, rather than dispute resolutions by a neutral third party. Furthermore, this estimate failed to distinguish properly between interest arbitration and grievance arbitration. Most prewar arbitration was of the former sort<sup>144</sup> while the latter type predominates today.

In short, little activity before World War I could be characterized as modern grievance arbitration, but the groundwork had been laid. Owing to the work of the NCF and numerous individual enthusiasts, the theory of arbitration was well known. Distinctions were emerging between negotiation, conciliation and arbitration, and between interest and grievance arbitration. Although few experiments survived, many had been conducted, arousing

140. See 4 ARB. J. (n.s.) 267 (1949) (quoting W. D. Mahon, president of the Union).

141. Gillmore, *Arbitration in the Entertainment Field*, 2 ARB. J. (o.s.) 24, 25-26 (1938).

142. Jacoby & Mitchell, *Development of Contractual Features of the Union—Management Relationship*, 33 LAB. L.J. 512, 515 (1982). An earlier study found records of 54 labor arbitration cases on wages or hours from 1865 to 1914 and classified them by result: 79.6% in favor of workers, 16.7% in favor of employers, and 3.7% mixed. RESULTS OF ARBITRATION CASES, *supra* note 26, at 1053.

143. In 1900, the earliest year for which reliable data are available on both union membership and the size of the workforce, there were only some 791,000 union members in a total workforce of 28,500,000, or about 2.8%. In 1910 the figures were 2,116,000 out of 36,850,000 (5.7%) and in 1916, 2,722,000 out of 40,238,000 (6.8%). The unionized percentage of the non-agricultural workforce was much higher but reflects the same trend. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 126, 177 (1976) [hereinafter HISTORICAL STATISTICS].

144. Almost the only type of arbitration not involving disputes over new contract terms that had as yet developed related to the establishment of piece rates in industries with incentive systems of payment. No standards for determining the piece rates were agreed upon by the parties. Arbitration in such cases, therefore, was in the nature of determination of conditions of employment by an outsider. In a real sense, however, arbitration of piece rates was the beginning of the type of arbitration now most prevalent, which is concerned with the interpretation and application of contract provisions that the parties have agreed upon in collective bargaining. E. WITTE, *supra* note 1, at 28-29.

sufficient interest to ease the spread of arbitration in the succeeding three decades. At least a few far-sighted observers realized that the age of industrial arbitration was just around the corner.<sup>145</sup>

### THE IMPACT OF THE FIRST WORLD WAR

Natural intolerance for strikes or lockouts during wartime typically prompts governmental efforts to co-opt labor leaders as part of the war effort and to encourage voluntary no-strike pledges. These efforts become less effective as the war continues, and so governmental or tripartite agencies are created to resolve disputes which interrupt production. The decisions of these bodies are usually backed by some indirect compulsion, with government exerting more control as time goes on.

Despite these controls, unions seem to gain strength during wartime. It may be that support for organization is the price unions extract for their participation in the war effort. Moreover, increased demand for labor may give employees enough security to risk their jobs by engaging in union activities. In any case, governmental efforts in this country to conciliate or arbitrate during both the First and Second World Wars resulted in the extension of union recognition and collective bargaining to new enterprises.<sup>146</sup>

The United States had reason to expect it would become involved in the War at least as early as 1915 with the sinking of the *Lusitania*. War was not officially declared until April 6, 1917, but by then it came as no surprise to anyone. What is surprising is that the government did almost nothing to plan for the inevitable labor disputes either before the declaration or during the first months of American involvement in the War. Strike statistics alone should have signaled the need for action. The year 1916 had been a particularly trying one for labor relations, with almost 3,800 strikes and lockouts involving over a million and a half employees, three times the number involved in 1915. The number of strikes increased sharply in 1917, to 4,359, although the number of employees involved dropped by several hundred thousand.<sup>147</sup>

The United States directly participated in the First World War from April 6, 1917, to November 11, 1918. During that brief period, the government tried three methods to minimize disruption of the war effort by labor disputes: recruiting organized labor as a willing participant in the war effort, creation

145. See, e.g., Wigmore, *A New Field for Systematic Justice*, 10 ILL. L. REV. 592 (1916).

146. Good sources on government involvement in labor disputes during the First World War exist, but some are difficult to locate. The most detailed description is Watkins, *Labor Problems and Labor Administration in the United States During the World War*, 8 U. ILL. STUD. SOC. SCI. 217, 335 (1920) (published in two parts). Another excellent study is A. BING, *WAR-TIME STRIKES AND THEIR ADJUSTMENT* (1921 & photo. reprint 1971). On the most important wartime labor relations agency, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 287, *NATIONAL WAR LABOR BOARD: A HISTORY OF ITS FORMATION AND ACTIVITIES, TOGETHER WITH ITS AWARDS AND THE DOCUMENTS OF IMPORTANCE IN THE RECORD OF ITS DEVELOPMENT* (1922) [hereinafter cited as NWLB HISTORY]. A shorter description of the NWLB is provided by Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39 (1919). E. WITTE, *supra* note 1, at 29-33, provides a good concise history of arbitration during the First World War.

147. A. BING, *supra* note 146, at 293. See also Watkins, *supra* note 146, at 292-300.

of specialized labor adjustment agencies for certain industries, and finally, the establishment of a central agency to handle most labor disputes.

*Phase One: Co-Optation of Organized Labor*

The first phase of government activity was the mildest. Rather than prohibit work stoppages, President Wilson attempted to make organized labor a willing partner in the war effort. For the first time organized labor was formally recognized by the government.<sup>148</sup> The President named Secretary of Labor William B. Wilson, a former United Mine Workers official, as War Labor Administrator. Samuel Gompers, still president of the American Federation of Labor, was appointed to the most important civilian war agency, the Advisory Commission of the Council of National Defense. In addition, labor representatives were appointed to almost every other wartime board.<sup>149</sup>

Beyond these co-optative efforts, the government did little to prevent or solve labor disputes during the early months of the war. The only federal agencies dealing with labor relations were the Board of Mediation and Conciliation, which had jurisdiction only over railroad labor disputes, and the United States Conciliation Service. The former functioned until 1917 when government seized the railroads and placed them under a new Railroad Administration.<sup>150</sup> The latter was solely a conciliation agency and lacked authority to prevent work stoppages. No new adjustment agencies were established until mid-June of 1917 and relatively few existed before 1918.<sup>151</sup> The government's hesitancy was partly attributable to the widespread notion that settling strikes was a matter for private, not governmental initiative, notwithstanding the obvious need to avoid industrial disputes during the War.<sup>152</sup>

The government's attempt to co-opt organized labor was notoriously unsuccessful. Strikes continued at an abnormally high rate. So many strikes occurred in the early months of the War, and public fear of radical activity was so intense, that many called for laws to prohibit *all* strikes for the duration.<sup>153</sup>

*Phase Two: Decentralized Administration  
by Specialized Agencies*

Adopting a second and somewhat firmer means of dealing with wartime labor relations, the government created many labor adjustment agencies for specific industries.<sup>154</sup> The first of these was the Cantonment Adjustment Com-

148. E. WITTE, *supra* note 1, at 29.

149. "Indicative of the importance which the Government attached to the wholehearted cooperation of labor was the fact that the one occasion on which President Wilson left Washington prior to the Armistice was to address the 1917 convention of the American Federation of Labor." Witte, *Strikes in Wartime: Experience with Controls*, 224 ANNALS 128, 130 (1942).

150. As to the United States Railroad Administration and its operation of the railroads during the War, see E. Sigmund, *supra* note 41, at 94.

151. A. BING, *supra* note 146, at 318-19.

152. *Id.* at 235.

