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Labor Arbitration: A Dissenting View, by Paul R. Hays (1966)

Robert S. Hunt
University of Washington School of Law

LABOR ARBITRATION: A DISSENTING VIEW. By Paul R. Hays. New Haven: Yale University Press 1966. Pp. vii, 125. $4.50.

The argument of this small book may be briefly summarized: First, the Supreme Court, having misread or inadequately comprehended the writings of the late Dean Harry Shulman and of Professor Archibald Cox, has adopted a romantic and, on the whole, inaccurate view of the role of labor arbitration in the conduct of industrial relations, and has wrongly elevated arbitration to its present preferred position in our national labor policy. Second, only a "handful" of arbitrators possess, "like Shulman and Cox," "the knowledge, training, skill, and character to make them good judges and therefore good arbitrators"; the remainder, who decide "literally thousands of cases every year," are "wholly unfitted for their jobs" and lack "the requisite knowledge, training, skill, intelligence, and character."[1] Third, given this deplorable state of affairs, it is outrageous to expect federal and state judges (all of whom presumably possess the "requisite knowledge, training, skill, intelligence, and character" to decide the cases mishandled by arbitrators) routinely to enforce either agreements to arbitrate or awards rendered pursuant to such agreements. Finally, unless some restraints are put upon the unfettered and grossly abused powers of arbitrators under private collective agreements, the courts ought to refuse to enforce either agreements to arbitrate or awards rendered pursuant thereto. Alternatively, we might "set up in this country a system of labor courts after the model which has been so successful in countries like Germany, Sweden, and Denmark."[2]

Conceding that his is "A Dissenting View," Judge Hays has nevertheless donned the armor of righteousness and has pursued his subject "without fear and without research." His asseverations about the "fatal shortcomings of arbitration as a system for the judicial administration of contract violations" are based largely "upon observation during twenty-three years of very active practice in the area of arbitration and as an arbitrator, and upon the hints I pick up in the literature here and there. . . ."[3] The flaws of the system upon which he delights to dwell—incompetent and corrupt arbitrators; collusive arrangements between labor and management designed to hoodwink innocent workers; excessive delays; outrageous costs—are individually and collectively so reprehensible that one is compelled to wonder how professor-

[1] P. 112.
[2] P. 116.
[3] P. 111.

arbitrator Hays permitted himself to participate actively in this sordid process for twenty-three years. Whether it was his elevation to the place he now occupies on a distinguished court, or the Supreme Court's ultimate act of folly in the *Steelworkers Trilogy*,[4] or other causes that turned him from the path of error we cannot know; but his rhetoric is redolent of the moral fervor one associates with publicly repentant sinners and reformed drunkards.

The book, presented originally in three Storrs Lectures at the Yale Law School in 1964, consists of three chapters, dealing respectively with the law, the practice, and the future of labor arbitration. The chapter on the law is an accurate, lucid exposition which, although critical of the Supreme Court decisions involving arbitration, demonstrates, nevertheless, that the lower courts retain and still exercise limited powers to refuse to compel arbitration, absent an agreement requiring it, or to deny enforcement of an award that plainly exceeds the arbitrator's authority.

The chapter on practice is an ill-tempered, rather gossipy tirade, replete with unwarranted inferences and unfair accusations supported by references from relatively few sources and by quotations frequently cited out of context. One example will suffice. Judge Hays cites an article by this reviewer[5] as follows:[6]

> Aaron says that an "arbitrator may unduly prolong a hearing by failing to maintain decorum, by refusing to work more than a few hours a day or by intruding persistently in the presentation of the case by the respective parties," and that "some arbitrators take too much time or, what is worse, charge for more time than they have spent."

The full context in which these statements were made is as follows:[7]

> An arbitrator may unduly prolong a hearing by failing to maintain decorum, by refusing to work more than a few hours a day or by intruding persistently in the presentation of the case by the respective parties. These things do happen, but not very often; an arbitrator guilty of such offenses is not likely to become overworked. In my experience most delays are caused by the parties, and the principal reason is their failure to agree in advance upon the precise issue to be decided and upon various procedural details. Having checked with a number of my colleagues, I find that most of us have on many occasions been forced to sit by for

[4] 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).
[5] Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605, 610 (1959).
[6] P. 67.
[7] Aaron, *supra* note 5, at 610.

> half a day or more while the parties sought to agree on the terms of a submission or wrangled about time limits for filing of briefs or about the use of a transcript. . . .
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> It cannot be denied that some arbitrators take too much time or, what is worse, charge for more time than they have spent. There is no excuse for such practices, just as there is no place in the profession for those who engage in them. Fortunately, the number of such offenders is relatively small—much too small to explain some of the impracticable schemes that have been suggested recently to restrain the alleged avarice of arbitrators.

