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## Book Review | Labor Arbitration - A Dissenting View by Paul Hays (Storrs Lectures on Jurisprudence 1964)

Alvin L. Goldman

University of Kentucky College of Law, [algold00@uky.edu](mailto:algold00@uky.edu)

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**Book Review | Labor Arbitration - A Dissenting View by Paul Hays (Storrs Lectures on Jurisprudence 1964)**

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“crucial position in our legal system. It is he who chooses between tradition and change, and in introducing change determines its direction and speed. The most intricate statutory structure can be mangled by inept judicial hands. Perhaps most important, the trial judge’s ability and personality shape the determination of the ‘facts’ to which the rules are applied, and finally decide the rules themselves in the multitude of cases which cannot be appealed.” The editor also reminds the reader that in reading this chapter he should consider the relative importance of the judge’s (1) intellectual ability, (2) integrity, and (3) social and judicial outlook (the latter being explained as the judge’s “response to the competing appeals of property and poverty, and his view of the propriety of judicially reshaping the law in the light of such preferences”). But the editor’s own views on *these and other* matters, together with critical summaries of what has already been written on them, *as well as* on judicial selection, would have constituted a more meaty and challenging 100 pages for the major intended audience, the second-year law student. While this criticism would apply to some other chapters as well, it does not counsel the elimination of all readings. The conciseness, substance and clarity of some of them (the above-mentioned pieces by Davis, Auerbach and Friendly, for instance) could not be much improved, and a Maitland’s style might be worth exhibiting even were his other virtues less substantial.

While I thus have some quarrel with whether the editor’s objective is best attained by the means he proposes, I must concede that the students for whom these readings were primarily intended will be better off for having read them—not to mention those readers who are not law students or lawyers. For the editor has been both diligent and discriminating in harvesting these fruits of critical scholarship on the legal system.

SAMUEL MERMIN.

*University of Wisconsin.*

LABOR ARBITRATION—A DISSENTING VIEW. By Paul Hays. New Haven: Yale University Press, 1966 (Storrs Lectures on Jurisprudence, 1964). Pp. vii, 118. \$4.50.

In the vast modern literature dealing with labor arbitration, words of praise for the process probably predominate. However, as Judge Hays notes, this literature consists “almost entirely of subjective discussions . . . written by arbitrators. . . . Many articles on arbitration, like some of the books by lawyers, could appropriately have the legend ‘Advt’ appended to them.”<sup>1</sup>

Judge Hays, who has had twenty-three years’ experience as a labor arbitrator, takes strong exception to the sweet talk. “Labor arbitration,” he asserts, “is a usually undesirable and frequently intolerable procedure . . . .”<sup>2</sup> He concludes that the courts should not let themselves be “used as the handmaiden for a system of private adjudication which has so many fatal shortcomings as has labor arbitration.”<sup>3</sup> The Judge would have the courts refuse to order parties to arbitrate as well as have them reject the

<sup>1</sup> P. 38.

<sup>2</sup> P. 111.

<sup>3</sup> P. 118.

presence of an arbitration clause as a defense to a suit on a collective bargaining agreement. He even advocates that the courts decline to enforce labor arbitration awards.<sup>4</sup> The parties would either voluntarily live by their arbitration provisions, sue on the merits under their labor agreements or resort to economic warfare.

Much of Judge Hays' criticism of labor arbitration and labor arbitrators is incisive, but he provides neither an accurate doctrinal analysis of the present law of labor arbitration, nor a persuasive case for flushing away the baby with the dirtied water. Although Judge Hays' major contention is that the courts should take a complete hands off attitude toward labor arbitration, he waits until the closing pages to present his anemic brief for this position. In fact, he never makes it clear whether he thinks that this is a job for the Court or for Congress. To put it another way, he does not tell us whether he thinks the Court reached the correct decision in *Lincoln Mills*,<sup>5</sup> the case which gave birth to, or at least acknowledged the legitimacy of, the present role of the federal bench in the enforcement of labor arbitration.

Instead, most of Hays' dissertation is devoted to debunking what purports to be the Supreme Court's rationale in the *Steelworkers*<sup>6</sup> cases. There the Court held, in part, that in construing a labor arbitration clause there is a presumption favoring arbitrability of the dispute in question. Judge Hays offers an oversimplified and inaccurate analysis of the *Steelworkers'* doctrine. He asserts that the preferred position there accorded to labor arbitration is largely based on the Court's questionable finding that labor arbitrators possess superior skills for resolving disputes arising under collective bargaining agreements.<sup>7</sup>

To be sure, Mr. Justice Douglas did lavish labor arbitration with unrealistic superlatives in Part Two of the *Steelworkers* trilogy.<sup>8</sup> But Justice Douglas' extravagant praise for labor arbitration was not a premise in his justification for the presumption in favor of arbitrability. Rather, his discussion of the idealized virtues of arbitrators was part of a rambling description of how, in a "system of industrial self-government"<sup>9</sup> established by a collective bargaining agreement, the grievance and arbitration process is substituted for future economic strife.<sup>10</sup> The Court's espousal of the preferred position policy was actually based on: a) The preferred position of labor arbitration implicit in Labor Management Relations Act section 203(d)'s declaration that the desirable method for the settlement of a grievance under a collective bargaining agreement is through "final adjustment by a method agreed upon by the parties;"<sup>11</sup> b) The value of arbitration in fostering the national labor

<sup>4</sup> P. 113.