153. See *infra* text accompanying notes 180-83.

154. See generally Watkins, *supra* note 146, at 337-64.

mission, established in June 1917 to deal with labor disputes involving construction of Army facilities. The Cantonment Commission was expected to have a short duration and a small workload, but as America's contribution to the War increased, so did the military's construction programs.<sup>155</sup> Federal commissions covering shipbuilding, arsenals, longshoring and shipping were also created. By the end of the War, nineteen such bodies existed, five of which handled only railroad disputes.<sup>156</sup>

These adjustment boards were small, tripartite mediation bodies with narrow jurisdiction. In certain government-controlled industries, the adjustment boards could set employment terms and conditions. More commonly, however, the boards mediated disputes and only reluctantly ruled on the merits of issues.<sup>157</sup>

Awards were usually accepted by both parties with little opposition, which suggests that boards may have drafted their decisions with acceptability in mind rather than objective merit. When one side seemed reluctant to accept an award, informal governmental pressure usually brought the recalcitrant party around. On occasion, less subtle pressure was required. In 1918, for example, the Shipping Board threatened to commandeer the boats of employers who continued to disregard an award.<sup>158</sup> Similarly, the arbitrator of labor standards for army clothing threatened to remove the names of non-complying manufacturers from the list of approved contractors.<sup>159</sup>

One serious drawback to this system of multiple adjustment boards was its lack of uniformity. Although different decisionmaking mechanisms among boards allowed for needed flexibility, the application of such mechanisms sometimes resulted in needless inequities. Those not tied to particular industries recognized that this second approach was ultimately inadequate, but for several months little was done to change matters. Even when change came, it was only slight.

### *Phase Three: Attempted Centralization*

In August 1917, the Advisory Commission of the Council of National Defense recommended establishing one adjustment agency to settle all labor disputes. The next month, President Wilson created the first presidentially proclaimed labor adjustment board, the President's Mediation Commission, whose jurisdiction extended to all trades throughout the nation.<sup>160</sup> The Commission was significant both because it was the first such organization with a broad charter, and because it was the product of a Presidential proclamation rather than an agreement with labor unions. The government was beginning to ad-

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155. At one time the Commission, later renamed the Emergency Construction Commission, had jurisdiction over 400,000 workers. A. BING, *supra* note 146, at 15.

156. *Id.* at 318-19.

157. E. WITTE, *supra* note 1, at 31.

158. A. BING, *supra* note 146, at 47.

159. *Id.* at 60.

160. The Commission was chaired by the Secretary of Labor, but its most active member was its secretary, a young lawyer named Felix Frankfurter. *Id.* at 54. *See also* Watkins, *supra* note 146, at 364-70.

vance, albeit haltingly, toward a more rationalized system of wartime labor relations. Lasting only a few months before it was replaced, the Commission resolved several serious disputes by appointing administrators to act as mediators and, when necessary, as arbitrators.<sup>161</sup>

Before its dissolution in January of 1918, the Mediation Commission repeated the Advisory Commission's recommendation for consolidation of all wartime labor agencies.<sup>162</sup> Although the President did not immediately adopt this proposal, the Secretary of Labor did appoint a War Labor Conference Board to advise on formulating a national labor policy. In March 1918, this board unanimously recommended the prohibition of strikes and lockouts during the war. The group also proposed creating a National War Labor Board with authority to intervene in any labor dispute that affected war production and that was beyond the jurisdiction of special adjustment boards. The President adopted the Conference Board's recommendation and appointed its members to the new National War Labor Board (NWLB).<sup>163</sup>

The NWLB initially consisted of five employer representatives chosen by the National Industrial Conference Board, five labor representatives selected by the American Federation of Labor, and two public representatives, one chosen by employers and the other by labor representatives. In addition, the President nominated ten umpires from which the Board could randomly select an arbitrator to decide cases the NWLB could not resolve.<sup>164</sup>

The NWLB's creation marked the beginning of the third phase of the government's wartime labor relations endeavors. This phase emphasized centralized jurisdiction, uniformity, and more coercion than generally exercised by specialized adjustment boards.<sup>165</sup> Like the other boards, the NWLB was designed to be both conciliation agency and arbitration tribunal. In practice, the NWLB's examiners and investigators engaged in conciliation, but the Board itself seldom did. Instead the Board functioned more like a court for complainants requesting adjudication.<sup>166</sup>

This "court" had only limited mandatory authority. Its decision was binding only when both parties made a joint submission to the Board. Of the 1,245 cases placed before the NWLB, only 193 involved such joint submissions. In the other 1,052 cases, one party refused to submit to the Board's jurisdiction, and the Board's decision thus had only the status of a recommendation.<sup>167</sup>

An increasing caseload forced the NWLB to employ a staff of judicial

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161. One of the administrators, Judge Samuel Alschuler, not only decided disputes during the war but continued to serve as "the virtual 'czar' of labor relations" in the Chicago meat-packing industry until 1922. E. WITTE, *supra* note 1, at 31-32.

162. NWLB HISTORY, *supra* note 146, at 30.

163. *Id.* at 31-34. See also Gregg, *supra* note 146, at 39-40; Witte, *supra* note 149, at 131.

164. NWLB HISTORY, *supra* note 146, at 11-12, 35.

165. The NWLB did not completely consolidate efforts, but it did minimize the need for many more specialized groups. One further attempt at consolidation occurred in September 1918: "[A] Conference Committee of National Labor Adjustment Agencies was created, with Felix Frankfurter . . . as chairman. The National War Labor Board refused to participate and thereby wrecked the plans for a super-agency to develop policies to be followed by all adjustment agencies." Witte, *supra* note 149, at 131 n.5.

166. *Id.* at 16. See also Gregg, *supra* note 146, at 44-45.

167. If the Board deadlocked on a case not jointly submitted, it could not appoint an



examiners to take evidence and prepare case transcripts. The NWLB was also forced to make preliminary judgments in small committees known as sections, composed of one representative from each of the three groups. The full Board decided only those cases on which a section could not agree; otherwise, the Board typically ratified the sections' decisions.<sup>168</sup>

The NWLB had no enforcement powers. In joint submission cases the victor could seek enforcement through normal contract law principles, as inconvenient as this might be. Public opinion presumably lent the Board's decisions some authority, but the parties' routine acceptance of Board decisions primarily resulted from Presidential and governmental agency support. When Western Union Telegraph Company refused to comply with a Board order, for example, President Wilson persuaded Congress to allow the government to take over the telegraph lines.<sup>169</sup> Similarly, after a major manufacturer of firearms refused to abide by a Board decision, the Board referred the matter to President Wilson, who directed the War Department to take over the plant.<sup>170</sup>

The government's policy sword had a second edge: draft boards could be used to break strikes. This strategy was effective because the industrial worker's draft exemption was valid only so long as he remained employed. Moreover, committees with jurisdiction over industrial exemptions were composed not of workers but of lawyers and businessmen.<sup>171</sup> No formal policy decision was ever made to use the draft to enforce NWLB orders, but high governmental officials invoked it on a few occasions. For example, when machinists at Remington Arms Company struck in defiance of a War Labor Board order, President Wilson promptly telegraphed them that they would lose their occupational exemptions and be denied all opportunity to work in war industries for a year unless they immediately returned to work.<sup>172</sup> Actions of this sort greatly strengthened the NWLB's prestige and power and its decisions were almost uniformly respected until the end of the War.<sup>173</sup>

The Board's effectiveness waned after the Armistice, as did that of specialized adjustment boards. Employers argued that the boards' jurisdiction ended with the War and either refused to participate in board proceedings or flaunted disadvantageous awards.<sup>174</sup> The NWLB continued to operate until August 1919, but with less and less impact. Although the number of strikes and lockouts increased only slightly from 1918 to 1919, those that occurred were far more serious. The number of workers involved in work stoppages jumped from just over one million to more than four million.<sup>175</sup> The year was becoming one of the worst in American labor relations history.

