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ARBITRATION

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An examination of the labour-management contracts filed in the office of the Conciliation Service reveals that the parties to these arguments have inserted arbitration clauses in only a very few cases (actual percentage figures will be available after a study now underway is completed. For the present it is safe to say that only a few of the many agreements make provision for final and binding settlements of disputes during the life of these agreements). Furthermore, even these are usually expressed in very general terms which suggest that the negotiators did not give them serious thoughts, or at least that they did not consider the implications of arbitration clauses. A few are drafted with care and do in fact cover the principal features of the arbitral process; although usually the all important question of the provision of a method of selecting an arbitrator, when the parties are unable to agree on whom to appoint, is left out. The following clause is reprinted from one of the agreements on file.

"Section 7. If any dispute, grievance or complaint cannot be settled by the Committee, it shall be referred to an Arbitrator or Arbitrators mutually agreed upon by both parties whose decision shall be final and binding upon all parties concerned. The Arbitrator or Arbitrators shall arrive at a decision on the matter presented to him not later than fifteen (15) days after submittal, subject to extension by mutual consent of both parties because of extenuating circumstances. It is understood that the Arbitrator in no way change the meaning or intent of the agreement of any of its provisions. Cost of arbitration shall be borne by both parties in equal proportions."

It will be noted that this clause provides (a) for referral for binding settlement of *any* dispute unresolved in the grievance machinery (b) to an Arbitrator (c) mutually agreed upon (d) which arbitrator shall be limited in time and confined to determinations consistent with the agreement. This sets up a complete provision for arbitration except for the resolution of

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deadlocks over the choice of an arbitrator. Had the parties designated some neutral person or official as the one with power to nominate in such deadlocked cases, the clause would be complete. The parties could then accept and grant respectively no-strike and no-lockout clauses with the assurance that in return for this voluntary surrender of the right to impose the disruptive sanctions of the work stoppage, they would receive protection from self interested unilateral interpretation and application of the agreement. The great virtue of the arbitration clause voluntarily accepted by the parties is that it ties the agreement together, gives real meaning to the no-strike and no-lockout clauses and more or less guarantees industrial peace, thereby reducing uncertainty and increasing the security of employer, unions, and employees.

The suggestion is made from time to time that some more formal and official body should be empowered to act as interpreter and adjudicator in disputes that occur during the life of an agreement. From time to time the Conciliation Service is asked to supply arbitrators on an ad hoc basis. Recommendations appear in support of the idea that the Court of Industrial Relations should have the power to try such cases. Coupled with this recommendation is the further suggestion that a failure to live up to the terms of a union agreement should be included in Section 4 of the Industrial Peace Act as an unfair labour practice. Another interested group requests the setting up of a new court especially created for this purpose. It is the contention in this memorandum that private voluntary arbitration, if it can be developed to operate soundly and efficiently is superior to any other means for the settlement of grievance and interpretation disputes which occur where agreements or contracts are in operation. Indeed voluntary arbitration of such disputes is entirely consistent with the principles of the Industrial Peace Act in a sense that the other proposals are not. To establish this "point it is necessary to explain clearly the nature of the collective agreement itself as well the specific character of th voluntary arbitration clause.

The collective agreement is more than simple commercial contract. It represents an agreement usually on a large range of issues, reached between an employer and the representative of his employees, The employer accords recognition to the union as having the institutional right to meet with him and to negotiate the terms. He furthermore acknowledges the union function of protecting the rights of the union itself and the employees, which are covered by the contract. This recognition of the protecting function is reflected in the grievance procedure of the agreement. Discussion in the grievance meetings at all steps manifests the continuous process of joint negotiation and good faith. But it should be noted that clauses of the agreement are jointly negotiated and administered by the parties in accordance with their own determination.

The need for interpretation arises out of the conflicting interests of the

parties and of the temptation of one or the other to seek an interpretation and application more favorable than the original or prior intention jointly reached. In some instances the particular disputed action may not clearly fit within any clause of the agreement. Again, business administration is a continuous process and involves the need to meet new unforeseen situations. No part of business policy can escape the consequences of the dynamics of business enterprise. Personnel policy and administration are no exceptions. Yet the agreement tends to be static. To meet this the parties often do try to insert clauses which will permit adjustments to changing circumstances; as reflected in lay off, promotion and transfer clauses, wage adjustments related to changing job requirements, and provision of escalator wage clauses related to either productivity changes or inflation.

