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MANAGEMENT AND LABOR APPRAISALS AND CRITICISMS OF THE ARBITRATION PROCESS: A REPORT WITH COMMENTS

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ALTHOUGH arbitration as a means of resolving disputes arising under collective bargaining agreements has received widespread acceptance in this country,[1] in recent years there has been some evidence of increasing criticism of the process.[2] As part of a research project dealing with the impact of the 1960 Supreme Court decisions in the *Warrior & Gulf* "trilogy"[3] and the 1962

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1 Professor R. W. Fleming in his paper, *The Labor Arbitration Process: 1943-1963*, given in January 1964, at the 17th Annual Meeting of the National Academy of Arbitrators reported: "I am told that an as yet unpublished study by the BLS will show that in 1961-1962 approximately 94 per cent of the agreements examined [presumably in the BLS files] contained grievance arbitration clauses."

2 See generally Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605 (1959); Ferguson, *An Appraisal of Labor Arbitration—A Management Viewpoint*, 8 IND. & LAB. REL. REV. 79 (1954-55); Iserman, *The Arbitrator in Grievance Procedures: Is Arbitration the Way To Settle Labor Disputes?*, 35 A.B.A.J. 987 (1949); Katz, *Challengeable Trends in Labor Arbitration*, 7 ARB. J. (n.s.) 12 (1952); Manson, *Is Arbitration Expendable?*, N.Y.U. 12TH ANN. CONFERENCE ON LAB. 1 (1959); Murphy, *Arbitration: Evaluation of Its Role in Labor Relations*, N.Y.U. 12TH ANN. CONFERENCE ON LAB. 281 (1959); Platt, *Current Criticisms of Labor Arbitration*, ARBITRATION AND THE LAW vii (BNA 1959).

3 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). For the results of a preliminary survey on the impacts of these decisions, see Smith, *Arbitrability—The Arbitrator, the Courts and the Parties*, 17 ARB. J. (n.s.) 3 (1962), which is an abridgment of Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties*, 16 SW. L.J. 1 (1962). See also Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 U.C.L.A.L. REV. 360 (1962).

Other discussions of the "Trilogy" include Davey, *The Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME LAW. 138 (1961); Gregory, *Enforcement of Collective Agreements by Arbitration*, 48 VA. L. REV. 883 (1962); Hays, *The Supreme Court and Labor Law—October Term, 1959*, 60 COLUM. L. REV. 901 (1960); Levitt, *The Supreme Court and Arbitration*, N.Y.U. 14TH ANN. CONFERENCE ON LAB. 217 (1961); Meltzer, *The Supreme Court, Arbitrability, and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961); Wallen, *Recent Supreme Court Decisions on Arbitration: An Arbitrator's View*, 63 W. VA. L. REV. 295 (1961); Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471 (1962); *Symposium—Arbitration and the Courts*, 58 NW. U.L. REV. 466, 494, 521, 556 (1963).

Sinclair "trilogy,"[4] we decided to ascertain how parties are appraising the arbitration process. We report here the more significant results of this survey along with our evaluation of the criticisms and suggestions which were received.[5]

The two questions asked which evoked the responses upon which this article is based were:

(1) Are you generally satisfied with the arbitration process, or, given a choice, would you prefer leaving all issues of contract application to the courts, or to collective bargaining (including strike action)?
(2) What suggestions do you have for improving the arbitration process?

A. SUMMARY OF OPINIONS

By an overwhelming majority our respondents indicate that they prefer the arbitration process to the available alternatives as a method of ultimate resolution of contract application (grievance) disputes. Only some five percent of our "management" respon-

4 Drake Bakeries v. Local 50, 370 U.S. 254 (1962); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962); Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962). For discussions of these cases, see Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027 (1963); Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292, 337-43 (1963); Burstein, *Labor Arbitration—A Management View*, N.Y.U. 16TH ANN. CONFERENCE ON LAB. 297, 317-18 (1963); Dannett, *Norris-LaGuardia and Injunctions in Labor Arbitration Cases*, N.Y.U. 16TH ANN. CONFERENCE ON LAB. 275 (1963); Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause*, 48 A.B.A.J. 914 (1962); Marshall, *Enforcing the Labor Contract*, 14 LAB. L.J. 353, 356-57 (1963); Marshall, *Section 301—Problems and Prospects*, LABOR ARBITRATION & INDUSTRIAL CHANGE 146, 151-55 (BNA 1963) and discussions by Frederic D. Anderson at 159-65 and David Previant at 172-74; Pfister, *Arbitration and the Supreme Court 1962 Spring Term*, 4 ARIZ. L. REV. 200 (1963); Stutz, *Arbitrators and the Remedy Power*, LABOR ARBITRATION & INDUSTRIAL CHANGE 54, 64-67 (BNA 1963); Sullivan & Tomlin, *The Supreme Court and Section 301 of the Labor Management Relations Act*, 42 TEXAS L. REV. 214, 228-30, 239-41 (1963); Vladeck, *Injunctive Relief Against Strikes in Breach of the Labor Agreement*, N.Y.U. 16TH ANN. CONFERENCE ON LAB. 289 (1963); Weiss, *Labor Arbitration and the 1961-1962 Supreme Court*, 51 GEO. L.J. 284 (1963); Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on Sinclair v. Atkinson*, 72 YALE L.J. 1547 (1963).

5 A total of 715 letters of inquiry were sent to management representatives (directors of industrial relations and labor counsels) or to independent attorneys representing management. There were 306 responses, 42 of which offered no assistance. Two hundred ninety letters were sent to union officials (international officers and general counsels) or to other attorneys representing unions. We received 90 responses, 13 of which offered no assistance.