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umpire. Fortunately, deadlocks were a rare occurrence. See NWLB HISTORY, *supra* note 146, at 16-17; Gregg, *supra* note 146, at 44-45. These two sources differ slightly in their classification of the cases.

168. See NWLB HISTORY, *supra* note 146, at 17; Gregg, *supra* note 146, at 46-47.

169. Witte, *supra* note 149, at 132.

170. Gregg, *supra* note 146, at 54.

171. A. BING, *supra* note 146, at 233-35.

172. Witte, *supra* note 149, at 132. See also Gregg, *supra* note 146, at 54-55.

173. Gregg, *supra* note 146, at 55.

174. *Id.* at 51.

175. A. BING, *supra* note 146, at 293.

*The Effect of Federal Arbitration*

The NWLB and its smaller specialized counterparts left a mixed legacy to the history of labor arbitration. In some respects the adjustment boards were not really engaged in arbitration in its modern sense of voluntary resolution of grievances by neutral third parties. The boards resolved more interest than grievance disputes, and usually preferred mediation to arbitration. The boards were often bipartite, with public members serving *ex officio* or by selection of the respective parties.<sup>176</sup> Most importantly, although both labor and management occasionally agreed to submit to the boards' jurisdiction, wartime arbitration was only nominally voluntary: formal and informal government sanctions coerced both participation and acceptance of resulting awards. Finally, even the boards' quasi-arbitration practices were not especially successful. The record of the War years might have been worse without the adjustment boards, but the strike statistics are largely inconclusive. The number of strikes and lock-outs and the number of employees involved in them during the adjustment boards' existence (1917 and 1918) were approximately the same as for the preceding and succeeding years.<sup>177</sup>

From a broader view, however, the adjustment boards do represent an important step in labor arbitration's development. The critical characteristic of labor arbitration, final dispute resolution after a hearing involving at least one voting neutral, was potentially present in all of the boards. For the first time, management and labor in many industries were exposed to arbitration, and not all of the participants found the experience distasteful. Public representatives gained respect from the parties with which they dealt and some of them continued their work as labor relations neutrals after the War. In a few industries and for a brief time, arbitration was regarded so highly that many could not imagine doing without it again.<sup>178</sup> Government activity had once again nudged labor arbitration further along its path of development.

Federal arbitration nonetheless ceased to be used in many industries as soon as the War ended. Alexander Bing, who worked with the government on labor disputes during the war, suggested several possible reasons for this decline:

The success of arbitration under these conditions made us too sanguine. The implications of a continuous use of arbitral processes were not generally realized. We overlooked the very important fact that the submission of industrial controversies to judicial settlement meant the relinquishment of an attempt by one or both sides to achieve its own way by force; that it meant the substitution of the judgment of the arbitrator for the will of the parties to the dispute. But the same factors which, through the centuries, have kept nations from settling their disputes in a peaceful manner are at work to destroy industrial peace —

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176. The National War Labor Board, for example, consisted of five employer and five employee representatives, along with William Howard Taft, the public representative of the employers, and Frank P. Walsh, public representative of employees. *Id.* at 303-04. The railroad adjustment boards did not include public representation. *Id.* at 283.

177. *Id.* The historic high of 4.1 million employees involved in work stoppages in 1919 was out of line with the other figures. *Id.*

178. *Id.* at 276.

the unwillingness of the individual or the group to substitute arbitration for force.

Another difficulty is the absence of any agreement upon a set of principles as a basis for the adjustment of disputes. . . .

Nor has either side faith in the impartiality or the wisdom of the judges who must be called upon to decide industrial controversies. The questions at issue are often of so controversial a nature and involve so many technical problems of industry that it is almost impossible to obtain judges who possess the necessary knowledge and impartiality.

The greatest obstacle to the continuous use of arbitration lies, perhaps, in a weakness inherent in any attempt to settle disputes by judicial process. By its very nature, arbitration, a semi-legal procedure, tends to produce fixation, tends to the uniform application of hard and fast rules. A board of judges will almost inevitably seek precedents for its guidance. . . . But progress in industry must come from continuous growth and change. . . . There is far too wide a difference of opinion on industrial questions. . . . to make advisable the creation of any arbitral machinery which is likely to impede a continuous process of industrial growth.<sup>179</sup>

Bing had spotted a fundamental difficulty with interest arbitration, particularly in an era when trade agreements were open ended. Eventually conditions would change and the arbitration award would no longer suit the parties' needs. Even when setting new terms, reference to previous wage and benefit levels would too rigidly limit the arbitrator's power to adjust to changed circumstances.

One solution to the difficulties noted by Bing would be to move away from interest arbitration toward interpretation of fixed-termed contracts. An arbitrator limited to interpreting the meaning of contractual terms would not appear so threatening to either side; this might make the parties more willing to forego imposing their views by economic force. In addition, repeated interpretation of similar agreements might aid the development of principles acceptable to both sides. Arbitrators so limited in function and guided by such principles would in turn develop a professional expertise that would inspire trust. Finally, the case-by-case application of principles would preserve some flexibility to meet new needs. Those changes were impossible to foresee clearly at the time Bing wrote, but twenty years later they would be easily observable; another twenty years and they would be universally in place.

#### *State Attempts to Prevent or Resolve Labor Disputes During the War*

States' activities in labor relations during the War deserve brief mention. The rash of strikes and lockouts in the first month of the War prompted strong action in some areas. New Hampshire banned all strikes in plants doing war work, but because it was an agricultural state with few unions, the law had little effect.<sup>180</sup> The Minnesota Public Safety Commission issued an order which gave its Board of Arbitration compulsory arbitration powers, but again,

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179. *Id.* at 277-79.

180. *Id.* at 137.

these powers were rarely used.<sup>181</sup> The Massachusetts Board of Conciliation and Arbitration was one of the most active state boards both before and during the War. In addition, the Executive Manager of the Massachusetts Committee on Public Safety acted as an arbitrator in some significant wartime labor disputes, which included railroads, shipyards, fisheries, street railroads and trucking.<sup>182</sup>

Twelve states adopted compulsory "work or fight" laws which were occasionally applied to strikers. Apart from specific legislation, courts issued injunctions on the theory that wartime strikes were illegal and in many instances local officials and "overzealous military authorities" arrested union pickets.<sup>183</sup> Special wartime arbitration procedures were developed in only a handful of states. Labor conciliation and arbitration agencies in most states continued to operate as they had before the War. In general, the War resulted in few advances in arbitration at the state level.

### BETWEEN THE WARS

Arbitration had already come a long way by Armistice Day. The years between the First and Second World Wars saw the emergence of labor arbitration in virtually modern form. Arbitration became a profession rather than an avocation; federal law not only sanctioned but positively encouraged arbitration; and important new segments of industry agreed to the establishment of permanent arbitration machinery.

#### *The Postwar Setting*

Union strength was at an historic peak at the War's end. About three and a half million employees belonged to unions in 1918, an increase of almost a million in three years. By 1919 the figure was over four million and by 1920, over five million.<sup>184</sup> Although the number of work stoppages dropped somewhat after 1917, their magnitude rose dramatically: over four million employees were involved in 1918, an incredible 20.8 percent of the workforce. This percentage is twice as high as that for any other year in our history and ten times the percentage for recent years.<sup>185</sup>

The obvious strength of the labor movement and the failure of wartime settlement procedures to survive the Armistice combined to produce a widespread feeling of disappointment that underscored the importance of devising new ways to resolve disputes. President Wilson, hoping to bring capital and labor together in a spirit of cooperation, convened a tripartite National Industrial Conference in October 1919.<sup>186</sup> The Conference quickly split on the

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181. From September 1917 through November 1918 the Minnesota Board handled only 45 cases, six of which were settled by arbitration. *Id.* at 137 n.1.

182. *Id.* at 137-44.

