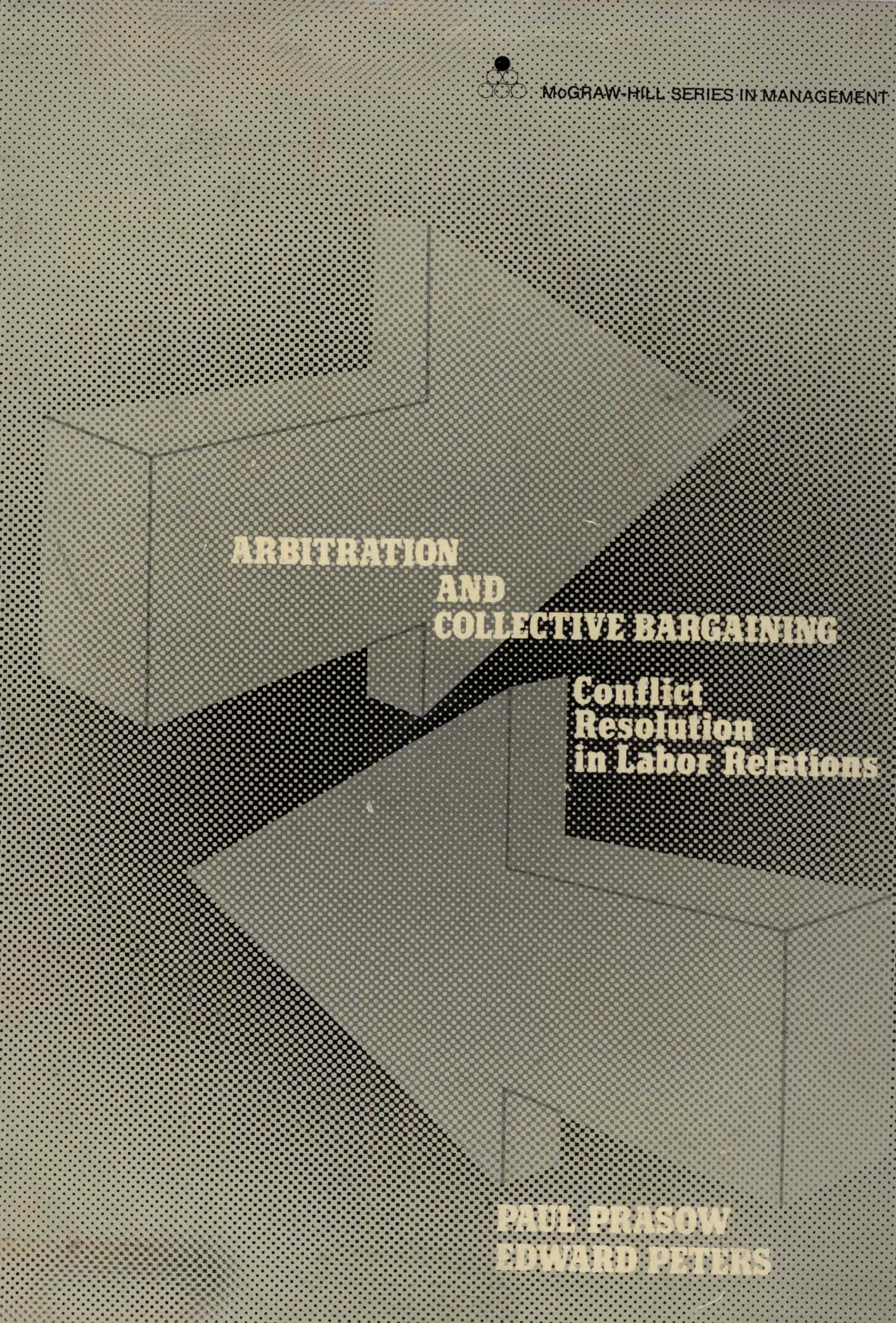
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AND
COLLECTIVE BARGAINING
Conflict
Resolution
in Labor Relations
PAUL PRASOW
EDWARD PETERS

ARBITRATION AND COLLECTIVE BARGAINING:

CONFLICT RESOLUTION IN LABOR RELATIONS

Second Edition

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FOREWORD

Arbitration has become a fundamental element in day-to-day North American industrial relations. Virtually all union contracts have some form of grievance procedure and the vast majority of these terminate with arbitration. The Federal Mediation and Conciliation Service reports appointments of almost 14,000 arbitrators in fiscal year 1980, up from about 5,300 in 1970. Students of industrial relations in universities throughout the United States and Canada are taught that arbitration is the normal final step in disputes arising out of the interpretation of union contracts.