In application administration means that innumerable decisions must be made everyday, and issued as authoritative instructions or orders from managers of various levels to workers covered by the agreement. Any one of these can be, or may at least be thought to be, an infringement of the rights guaranteed by the agreement. It is therefore necessary to have some means of resolving the disputes that are the inevitable result of administrative action. These disputes involve usually two related questions. The first concerns the meaning of agreement; and the second asks whether the action in dispute is consistent with the accepted meaning of the agreement or clause thereof.

It is especially important that it be recognized that these disputes of interpretation and application have absolutely nothing to do with public law as such. Nor, indeed, do they have anything to do with public standards. The agreement of the parties and the supplements provided either by written amendment or by adjustments tacitly accepted in practice provide the framework of 'law' and the criteria which should be the basis of decision in cases of rights disputes. These disputes have nothing to do with public law. They concern only the private agreement of private parties, and the parties themselves recognize this to be so when they arrange for a grievance machinery; because in the operation of that process any one of three results may emerge. One party may convince the other of the correctness of its interpretation; there may be a compromise or a re-interpretation or even redrafting of the agreement; or there may be a deadlock.

Voluntary arbitration of these deadlocked cases is not the same thing as going to court. It merely represents a further logical extension of the agreement. The arbitrator is, in this sense, an agent of both of the parties, not their judge. They have mutually appointed him to make a contract of settlement for them. The arbitrator gets his jurisdiction from the parties themselves.* As in the clause reproduced above, they have authorized

* Jules J. Justin — Arbitrability and the Arbitrator's Jurisdiction Paper delivered before the National Academy of Arbitrators Annual Conference Cleveland Jan 1956.

him to determine the issue, but within the meaning of their own agreement. Obviously an interpretation dispute as such, therefore, has nothing to do with public law or public policy, but it has all to do with the private agreement between the contracting parties. Moreover the arbitrator is in a position quite dissimilar from that of the judiciary, whether in the regular courts or in the Court of Industrial Relations. He is not concerned with legal justice in accordance with public law, but the judges are. The arbitrator is concerned with justice as the parties themselves have defined it in their agreement and elaborated it in practice. This point is crucial and requires further elaboration.

The principal question for the arbitrator to ask himself is, "What have these parties agreed to?" The answer to this question is to be found in the clauses of the contract; in supplementary documents contained in the files of the company and the union, including minutes of grievance meetings, administrative documents such as published plant rules and regulations; and in the known behaviour of the parties themselves. To illustrate, the agreement may clearly state that the company retains the exclusive right to discipline for just cause. To this the union has agreed in signing the contract. In the course of time the company exercises its right and, let us say, the union occurs by not challenging the company. But the time arrives when the union does challenge. The arbitrator has now more than the mere words of the agreement itself. He has the unchallenged precedents. If the employer has been permitted without challenge to suspend men for rule infraction of a certain level of seriousness, the arbitrator can properly assume that this standard has been accepted by the union. If the union has taken such a case to the grievance procedure and not to arbitration, this is even more conclusive evidence of acceptance. If the union has taken such a case to voluntary arbitration and the arbitrator has upheld the employer, this means that the union has also accepted the employer's interpretation because it had agreed to be bound by the arbitration. In like manner, if the employer backs down in the grievance machinery, or if an arbitrator rules against the employer, the employer has accepted the union standard as the true meaning of the clause.

The arbitrator is, in this interpretation of his function not concerned with justice in the abstract, or justice according to his own conception of fairness, or justice according to general industrial practice. He is concerned with justice as defined by the parties to the agreement. When he finds the answer to the question of what the parties have agreed to, he has his meaning of the responsibilities imposed by the agreement, as well as the meaning of just causes. He also has his award.

We are now in a position to examine some of the proposals for the settlement of disputes which occur during the life of an agreement. While these take different forms, as mentioned above, they nevertheless all contain the

basic idea that there should be access to some court external to the collective bargaining parties to which either party could bring a charge of violation of the agreement either classed as such, or as an unfair labour practice.