183. E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES*, 246-47 (1932 & photo. reprint 1969).

184. L. WOLMAN, *supra* note 138, at 26.

185. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1865, *HANDBOOK OF LABOR STATISTICS 1975—REFERENCE EDITION* 390 (1975); BUREAU OF LABOR STATISTICS, BULL. NO. 2070, *HANDBOOK OF LABOR STATISTICS* 415 (1980).

186. See *National Industrial Conference, Washington, D.C.*, 9 MONTHLY LAB. REV. 1342 (1919).

right of workers to bargain collectively. The union members withdrew from the Conference, and no decision was reached on the public members' ambitious proposal for an arbitration scheme modeled after the World War I adjustment boards.<sup>187</sup>

The President convened another Industrial Conference in December composed solely of public members. The group submitted a report in March of 1920 calling for the establishment of bipartite local, regional and national boards to adjust labor disputes. Board decisions would be unanimous or, failing unanimity, made by an umpire. Participation by the parties would be strictly voluntary and the plan involved no penalties other than the prospect of adverse public opinion.<sup>188</sup> The report led neither to legislation nor to a discernible change in industrial relations practices,<sup>189</sup> perhaps because it was based on the fallacy that work stoppages resulted from a lack of arbitration machinery.<sup>190</sup> Those involved in labor relations knew better. They knew that when disputants wished to talk they did not need elaborate machinery.

Arbitration suffered more tangible setbacks during the same period. Post-war conservatism and employers' renewed opposition to unions caused union membership to drop from the 1920 peak of five million to four million in 1922, to three and a half million before the Depression, and below three million in 1933<sup>191</sup> — all this while the workforce was expanding.<sup>192</sup> Unfavorable arbitration decisions in coal mining in 1919 and 1920 so upset the United Mine Workers that the union refused to arbitrate for a long time thereafter. In 1921, Chicago construction unions rejected an arbitration award, thereby bringing on six years of labor turmoil in that city. Industrial warfare similarly followed arbitration awards in the San Francisco construction and New York printing industries.<sup>193</sup>

### *The Temptation to Compulsion*

Every few years in this country there arises a new wave of intellectual and

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187. *Id.* at 1348-49. Under the proposal, bipartite boards would consider all disputes not resolved locally; if a board could not reach a unanimous decision it would turn the matter over to an umpire. Umpires would be selected by unanimous decision of the board or failing that, would be "drawn by lot from a standing list of 20 persons named by the President of the United States as competent umpires in labor disputes." *Id.* at 1348. On the fundamental differences between the labor and management representatives at the Conference, see Hurvitz, *Ideology and Industrial Conflict: President Wilson's First Industrial Conference of October 1919*, 18 LAB. HIST. 509 (1977).

188. *Report of the President's Industrial Conference*, 10 MONTHLY LAB. REV. 863 (1920).

189. "For a brief period, the report of this second conference was rather widely discussed in labor, business, and academic circles, but it had little if any effect upon the long-run course of American industrial relations." H. MILLIS, *supra* note 41, at 147.

190. Ralph Easley of the National Civic Federation wrote to Samuel Gompers that, "[T]he Statement is a legalistic document, full of . . . ideas for Supreme Courts, Federal Courts and Jury Panels. It would be as useful as the Hague Tribunal, and no more so." M. GREEN, *supra* note 125, at 447.

191. L. WOLMAN, *supra* note 138, at 34.

192. The total labor force grew by 22.6%, from 41,720,000 in 1920 to 51,132,000 in 1933. HISTORICAL STATISTICS, *supra* note 143, at 126.

193. E. WITTE, *supra* note 1, at 35-36.

political enthusiasm for compulsory arbitration. Prior to the First World War, for example, the Canadian Industrial Disputes Act of 1907 containing some compulsory arbitration features inspired a great deal of discussion in this country.<sup>194</sup> During the War, both federal and state governments experimented with compulsory arbitration.<sup>195</sup> So it was immediately after the War. Colorado and Kansas were the main jurisdictions to act pursuant to the postwar enthusiasm. Several other states adopted less stringent labor laws during the same period.<sup>196</sup>

The Colorado Industrial Disputes Act of 1915 was adopted before American entry into the War, but most cases brought under it arose after the Armistice.<sup>197</sup> The law was prompted by a bloody miners' strike in 1914 in which nineteen persons died, among them eleven children.<sup>198</sup> Modeled after the Canadian Industrial Disputes Act, the Colorado statute required that industrial disputes be suspended until the state industrial commission held hearings and rendered a decision.<sup>199</sup> Because the commission's decision was not binding, the 1915 law provided for compulsory investigation rather than compulsory arbitration.

The industrial commission handled 1,395 controversies from 1915 through 1928, but the Act's enforcement provisions were seldom invoked. A number of strike leaders were criminally prosecuted from 1919 to 1922<sup>200</sup> and several injunctions were issued; nevertheless, several hundred strikes occurred during this period, many in flagrant violation of the Act.<sup>201</sup> The law became an issue in the 1922 state election and the new labor-supported governor promptly, but vainly, recommended that the legislature repeal the Act. The law remained on the statute books but was little used after 1922.<sup>202</sup>

Of somewhat greater importance was a Kansas law which did provide for compulsory arbitration.<sup>203</sup> Like the earlier Colorado law, the Kansas Industrial

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194. B. RAMIREZ, *supra* note 125, at 160-71.

195. See *supra* text accompanying notes 158-59, 169-73, and 180-83.

196. H. KALTENBORN, *supra* note 34, at 257-96, provides a convenient summary of state laws concerning the adjustment of labor disputes.

197. For a discussion of the Colorado law, see Warne & Gaddis, *Eleven Years of Compulsory Investigation of Industrial Disputes in Colorado*, 35 J. POL. ECON. 657 (1927). See generally E. WITTE, *supra* note 183, at 253-55.

198. Warne & Gaddis, *supra* note 197, at 657 n.1.

199. *Id.* at 657.

200. See, e.g., *People v. UMW*, 70 Colo. 269, 201 Pac. 54 (1921). See also Warne & Gaddis, *supra* note 197, at 672.

201. E. WITTE, *supra* note 183, at 253-54.

202. *Id.* at 255. The Colorado Supreme Court further limited the statute's impact by giving it a restrictive reading in *People v. Aladdin Theatre Corp.*, 96 Colo. 527, 44 P.2d 1022 (1935).

203. On the early years of the Kansas Court of Industrial Relations, see H. ALLEN, *THE PARTY OF THE THIRD PART* (1921 & photo. reprint 1971) (this edition includes a reprint of Samuel Gompers' pamphlet, *The Kansas Court of Industrial Relations Law*, subtitled *Laws to Make Strikes Unlawful Will Not Prevent Them*). A later study reviews the work of the Kansas court more completely. D. GAGLIARDO, *THE KANSAS INDUSTRIAL COURT* (1941). See generally H. MILLIS, *supra* note 41, at 822-27; E. WITTE, *supra* note 183, 255-60 (gives good short history of the court); Rabinowitz, *The Kansas Industrial Court Act*, 12 CALIF. L. REV. 1 (1923).