Yet what seems normal today was not always the standard mode of conducting labor-management relations. Fifty years ago, many union contracts were signed without arbitration clauses. Where such clauses existed, the distinction now made between interest arbitration and rights arbitration was often unclear. One hundred years ago, it would have been difficult to find someone who could distinguish the concepts of collective bargaining, conciliation, and arbitration. Nor does one have to go back in history to discover the uniqueness of our current system. In many countries today, collective bargaining of some type occurs but the use of arbitration is rare.

The development of arbitration in North America is a product of a sequence of historical, economic, social, and legal forces which fostered the development of contracts of fixed duration and their related limits on the right to strike during the contract. Although evolution is gradual, the balance of forces continues to change. During the 1970s, economic pressures on many unionized employers increased, collective bargaining continued to spread into the public sector, public policy in the labor market tilted toward such areas as equal employment opportunity and occupational safety and health, and new court decisions affecting arbitration continued to be handed down.

Books on arbitration must evolve with the arbitration system. The previous edition of the Prasow and Peters text, published in 1970, brought to the student of arbitration a comprehensive view of the institution as it existed at that time. The new edition provides an update covering many critical developments of the 1970s and early 1980s. But it continues to present its material in the attractive, readable style enjoyed by its first-generation audience.

The Prasow and Peters text can be viewed as three books in one. First, it is a "how to" book: it explains the technology of arbitration to the reader. Second, it is a "why" book: it explains how the technology developed and why it makes sense in today's collective-bargaining system. Third, it is a "where to" book: it raises the important questions of the future and gives the reader a sense of the direction of evolution. In an ever-changing environment, what more could be asked of a book on arbitration?

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PREFACE

A number of years have elapsed, necessitating several printings, since the first edition of this work was issued in the year 1970. The decade of the 1970s featured an ample number of arbitral landmarks, but none as auspicious as the one which had ushered in the previous decade. We refer, of course, to the Steelworkers Trilogy, issued by the U.S. Supreme Court in the year 1960—a trio of decisions hailed by many as the Magna Carta of arbitration in the United States.

As for the 1970s, even a cursory survey of arbitral developments into the early 1980s reveals the landmark case of that period to be *Alexander v. Gardner-Denver,* issued by the High Court in 1974. (See Appendix B.) The impact of Gardner-Denver external law reverberated within a private system of arbitration wherein the trier of fact had previously been instructed by the Trilogy that "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." (*Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S., 593, 597.)

The Gardner-Denver ruling now permits an employee to file a discrimination grievance under the collective agreement and simultaneously or

later (in the event of an adverse arbitration award) file a claim in court alleging a violation of Title VII of the Civil Rights Act of 1964.

The Court's ruling was a pronounced departure from the trilogy principle of support for finality of arbitral awards, allowing for legal challenges of the award on limited procedural grounds.

Needless to say, the High Court's ruling received a decidedly mixed reception among arbitrators. There were those who voiced an alarmist concern that the new ruling could well be a first step by a more conservative Court to undermine and perhaps dismantle the trilogy. Others viewed Gardner-Denver as no more than an exception to the trilogy mandate, in keeping with the letter and spirit of the Civil Rights Act—an exception issued by a Court mindful of the turbulent events that had produced the Civil Rights Act.

The authors are inclined to the latter viewpoint, fortified in their leaning by the strong statement made by Chief Justice Warren Burger in an address to the American Bar Association. He called for greater use of private binding arbitration to settle complex business cases as well as disputes over probate and personal injuries, divorces, and child custody as a way to relieve the growing civil backlog in the nation's courts.*

Since the first edition projected a theoretical analysis of the arbitration process based upon carefully selected empirical findings, it is only natural that this treatment in expanded form be continued in the new edition. The authors submit this revised work reiterating its fond hope that it represents a significant advance in the treatment of arbitral concepts and criteria. In addition to other revisions, three new chapters have been prepared for this second edition.

A thought worth underscoring: in preparing the material for revision and updating, the authors had to cope with a dilemma that is a familiar one with many textbook writers—a dilemma not nearly as often encountered by contributors of articles to scholarly publications. The difficulty arises when cases and problems are treated whose impact, however important, is temporary and becomes obsolescent in a very few years. There can be no question of the lasting significance and impact of Lincoln Mills and the Trilogy, but the lasting impact of many other developments that command attention at the time of preparing a text or its revisions are more usually unpredictable. In most instances, at least a few years must elapse before the permanence of a contemporary development can be validly and realistically gauged.