The study was not conceived, however, as a statistical survey. We were concerned more with quality than with quantity and hoped to receive the considered judgment of knowledgeable people in the field. Our list of potential correspondents was developed from various sources, including members of the National Academy of Arbitrators. The names thus supplied were carefully reviewed, and to them were added others in an attempt to obtain adequate coverage both of industry and section of the country.

dents (including lawyers representing management) indicate a preference for resort to the courts, or a preference for exclusive reliance on the collective bargaining process including permissive strike action. Not a single union official respondent prefers either of such methods as an alternative to arbitration. Four attorneys representing unions indicate a preference for the collective bargaining-strike route alternative, but none prefers the route of litigation. A few respondents from each side indicate that there are instances in which the collective bargaining process, including possible strike action, might be preferable for "strategic" reasons, but they would still select arbitration as the end process for most disputes.

The reasons stated for preferring arbitration over judicial litigation of contract application issues are the traditional ones—court action is too slow, cumbersome, and expensive, as compared with arbitration, and arbitrators, by virtue of their "expertise," are better equipped than judges to decide such issues. The few who state a preference for the judicial process do so on various grounds. Some think the "traditional" views are factually incorrect.[6] Others make the invidious charge that arbitrators (or at least some of them) lack the "courage" to make clear-cut, firm decisions for fear of "losing business" and tend to "split" decisions. Some indicate dissatisfaction with the finality of the arbitrator's decision, and hence prefer the litigator's opportunity for appellate review. In part, those who express this view believe there is no effective way, as law and practice now stand, to limit the power of the arbitrator.

A few respondents, principally from the management side, who prefer collective bargaining, including potential strike action, over other methods of settling contract application issues, express some of the same kinds of dissatisfaction with the arbitration process

[6] One respondent states: "In a court of law you are reasonably sure of what the law provides before you initiate a lawsuit, and your main concern is whether you can introduce facts in support of your theory of law. In an arbitration proceeding you are just as unsure of your facts, but you are also unable to determine the law of your contract, and it makes little difference whether you are speaking of the general principles of arbitration law or the principles followed by a particular arbitrator. I am sure we are all aware of the fact that several nationally known arbitrators have decided the subcontracting question in separate cases on completely inconsistent theories."

We have some disagreement with our respondent to the extent he thinks there is more predictability or certainty as to "the law," even of contract interpretation, in judicial than in arbitration proceedings. In our multifarious judicial system, state and federal, instances of irreconcilable conflict between decisions are numerous, and even the highest appellate tribunals, including the United States Supreme Court, often increase areas of uncertainty by overruling, modifying, or qualifying previously established rules.

noted above, as well as the traditional reasons for rejecting the alternative of judicial litigation. Some frankly believe that management would do better with collective bargaining because unions would be less disposed to strike than to arbitrate in view of the financial loss involved in strike action and the political difficulties of obtaining membership approval of strike action, especially in the case of grievances important only to a single individual or to a small group within the bargaining unit. On the other hand, some of our union respondents indicate that this is one of the reasons they prefer arbitration to collective bargaining or to judicial litigation. They believe that individual claims would often have to be disregarded, and thereby contractual rights would become less meaningful, if the final resolution of such claims depended upon strike action or judicial litigation.[7]

A substantial number of our respondents not only prefer arbitration over the other available alternatives, but also indicate they are generally satisfied with the arbitration process as they now find it, and offer no suggestions for its improvement. On the other hand, many, although generally of the opinion that arbitration is the best of the viable alternatives, indicate dissatisfactions of various kinds, and hold that the process can and should be improved.

Criticisms range rather broadly. There is a very substantial concern, especially on the management side, with the scope of the arbitrator's power. This stems in part, but only in part, from the *Warrior & Gulf* trilogy, and has evoked interest in establishing some kind of arbitral "review." Many of our respondents express the desire to see improvements in arbitration procedure, including methods of selecting arbitrators and a reduction in the time and expense involved in arbitration. Overwhelmingly, our respondents who think things could be improved single out for special attention the arbitrator himself. They do not seem to share Mr. Justice Douglas's view, as expressed in the *Warrior* trilogy, that the arbitrator is possessed of extraordinarily superior talents, bordering on the occult, for dealing with the issues. Indeed, they would like to see him achieve a higher quality performance standard than they claim to have encountered. (Naturally, some arbitrators seem

[7] We agree that management would "gain," in a sense, by the elimination of arbitration in that unions probably would be disinclined to strike over some matters that would ordinarily be arbitrated. Accordingly, management would not be risking an adverse decision. But the "gain" in particular cases might be offset by an end product of severe employee and union dissatisfaction with the non-resolution of grievances, which could increase the intensity of strike action in those cases where such action is taken.

to have reached the pinnacle, but they apparently are considered to be few in number.)

Our general impression from the survey leads us to believe that arbitration is not seriously threatened, at least at this time, by any of its possible competitors; there is, however, a substantial amount of discontent with some aspects of the process. We think the criticisms and suggestions for improvement are sufficiently widespread to deserve careful consideration. Not all of the suggestions advanced will be discussed, because some lack anything resembling widespread support, and others, in our judgment, are specious or capricious. In what follows we shall undertake a review and appraisal of the suggestions made in the problem areas which appear to be of greatest concern or merit.