Relations Court Act of 1920 was enacted following a long and bitter miners' strike. The law applied only to certain industries: public utilities, transportation, food, fuel and clothing. In addition to banning strikes, picketing, boycotts, and lockouts, the Kansas Act created a Court of Industrial Relations to arbitrate disputes. The court, composed of three neutral persons appointed by the governor, had authority to resolve any controversy endangering the continuity and efficiency of the affected industry. Its decisions were limited only by requirements that labor receive a "fair wage" and capital a "fair return on investment."<sup>204</sup>

The new court angered organized labor in 1920 by causing leaders of striking mine workers to be jailed. During the next two years, striking workers in mines, railroads, and the meat packing industry simply ignored the court. In local disputes involving street railways and public power, however, the court successfully prevented strikes and issued acceptable awards.<sup>205</sup> The court also angered employers and inadvertently brought about its downfall by attempting to set wages and hours at the Wolff Packing Company. The company fought the court's request for an injunction and, after extended litigation, succeeded in having the law declared unconstitutional as applied to industries that did not strongly affect the "public interest."<sup>206</sup>

The court had ceased to operate long before this decision. Like the Colorado law, the Kansas law became an issue in the 1922 gubernatorial election. Although the newly elected governor could not convince the legislature to abolish the Act, he undercut the court's effectiveness by making innocuous appointments.<sup>207</sup> The court heard few cases in 1922 and none in 1923; in 1925 it disappeared into the state Public Service Commission.<sup>208</sup> Although the Kansas court had no appreciable effect on the number of strikes, it may have influenced their outcome by depriving unions of weapons such as picketing.<sup>209</sup> Thus in Kansas as in other states the enthusiasm for arbitration compulsion had waned by the mid-1920s, not to regain strength until World War II.

### *A Profession Arises*

Setbacks to the labor movement in the 1920s and unhappy experiences with compulsory arbitration legislation undoubtedly delayed the development of labor arbitration. Countervailing forces were at work, however, and proved stronger in the long run as arbitration spread to new industries and became more sophisticated. As early as 1920 fifty-five percent of all labor agreements had arbitration clauses, but by 1934 the figure rose to sixty-six percent and by 1942 to seventy-six percent.<sup>210</sup> Presumably declining union membership meant

204. Rabinowitz, *supra* note 203, at 2.

205. *Id.* at 3-4. See also E. WITTE, *supra* note 183, at 256-58.

206. Wolff Packing Co. v. Court of Indus. Relations, 267 U.S. 552 (1925). On the constitutionality of compulsory arbitration legislation based on the Kansas cases, see Berman, *The Supreme Court and Compulsory Arbitration*, 18 AM. ECON. REV. 19 (1928). The legal challenges to the Kansas law are fully described in D. GAGLIARDO, *supra* note 203, at 173-200.

207. Rabinowitz, *supra* note 203, at 3.

208. E. WITTE, *supra* note 183, at 259.

209. D. GAGLIARDO, *supra* note 203, at 232-33.

210. Jacoby & Mitchell, *supra* note 142, at 515. R. FLEMING, *supra* note 1, at 13, gives

fewer collective bargaining agreements; nonetheless, the high percentage of arbitration clauses must have resulted in numerous arbitrations. Reliable figures are hard to come by for the early years, but one report found 423 arbitrations on wages and hours prior to 1929. Of these, only fifty-four occurred before 1915, compared to 271 from 1921 to 1929.<sup>211</sup>

By the 1930s arbitration generally was understood in its common modern sense as involving grievance cases. Development of the trade agreement not only made the distinction between interest and grievance arbitration meaningful, but also made grievance arbitration almost a necessity. Before that decade the few written agreements were extremely simple, often dealing only with the issue of a flat-rate wage increase.<sup>212</sup> As long as agreements remained simple, the potential for contractual grievances was slight. Either employers paid the agreed rates or they did not, and if they did not the dispute was probably too serious to be limited by the words of the agreement. Because the employer had obviously breached the agreement, the only issue for arbitration would be whether existing rates should be changed.

When agreements began to include more items, the possibility of a dispute over the interpretation or application of the contract increased more than proportionately. Unions might react to an unfavorable contract interpretation the same way they had historically reacted to a failure to pay the agreed wages — by striking. Gradually though, parties must have come to realize that economic pressure was an inefficient way to resolve small disputes ostensibly governed by the agreement. Arbitration then would begin to appear preferable to tossing out the agreement and forcing the other side to its knees. Arbitration over interpretation would of necessity be markedly different from arbitrations used to set the wage rates initially. For example, the critical question would no longer be to what *should* the parties agree, but to what *had* the parties agreed. The evidence bearing on the latter question would differ from evidence of the former question, and the requisite advocacy skills would change as well. In short, arbitrations would become more “legal”.

The same considerations would require a new level of professionalism among arbitrators. By the 1930s, in addition to objectivity and reasonable intelligence, arbitrators would need such judicial skills as the ability to conduct formal hearings, to understand principles of evidence and contractual interpretation, and to weigh testimony for relevance and credibility.

That is, in fact, how arbitration developed before the Second World War. The questions posed became more complex, the evidence presented grew more voluminous, and the arguments necessarily became more technical. Arbitration

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radically different estimates of 8-10% in the 1930s and 62% in 1941. Both sets of estimates point to increasing inclusion of arbitration clauses prior to World War II.

211. RESULTS OF ARBITRATION CASES, *supra* note 26, at 1052-58.

212. E. WITTE, *supra* note 1, at 48-49. The first contract between the Amalgamated Clothing Workers of America and the Rochester Clothier's Exchange in 1919, for example, had four clauses and was only 12 lines long. M. JOSEPHSON, *supra* note 111, at 183. The document's brevity was partly due to one employer's belief that any contract “with too many words in it” could be broken by a smart lawyer. *Id.* As late as 1937 the first contract between the Steel Workers Organizing Committee and the Carnegie Illinois Steel Corporation contained just four brief clauses. AMERICAN LABOR: THE TWENTIETH CENTURY 323 (J. Auerbach, ed. 1969).



procedure of the time was surprisingly similar to that of today, down to rebuttal and surrebuttal statements.<sup>213</sup> Arbitrators, gaining confidence in their role, came to prefer the "judicial" model of arbitration to the "mediator" model,<sup>214</sup> especially for grievance disputes. Frequent arbitrations and this preference for the judicial approach caused arbitrators to examine what other arbitrators had done in similar situations. A loose form of *stare decisis* began to influence decisions, and broad principles such as the "just cause" concept for discharge became generally accepted. Application of these principles to difficult situations resulted in the incremental production of an industrial common law.<sup>215</sup> Arbitration awards were fair and principled, though much briefer than modern awards.<sup>216</sup> The number of qualified arbitrators, however, was still extremely small. By one estimate there were only one or two dozen experienced arbitrators in the entire country at the time of the great Depression.<sup>217</sup>

### *The American Arbitration Association*

Labor arbitration received indirect support from a great increase in the use of commercial arbitration, particularly in New York. Commercial arbitration had been used in England for hundreds of years, but it was hedged by the common law rule that executory arbitration agreements were not enforceable. In 1920 New York enacted the first statute changing this common law

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213. Anyone who doubts the sophistication of labor arbitration before the Second World War should read the fascinating study, G. SOULE, *WAGE ARBITRATION: SELECTED CASES, 1920-1924* (1928). The book is significant simply as the first collection of arbitration awards printed in the country and an early precursor to the modern CCH and BNA reports. It is even more important for its substance. It gathers full reports of wage arbitration decisions in different industries in several cities, some interpreting existing agreements and some setting new wages. The reports show the use of a well-structured procedure to present detailed evidence.

214. Witness this early statement by William Leiserson, at the time the impartial chairman in the Rochester Clothing trade:

It is plain that for all law, whether constitutional or statute, arbitration, i.e., decision by a third party, is unsound from a political point of view and dangerous from an industrial viewpoint. Conciliation or compromise between the legislative bodies is the sound basis. But when the question is not one of new legislation, but merely a matter of interpreting the law already in existence, and applying it to particular cases, then compromise and conciliation may prove dangerous. Even the delay in deciding such questions involved in the method of conciliation may cause temporary disruption of the agreement—as, for example, when illegal strikes or lockouts occur, as protests against delayed decisions. In all cases, therefore, which involve merely judicial interpretation of the agreement or the rules made under it, arbitration by a third party is not only a sound policy, it is well nigh inevitable.

Leiserson, *Constitutional Government in American Industries*, 12 AM. ECON. REV. 56, 63 (Supp. Mar. 1922) (quoted in J. EISNER, *supra* note 119, at 51-52).