Without doubt, there are dishonest and incompetent arbitrators, just as there are dishonest and incompetent lawyers and judges. Few would agree with Judge Hays' implicit conclusion, however, that the overwhelming number of practicing arbitrators are knaves or fools; and those who entertain honest doubts on this matter are not likely to be edified by Judge Hays' disingenuous handling of the source material.

On the question of sources, Judge Hays deplores the "surprising lack of objective factual studies"[8] about arbitration, and also the "undiscriminating praise which has been heaped on labor arbitration since World War II." The reason, he suggests, is that "few besides arbitrators have made any attempt to evaluate the process,"[9] and he urges "frank and thoughtful studies" written by the "clients" of arbitration.[10]

These comments are among the most surprising in the book. First, it is hardly remarkable that most books on arbitration are written by arbitrators, just as most books on law and the judiciary are written by legal scholars, judges, and lawyers—not by their "clients." In addition, Judge Hays appears not to have made even the most cursory review of the literature of labor arbitration. Descriptive and statistical studies, as well as critical articles, abound, and some of the most outspoken attacks on both the system of labor arbitration and on arbitrators themselves by their "clients" have been published in the Annual Proceedings of the National Academy of Arbitrators. Indeed, I know of no other group of specialists who seem to take such perverse delight as do arbitrators in examining their own real or imagined deficiences in private sessions and inviting criticism from others in public meetings.

Judge Hays' two proposals for reform are both interesting; but the

[8] P. 38.
[9] P. 59.
[10] P. 38.

first is impracticable, to say the least, and the second is premature. Prior to *Lincoln Mills*,[11] a good argument could have been made—and was made by Harry Shulman—that the courts ought to keep hands off the arbitration process.[12] After all, if an employer or union has to go to court to enforce either a promise by the other to arbitrate or an award that both parties had previously agreed to accept as final and binding, it is apparent that the arbitration function is not operating as the parties presumably intended. It might be better, therefore, to leave them to their own devices, the probability being that they will either learn to make arbitration work or will resort to the strike and the lockout to settle their disputes. *Lincoln Mills* and the *Steelworkers Trilogy*, however, rejected that suggestion, and most representatives of labor and management are apparently reasonably satisfied with the result. Demands to "throw the rascals (*i.e.*, the arbitrators) out" and scrap the whole system are hardly an expression of the general will.

The second proposal—to set up a system of labor courts "which have been so successful" in other countries—is followed by a footnoted suggestion to "see" an article by Professors Russell A. Smith and Dallas L. Jones.[13] Because I was unaware that the labor court systems in Germany, Sweden, and Denmark had been so successful, or that they had received the imprimatur of these two authorities or other American scholars, I checked the reference. What Smith and Jones said was this:[14]

> But we seriously question whether the risk of improvident, unsound, or insupportable decisions, either on issues of arbitral authority or on the merits of the issue of contract interpretation or application—and such risk there undoubtedly is—should be "remedied" through increased availability of resort to the courts, at least as our judicial system is now constructed in relation to such questions. Whether a separate set of federal "labor courts" might be a more appropriate answer, perhaps even to the exclusion of private arbitration as in some other countries, is a different question which we will not explore here.

In a lengthy footnote following the above-quoted passage, the two authors list a number of books and articles by European and American authors on the "use of labor courts to decide contract interpretation

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[11] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
[12] Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955).
[13] Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV., 1115 (1964).
[14] *Id.* at 1121-22.

matters . . . in France, Germany, and some of the Scandinavian countries."[15] The authors did not assert, nor is there any consensus reflected in the authorities cited in the footnote, that these courts have been as successful as Judge Hays claims. Indeed, the task of critically evaluating the experience with labor courts in these countries and its relevance, if any, to the American scene remains to be done.

On the subject of work remaining to be done, it is important to recognize that although Judge Hays has not convincingly documented his attacks on arbitration and arbitrators, a substantial minority believes or suspects that there may be some factual basis for his position. A more searching and objective inquiry into the arbitration process, preferably by a research team including persons not immediately involved as arbitrators, could perform a useful public service. No responsible critic has responded to Judge Hays' polemic by questioning his right to challenge the social utility of arbitration; just as no one familiar with his distinguished career as a law teacher, scholar, and jurist has doubted his qualifications to discuss the subject. What is so disappointing about this unfortunate book is that it represents the triumph of an unexplained rancor and irascibility over reason and fairness.

Benjamin Aaron*

[15] *Id.* at 1122 n.11.

* Professor of Law and Director, Institute of Industrial Relations, University of California, Los Angeles; Fellow, Center for Advanced Study in the Behavioral Sciences, Stanford, California (1966-1967). A.B., 1937, Michigan; LL.B., 1940, Harvard. Member, Illinois Bar. Author, LEGAL STATUS OF EMPLOYEE BENEFIT RIGHTS UNDER PRIVATE PENSION PLANS (1961). Principal Editor, THE EMPLOYMENT RELATION AND THE LAW (1957); Co-editor, LABOR RELATIONS AND THE LAW (2d ed. 1960).