We conclude these introductory remarks with a note on the lighter side. We have gained the rather distinct impression from our survey that the lawyers involved in labor relations, whether representing management or unions, tend to be more concerned than "laymen" (industrial relations directors and union officials) about the inadequacies of the arbitration process. What this signifies we would not, if we could, attempt to say, since the coauthors are, respectively, a layman and a lawyer—more accurately, a labor economics professor and a law professor.[8]

B. MAJOR AREAS OF CONCERN WITH THE ARBITRATION PROCESS

1. *The Arbitrator's "Power" and the Finality of His Decision: Should There Be "Review" Procedures?*

There is no doubt that the scope of the arbitrator's authority, and the legal finality of his award, are matters of some concern. This concern is seen especially on the management side, although the range and depth of feeling on these matters varies widely. There likewise appears to be no doubt that this apprehension, although of long standing, has been substantially increased in consequence of the Supreme Court's 1960 decisions in the *Warrior & Gulf* trilogy. These decisions have been interpreted, correctly we think, as having sharply reduced the opportunity to make effective use of the courts in either an attempt to intercept the submission of

[8] We also do some arbitrating, and we issue the caveat that, since we believe in the process and are to some extent involved in it, our appraisals of the criticisms and suggestions offered by our respondents may be colored somewhat by a bias which we cannot escape. On the other hand, our participation in the process may perhaps serve the useful purpose of giving us a perspective or basis for judgment based on a certain amount of experience.

issues to arbitration or to upset the awards which result. One management representative stated:

> "In general, we are satisfied with the arbitration process. It provides a speedy, fair, and inexpensive means to resolve disputes. However, we are beginning to be concerned with the doctrine of non-reviewability (for all practical purposes) of arbitration decisions. The 1960 trilogy and subsequent decisions have placed upon arbitrators a degree of responsibility that tends to produce chills upon appropriate body locations. When one combines the doctrine of non-reviewability with the complex and explosive questions of plant relocation, vesting of seniority rights, etc., you have the potential ingredients necessary for unions and/or employers to begin considering new tribunals of original and/or appellate jurisdiction. In effect, I am suggesting that perhaps on the immediate horizon is the need for a middle ground regarding the reviewability of certain arbitration awards."

The fear, to put the matter baldly, is of the power of the arbitrator to render a "bad," non-reviewable decision. One result, as our survey shows, has been the expenditure of much energy and thought on possible collective bargaining answers to this problem, usually aimed at contract provisions limiting the scope of the arbitrator's authority, and, hopefully, increasing the opportunity for attack upon "improper" assumptions of arbitral authority. Another result has been to consider or undertake changes in the "law" through legislation which would increase the scope of judicial review of arbitration proceedings.

We shall not attempt here to report in detail on either of these two approaches to the "problem" of arbitral power. This will be done elsewhere. For present purposes it will suffice to make some very general, and to some extent obvious, observations. The collective bargaining approach to the problem presents the parties with an entire gamut of possibilities, ranging, on the one hand, from total rejection of arbitration, or provision for its use on an *ad hoc* consensual basis only, to the inclusion in the agreement of specific and detailed limitations on the use of the process both as to subject matter and as to remedy, even including the requirement of judicial determination of "arbitrability" upon demand of either party as a prerequisite to arbitral jurisdiction to proceed.[9] There is

[9] The most widely publicized recent example of the restrictive approach is represented by the elaborate provisions which General Electric Company succeeded in obtain-

little doubt that carefully written contractual restrictions on the scope of arbitration would reduce substantially the dangers of "usurpation" of authority by arbitrators, not only because arbitrators in general can be expected to respect specific limitations on their authority, but also because, if they do not, the courts will be available to patch any obvious breaches in the dam. We use the word "obvious" advisedly, however, because we do not wish at this point to indicate any pre-judgment of the kinds of decisions which the courts might make in a proper application of the 1960 trilogy cases where, for example, there might be a dispute over the meaning of the very language used by the parties in their attempt to define the limits of arbitral authority.

Nor, of course, is there any doubt that the "problem" of arbitral authority could be met through legislation, and in some measure resolved. The scope of judicial review of arbitrability issues, as now restricted by the 1960 trilogy decisions, could be enlarged. Indeed, provision could be made for a general "appellate" review of arbitrators' decisions, both as to fact and as to "law," either with or without requiring judicial deference to any of the conclusions reached by the arbitrator. It seems obvious, however, that the commonly accepted values of the arbitration process will apply inversely with the extent of resort to the courts to avoid either the use or the results of the process. This is not to say that the courts should not be available—indeed, under our law they must be—to prevent assumptions of authority by the arbitrator which the parties clearly intended to withhold from him.[10] 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"

ing in its 1963 negotiations with the IUE. This was one instance in which management decided to make the "arbitrability" issue a major one, and evidently succeeded in its objectives. Many of our management respondents have thought that, ideally, a major effort of this kind would be desirable, but for various reasons have either refrained from presenting the issue in collective bargaining or, having made proposals, have ultimately withdrawn them. Many other respondents, however, succeeded in negotiating limitations on the arbitrator's authority.

10 While the Supreme Court in the 1960 trilogy cases reduced the scope of judicial authority to reject the arbitration process, the Court recognized that "the question of arbitrability is for the courts to decide." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1963). The Court was addressing its remarks to the point that, except for parties subject to the Railway Labor Act or to a few state statutes (applicable to public utilities, and then only where not "pre-empted" by the National Labor Relations Act), arbitration in this country rests not upon legislative mandate, but upon the agreement of the parties.

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.[11]

Some of our respondents, while sharing a general aversion to increased judicial intervention, wonder if some method of meeting the problem might be found within the arbitration system itself. Thus there is posed the question of how to obtain the review of an arbitration award without unduly sacrificing the values of the present arbitration process. This presupposes that judicial review, despite the 1960 trilogy, is still available to prevent clear excesses of jurisdiction, and on other grounds disassociated from the "merits" of the underlying issue of contract interpretation, such as lack of a fair hearing.