215. M. DERBER, *supra* note 3, at 278.

216. A good sampling of early awards can be found in G. SOULE, *supra* note 213.

217. E. WITTE, *supra* note 1, at 51. Some of those arbitrators were as able and experienced as any practicing today. George Taylor, for example, was said to have heard more than 1,400 cases from 1931-1941 and was in great demand as a permanent umpire as well as an ad hoc arbitrator. Gershenfeld, *Early Years: Grievance Arbitration*, in *INDUSTRIAL PEACEMAKER*, *supra* note 123, at 29-34.

rule to make such agreements enforceable in state courts. By 1933 ten states and the federal government had passed similar laws.<sup>218</sup>

The first professional arbitration association in this country, the Arbitration Society of America, was a product of this movement for commercial arbitration. Founded in 1922, the Society published the first periodical devoted exclusively to arbitration, pressed for adoption of arbitration statutes, and brought together arbitrators, lawyers, academics and others interested in arbitral theory and practice. The Society lasted only four years and is now largely forgotten, but it played a notable part in arbitration's transition from an oddity to a commonplace practice.<sup>219</sup>

In 1926 the Society merged with another group to form the American Arbitration Association,<sup>220</sup> which eventually became labor arbitration's major private organization. From its first years the Association had arbitrated a few labor disputes but this was distinctly a minor sideline to the Association's main work in the commercial arbitration field. Requests for labor arbitration services became more common in the 1930s, particularly after passage of New Deal legislation which made union organizing easier. To deal with this new demand, the Association established a Voluntary Industrial Arbitration Tribunal in 1937.<sup>221</sup>

The Tribunal had to plow new ground, and the Association therefore was obliged to make several major policy decisions about labor arbitration. For the most part, the Association's policies have stood the test of time and have shaped the pattern of modern labor arbitration. Examples include decisions to:

- (1) separate quasi-judicial arbitration from conciliation because the same person could not adequately perform both functions in the same dispute;

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218. E. WITTE, *supra* note 1, at 38-39. See also F. KELLOR, *supra* note 16, at 10-11.

219. F. KELLOR, *supra* note 16, at 11-14. The author concludes, somewhat grandly:

During the four years of its existence, from 1922-26, this new Society substantially changed the pattern of arbitration. It brought arbitration out of its austere juridical area into the limelight as an instrumentality which people themselves could use generally for the voluntary settlement of many kinds of differences. It made arbitration procedures readily accessible to the people through the establishment and operation of a commercial arbitration tribunal. It created new leadership through panels of arbitrators and trade groups. It directed public attention to a hitherto drab and obscure subject. It flung a challenge of self-regulation to private enterprise. It opened the eyes of lawyers to a new practice in arbitration tribunals. It envisioned the dawn of a new profession by starting a panel of arbitrators and beginning their education. It brought arbitration to the people in a simple yet dramatic way and stimulated their faith in this age-old method of solving differences and maintaining friendships. It introduced into the American way of life a new institution for building and maintaining good faith, goodwill, and confidence in human relations.

*Id.* at 13-14.

220. *Id.* at 15-17.

221. Requests for labor arbitration services increased after passage of the National Industrial Recovery Act in 1933 and the National Labor Relations Act in 1935. See generally *The First Year of the Voluntary Industrial Arbitration Tribunal*, 3 ARB. J. (o.s.) 126 (1939) [hereinafter cited as *First Year*].

- (2) discourage "compromise" awards because justice, not compromise, was the arbitrator's objective;
- (3) establish a separate panel of arbitrators skilled in labor, rather than commercial affairs;
- (4) draft and apply procedural rules for labor arbitrators, despite the risk that such rules could lead to formal, legalistic proceedings.<sup>222</sup>

One policy decision that has not survived pertained to fee limitation. The Association established a minimum fee of twenty-five dollars and a maximum of one hundred dollars per day for arbitrators and avoided using arbitrators who arranged for higher pay. This approach was abandoned along with Association expectations that some arbitrators would serve without charge or at least on an "honorary basis" when the parties could not pay fees.<sup>223</sup>

The practice of the Association's Labor Tribunal in its first year is strikingly similar to that of contemporary arbitration.<sup>224</sup> If the parties had an agreement to arbitrate and notified the Association of their dispute, the Association sent them a list of names from its panel of arbitrators. After the parties struck off the unacceptable names and ranked the others, the Association appointed the highest ranked arbitrator. The Labor Tribunal then arranged a hearing in which each party could present its case, use legal counsel, and submit briefs. Hearings were informal but orderly, involving presentation of witnesses and evidence, cross-examination, and rebuttal.<sup>225</sup>

With different motives and much greater success, the Association took over many tasks performed thirty years earlier by the National Civic Federation. Such tasks included publicizing the benefits of the arbitration system, providing arbitration services, refining the arbitration process, and training qualified arbitrators. The Association continues the same work today.

#### *Government Encouragement of Arbitration in the 1920s and 1930s*

In addition to private and professional developments, there were numerous governmental actions taken between the wars to encourage voluntary arbitration. In 1925 the Conference of Commissioners on Uniform Laws, intending to assist commercial arbitration, adopted the first Uniform Arbitration Act. Even if the Act had been widely adopted, it would not have notably affected labor arbitration because it did not provide for arbitration of future disputes.<sup>226</sup> De-

222. F. KELLOR, *supra* note 16, at 85-86.

223. *Id.* at 89. In fact the earliest arbitrators on the Tribunal did serve without pay. *First Year*, *supra* note 221, at 128-29.

224. Even in its infancy, the Association recognized that collective bargaining agreements should detail important terms from the outset and include provisions for dispute avoidance, conciliation, mediation, and, as a last resort, arbitration. *First Year*, *supra* note 221, at 128. The author wrongly predicted that single arbitrators would gradually be replaced by arbitration boards. Exactly the opposite has happened.

225. *First Year*, *supra* note 221, at 128-30.

226. The general attitude of judges and lawyers at that time was against arbitration. They regarded it as an interference with the judicial process, as in competition with the courts, as in competition with the practice of lawyers, and they were "agin" it, with the result that future disputes did not appear in the original Uniform Arbitration Act.

spite formal approval by the American Bar Association, the Act was adopted in only a few states and was ultimately withdrawn by the Conference.<sup>227</sup>

In 1925 Congress passed the United States Arbitration Act<sup>228</sup> which continues to regulate commercial arbitration today. It applies to arbitration agreements in "maritime transactions" and in "commerce," the latter term defined to exclude "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>229</sup> Despite the apparent breadth of this exclusion, the federal courts remain divided over whether collective bargaining agreements, as opposed to individual contracts of employment, are excluded. Some decisions, especially those rendered before 1960, flatly hold the law inapplicable to labor arbitration.<sup>230</sup> More recent decisions just as flatly apply it to collective bargaining agreements.<sup>231</sup> Still others, more disturbingly, avoid the problem altogether by applying the Arbitration Act only by analogy,<sup>232</sup> narrowly interpreting the exclusion,<sup>233</sup> or simply

*The Proposed Uniform Arbitration Act: A Panel Discussion*, 10 PROC. NAT. ACAD. ARB. 112, 116 (1957) (statement of Dean Maynard Pirsig).

227. A DICTIONARY OF ARBITRATION AND ITS TERMS, *supra* note 2, at 233.

228. Ch. 213, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 1 (1976)). The law is sometimes referred to as the Federal Arbitration Act.

229. *Id.*

230. *E.g.*, *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944); *International Union v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Amalgamated Ass'n of Street, Elec. Ry., & Motor Coach Emps., Div. 1210 v. Pennsylvania Greyhound Lines, Inc.*, 192 F.2d 310 (3d Cir. 1951); *Pennsylvania Greyhound Lines, Inc. v. Amalgamated Ass'n of Street, Elec. Ry., & Motor Coach Emps., Div. 1063*, 193 F.2d 327 (3d Cir. 1952). This view was more faithful to the intentions of the Congress that adopted the Act. *Kaye, The Federal Enforcement of Labor Arbitration Agreements*, NYU SIXTH ANN. CONF. ON LABOR 207, 213-16 (1953).

