

Winter 1969

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## Recommended Citation

Getman, Julius G. (1969) "The Debate Over the Caliber of Arbitrators: Judge Hays and His Critics," *Indiana Law Journal*: Vol. 44 : Iss. 2, Article 3.

Available at: <http://www.repository.law.indiana.edu/ilj/vol44/iss2/3>

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# COMMENTS

## THE DEBATE OVER THE CALIBER OF ARBITRATORS: JUDGE HAYS AND HIS CRITICS

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In the famous Steelworker Trilogy the Supreme Court established a strong Federal policy favoring labor arbitration as a means of settling industrial disputes.<sup>1</sup> Justice Douglas, who wrote the opinions in all three cases, based his decisions in large part on the premise that labor arbitrators are much better qualified than are judges to pass on disputes arising under collective bargaining agreements. Indeed, Justice Douglas waxed eloquent when he described the qualifications of arbitrators and the special expertise which they bring to bear on such cases:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.<sup>2</sup>

This paragraph has provoked considerable debate. Although almost all subsequent writers have agreed that Justice Douglas' description was uninformed and excessive,<sup>3</sup> there is considerable difference about how

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1. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

2. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

3. Fleming described the language quoted above as "a paragraph which caused many arbitrators to purchase new mirrors." R. FLEMING, *THE LABOR ARBITRATION PROCESS* 24 (1965).

wide of the mark Justice Douglas was.

The strongest attack came from Judge Hays of the Second Circuit in a highly provocative little book entitled *Labor Arbitration, A Dissenting View*.<sup>4</sup> Not only does Judge Hays argue "that there is no authority to support the view of arbitration adopted in the *Steelworkers* case,"<sup>5</sup> he goes much further and offers his own picture of the process, almost completely at variance with that of the Court.

Judge Hays points out that most arbitration cases in the United States are decided by arbitrators who have no continuing relation with the parties but are specially selected for particular cases. Far from having an intimate knowledge of the common law of the plant and the state of industrial relations, the arbitrator is likely to be a stranger to the parties and to the controversy.<sup>6</sup>

Further, the process by which arbitrators are selected is likely to involve considerations other than competence. Typically, both parties choose the arbitrator, and either party has the power to reject any candidate. Because labor arbitration is a significant part of the industrial scene in the United States, both labor and management carefully follow the decisions of arbitrators. Often they know how many cases a potential arbitrator has decided for labor and how many for management, and what his views are on significant issues. Judge Hays makes the point that the parties, in fact, choose not on the basis of their confidence in the judgment of the arbitrator but because their private intelligence indicates that the arbitrator will decide the issue in a way favorable to them.<sup>7</sup> While there has been no definitive survey made, many arbitrators and observers are of the same opinion.<sup>8</sup>

In order to be chosen, it is necessary that an arbitrator not unduly offend either labor or management in his decisions, so that he will continue to be acceptable to both. One of the criticisms made by Judge Hays and others is that arbitrators are often more concerned with maintaining their own acceptability than they are with properly deciding the case. It is claimed that arbitrators try to decide some cases for each side and to avoid deciding individual cases wholly one way or the other so that they will not earn the reputation of being unduly favorable to one side and, thus, become unacceptable to the other. Indeed, both union and

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4. P. HAYS, *LABOR ARBITRATION, A DISSIDENTING VIEW* (1966) (Hereinafter cited as HAYS).

5. *Id.* 9.

6. *Id.* 111-12.

7. *Id.* 37-75.

8. McDonald, *The Selection and Tenure of Arbitrators in Labor Disputes*, N.Y.U. 1ST CONF. ON LABOR 145 (1948); Stein, *The Selection of Arbitrators*, N.Y.U. 8TH CONF. ON LABOR 291 (1955).

management officials often complain that too many arbitrators tend to "split a case down the middle," giving a little bit to each side in order to maintain acceptability.

Judge Hays also says that many arbitrators are not well qualified. He suggests that many have no special expertise in labor relations or labor law. In order to substantiate his claim, Judge Hays in his book analyzes the biographical data on arbitrators which is published by the Bureau of National Affairs. Many of the people listed could claim no prior relevant experience in labor law or in any other decision-making role.<sup>9</sup>

Judge Hays' disillusionment with arbitration is so great that he urges that judicial enforcement of arbitral decisions be stopped.<sup>10</sup> He suggests that if either of the parties refuses to comply with a decision, courts should be willing to hear the case de novo. If special expertise in labor matters is thought desirable, he suggests a system of industrial courts.