A few of our respondents suggest that the National Academy of Arbitrators, on its own initiative, should establish review procedures. This suggestion reveals a lack of understanding of the functions of the Academy. The Academy is a professional organization concerned with the quality of the labor dispute arbitration process.[12] It has some 310 members, including many, if not most, of

11 Notable instances of the use of "labor courts" to decide contract interpretation matters are to be found in France, Germany, and some of the Scandinavian countries. See generally BRAUN, LABOR DISPUTES AND THEIR SETTLEMENT chs. IX-XI (rev. ed. 1955); MYERS, INDUSTRIAL RELATIONS IN SWEDEN (1951); SLABY, THE LABOR COURT IN NORWAY (Oslo Norwegian Academic Press, 1952); 2 SMITH, LABOR LAW, CASES AND MATERIALS 188-96 (1954); Adlercreutz, *Some Features of Swedish Collective Labour Law*, 10 MODERN L. REV. 137, 140, 142-48 (1947); Cole, *The Role of the Labor Courts in Western Germany*, 18 J. POL. 479-98 (1956); Cole, *National Socialism and the German Labor Courts*, 3 J. POL. 169 (1941); Colton, *The Rejection of Compulsory Arbitration in France: The New Law on the Settlement of Labor Disputes*, 6 ARB. J. (n.s.) 42 (1951); Kerr, *Collective Bargaining in Postwar Germany*, 5 IND. & LAB. REL. REV. 323, 335-36 (1951-52); Kronstein, *Collective Bargaining in Germany: Before 1933 and After 1945*, 1 AM. J. COMP. L. 199, 203, 211 (1952); Lester, *Reflections on Collective Bargaining in Britain and Sweden*, 10 IND. & LAB. REL. REV. 375, 386, 386 n.37, 399 (1956-57); McPherson, *Basic Issues in German Labor Court Structure*, 5 LAB. L.J. 439 (1954); Meyers, *Labor Relations in France*, 3 CALIF. MGMT. REV. 46 (1961); Nye, *The Status of the Collective Labor Agreement in France*, 55 MICH. L. REV. 655 (1957); Reich, *Collective Bargaining: The United States and Germany*, 8 LAB. L.J. 339, 345-46 (1957); Schmidt & Heineman, *Enforcement of Collective Bargaining Agreements in Swedish Law*, 14 U. CHI. L. REV. 184 (1946-47); Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421 (1963); Taft, Book Review, 1 IND. & LAB. REL. REV. 163 (1947-48).

12 The Academy was organized in 1947. Article II, § 1 of its constitution provides: "The purposes for which the Academy is formed are: To establish and foster the highest standards of integrity, competence, honor, and character among those engaged in the arbitration of industrial disputes on a professional basis; to adopt and encourage the acceptance of and adherence to canons of ethics to govern the conduct of arbitrators; to

the more active and experienced arbitrators in the country. It can and does seek to improve the arbitration process through its educational, research, and other activities, but for it to offer parties, through some constituent group of members, the function of review of the decisions rendered by their arbitrator would be foreign to its purposes and, as a practical matter, inconceivable. This would be like asking a bar association or the American Medical Association to establish a "tribunal" to review the "merits" of a professional opinion rendered by one of its members as distinguished from questions of ethics.

Another suggestion is that the appointing or designating agencies (The Federal Mediation & Conciliation Service, The American Arbitration Association, and state agencies having similar functions) establish review procedures. This again must be dismissed as an unlikely solution, although for somewhat different reasons. These agencies, like the Academy, are concerned with the quality of the arbitration process, but their primary responsibility is to provide the parties with the names of prospective arbitrators. By virtue of the fact that they do provide an appointment service, however, they have an opportunity not open to the Academy to provide the parties with whom they deal a means of obtaining arbitral review either by the agency itself or by some appellate tribunal of arbitrators established by the agency. We seriously question whether review of the merits of a decision by the appointing agency would be acceptable to most parties, or, for that matter, to the agency. On the other hand, review by a tribunal established by the agency, or under *ad hoc* procedures developed by the agency, could be an additional service offered. Utilization of any such review procedure would have to be based upon a mutual consent, voluntary basis, although parties obviously could agree in advance that the procedure would be available. If an agency were to make review by such a tribunal a condition on the availability of the agency's services, it would probably be taking a big step toward going out of business altogether.

There are other ways, however, to obtain arbitral review, short of going to the courts. One method is for the arbitrator himself to provide for such review even though he is functioning

promote the study and understanding of the arbitration of industrial disputes; to encourage friendly association among the members of the profession; to cooperate with other organizations, institutions, and learned societies interested in industrial relations; and to do any and all things which shall be appropriate in the furtherance of these purposes."

under a standard arbitration provision. Under orthodox arbitration law the "jurisdiction" of the arbitrator terminates with the rendering of the award. There may be ways around this problem, however. One, suggested by Professor (and Arbitrator) Edgar A. Jones, is to include in the award a provision delaying its finality for a specific period during which either party may file a request for rehearing or reconsideration, state the basis for such request, and serve notice of such request upon the other party, who will then have the opportunity to reply.[13] Jurisdiction would be "retained" to entertain any such request, and to reconsider or rehear the matter. A less formal method of providing this kind of opportunity would be for the arbitrator, on his own motion, to send to the parties a draft of the "proposed" decision and opinion. This procedure was suggested for possible consideration by Sylvester Garrett in his presidential address at the 1964 Annual Meeting of the National Academy of Arbitrators.[14]