Chapter 1 examines the essence of the collective-bargaining relationship

* Reported in the *Los Angeles Times,* Jan. 25, 1982.

in this country as contrasted with that prevailing in other industrially advanced nations. It shows historically how the collective agreement in the United States has changed from a brief series of broad general statements to the detailed legally enforceable document of today. It traces the development of judicial arbitration from the earlier process of consensus arbitration which predominated prior to World War II.

Chapter 2 focuses on the nature and scope of the arbitrator's authority in interpreting a written agreement. It stresses the critical nature of the submission agreement in limiting the arbitrator's authority and, defining precisely the issues to be decided. Also stressed is the role of the record made by the parties at the arbitral hearings.

Chapter 3 seeks to cast additional light on the entire concept of management's rights and obligations in the context of the bargaining relationship. The reserved rights theory of management is considered as a basic frame of reference, incorporating within it the doctrine of employer implied obligations. A concrete application of the reserved rights doctrine has been elaborated for classroom discussion.

Chapter 4 focuses primarily on development of the federal substantive law on labor arbitration. Included is a discussion of the Steelworkers Trilogy of 1960 and a review of later key High Court decisions affecting the legal status of arbitration. Reference is also made to the jurisdiction of state courts in this area of labor-management relations. An extensive analysis of the landmark Wiley case as it pertains to a so-called zipper clause has been added.

To our knowledge Chapter 5 constitutes the only systematic treatment of semantic principles as applied to arbitration and collective bargaining. A case analysis has been added which illustrates the futility of attempting to write contract language so absolute in formulation as to anticipate every conceivable problem that may arise. It serves as the basis for Chapter 6 and illustrates the progression from a philosophical discussion of semantic and linguistic principles involved in contract language to specific case studies demonstrating how these principles are utilized in actual arbitral situations.

Chapters 7 and 8 present an extensive treatment of the nature and role of past practice on contract administration and enforcement.

Chapter 9, entirely new, is designed to illustrate a number of cases and situations where modifications of and exceptions to the past practice rule and other standard criteria are called for. An introductory summary has been supplied as a guiding commentary.

Chapter 10 analyzes two methods of dealing with ambiguity in the written instrument. In one method the issue is disposed of substantively and

the ambiguity is resolved by a single conclusive determination. In the second, the ambiguity is treated on a case-by-case basis by an established mode of procedure which involves recurrent negotiations on individual claims during the life of the agreement.

Chapter 11 is an in-depth analysis of the importance of precontract negotiations and their influence on the resolution of subsequent questions of interpretation and application.

Chapter 12 goes to the heart of the institutional roles of the parties in collective bargaining. It emphasizes a theme recurrent throughout the entire work, namely, that the employer acts and the union reacts—that management exercises the right of administrative initiative and the union is free to challenge its decisions. The Torrington case is ideally suited to illustrate fundamental premises of the nature of collective bargaining which are not infrequently lost sight of by the parties.

Chapter 13 is a pragmatic adaptation of the legal rules of evidence and burden-of-proof concepts as they have been applied in the quasi-judicial arbitration process. Added in this chapter is the important thesis that a singular similarity exists between the function of the arbitrator and a legally constituted administrative tribunal. Decision making by such an administrative tribunal serves as a realistic model for arbitral decision making and vice versa.

Chapter 14 analyzes the essential criteria developed by arbitrators to review managerial decisions affecting an employee's status. Cases involving discipline, discharge, and promotion are included to illustrate the three most common tests used by arbitrators to determine whether managerial discretion has been exercised unreasonably.

Chapter 15, written for this edition, analyzes the fundamental guidelines for interest arbitration and fact-finding. Also studied is the nature of decisional thinking by the trier of fact.

Chapter 16, newly written for the second edition, comprises a collection of legal and procedural developments in the arbitration process. Included is a discussion of two landmark High Court rulings of the past decade: Gardner-Denver and Boys Markets. In addition, the Collyer-Spielberg doctrines of the NLRB are analyzed in light of their controversial reception. Also included is an outline discussion of the duty of fair representation. Significant aspects of final-offer arbitration are examined by an expert. Expedited arbitration, its uses and limitations, are given a searching analysis.

The work ends with a colloquy between the authors which seeks to illuminate some of those tangible forces that contribute to the development and acceptability of an arbitrator—typical of the few hundred persons who do most of the labor arbitration in the United States.

