

1978

Value Judgments in Arbitration: A Case Study of Saul Wallen. By Brook I. Landis

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Recommended Citation

Schmertz, Eric J. and Sirefman, Josef P. (1978) "Value Judgments in Arbitration: A Case Study of Saul Wallen. By Brook I. Landis," *Hofstra Law Review*: Vol. 6 : Iss. 2 , Article 9.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol6/iss2/9>

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BOOK REVIEW

VALUE JUDGMENTS IN ARBITRATION: A CASE STUDY OF SAUL WALLEN. By BROOK I. LANDIS.* Ithaca, New York: New York State School of Industrial and Labor Relations, Cornell University, 1977. Pp. xiv, 184. \$10.00.

*Reviewed by Eric J. Schmertz** and Josef P. Sirefman****

As the sheen of grievance arbitration, so burnished by the Supreme Court Trilogy decisions,¹ is becoming dulled by increasing instances of infinality, by greater judicial and administrative agency interest in reviewing awards, and by a heightened judicial concern for arbitrability in the public sector, a tendency may exist to look back with nostalgia to the glory days of private sector labor dispute settlement. Brook I. Landis's *Value Judgments in Arbitration: A Case Study of Saul Wallen* can serve as a guide to "the way it was."

Modern labor arbitration in the private sector, so-called "rights" arbitration, draws its main substantive and procedural precepts from the work of arbitrators active primarily from World War II through the 1960's. By means of thousands of awards and opinions ranging over a broad spectrum of issues, these private judges shaped and molded the private law and more sharply defined the rights of management and union. This process was not accom-

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1. *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). These decisions, commonly referred to as the Trilogy, dealt with the appropriate role of the courts in arbitration. For a discussion of these decisions, see pp. 9-14.

plished by manifesto, but rather through careful evaluation of actual controversies on their individual merits. This was a technique which gained the confidence of the parties to the extent that over ninety percent of all private sector collective bargaining agreements contain some sort of grievance arbitration clause.

Protean among those shapers and molders was the late Saul Wallen. Upon his graduation from New York University in 1933 until his death in 1969, he was totally immersed in labor-management problems. During World War II, he was chairman of the National War Labor Board's Boston office. As Professor Landis summarizes:

In 1946, Wallen began his career in Boston as a full-time labor arbitrator and mediator, a career that covered 22 years and approximately 6,200 separate grievance arbitrations. He became the permanent arbitrator for several unions and companies, including the Ford Motor Company and the United Auto Workers, General Motors and the United Auto Workers, General Tire Corporation and the United Rubber Workers, B.F. Goodrich and the United Rubber Workers, Firestone and the United Rubber Workers, Eastern Airlines and the International Association of Machinists, Sylvania Electric and the International Union of Electrical Workers, and the Massachusetts Leather Association and the Leather Workers' International Union. He was a charter member of the National Academy of Arbitrators and was its president in 1954.²

Wallen was sometimes controversial in his views, but was always respected and admired for his experience and sincerity. Throughout his long career, he maintained acceptability by many diverse parties. In 1966, he became an Impartial Member of the New York City Office of Collective Bargaining. At the time of his death, Wallen was Director of the New York City Urban Coalition.

Beyond the massive body of decisions and opinions he produced, Wallen was the author of a number of books, a frequent contributor to journals and reviews, and an outspoken champion of the grievance arbitration process. Wallen's personal papers and case files were contributed to the Labor-Management Documentation Center at Cornell University's New York State School of Industrial and Labor Relations' Martin P. Catherwood Library; this gift has generated a number of books and studies, including Professor Landis's work.

2. P. 21 (footnote omitted).

Professor Landis's interest in Wallen, however, stems only partially because the documentation is there.³ As Landis briefly explores in Chapter 1, "The Historical Link," modern arbitration has moved away from the earlier policymakers, the "consultants," who applied "their own expertise or ideas of justice,"⁴ toward arbitration as a quasi-judicial process; this process views the arbitrator as an adjudicator, ever mindful of the restraints drawn upon his powers by the contract, who addresses only the "narrowly defined issue submitted"⁵ and possesses the discipline to limit his consideration solely to the material presented in an adversary proceeding. What then can explain Saul Wallen's acceptability as an arbitrator who had very definite ideas about the social values underlying the relations between management, employees, and unions, and who was not reticent in espousing those values or in consistently and openly applying them in deciding actual disputes?