Another obvious way to obtain review is for the parties to establish their own appellate system. So far as we are aware, the instances of this are few, but they are noteworthy partially because of their variant characteristics. One type of procedure is to be found in the newspaper industry. Under many agreements in the industry involving the Pressmen's Union, an arbitration decision made by an arbitrator selected by the immediate parties to the dispute may be appealed to an International Board of Arbitration consisting of three members of the Board of Directors of the Pressmen's Union, three members of the Special Standing Committee of the American Newspaper Publishers Association (ANPA) and a seventh or "neutral" member chosen from a pre-selected panel of ten impartial arbitrators. The suggested standard contract language providing for appeals is in broad terms, and there are no specified grounds for appeal. Despite this fact, our information is that appeals are infrequent.[15]

Another and quite different approach is represented in the agreements between Allis-Chalmers Manufacturing Company and its various UAW locals. Although there is no "master agreement," the local agreements contain uniform arbitration provisions, which give either party the right "to request the Impartial Referee to reconsider his decision or any part thereof or rehear any issue

13 Jones, *Arbitration and the Dilemma of Possible Error*, 11 LAB. L.J. 1023 (1960).

14 This address will appear in the published Proceedings of the meeting.

15 See Appendix *infra*.

involved." The procedures to be followed are carefully spelled out and include the specification of time limits applicable both to the parties and to the Referee.[16] As in the Pressmen's-ANPA case, the contracts do not specify the standards to be used by the Referee in determining whether or not to grant a request to reconsider or rehear. Although requests for review have been infrequent, there have been reversals or modifications of original rulings in a few cases despite the psychological and practical difficulties which presumably would make the Referee reluctant to reach this result. It should be mentioned, however, that the Allis-Chalmers contracts, and in general practice under them, anticipate the use of "permanent" (in the usual sense) arbitrators, and this may be a factor of some significance in appraising the utility of the procedure.

These various possibilities for obtaining arbitral review merit serious consideration. The procedure suggested by Professor Jones possibly involves the objection that the arbitrator has exceeded his authority under the contract, although probably not fatally so in view of the implications of the *Warrior & Gulf* trilogy. Moreover, we question the wisdom of introducing any such procedural device, or the less formal equivalent suggested by Arbitrator Garrett, without an advance understanding with the parties that the procedure will or may be used. The parties' interest in shaping their arbitration procedure seems to argue that they should not be taken by surprise in respect to a matter as important as this, especially since most parties expect the arbitrator's initial decision to be final. Mr. Garrett recognized that the utility and viability of his

16 The Allis-Chalmers-UAW contracts provide:

"10. Either party shall have the right to request the Impartial Referee to reconsider his decision or any part thereof or rehear any issue involved, subject to the following:

"a. The requesting party shall send its written request to the Impartial Referee and the other party as promptly as possible but in no event later than 48 hours (excluding Saturdays, Sundays and holidays) following receipt of the Impartial Referee's decision, and

"b. The requesting party shall send its brief in support of its request to the Impartial Referee and the other party within seven (7) calendar days of the receipt of the decision.

"The other party shall have five (5) days to file any objections to the request, with a copy to the other party. No further documents may be filed except at the request of the Referee. The Referee shall decide within seven (7) calendar days whether or not to reconsider or rehear, and such decision shall be final and binding.

"11. If the Referee's decision is to rehear, such rehearing shall be given priority over other pending matters and shall be held promptly. The decision shall be issued within thirty (30) days following any such rehearing. Such decision shall be final and binding."

suggested procedure may depend on the arbitrator's relationship with the parties, and that the opportunities for its use are obviously better in the "permanent" than in the *ad hoc* situation.

It would seem that a case can be made for some kind of review procedure within the arbitration process, although we believe it should be one worked out by the parties, not compelled by the arbitrator. Arbitrators occasionally *do* make mistakes, however experienced and conscientious they may be, and the best interests of the parties and of the arbitration process may well be served by making provision for their correction. Of the various possible procedures available for this purpose, it seems that one which would give the original arbitrator the opportunity to review his own decision is preferable to independent review by an "appellate" arbitrator or arbitrators. The latter is likely to involve more time and expense than the former, and we doubt that the over-all results would be any better. The original arbitrator, assuming (as we must) his basic honesty, integrity, competence, and conscientiousness, will very likely have the capacity to be persuaded that he has erred, if there are proper grounds for a claim of serious error, and he will have the courage to admit his error. Indeed, it seems to us that he is the one who should have the initial opportunity to make the assessment.[17]

The scope of the "review," however established, is a difficult substantive problem. We doubt, for example, that it should be available to enable a party to present new evidence or to change his theory of the case. Slothfulness in the initial preparation and presentation should not be encouraged. But experience with a review procedure will provide the necessary basis for judgment concerning the criteria for reviewability which should be developed by the arbitrator or prescribed by the parties. A priori doctrinaire positions should be avoided at this juncture, tempting though they may be.

To conclude on the subject of "review" of arbitration decisions, we repeat that this seems to be a matter of genuine and

17 One of us (Smith) for some years has served as Impartial Referee under some of the Allis-Chalmers-UAW agreements, and has been confronted from time to time with requests for reconsideration or rehearing, although such requests have been infrequent. Some have been denied; others granted. On one occasion the Referee granted the request, in this instance by the Company, on the basis that he had misread part of the testimony appearing in the transcript of the hearing, and that this fact may have been a material factor in the analysis of the case. The ultimate result was a reversal of the earlier decision. The Referee in this instance, although understandably embarrassed, appreciated the opportunity to review his findings of fact and determination.

understandable concern to many who basically believe in arbitration. We think there is room for constructive experimentation in this area provided the review procedures are kept out of the courts, except to the extent now available, and provided review is structured within the arbitration process itself. We believe this is a matter which could properly be on the collective bargaining agenda.