231. *E.g.*, *Amanda Bent Bolt Co. v. UAW Local 1549*, 451 F.2d 1277 (6th Cir. 1971); *International Ass'n of Machinists & Aerospace Workers v. General Elec. Co.*, 406 F.2d 1046 (2d Cir. 1969); *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 595 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968); *UAW v. Kohler Co.*, — F. Supp. —, 113 Lab. Rel. Ref. Man. (BNA) 2429 (E.D. Wis. 1982). This is the better view in light of the pro-arbitration policy of the federal labor laws, as interpreted by the Supreme Court. The adoption by Congress of § 301 of the Labor Management Relations Act of 1947, which allowed enforcement of collective bargaining agreements in federal courts, and the breadth later given to that section by the Supreme Court in *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) "removed the basis for any judicial qualms that application of the United States Arbitration Act in a Section 301 action would reach a class of agreement or worker with respect to which Congress did not intend to enforce an arbitration promise." *Dunau, Scope of Judicial Review of Labor Arbitration Awards*, NYU TWENTY-FOURTH ANN. CONF. ON LABOR 175, 182 (1972).

232. *See, e.g.*, *Ludwig Honald Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969). One of the first to do this was Judge Wyzanski in *Textile Workers v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953), a decision praised by the Supreme Court in *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957).

233. *See, e.g.*, *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3d Cir. 1945) (exclusion of contracts of employment in § 1 does not exclude them from § 3), *cert. denied*, 327 U.S. 777, *reh'g denied*, 327 U.S. 816 (1946); *Pietro Scalzitti Co. v. International Union of Operating Eng'rs, Local No. 150*, 351 F.2d 576 (7th Cir. 1965) (by excluding "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce" Congress meant to exclude only those actually engaged in the transportation of goods or work closely related thereto).

ignoring the question.<sup>234</sup> Because of doubts as to its applicability, the Act had virtually no impact on labor relations before the Second World War.

A more useful aid to labor arbitration was the United States Conciliation Service (Service), an agency of the Department of Labor.<sup>235</sup> Created in 1913, the Service immediately faced suspicion from employers, partly because many of its employees were former union officials. By 1932 the Service was so well established that one industrial relations expert commented it "is today by far the most important agency of mediation in the country" and to a "very great extent it has taken over work formerly done by state arbitration boards, with their full consent."<sup>236</sup>

Although the Service's main function was conciliation, it often used arbitration. At times the Service recommended an outside arbitrator or appointed an arbitrator itself. At other times the Service arbitrated disputes directly through one of its employees.<sup>237</sup> Arbitration requests became so frequent by 1937 that two commissioners were designated full-time arbitrators, and by 1942 seventeen commissioners devoted their full time to arbitration.<sup>238</sup> The number of actual arbitration decisions rendered by the Service more than doubled in that same period.<sup>239</sup>

Several pieces of New Deal legislation indirectly encouraged the spread of labor arbitration. The Norris-LaGuardia Act of 1932<sup>240</sup> expressly announced a Congressional policy favoring arbitration. Although the National Industrial

234. See, e.g., *Grahams Serv., Inc. v. Teamsters Local 975*, 700 F.2d 420, 424 (8th Cir. 1982) (Gibson, C.J., concurring) (court discusses the Arbitration Act but "is not squarely deciding" its applicability, a question "on which courts are presently divided").

235. The only book-length study of the Service is V. BREEN, *THE UNITED STATES CONCILIATION SERVICE* (1943).

236. E. WITTE, *supra* note 183, at 245.

237. Early in World War II, the Director of the Conciliation Service described its arbitration activities:

The Conciliation Service is actually engaged in official and private arbitration. In official arbitration, a Commissioner of Conciliation with specific arbitration training is appointed at the joint request of the parties involved. In private arbitration, the Director, at the joint request of the parties, appoints an outside arbitrator from a panel compiled by the Conciliation Service. This panel consists of several hundred names of private public-spirited citizens who have done arbitration work or who have special qualifications in the field.

Steelman, *The Work of the United States Conciliation Service in Wartime Labor Disputes*, 9 LAW & CONTEMP. PROBS. 462, 465 (1942). By 1941 the panel of arbitrators included people in 1,600 cities and had handled 700 cases, most of which involved grievance issues. S. SLICHTER, J. HEALY & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 746 (1960).

238. H. KALTENBORN, *supra* note 34, at 22.

239. The number of "arbitration matters" handled by the Service continued to grow, rising from 80 in 1938 to 99, 171, and 192 in successive years. *Id.* at 33.

240. 29 U.S.C. §§ 101-15 (1976). Section 8 of the Act specified that "[n]o restraining order or injunctive relief shall be granted" in any labor dispute case "to any complainant . . . who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." *Id.* § 108.

Recovery Act<sup>241</sup> and the National Labor Relations Act<sup>242</sup> said nothing about arbitration, both laws contributed to a dramatic rise in the number of unionized employees,<sup>243</sup> and thus of collective bargaining agreements.<sup>244</sup> Since the percentage of collective agreements containing arbitration clauses was also rising,<sup>245</sup> the net effect was to increase the number of arbitrations in the last years before the Second World War.

Despite the vigorous congressional support for collective bargaining, governments did little to remove the biggest disincentive to labor arbitration agreements, the lack of enforceability of collective bargaining agreements and the arbitration clauses contained in them. In some states lack of enforceability stemmed from a continuing judicial hostility to arbitration. Elsewhere it was due to doubts about whether collective agreements were contracts at all and if they were, who had standing to enforce them.<sup>246</sup>

*The Age of Majority: The Major  
Industries Adopt Arbitration*

Although governmental encouragement was a significant factor in labor arbitration's growth before World War II, nongovernmental events, such as the negotiation of arbitration clauses with major manufacturers, were equally important. In the 1930s, union organizing campaigns reached mass production industries such as automobiles, steel, rubber, electrical products and petroleum refining.<sup>247</sup> These new industrial unions developed contract administration systems which differed significantly from those in the older craft unions. Multi-step grievance procedures became commonplace and the newer contracts often limited the scope of the arbitrator's authority. These developments encouraged manufacturers and unions alike to move from grudging acceptance of ad hoc arbitration to voluntary establishment of permanent arbitration machinery.<sup>248</sup>

241. Ch. 90, 48 Stat. 195 (1933) (Title II repealed 1966).

242. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1976)). The law is better known as the Wagner Act.

243. See Taft, *Organized Labor and the New Deal*, in *HOW COLLECTIVE BARGAINING WORKS*, *supra* note 82, at 3, 4-16.

244. Unions were reluctantly recognized despite the pro-union provisions of the NLRA and vigorous congressional support for collective bargaining. See, e.g., J. AUERBACH, *LABOR AND LIBERTY: THE LAFOLLETTE COMMITTEE AND THE NEW DEAL* (1966) (investigations of violations of the right to organize). Many large employers refused to sign written agreements until the Supreme Court held in *H. J. Heinz v. NLRB*, 311 U.S. 514, 523-25 (1941) that refusal to reduce an agreement to writing violated the National Labor Relations Act. R. FLEMING, *supra* note 1, at 17, states that this decision "caused a change in attitudes in many quarters."

245. See *supra* note 210 and accompanying text.

246. On the status of these issues before World War II, see generally, Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941); Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938); and Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931).