Consider first the proposal that contract violation should be an unfair labour practice. It should be clear now that these are not sound proposals. The violation of an agreement is not an unfair labour practice. Unfair labour practices refer to behaviour which violates public policy regarding the rights of labour and management in collective bargaining. They really all relate to bargaining in good faith. The fact that the parties may disagree as to the interpretation of their agreement may be completely honest and in no way in bad faith. If there is bad faith, it has nothing to do with the substance of the terms, but rather with whether the party concerned intends to live up to the terms, whatever may be the ultimate agreed meaning.

It is precisely because a failure to agree on interpretation may be accompanied by an intention not to abide by the terms of the contract that confusion has crept into reasoning about the problem. To illustrate, an employer may choose to promote one employee in preference to another, and the union may protest. It is quite possible that each honestly believes in its own interpretation of the agreement and of the action taken; or they may be trying to alter the contract to their respective advantages. Up to this point there is no bad faith. But if the employer refuses to meet with the union to discuss the matter, or to use any further machinery to which he had agreed in advance, such as arbitration, this is bad faith because it represents a refusal to bargain. Similarly if a union refuses to meet with the employer to discuss such a case and threatens a strike over the issue, it is guilty of an unfair labour practice under the above quoted sections it is refusing to bargain in good faith. And it is worth noting that the Industrial Peace Act already makes provision for such cases. Section 4(a) (6) declares it to be an unfair labour practice "to refuse to bargain collectively..." and Section 13 defines the duty to bargain collectively in part as meaning..." the performance of the mutual obligation to meet and confer promptly and expedetiously and in good faith... for the purpose of adjusting any grievances or question arising under such agreement..."

This section practically makes a grievance procedure mandatory and establishes the right of a party to resort to the court to guarantee that this procedure shall be used. It makes no reference to procedures which might be included in the agreement and which go beyond the level of consultation contemplated in the Act. Thus, it is appropriate to ask if the Court would interpret a refusal of one party to go to arbitration, in accordance with the procedure set out in the agreement, as a violation of the requirement to bargain in good faith. Since voluntary arbitration has been used so sparingly it is probable that there is no jurisprudence on the matter. If the refusal to carry out these administrative obligations regarding dispute

settlement should be not classed as a failure to bargain in good faith, there might be a case for a legal amendment which would extend the meaning of collective bargaining to include the obligation to respect the procedural clauses of the agreement itself. The Court in such cases could merely order the parties to bargain in good faith and could specify that in a particular case this would mean using the grievance, or arbitration procedure as intended in the agreement. It would not deal with the substantive dispute. For example, in a dispute about a layout, or a promotion, or a discipline issue, the Court would be simply guaranteeing the procedure of collective bargaining, and would not be concerned with the issue in dispute. That would be left to the arbitrator.

The question whether or not a failure to follow the contract procedure is to be interpreted as a failure to bargain in good faith may be reasoned as follows: the law clearly requires the parties "to meet and confer promptly and expeditiously" on these issues for the purpose of "adjusting any grievance or question." In an agreement into which the parties have written a grievance procedure they are, in effect, mutually defining in specific terms how they are to meet this legal requirement. If they go a step further and include an arbitration clause, is this not an extension of the same procedure? The law requires that they meet to work out the adjustment. They have agreed that "meet" in this connection means meet in grievance sessions, and if necessary, before an arbitrator. In other words the mutually agreed arbitration is the final step which the parties have provided voluntarity as the machinery to be used to carry out the intention of Section 13. It is true the law does not specify any particular form, nor does it require the acceptance of arbitration in such cases. Nevertheless it seems reasonable that what the parties have agreed upon as the proper procedure might well have the support of Section 13. But it must be emphasized that this issue concerns bargaining in good faith. The arbitration of the substantive issues is another matter. In the event that legal opinion should reject the notion that a failure or refusal to use agreed procedures for dispute settlement is a refusal to bargain in good faith, the matter should be corrected by an addition to Section 13 the substance of the following: "The duty to bargain collectively shall also include the responsibility to perform such acts as are contemplated in any and all steps provided by the parties in their agreement for the settlement of any dispute arising during the life of the contract."

The case for private arbitration of the interpretation issues themselves as against litigation in Court is strong for the reason implicit in the explanation so far. The issue really resolves into the question whether an outside Court established to interpret public law is appropriate to determine private agreements, or whether these might not be better dealt with by private ad hoc arbitrators selected jointly by the parties, and functioning within the agreement they themselves have written and administered.