2. *Procedural Matters*

Many of our respondents' criticisms are directed at alleged procedural deficiencies. There appears to be general agreement that the arbitrator should control the hearing, conduct it in an orderly fashion, and not "let it get out of hand." Too often, it is said, the arbitrator allows the hearing to degenerate into a formless discussion that strays from the issue and precludes an orderly presentation of the case. One management representative comments:

> "Many of the arbitration cases in which I have participated have been unnecessarily lengthened and greatly confused by the unwillingness of the arbitrator to really act as a hearing officer in control of his own hearing. While there is no need to develop the judicial attitude of a Federal judge, it would be of immense help to raise the arbitration hearing above the level of a bar room brawl."

Somewhat related is the view, expressed frequently by our respondents, especially lawyers, that there should be more extensive use of the "rules of evidence." A union attorney stated:

> "My most important concern is that arbitrators pay closer attention to procedural due process. I will predict that in the near future, a new line of court attack on arbitration rulings will commence on procedural due process grounds unless arbitrators pay greater attention to these requirements. For example, some arbitrators seem to consider that rules of evidence are useless technicalities to be scorned by broad-thinking men. They forget that rules of evidence are usually based upon rules of reason and if they continue to admit hearsay, wholly irrelevant matters, and similar oddities, there will be difficulty ahead . . . . It is my personal belief that an arbitrator who pays closer attention to procedural due process, including reasonable rules of evidence, is more likely to reach a correct result."

On the other hand, there are those, including some who advocate more formal procedures and greater reliance on the rules of

evidence, who object that the arbitration process is becoming too "legalistic." The following comment is illustrative:

> "I am of the opinion that arbitration is becoming too legalistic. Originally, arbitration was designed for laymen to settle promptly disputes that arise between the company and the union. Now it appears that arbitration is being too heavily influenced by precedent and court procedures, and engaged in, in my opinion, to an unhealthy extent by the legal profession."

Another criticism of some intensity concerns the use of post-hearing briefs. Some feel that "briefs . . . should not be proliferated, especially on request of the arbitrator, except in cases which are unusually technical or complex." Complaints about the use of briefs stem in large part from the desire to minimize delays and costs. There is also, however, some feeling that on occasions arbitrators improperly use briefs as "crutches." As one respondent remarks, "there are some arbitrators who make use of briefs as an escape hatch so that the decision consists of the briefs of the respective parties quoted in 'full' [in lieu, we suppose, of the arbitrator's own summary and analysis of the evidence and arguments] and the award."

In the general area of arbitration procedure there exists not only a wide range of opinion, but also, we suspect, some confusion of thought about the meaning of terms such as "legalisms," "legalistic," and "rules of evidence." We doubt that there are many clearly validated principles in relation to such matters, including the extent to which the arbitrator, as distinguished from the parties, should assume the basic responsibility for procedural matters. Moreover, there is probably no real consensus on most of these procedural problems among the arbitrators themselves, except perhaps the view that there is no virtue in consistency and uniformity, and that the parties, subject to some limitations, "can have it the way they want it." Most persons concerned with the process would probably find their greatest area of agreement on the point that the arbitrator has a responsibility for keeping the proceeding under control. But even this is subject to the qualification that the parties sometimes have their own, mutually acceptable notions of procedure, to which the arbitrator may properly be inclined to defer.

In general, complaints about the looseness of arbitration proceedings in the matter of presentation of evidence are probably

factually sound. It is our impression that arbitrators do not, as a rule, strictly apply the "rules of evidence," if they apply them at all. This is doubtless due in part to the fact that many arbitrators and party representatives are not lawyers, but even more to the belief that strict adherence to these rules is inappropriate and unnecessary in an arbitration proceeding. The result in many instances undoubtedly is the burdening of the "record" with much "hearsay" testimony and documentary evidence of questionable probative value. In some cases the receipt of this questionable evidence prolongs the hearing, but in most cases the actual result is probably otherwise, since strict application of the rules of evidence would put parties to the necessity of producing more validating testimony and witnesses who may not be readily available, and would involve the hearing in much time-consuming squabbling over the "admissibility," "materiality," and "competence" of proffered evidence.

We believe there is no clearly defined road map to direct the parties or the arbitrator in the handling of these evidentiary problems. Here again the arbitrator may find that the parties have established their own procedures, which occasionally indicate complete rejection of orthodox notions concerning the presentation of evidence.[18] Laying aside such situations, however, in which

[18] For many years the Chrysler-UAW "appeal board" procedure involved no presentation of oral testimony at the "Impartial Chairman" level, and, indeed, no opportunity for the Impartial Chairman (the arbitrator) even to view the plant premises, machine, etc., involved in the case. The evidence consisted entirely of written statements signed by persons claiming to have knowledge of the relevant facts, and of the pre-arbitration written presentations of the parties. This procedure was reviewed by David A. Wolff, for many years the Umpire, and by Louis A. Crane and Howard A. Cole, who have been associated with Mr. Wolff in Wolff, Crane & Cole, *The Chrysler-UAW Umpire System*, THE ARBITRATOR AND THE PARTIES 111 (BNA 1958). On the "appellate" nature of the procedure the authors stated:

> "The appeal board believes such statements to be generally as, or more, reliable than oral accounts, under oath or otherwise, given in the excitement, and under the circumstances, of direct discussion. Although on occasion the actual presence and participation of witnesses might be of some help where credibility is a factor, almost always the type of proof called for and submitted is more than adequate to enable an accurate determination of the truth. Further, the 'closed' session rule encourages discussions which are frank and to the point, avoids conditions which might lead to the rekindling of old fires, and, it is believed, serves to provide, over-all, more effective and expeditious presentations as well as better relations between the parties." *Id.* at 125.