247. *HOW COLLECTIVE BARGAINING WORKS*, *supra* note 82, includes chapters on union organization and collective bargaining in these industries. See, e.g., Anthony, *Rubber Products*, *id.* at 631; Derber, *Electrical Products*, *id.* at 744; Harbison, *Steel*, *id.* at 508; McPherson, *Automobiles*, *id.* at 571; Taft, *Brief Review of Other Industries*, *id.* at 908, 946 (on petroleum products).

248. Pullman & Tripp, *Collective Bargaining Developments*, in *LABOR AND THE NEW DEAL* 317, 350-51 (M. Derber & E. Young, eds. 1961).

A prime example of this trend is the relationship between the United Automobile Workers (UAW) and General Motors. In 1937, General Motors and the UAW agreed to establish a multistep grievance procedure culminating in arbitration before a mutually chosen arbitrator. The initial system pleased neither side, and they began to consider a permanent umpire system. Walter Reuther, then head of the UAW's General Motors Department, argued in 1940:

You cannot strike General Motors plants on individual grievances. One plant going down will affect the 60 other plants. You have to work out something to handle individual grievances . . . . I don't want to tie up 90,000 workers because one worker was laid off for two months. That is a case for the umpire.<sup>249</sup>

A new General Motors-UAW agreement accordingly established in 1940 the "Office of the Umpire" which remains substantially the same today.

This 1940 agreement expressly restricted the umpire to handling grievance disputes, rather than interest issues. Employers bitterly opposed unionization in the mass production industries and in the early years there was none of the spirit of accord that inspired earlier arbitration agreements such as the Hart, Schaffner & Marx agreement in Chicago. The continued tension and mutual suspicion were reflected in contract clauses which limited arbitrators to interpreting the written agreement.<sup>250</sup>

The General Motors-UAW arbitration model both arose from and contributed to the popular support enjoyed by collective bargaining in the late 1930s.<sup>251</sup> Similar multistep grievance procedures culminating in arbitration were negotiated at about the same time in most other mass production industries.<sup>252</sup> From that point on, grievance arbitration was all but universal in the unionized sector of the American economy.

#### ENVOI

When little attention is paid to an institution's history, misconceptions

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249. Alexander, *Impartial Umpireships: The General Motors-UAW Experience*, 12 *Proc. NAT. ACAD. ARB.* 108 (1959). Reuther cited the example of the Clothing Workers and claimed that "they have made more gains with an impartial umpire, more gains without a strike than any other group of workers in America." *Id.* Heliker also emphasizes the strong influence clothing industry arbitration had on the General Motors agreement. It was thus quite understandable that General Motors and the UAW selected as their first and second permanent umpires Dr. Harry Millis and Dr. George Taylor, who had served previously in clothing industry arbitrations. G. Heliker, *supra* note 111, at 96-97, 102-05.

250. Pullman & Tripp, *supra* note 248, at 355. Heliker suggests that the General Motors-UAW arbitration system did not become "legalistic" until the terms of the third and fourth permanent umpires, beginning in 1942. G. Heliker, *supra* note 111, at 108-09.

251. R. FLEMING, *supra* note 1, at 14. *See also* Pullman & Tripp, *supra* note 248, at 352.

252. *See* E. LIVERNASH, *COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY* 233 (1961 & photo. reprint 1976) (early contracts in the steel industry provided for arbitration after a five-step grievance procedure); J. MATLES & J. HIGGINS, *THEM AND US: STRUGGLES OF A RANK-AND-FILE UNION* 87 (1974) (first contract of the United Electrical, Radio and Machine Workers of America and the General Electric Corporation in 1938 provided for voluntary arbitration at the end of a multistep grievance procedure).

often arise. Without an accurate recollection of the past, the tendency is to reconstruct a past that conforms to current assumptions. Labor arbitration gives two examples of this tendency.

The first misconception is an exaggerated belief in the autonomy of the labor arbitration system — that, in Karl Klare's words, "labor and management autonomously developed grievance arbitration as a private dispute resolution system to keep the law 'out' of their affairs."<sup>253</sup> At least as applied to the period before World War II, this belief contains two fundamental errors. Far from being autonomously developed, labor arbitration was time after time prompted and even mandated by outside legal and political forces. These outside influences were evident as long ago as the 1870s and 1880s when many states established boards of arbitration. The same forces were at work when Congress passed legislation to prevent railroad labor disputes, when President Roosevelt created the Anthracite Board of Conciliation, and when both federal and state governments moved toward compulsory arbitration both during and after the First World War. Government involvement occurred almost exclusively in interest disputes but the resulting arbitration agreements set a pattern for grievance disputes. The belief in an autonomously developed grievance arbitration system is inaccurate in another way as well. Before World War II there was little possibility of direct legal intervention in grievance disputes, so there was no pressure to keep the law "out." Rather than creating a dispute resolution system to prevent government involvement, labor and management developed a system in response to their own needs.

What can truthfully be said about arbitral autonomy is that once parties decided, voluntarily or under some compulsion, to use arbitration they had great freedom to structure the scope, form and jurisdiction of their arbitration system. Most industries voluntarily decided whether to use arbitration, but even those under compulsory arbitration usually could choose the type of arbitration they would use. Moreover, the law generally left them alone once the agreement was made: it seldom enforced and only rarely interfered with such agreements. Most prewar arbitration systems were created, modified and abandoned in response to local and immediate considerations such as competitive pressures. The main consideration, however, was the parties' wishes. In this sense labor arbitration can be said to be autonomous, but governmental pressures to enter *some* arbitration arrangement as an alternative to economic warfare should not be ignored.

The second misconception is even more widely and firmly held. American labor relations practitioners and scholars almost universally attribute labor arbitration's existence, widespread acceptance, and present form to the War Labor Board of World War II, although with differing emphasis. For example,

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253. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 463 (1981). Klare does not endorse this view. His statement is simply intended as a paraphrase of what he terms the "traditional view." Klare overstates his point, because neither of the men he cites as purveyors of the traditional view makes quite so bold a statement. Cf. Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 603-05 (1956); Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007-09, 1023-24 (1955). Nevertheless, Klare's sentence only slightly exaggerates the perception of arbitration's independence held by many practitioners and proponents.



David Feller, one of the most distinguished writers on arbitration, contends that "the real explosion in the number of provisions for grievance arbitration, and in large measure the forms which those provisions took, came as a result of the activity of the War Labor Board."<sup>254</sup> An experienced arbitrator, Joseph Raffaele, asserts even more broadly that the War Labor Board "planted the idea that labor arbitration could be an effective means of resolving labor-management problems."<sup>255</sup> The time has come to place the War Labor Board's contributions in a broader context. By exploring the development and practice of arbitration before the War Labor Board's creation, this article has taken the first step toward that goal.

Well before the start of World War II labor and management were largely convinced that grievance arbitration could be mutually advantageous. The arbitration concept was clear and models of arbitration practice were well established. Nearly three-quarters of all collective bargaining agreements contained arbitration clauses.<sup>256</sup> The number of arbitrators grew rapidly in the 1930s, and their professionalism increased immensely. The practical benefits of arbitration were apparent not only to those engaged in labor relations, but to scholars and government officials as well. In sum, the stage was set for arbitration's postwar role as the standard method for settling labor disputes that the parties were unable to resolve by negotiation. American labor arbitration had come of age by 1941. At this point, the early history of American labor arbitration ends and its modern history begins.

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254. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 746 (1973). More recently Karl Klare, no friend of arbitration or of Feller's views, has attributed arbitration to the same source: "Grievance arbitration first became widespread under the aegis of the National War Labor Board." Klare, *supra* note 253, at 463.

255. Raffaele, *Lawyers in Labor Arbitration*, 37 ARB. J. 14 (Sept. 1982). See also R. FLEMING, *supra* note 1, at 15-19; E. WITTE, *supra* note 1, at 58. See generally Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. L. REV. 396, 413-16 (1979) (discussing the beginnings of the no-strike, binding arbitration trade-off).

256. See *supra* note 210 and accompanying text.