<sup>5</sup> *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

<sup>6</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>7</sup> P. 37.

<sup>8</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581-582.

<sup>9</sup> *Id.* at 580.

<sup>10</sup> *Id.* at 580-82.

<sup>11</sup> *United Steelworkers v. American Mfg. Co.*, 363 U.S. at 566.

policy of promoting industrial peace;<sup>12</sup> and c) The value of labor arbitration as a continuation of collective bargaining, giving detail to the broad, hazy scheme of the labor agreement.<sup>13</sup> The concurring Justices added that the presumption of arbitrability is necessary to avoid the mistake of judicial scrutiny of the merits of a dispute when the parties, by the very presence of an arbitration clause, manifest a desire to be ruled by arbitrators and not judges.<sup>14</sup> At least one further reason for the presumption in favor of arbitrability was appended by Mr. Justice Harlan in the *Wiley*<sup>15</sup> decision.

Operating from his oversimplified analysis of the *Steelworkers'* rationale, Judge Hays proceeds to topple the arbitrators' pedestal and the purported foundation of the *Steelworkers'* doctrine. He mounts his attack from all sides. It is a blitzkrieg and the battle is quickly won. Clearly, in *Steelworkers* Mr. Justice Douglas exaggerated the attributes of labor arbitrators. But merely demonstrating this point is not enough to satisfy Judge Hays. He launches a mopping-up exercise, pillories the enemy and finally parades him naked before the bar—virtue unmasked, halo removed and omniscience stripped away. Though the field is spattered with the hues of blood and flesh, Hays views it only in black and white.

Many labor arbitrators do lack any special expertise in the field of labor relations, some appear to keep close tabs on their management-labor box scores, others are corrupt and still others do not possess the highest intelligence. But this is no reason for the law to follow Hays' urgings and abandon the arbitration process. Judges, too, err and some even suffer from the more serious defects Hays attributes to labor arbitrators. So do some administrative adjudicators, mediators and negotiators. Since human frailties are to be found in all of these decision shapers, is Judge Hays going to refuse to lend judicial sanction to them as well?

The fact remains that when labor lawyers, whether representing unions or management, have to choose between resolving disputes in a courtroom or at an arbitration hearing, they generally choose arbitration.<sup>16</sup> And, when they have an opportunity to utilize judges as arbitrators, as they do under New York's Simplified Procedure for Court Determination of Disputes,<sup>17</sup> they characteristically pass up the opportunity.<sup>18</sup> The explanation for the labor

<sup>12</sup> *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 577-78. This argument appears to be dependent upon Douglas' naive notion that the arbitration clause is the quid pro quo for a no strike clause. *Id.* at 578 n. 4. Some would reject the entire argument on the grounds that it is built upon a fictitious concept of what transpires at the bargaining table. However, at note 5 on page 579, Mr. Justice Douglas evidenced a more sophisticated grasp of the presence of arbitration as part of the whole scheme for grievance settlement.

<sup>13</sup> *Id.* at 579-81.

<sup>14</sup> 363 U.S. at 572.

<sup>15</sup> *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964) (desire to safeguard the speed and inexpensiveness of the arbitration process).

<sup>16</sup> See, Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process*, 62 MICH.L.REV. 1115, 1116-1117 (1964); BNA, *Labor Relations Expediter*, LRX 19 §§ 6 and 7.

<sup>17</sup> N.Y. Civil Practice Law and Rules §§ 3031-37.

<sup>18</sup> Siegal, *Practice Commentary* in McKinney's Consolidated Laws of New York CPLR § 3031 at 131, 134-35, § 3035 at 139 (1965 Cum. Ann. Pocket Part).

lawyer's conduct punctures Hays' critique of the arbitration system. Parties are more likely to be satisfied that justice has been done when their case has been decided by a fool or a knave of their own selection than when the decision is made by a fool or a knave who was assigned to be their judge. Moreover, despite the doubts which Judge Hays and others raise, there are many competent labor arbitrators. And, finally, labor arbitration remains a relatively inexpensive and expeditious method for resolving disputes.<sup>19</sup> All of this, of course, is to assert that if there is cause to deny judicial assistance to the labor arbitration process, it is not to be found in the deficiencies of the arbitrators.