These views, if accurate, must come as something of a surprise to lawyers and others familiar with customary judicial procedures. It is interesting that in 1963 the procedure described above was modified, so that now the Chrysler "Umpire" hearings involve the presentation of evidence in the manner customary in most arbitration proceedings.

The current Bendix Corporation-UAW Master Agreement expressly forbids the presentation of witnesses at an Umpire hearing. As a result, the evidence presented at hearings resembles that which earlier characterized the Chrysler hearings, with the exception

the arbitrator may or may not feel comfortable, we think the answer lies not in a formula of strict adherence to the so-called "rules of evidence" (which present their own special problems and are less rigid and mechanical than might be supposed even in court proceedings), but rather in an increased awareness that some kinds of evidence are more trustworthy than others, that the opposing party has a natural interest in minimizing the possible impact of evidence which he considers untrustworthy or irrelevant, and that a party has the responsibility of doing his home work prior to the hearing and making the best case he can.

One of the difficulties in discussing the "rules of evidence" lies in the failure to distinguish between the rules relating to relevancy and materiality and the rules relating to admissibility (*e.g.*, concerning "hearsay" testimony or records which are not properly authenticated). The looseness of the arbitrator in being willing to listen *ad nauseam* to testimony alleged to be completely irrelevant is sometimes due to his inability, at least until the hearing is well along, to determine precisely what the issue is. Stipulations of the issue are rare, and very often the claims made are so vague or so broad that questions of relevancy and materiality simply cannot be decided at the time the proffer of evidence is made. We agree, however, that in this area arbitrators are fairly subject to some criticism. Too often, we fear, the answer, "I'll accept it for what it's worth," or "I'll determine its relevancy later," places an unfair burden on the opposing party who should not ordinarily be compelled to defend himself against an improper line of attack or array of evidence. Perhaps the arbitrator should spend whatever time is necessary at the outset of the hearing, within reasonable limits (and limits there are!) in an attempt to determine precisely what the issues are (at least to his satisfaction), and thus place himself in a position to exclude matters which are clearly irrelevant or immaterial. One need not be a lawyer to make rulings of this nature. At the same time, it must be recognized that arbitration procedures are highly variable, and the extent to which the arbitrator may invoke rules of exclusion may depend upon the degree of sophistication and the expectations of the parties as well as his or their conception of the function of arbitration.[19]

that it appears to be understood that the Company and Union representatives who are entitled to be present at the hearings are likewise entitled, almost as if they were ordinary witnesses, to present statements of pertinent facts alleged to be within their personal knowledge or otherwise known to them.

[19] The late Dean Shulman, in one of the most significant of the many analyses of

A brief comment on the use of briefs may be in order. There are probably few arbitrators who would not agree that in the complex case, especially where there is no transcript, a brief can be of great value. A brief also has special utility in those instances in which the parties have not made adequate presentations at the hearing, although the parties should not be tempted in such cases to use the brief as a substitute for evidence. We believe that *good* briefs are usually helpful to the arbitrator and may, in fact, reduce the amount of required "study" time, thus expediting the decisional process. We use the term "good" advisedly, because too often briefs are so poor as to be worthless. In view of the criticisms expressed by our respondents, it seems apparent that the arbitrator should use caution in asking for briefs when the parties seem reluctant to supply them. But it must be remembered that he has the burden and responsibility of deciding the case, and should not hesitate to ask for briefs when he feels they are needed. Nor may he properly deny a party the opportunity to file a brief.

One device which profitably could be used more widely is a pre-hearing brief or statement by each party, containing the party's version of the issues and the facts, for presentation at the hearing. This procedure is used under the General Motors-UAW umpire system, and our understanding is that both parties consider it useful. In our own experience we have found such statements to be useful. It occurs to us that if pre-hearing statements are to be prepared, the parties might consider exchanging them prior to the hearing, and might even send them to the arbitrator, so that positions will be known and, perhaps, a better basis will be established for stipulating facts and thus reducing hearing time.[20]

labor dispute arbitration, even suggested that rigid rules of exclusion may unduly restrict the information gathering function of the hearing. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1017 (1955), in which he stated:

"The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out. Rules of procedure which assure adequate opportunity to each party to prepare for and meet the other's contentions, or rules designed to encourage full consideration and effort at adjustment in the prior stages of the grievance procedure may be quite desirable. But they should not be such as to prevent full presentation of the controversy to the arbitrator before he is required to make final decision. For that would not only limit his resources for sound judgment, but would tend also to create dissatisfaction with the system."

20 We recognize that some will object to this procedure on the ground that it may induce the arbitrator to decide the case before he hears it. We will simply state that in our judgment this view lacks merit.

Another technique which might be used with profit in some situations, or at least ought to be considered, is something analogous to the pre-trial conference which is commonly used in judicial proceedings. This would involve a preliminary meeting with the arbitrator, or perhaps with a representative of the appointing agency (*e.g.*, The American Arbitration Association) if it is involved, in an attempt to resolve any differences which may exist concerning the issues to be decided and to stipulate facts insofar as possible.