The case against referral of grievance or interpretation disputes to the Court of Industrial Relations or any other Court or body set up on a permanent basis largely concerns the distinction between public law and public policy on the one hand and private agreement and private policy on the other. If we assume that a permanent public body is charged with the responsibility of adjudicating these issues we are immediately confronted with the question of the criteria to be used. The above analysis certainly indicates that the proper criteria are those which have been established by the parties themselves in their written agreement and in the manner in which they have been interpreting and administering and giving meaning to the agreement in the day to day administration of the affairs of the company and the union jointly. This means that the settlement of the dispute over an agreement between one company and its union might produce results sharply different from those which would occur over the agreement of another company and its union. For example, in discipline cases in a situation where traditionally strictness has been observed in administration a discipline action might be upheld, while in a more lax admnistrative tradition it would not be upheld. In other words the standards of the parties in each case would be respected even though the results might appear to be contradictory.

This contradiction is more apparent than real if it is examined in the context of the private agreement. If the arbitration should attempt to apply common standards from company to company it would indeed violate the several agreements being adjudicated simply because the standards of the parties themselves rarely conform with any degree of accuracy from one bargaining situation to another. The imposition of such common standards would therefore do some violence to the principles of the Industrial Peace Act which deliberately allocated the determination of the issues to the parties and, except for certain established public standards covered by such social legislation as the Minimum Wage Act, gives no indication to the parties as to what terms and conditions they should include in their agreements.

If referral to a Court were established and if the Court would in fact adjudicate on the basis of precedence drawn from other cases under other contracts collective bargaining would tend to revert to the position in existence prior to the enactment of the Magna Carta of Labour. As precedent piled upon precedent the real legislating power would be transferred from the parties to the Court and collective bargaining as intended in the Industrial Peace Act would be the principal casualty.

It might be argued that a Court would in effect confine itself strictly to the agreement of the parties as a source of standards or criteria. This is hardly likely. Court traditions do not support this optimistic view. And in any case, if the above analysis is sound, a Court would be called upon to operate in a manner contrary to the usual role of judicial body. It is for this reason that so much emphasis was placed on the distinction between a breach of law and alleged violation of a union agreement.

To a certain extent this defense of the grievance procedure and the voluntary agreement to arbitrate is idealistic or unrealistic. The lack of experience with grievance machinery, the almost total absence of voluntary arbitration clauses in agreements, and the critical shortage of experienced arbitrators all too clearly show the difficulties; and it is quite probable that the current interest in establishing contract violation as unfair labour practice, or in setting up some special Court to hear and decide these cases reflects the frustration of the parties which indicates the weakness of private facilities available at present. But those who would choose a Court procedure should recognize the confusion between violation of rights under public law with violation of rights under private agreement. They should also take into account the inevitable damage to collective bargaining if steps are taken which will in fact be the first serious retreat toward compulsion. If a Court becomes available to an aggrieved party it is no longer the matter of a mutually established system for settlement. The decision to go to Court is unilateral. It is fraught with the danger that one may indeed force an issue into Court for reasons external to the issue involved. There is ample evidence that this is true in many of the cases involving other aspects of union-management relations which come before the Courts at present.

It should be clearly understood that the suggestion favoring voluntary arbitration over the established Court in no way rules out the use of members of the Court or the Court as a whole to settle disputes of interpretation or application. Under the voluntary principle it is quite conceivable that the parties would jointly agree on a member of the Court or the Court staff as the arbitrator. Indeed this is already being practiced in a few cases. Whether the Court as a whole would have the authority to act as an arbitration board is a matter for the jurists to decide. But if there were no such obstacle it is quite conceivable that there might be joint applications to it. Indeed the parties may jointly decide for a single arbitrator, for a board, for a judge, for a lawyer, for a university professor, or for any other person upon whom they can jointly agree. In the experience of some other countries, particularly in the early stages of the development of voluntary arbitration there has been a pronounced tendency to invite judges of the various Courts to act as arbitrators. But it is equally apparent that there is a gradually increasing reliance on private individuals from many walks of life. In some situations government agencies such as conciliation and mediation services assist the parties to find arbitrators. As experience accumulates, private agencies jointly sponsored by business and labour, such as the American Arbitration Association, take over part of the responsibility for finding and developing arbitrators, and promoting information about arbitration and knowledge of its principles. The result is a gradual increase of the private citizen arbitrator.