Judge Hays' book has been severely criticized by his former colleagues.<sup>11</sup> The critics have had two major objections to Judge Hays' book. They have pointed out that he had no more empirical data or scholarly research to support his view of arbitration than Justice Douglas had to support his.<sup>12</sup> And while none have accepted Justice Douglas' idyllic portrait of labor arbitration, they have reported that their own experience indicates that Judge Hays ignored the positive and exaggerated the negative aspects of arbitration.<sup>13</sup> The critics suggest that arbitrators are generally better qualified than Judge Hays suggests. They do not agree that arbitrators in reaching their decisions are likely to be motivated by the desire to maintain acceptability. And they generally conclude that the arbitration process as it now functions does a much better job of meeting the needs of labor, management, and the public than Judge Hays suggests and than any alternative method of dispute settlement is likely to do.

The debate between Judge Hays and his critics reveals how little is actually known. Much of the pertinent literature evaluating the labor

9. HAYS 53-58.

10. As a minimum he suggests much closer judicial scrutiny of arbitral decisions. HAYS 79-118.

11. See, *e.g.*, Aaron, Book Review, 42 WASH. L. REV. 976 (1967); Meltzer, Book Review, 34 U. CHI. L. REV. 211 (1966); Shieber, Book Review, 41 TUL. L. REV. 743 (1967); Wallen, Book Review, 81 HARV. L. REV. 507(1967); Wallen, *Arbitrators and Judges Dispelling the Hays Haze*, 12 SW. LEGAL FOUNDATION INSTITUTE ON LABOR LAW 159 (1966).

12. Judge Hays did not claim that there was sufficient data from which to draw conclusions about the way arbitration works. He called for further research, but the ferocity of his indictment generally belied his disclaimers of adequate information.

13. See note 11 *supra*.

arbitration process involves generalization from personal experience,<sup>14</sup> and there are several reasons why this is true. The leading academic authorities on labor law are almost invariably part-time labor arbitrators, and their own experiences provide an opportunity to write about something which they have experienced first hand. Moreover, traditional legal research directed toward the internal workings of the process is hardly feasible. Individual decisions are not nearly as important as they are in other branches of labor law and they rarely merit extensive consideration. The precedential value of individual decisions is slight, partly because arbitrators pay less heed to precedent than courts do and partly because the great number of arbitrators means that on any controversial issue a variety of differing opinions can be found, making it very difficult to predict which, if any, will have an impact on the general trend of decisions. Since there is no formal hierarchy, each opinion is as significant as any other.<sup>15</sup>

Similarly, the great number of opinions plus the fact that a very large percentage of significant opinions are never published make it difficult to discern the general status of the decisions with respect to significant recurring questions of contract interpretation. Some survey studies do exist<sup>16</sup> but they rarely involve careful attention to individual opinions. As a result, we do not have the type of scholarly analysis which might indicate how well or how badly arbitrators are performing their assigned task. In view of the large number of arbitrators, their varied background, and the different forms that arbitration takes, this lack of information makes any generalization about the caliber of arbitration hazardous.

It is unlikely that the question of the caliber of labor arbitration decisions will be resolved. The difficulties discussed above would seem to preclude a definitive study of this subject. This realization is neither

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14. The most significant of these works was Dean Shulman's famous Holmes lecture delivered at Harvard Law School, entitled "Reason, Contract, and Law in Labor Relations," appearing in 68 HARV. L. REV. 999 (1955). Dean Shulman's description of his experiences as permanent umpire under the Ford Motor Co. Law Contract gave a picture of the labor arbitration process at its best. By common consent Shulman was a superb arbitrator. Shulman's talk had, as Judge Hays, points out a "profound influence on attitude towards labor arbitration in this country." HAYS 3. The talk was cited repeatedly in the trilogy and Justice Douglas' description of labor arbitration is more consistent with Shulman's personal experiences than with anything else. See also Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Davey, *The Supreme Court and Arbitration; The Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138 (1961); Fleming, *Reflections on the Nature of Labor Arbitration*, 61 MICH. L. REV. 1245 (1963); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3; Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545 (1967).

15. Cf. Gilbert & Sullivan: "Where everybody is somebody nobody is anybody."

16. See, e.g., Note, *Standard for Arbitrators in Subcontracting Disputes*, 39 IND. L.J. 561 (1964).

surprising nor cause for undue alarm, since there are many classes of judges whose decisions are similarly insulated from critical scrutiny.

It would be possible, however, to make the current debate a better informed one. A logical starting point would be an effort to ascertain the attitude of the parties toward arbitration. An interesting start was made in an article by Professors Jones and Smith<sup>17</sup> in which they analyzed the responses to a questionnaire sent to management and union attorneys and officials. Those contacted were asked whether they were generally satisfied with the arbitration process, and what suggestions they had for improvement. The responses indicated general satisfaction and a desire to retain the current system, but they also indicated several areas of dissatisfaction. Those responding indicated concern over the scope of the arbitrator's power and the limited scope for review, the procedural limits of arbitration hearings, the choices made available to them through the appointing agencies, delays in the issuance of opinions and the costs of arbitration. Most of all, they expressed a desire for more competent arbitrators.<sup>18</sup>

While the data gathered by Professors Smith and Jones is provocative, it gives neither a clear nor an authoritative picture of the attitude of the parties toward arbitration. Their sample was highly limited and unrepresentative. The responses were primarily from management attorneys and included no rank and file union members nor local officials. Moreover, the questionnaire was not calculated to tap in a sophisticated fashion the attitudes of the respondents who were merely expected to sum up their general attitudes toward arbitration.