Landis initially isolates those crucial social values that Wallen claimed to be at the heart of his approach. This isolation presented little difficulty for, as the author observes: "Saul Wallen was not a private man; in his extensive career of public service, he placed himself on the record on most of the significant social issues of his time."⁶ During his long career, "he outlined the goals that an arbitrator, as a participating member of industrial society, should advance."⁷ According to Landis: "Wallen was particularly concerned with considerations of productive efficiency, industrial relations stability, and equity, including the recognition of workers' growing human investment in their jobs and the public's right to safety of product and service."⁸ These values identified, Landis classifies Wallen's awards in terms of major issues raised and seeks to determine whether these decisions were indeed founded upon the goals and values Wallen advocated to reduce industrial strife and raise the levels of living and productivity.

A central portion of the study is therefore devoted to cataloging Wallen's awards, with varying fact patterns serving to reconcile

3. See p. xiii: "[I]t is hoped that [this book] can also stand as a fitting tribute to an outstanding man. Saul Wallen was unique. The parties who used him and his fellow arbitrators knew this. Future practitioners and students of arbitration also should be reminded of his contributions."

4. P. 11.

5. P. 12.

6. P. 22.

7. *Id.*

8. P. 164.

different outcomes on the same issue. As a result, the reader is made aware of the arbitrator's determinations on such matters as procedural and substantive arbitrability; contract interpretation, and associated points such as oral modification, discussions during negotiations, and past practice; management rights in product selection, manning subcontracting, and rulemaking; union and employee rights, including review of discharge and discipline; and, finally, the vital matter of remedies.

Through an analysis of how these central issues were determined, Landis is able to answer the first question he raises: whether Wallen actually used his "extracontractual" goals, that is, his personal values, in decisionmaking. Landis concludes:

Wallen often relied on personal values and his own expertise where no clear evidence of any contractual intent existed in cases on virtually all subjects. He also did not hesitate to rely on his own values and expertise even where considerable evidence of intent did exist if the plain words of the written agreement did not positively dictate a solution and if the issue at hand had important implications for a firm's economic well being, the bargaining ability of a union, an individual worker's safety or job security, or public safety. In a very few exceptional instances, he was even willing to ignore the agreement's clear written terms where the result of those terms was repugnant to his personal values.⁹

In 500 cases which Wallen decided involving a total of 525 clear statements of these extracontractual values, Landis indicates by tabulation that in 206 cases Wallen considered and evaluated efficiency and productivity; in 220 cases, Wallen considered and evaluated equity and justice; and, in 99 cases, Wallen evaluated extracontractual considerations of industrial relations stability.¹⁰ Moreover, Landis demonstrates that absent specific limiting contractual language, Wallen believed that extracontractual considerations should have serious weight in an arbitrator's decisionmaking process.

Perhaps the most consistent evidence of Wallen's attitude is found in the chapter discussing remedies. While many arbitrators view themselves as "solving only the precise and limited issue placed before them,"¹¹ Landis suggests that Wallen often believed that his approach to fashioning relief was the reason he was selected

9. *Id.*

10. *See* Table p. 166.

11. P. 146 (footnote omitted).

by the parties over other arbitrators. In Wallen's view, the parties expected him to draw upon his vast experience, not only to end the dispute, but also to project its ramifications into the future and to furnish the parties with a step-by-step scheme for avoiding later problems, if he viewed such a scheme as appropriate. In one of his decisions, Wallen depicted his function as "not only to provide answers in specific cases but also to develop principles and approaches to guide the parties when they discuss future grievances and make their friendly settlement easier."¹² As Landis states:

Wallen behaved as a consultant to the parties in many instances and was concerned with the future conduct of the parties. . . . He . . . did not hesitate to exercise his remedy powers and order such solutions. His touchstone was not whether the agreement's terms pointed to a particular remedy so much as whether they prohibited that remedy. Where repeated violations of clear contract terms occurred, Wallen was not loathe to use threats and penalty remedies to insure future contract compliance.¹³

This approach leads to the second question: why Wallen's acceptability was not adversely affected, as some would have predicted, despite the well-publicized and not infrequent occasions when Wallen went extracontractual. Landis suggests two reasons. First, these values were "conservative values with which few businessmen or trade unionists would quarrel."¹⁴ Second, he applied them evenhandedly.¹⁵ Thus, Landis concludes that Wallen's career demonstrates that "competent arbitrators can allow certain personal values to influence their decisionmaking and still remain generally acceptable as an arbitrator,"¹⁶ and that "arbitrators can play a large role in influencing the parties' future behavior through the creative and assertive use of remedy powers."¹⁷

Value Judgments in Arbitration has many virtues. It is clearly and concisely written. Although its comprehensive treatment of the results of many individual cases is compressed into relatively few pages, it remains interesting reading. From its pages emerges the picture of a major arbitrator who knew what he wanted the

12. P. 148 (quoting *General Tire & Rubber Co. v. United Rubber, Cork, Linoleum, and Plastic Workers of America* (Jan. 24, 1949) (Wallen, Arb.)).