In summary, this book presents a unified theory of rights arbitration based upon standard criteria which draw their sources from three areas: (1) commercial contract law, (2) legal rules of evidence, and (3) principles of enlightened personnel management as pioneered by such persons as Chester I. Barnard, Mary Parker Follett, Elton Mayo, and Douglas MacGregor.

The organization of the material lends itself to guiding flow charts. Two such charts have been prepared by Edward Peters, aided by invaluable suggestions from Paul Prasow. One flow chart, presented on both front and back endpapers, outlines basic principles and key steps in grievance processing. *Most important are the page and chapter notations which systematically elaborate and illustrate these key steps.*

Also presented, on page 312, is a flow chart of interest dispute procedures discussed and illustrated in Chapter 15.

As for the Appendixes, note should be made of the articles in Appendix C, especially the public sector study made by the Honorable Joseph Grodin, Presiding Justice of the California Appellate Court.

The subject matter has been presented in a manner which we trust will be of maximum usefulness to students and scholars, as well as to active participants in the arbitral process.

The order of authorship does not reflect a difference in contributions to this study, which has truly been a joint endeavor.

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PAUL PRASOW
EDWARD PETERS

CONTENTS

CHAPTER ONE

THE COLLECTIVE-BARGAINING AGREEMENT

■ *An examination question sometimes posed to labor relations students is:* "More than twice as many unfair labor practice charges are filed with the National Labor Relations Board by unions against employers as are filed by employers against unions. *What is the reason for this disparity?*"

Certainly unions are not twice as virtuous as employers. The correct answer lays bare the essence of the collective-bargaining relationship—that the employer *acts* and the union *reacts.* The employer does not go to the NLRB and ask permission to make changes affecting wages, hours, and working conditions. He is much more likely to call his attorney, who might advise him as follows: "If you do it *this* way, you could be on thin ice with the Labor Board; if you do it *that* way, you will be on solid footing." It is then up to the employer to decide which way to proceed on his own. If he anticipates opposition, especially from a strong or militant union, he may consult with the union representatives and attempt to win them over.

However, assuming the union withholds its acquiescence, even objects strenuously, the employer, if he wants to inaugurate the proposed changes, is free to do so unilaterally. The burden then shifts to the union to file charges with the NLRB or, if there is a binding contract, to invoke the

grievance and arbitration provisions. If the collective agreement is open for modification, the union might even resort to economic sanctions such as strikes, picketing, and boycotts. It cannot be overstressed, however, that it is the union which is the moving party, the union which attempts to alter the status quo—the status quo, as defined by Webster, being "the existing state of affairs at the time in question."

Another examination question illustrates the same point: "How would you answer an employer who says: 'All through these contract negotiations I have made one concession after another and the union has not offered me a single thing in return. Is *this* what you call collective bargaining?' " To answer his question one must first consider what a union can really offer the employer in exchange for improvements in wages, hours, and working conditions. Can it give up old benefits secured in past negotiations for new, improved benefits? Obviously not. Such an arrangement would transform collective bargaining into a process where the employer takes back with one hand the equivalent of what he has offered with the other.

Assuming that the employer is not trying to revamp or rescind an old established working condition,[1] there are basically only two things the union can offer. It can give up all or part of its other negotiating demands; and above all, the union, for the duration of the current contract term, can give up its right to strike. And that, stripped of pretexts and platitudes, is the fundamental bargain struck by the parties. The union signs away its right to strike for a fixed period of time in exchange for a contract guaranteeing acceptable minimum rates of pay and working conditions.[2]

AN AMERICAN PHENOMENON

This bald exposition of the inner dynamics of collective bargaining is no more complete as a description of the labor-management relationship than "skeleton" is as a description of a human organism. It is intended only to

[1] The 1960 agreement between the West Coast Longshoremen's Union and the Pacific Maritime Association is a case in point. The longshoremen yielded long-established working rules governing size of gangs and severely restricting laborsaving methods and equipment in cargo handling in exchange for a mechanization fund of 5 million dollars annually for 5½ years.

[2] On this point, Morrison Handsaker observes that the union signs away its right to strike only if the arbitration clause and the no-strike clause are unlimited. In a considerable number of cases certain types of grievances are (unwisely in his view) excluded from the arbitration process and therefore also from the application of the no-strike clause. Disputes over production standards in the auto industry constitute one well-known example of the limited arbitration clause and the limited no-strike clause.