Further work would be useful. A more comprehensive questionnaire should be sent to a more carefully selected sample. Those queried should be asked to compare their attitude toward arbitrators and arbitration with their attitudes toward the National Labor Relations Board and the courts. They should also be asked whether they think arbitrators decide cases to maintain acceptability and what, if any, evidence they have for their conclusions. Those involved in the selection process should be questioned concerning the criteria they employ. Personal interviews should be conducted with people involved in the arbitration process, including arbitrators. In this way a more valid and comprehensive picture of the extent to which the process satisfies its constituents would be obtained.

Judge Hays bases his criticism of the arbitration process in part on his assumption that arbitrators as a group are fairly undistinguished,

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17. Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: a Report with Comments*, 62 MICH. L. REV. 1115 (1964).

18. Most of these problems which are peripheral to the question of arbitral competence are treated in R. FLEMING, *THE LABOR ARBITRATION PROCESS* (1965).

with no special competence for their job. This conclusion he supports with a survey of the arbitrators whose personal backgrounds are listed in the BNA labor arbitration series. Judge Hays' survey as he acknowledges is a highly inadequate means of obtaining a picture of who does arbitration. Not only is the survey composed of an unrepresentative sample, but it also fails to indicate what proportion of the arbitration is done by each of the different types represented. Nor does Judge Hays really direct himself to the question of what constitutes competence for a labor arbitrator.

Such data as Judge Hays presents is not necessarily consistent with his attack on labor arbitrators. While the group he has selected seems generally well qualified to serve as decision makers in the field, he gives the contrary impression by dealing unfairly with his material and slighting the occupational groups represented and emphasizing the exceptions.

Certainly a clearer picture of the people doing labor arbitration and the distribution of cases is possible.<sup>19</sup> The list of arbitrators of the various referring agencies should be studied and the qualifications of the arbitrators considered. Discussions with company attorneys and officials and with union leaders should permit discovery of the identity and qualifications of arbitrators not on the lists of the referral agencies. By comparing the qualifications and selection process for arbitrators with those for N.L.R.B. trial examiners and Federal and State district court judges, some idea may be obtained as to whether the use of private citizens as arbitrators results in decision-makers more or less qualified than government officials.

Only part of Judge Hays' criticism is based on the caliber of the people who arbitrate labor disputes. His main argument is that the system of selection affects the decisional process by emphasizing acceptability. This is a difficult question to investigate because it rests on an assumption about the state of mind of arbitrators which, even if true, one could hardly expect people to admit freely. Indeed, it is not at all clear that arbitrators are aware of the extent to which they are motivated by such considerations. Like all human beings, arbitrators tend to be more conscious of their more noble motives; those which cause shame or embarrassment are rarely acknowledged and even more rarely assigned their proper weight. But a fuller picture may be obtained by:

a) Making a careful, fairly extensive survey through questionnaires and personal interviews of the process by which companies and unions

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19. At least one such study has been made. Although the results are old and the survey incomplete, it does not bear out Judge Hays' charge. *Survey of the Arbitration Profession in 1952* in THE PROFESSION OF LABOR ARBITRATION 176-82 (BNA 1957). (selected papers from first seven annual meetings of the National Academy of Arbitrators, 1948-54).

select arbitrators, aimed at ascertaining to what extent these parties tend to pass over an arbitrator because he has decided a recent string of cases in favor of, or because his over-all average seems weighted in favor of, the other side. If such considerations are taken into account it should be ascertained if they are more likely to be applied to newer arbitrators than to experienced ones.

b) Examining decisions of a selected cross-section of arbitrators to see if the determinations form a pattern indicating attention to acceptability. Such patterns might be contrasted with the decisions of judges trying section 301 cases or with Trial Examiners in N.L.R.B. cases.

c) Interviewing a carefully selected cross-section of arbitrators to ascertain how they think the parties go about choosing arbitrators and how they deal with the problem of maintaining acceptability.