Judge Hays cites a statutory mandate to those who would object to the cavalier way in which he casts off the bench's time and precedent honored role in enforcing contracts. He asserts that section 203(d) of the Labor Management Relations Act "expresses a strong policy in favor of purely voluntary adjustment by the parties"<sup>20</sup> because it cautions the National Mediation and Conciliation Service to offer its assistance in grievance disputes "only as a last resort and in exceptional cases." This is correct. But it does not mean that courts must cease enforcing arbitration agreements, just as it does not mean that the Mediation Service must forever stay out of these disputes. Indeed, by aiding the arbitration process, the courts reduce the prospects of the Service becoming involved in unexceptional grievance disputes. To the extent that section 203(d) has any relationship to arbitration, surely it must be to direct that when the parties have voluntarily agreed to settle their differences through arbitration, the courts should assure the performance of such agreements. After all, this section is found in the same act that provides for judicial enforcement of compulsory good faith bargaining.<sup>21</sup>

Hays' second line of criticism of the law of labor arbitration is that if the courts must participate in the arbitration process, they should at least give more careful scrutiny to the decisions of the arbitrations. At the present time, he asserts, "under the leadership of the Supreme Court the courts have been vying with each other in paying homage to labor arbitration."<sup>22</sup> However, this reviewer finds that in several of the Judge's key examples of homage paying, the decisions reflect a well reasoned and meritorious interpretation of the intent of the arbitration clauses in question.<sup>23</sup> Moreover, Judge Hays makes this criticism despite the numerous cases he discusses in other portions of his book which reflect a variety of rules that the courts have developed for carefully scrutinizing arbitration awards.<sup>24</sup> The Judge similarly glosses over the

<sup>19</sup> Fleming, *The Labor Arbitration Process: 1943-1963*, 52 *KY.L.J.* 817, 822-24, 825-28, 835 (1964); Jones & Smith, *supra* at 1117, 1141 and 1143.

<sup>20</sup> P. 115.

<sup>21</sup> Labor Management Relations Act, as amended, § 101 [§ 8(a) (5), (b) (3), (d)]. The mandate for judicial enforcement of labor arbitration agreements is more clearly presented in § 201(b) and (c) of the LMRA.

<sup>22</sup> P. 34.

<sup>23</sup> *E. g.*, *Hod Carriers v. Builders Ass'n*, 326 F.2d 867 (8th Cir.), *cert. denied*, 377 U.S. 917 (1964); *Local v. Bridgeport Gas Co.*, 328 F.2d 381 (2d Cir. 1964); *I.U.E. v. General Elec. Co.*, 332 F.2d 485 (2d Cir.), *cert. denied*, 379 U.S. 928 (1964). All of these cases are discussed by Judge Hays at pp. 32-33.

<sup>24</sup> See, *e. g.*, pp. 94, 97-100, 102-105.

fact that too much judicial scrutiny of the labor arbitration process will rob it of its very essence—simplicity, expediency, frugality and finality.

Probably a fairer evaluation of the present state of the law in this area would be that it puts a great burden on the parties' ability to fully explore, at the bargaining table, their intentions concerning the arbitrator's power. And, it puts at least an equally great burden on the draftsman's ability to express the parties' intentions respecting arbitration.

Initially, labor-management differences evolved around the simple questions: "Can management pay more? Will it pay more?" Opulence, automation, plant relocation, technological change, socio-economic legislation and shifts in economic and cultural patterns have now enmeshed the collective bargaining relationship, placing ever greater demands upon the mechanisms for resolving labor-management differences. There is little wonder that, from time to time, major inadequacies are discovered in the tools of the trade. A new device may be the answer, but until it is invented, developed, tested and installed<sup>25</sup> it is foolish to discard the existing machinery. Rather, we ought to guide the operators in the more skillful use of that machinery and hope for a bit more tolerance from those to whom its wares are exhibited.

ALVIN L. GOLDMAN.

*University of Kentucky.*

CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY. By Maynard E. Pirsig. St. Paul: West Publishing Co., 1965. Pp. xxvii, 388. \$10.00.

This book, though it bears a new title and makes no reference in the preface to earlier editions, is a third edition of the author's earlier work, *Cases and Materials on Legal Ethics*,<sup>1</sup> which was designed as a short supplement to the author's larger work, *Cases and Materials on Judicial Administration*.<sup>2</sup> The first edition was prepared for use in a one semester hour course of 15 to 20 class hours, to be followed by a course of greater length on judicial administration. The stated task of the first edition was to provide information and background valuable for the later, larger study of judicial administration in which the role of the legal profession would be viewed in the more encompassing light of the principles, techniques, methods and personnel employed in the administration of justice.

I cannot find that the first edition was ever reviewed. It was a thin book (208 pages of large type compared to 211 pages of smaller, double column type in the second edition and 388 pages in the third edition) consisting of 41 case opinions, together with the author's short notes between cases, and 11 opinions of the A.B.A. Committee on Professional Ethics and Grievances. It contained only three brief selections from articles and books of other authors.

The first edition was quite inadequate for use in a legal profession course designed to stand by itself rather than as an introduction to a later course that

<sup>25</sup> Judge Hays does note two possible alternatives to arbitration—labor courts based on the model of Germany, Sweden or Denmark, or a Simplified Procedure for Court Determination of Disputes based on the New York model. Pp. 116-118.

<sup>1</sup> Published 1949.

<sup>2</sup> Published 1946.