13. Pp. 164-65.

14. P. 171.

15. *Id.*

16. P. 167.

17. *Id.*

process to accomplish and who effectively moved it in that direction. As with all worthwhile studies, the book raises questions the reader wishes to explore further. As indicated by a variety of statements in the book, these questions have also occurred to Professor Landis, who understandably preferred to limit his study to Wallen. Yet, given Landis's finding that Wallen's values were indeed conservative and generally acceptable, their use becomes less convincing as evidence that he was an extraordinary arbitrator. Rather, one could argue from this finding that Wallen was less a policymaker, less a "lone wolf," than a conveyer of a developing consensus. In other words, by studying only Wallen, one may not learn much about what made Wallen a great arbitrator.

In the post-World War II era, grievance arbitration came of age. During this period, the perception of the collective bargaining agreement moved away from residual rights toward an implied obligation theory, permitting arbitrators to apply the rule of reason more freely to many situations. The arbitrator's purpose was to create a climate in which production could be maximized, while at the same time recognizing the dignity of the individual and appreciating the representative nature of the union. It is not just the impact of individual arbitrators, although important, which is dealt with, but something much broader: a national movement from one set of policy considerations toward different policies, objectives, and emphases. Viewed in this historical context, the goals of efficiency and productivity, equity and justice, and stability of industrial relations were not the unique values of certain thinkers, but universally assimilated doctrine. A new relationship between labor and management was developing. The era may have permitted, indeed propelled, all activist arbitrators into translating these values into solutions to actual work disputes.

Thus, it would be useful to have fuller excerpts from Wallen's opinions placed beside equally full excerpts from the opinions of other leading contemporary arbitrators on similar fact patterns and issues, so as to determine whether the extracontractual values were in fact part of the prevailing atmosphere. Where significant differences appeared, detailed analysis of the reasoning and support marshaled by each point of view would be instructive. Although Landis suggests that such an analysis would reveal "a very wide disparity among arbitrators,"¹⁸ this disparity may not necessarily exist. Any seeming disparity may well be based on preference for

18. P. 140.

different phraseology, rather than upon fundamental disagreement. For example, the author notes that two other arbitrators, Paul Prasow and Edward Peters

advocated that management should have a free hand to pursue efficiency not as a social good on its own, or as a guarantee of the future of the firm as a source of goods and jobs, as Wallen advocated, but rather as a means of justly protecting the large capital investment of the stockholders, an aspect of equity not considered, or at the least not relied on, by Wallen. Here, while the result was the same, the value considerations varied greatly.¹⁹

As Gertrude Stein once so aptly stated: "A difference to be a difference must make a difference." Justly protecting the stockholders' capital investment should in most instances "guarantee . . . the future of the firm as a source of goods and jobs,"²⁰ and therefore must be the same "social good on its own"²¹ that Wallen contemplated.

Did Wallen's views change with the passage of time? The book contains passing references to changes, but it would be useful to know what prompted the relevant reconsiderations and whether the changes tended to conform to a changing arbitral consensus, or preceded it.

Many situational concepts propounded by Wallen and his generation of arbitrators have become an integral part of contemporary grievance arbitration. However, once again the times have changed. The relationship between labor and management in the private sector is no longer a new one. These groups are now seasoned partners, writing contracts that have become more comprehensive. There is sufficient distance from the Great Depression so that some critics protest the absence at all educational levels of any substantial reference to that prolonged national trauma. Despite continuing fluctuations in the business cycle and chronic inflation, the average level of living has increased dramatically since the post-World War II era. Transfer payments have proliferated in type and amount. In view of these significant social changes, it would be useful to explore whether Wallen's personal style would be as acceptable now as it was in the past. Have the expectations of the parties concerning the arbitrator's role changed appreciably?

19. *Id.* (footnote omitted).

20. *Id.*

21. *Id.*

Finally, Professor Landis's own evaluation of particular positions taken by Wallen would be of interest. Admittedly, the study was not intended to accommodate the author's personal opinions. Nevertheless, another insight into these perennial arbitration issues is always welcome.

It is the hallmark of a worthwhile study that it succeeds in its limited mission, yet leaves the reader interested in continued exploration of the issues raised. Still, there remains the tantalizing question: Was it his personal values or his personal style that accounted for Saul Wallen's tremendous success as an arbitrator?