In the final analysis, Judge Hays' argument rests on an assumption about the way arbitrators themselves perceive the selection process and how they respond to it. There is little information on either of these points, and some help could be obtained by merely discussing them with a cross-section of arbitrators. In particular, it should be possible to determine whether arbitrators think that they are likely to be harmed by deciding too many cases for one side or the other. It is unlikely, of course, that arbitrators would admit to deciding cases in order to maintain acceptability, but it would be useful to analyze the nature of the case they make on their own behalf. Review of the literature and discussions with arbitrators indicate that many arbitrators admit to concern with acceptability but deny that it shapes their opinions. For example, some claim that such concern actually improves their performance because it compels them to spell out clearly to the losing side why its arguments were rejected.<sup>20</sup> This writer's comparison of arbitration and judicial opinion suggests that arbitrators do in fact tend to deal more fully with the arguments they reject than do courts.

Some arbitrators may claim the ability to wrestle with conscience and win. They may check their decisions regularly with disinterested colleagues or they may claim that acceptability is a false independent goal on the grounds that a decision against the side which has the stronger case on the merits is likely to be more costly to acceptability than a series of decisions favoring one side or the other. After all, it is generally possible to divide enough cases both ways on the merits to avoid the fatal reputation for being completely partisan.

In discussion with union and management officials I have noticed that both sides are often bitter about the claimed tendency of arbitrators

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20. See Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545 (1967).

to attempt, Solomon like, to split cases down the middle, awarding something to each side. This claimed tendency is the most frequently cited "proof" that arbitrators decide in terms of their own self interest rather than "on the merits." In evaluating this argument it would be useful to compare the incidence of split decisions by arbitrators and by judges in section 301 cases. However, even if arbitrators split their decisions more frequently than judges it does not necessarily follow that their reason is to preserve acceptability. This writer suspects that many split decisions result from the arbitrator's lack of assurance about his factual determinations.

Arbitration is a particularly poor process for determining the facts. A comparison of arbitration with proceedings before the National Labor Relations Board is useful in explaining why.

When an unfair labor practice charge is filed with the N.L.R.B., a preliminary investigation is conducted by trained government personnel. During the investigation, all parties have the opportunity to discuss the critical facts. Meetings are held to attempt to compromise and, as a result, the issues are usually quite well drawn. If a hearing is necessary, one is held before an expert hearing officer. Both the government and the respondent are represented by attorneys and, in many cases, so is the party who files the charge. The parties know what it is they wish to bring out and the hearing may go on for several days if the matter is an important one. The hearing officer has powers of subpoena and a trained court reporter makes a record of the hearing so that a complete transcript is available to the examiner when he makes his decision.

In arbitration, by contrast, the parties are generally not represented by attorneys: The union is usually represented by a business agent, who is apt to be very busy and often has just learned the facts of the case. Companies are usually represented by personnel directors. Thus, each party's case is likely to be handled by someone who is not an expert at bringing out facts through examination and cross-examination of witnesses. Moreover, quite frequently the issue in dispute has not been isolated, so that at the hearing neither side is clear about what it wants to prove, and it is rarely possible to extend the hearing beyond a single day in order to ensure that all the pertinent testimony has been elicited. Very often the arbitrator, who does not have subpoena power, serves as his own court reporter. While ruling on questions of evidence and attempting to judge the credibility of the witness he must take notes on his testimony. In my own limited experience I have found the task of taking notes while performing other functions a tremendously demanding one, and in such cases I have never felt complete confidence in my judgment as to the facts of the dispute. Where an arbitrator is uncertain

of the facts he might well try to give a little bit to each side in order to avoid being fooled completely. Accordingly, if split decisions occur more frequently in arbitrations, it would be desirable to find out if such decisions occur most often in cases in which there are significant factual disputes which are not presented by attorneys or in cases in which the arbitrator acts as his own reporter.

Careful investigation might also reveal the extent to which arbitration serves significant interests which would not necessarily be served by any officially sanctioned substitute. For example, in this writer's view it is a matter of considerable significance that to rank-and-file employees arbitration is a familiar process, one in which they are not afraid to speak freely. Employees are frightened by formal proceedings before governmental agencies. I have observed that rank-and-file union members invariably display considerable timidity in N.L.R.B. hearings, and I have heard burly steelworkers and coal-miners express anxiety, in some cases approaching terror, at the thought of appearing in court. Arbitration, however, is much different. The hearing generally takes place in the company premises or in a hotel room where there is often little formality. The fact that the arbitrator is a private citizen rather than a government official makes him less frightening. Some of the very factors which make arbitration an imperfect way of finding facts make it comfortable for the employees. Accordingly, they are willing to appear in arbitration hearings and to speak with considerable freedom. Thus, in my view arbitration gives employees a sense of having had their "day in court," without its normal disadvantages.

The validity of this theory could be checked fairly easily by extensive discussion with employees. It should be possible to determine how employees and union leaders perceive the arbitration process in this regard and how their perception of the process differs from their perception of N.L.R.B. or court proceedings. Interviews might well bring out other strengths or weaknesses in the process. One of the chief problems with the current debate over arbitration is that little or no systematic effort has been made to obtain the views of those most directly affected, the employees.