To conclude on the matter of arbitration procedure, our survey indicates some degree of dissatisfaction with the present state of affairs. We think some of it is justified, and that there is room for improvement. Yet, it is our view that the arbitrator may have even more basis of complaint than the parties. He often faces the difficult tasks of making some "record" of the proceeding without the assistance of a reporter, trying to ascertain the real issues where there has been inadequate preparation by one side or the other (and wondering whether and how to obtain facts which are lacking), sifting the chaff from the wheat in what has been presented, and, withal, maintaining some kind of image for the parties that he is the "impartial judge" of their dispute. We see need for a more thorough examination of the question of the arbitrator's role and responsibilities, not excluding those situations in which the parties seem to feel that the entire matter of procedure is theirs to decide, if they can agree. We frankly think that more can be learned from the arbitrators than from the parties on the problems of procedure encountered in arbitration, and that the arbitrators should assume a greater responsibility than they have in the past in indicating their views and suggesting needed improvements.

3. *The Appointing Agencies and Their Responsibilities—The Development of "New" Arbitrators*

From a substantial number of our respondents come criticisms of the appointing agencies, which are principally The Federal Mediation & Conciliation Service and The American Arbitration Association. The following types of complaints are most frequent: (1) The agencies are not sufficiently selective in placing individuals on their rosters of available arbitrators (and the corollary proposition that only "qualified" people should be included); (2) the names of the same arbitrators appear too frequently on the lists or "panels" sent to the parties; (3) insufficient information

is supplied to the parties about the people included on the panels; and (4) the agencies at times improperly include the name of an "objectionable" arbitrator upon a panel list.

The criticism of insufficient selectivity on the part of the agencies in adding names of potential arbitrators to their rosters is accompanied very often by the claim that there is a pressing need for developing a greater supply of competent, experienced arbitrators.[21] Obviously, the agencies and the parties face the dilemma that the supply of competent, experienced arbitrators cannot be increased except by the development of new arbitrators; and the new arbitrators cannot become "experienced" except as they are used by the parties.

The problem of increasing the supply of competent and "acceptable" arbitrators is not easy to solve. A substantial portion of our current crop are alumni of the War Labor Board (of World War II) or the Wage Stabilization Board (of the Korean War). Not only did their governmental experience bring them into active contact with management and labor representatives, but, since they received governmental appointments as "neutrals," they acquired a basis for subsequent acceptability as arbitrators when their government service ended. But this group of arbitrators is limited in number and often so busy as to make them unavailable except to their regular clientele. A new world crisis, which would require us again to establish a tripartite apparatus for labor dispute resolution, would be the most obvious (but clearly unwelcome) way to provide new talent for the arbitration field. We must find other methods of meeting the problem.

The appointing (designating) agencies have the greatest opportunity and perhaps the major responsibility in this area. The American Arbitration Association through its regional offices is constantly attempting to obtain the acceptance by the parties of inexperienced, but, in the Association's judgment, qualified men. The Regional Manager, by virtue of his personal contacts with the parties in his region, is frequently able to persuade them to "try out" a new man. This process has had considerable success in bringing new arbitrators into the field.[22] The Association does

21 This suggestion, in fact, is the one most frequently advanced by our respondents, both management and union.

22 During the period 1956-1958, inclusive, 149 arbitrators listed on the Association's national labor dispute arbitration roster received their initial appointments in cases. During the period 1959-1961, inclusive, the figure was 124. Most of these individuals were actually added to the AAA panel prior to the respective three-year periods. The

not require prior arbitration experience as a prerequisite for inclusion of an individual on its national panel or roster of labor dispute arbitrators. However, endorsements from labor and management representatives are required, and, in addition, the Association's Regional Manager usually makes an independent local "check" of the individual's repute in the labor-management community.

The regulations of the Federal Mediation and Conciliation Service state that it will not add a name to its roster unless the individual has had "experience in the labor arbitration field or its equivalent."[23] We are informed that, while the Service lays considerable stress upon actual arbitration experience, it gives a liberal interpretation to the term "equivalent," and that actual prior arbitration experience is not, in fact, a prerequisite for the inclusion on the roster.[24] It is appropriate, we think, to note that the information which we are reporting concerning the internal operations of

number of persons added to the Association's national panel was 51 in 1959, 61 in 1960, and 56 in 1961. A majority of these had had no previous actual arbitration experience, although a good many had had previous labor relations experience with the government or in other capacities. Some of these persons were selected by parties in the year of their appointment; others, subsequently. (Information supplied by Joseph Murphy, Vice-President of the American Arbitration Association.)

23 The Regulations of the Service provide as follows:

"It is the policy of the Service to maintain on its roster only those arbitrators who are experienced, qualified, and acceptable, and who adhere to ethical standards. Applicants for inclusion on its roster must not only be well-grounded in the field of labor-management relations, but, also, possess experience in the labor arbitration field or its equivalent. (Arbitrators employed full time as representatives of management or labor are not included on the Service's roster.) After a careful screening and evaluation of the applicant's experience, the Service contacts representatives of both labor and management, as qualified arbitrators must be acceptable to those who utilize its arbitration facilities. The responses to such inquiries are carefully weighed before an otherwise qualified arbitrator is included on the Service's roster." 29 C.F.R. § 1404.2 (1963).

24 During the period March 1, 1961, through December 31, 1963, the Service added 168 names to its roster. (The total number on its roster now is approximately 850.) Approximately 120 of the persons added during this period had no, or very limited, previous arbitration experience. Of those without any previous arbitration experience, 33 have acquired varying degrees of acceptability, having been selected by parties in one or more cases. During this period the Service issued to parties a total of 12,025 "panels" (suggested lists of arbitrators from whom the selections could be made for particular cases). Of these panels 4,097 included some one of the 168 individuals whose names were added to the Service's roster during the period, and these submissions resulted in a total of 271 selections of some one of such persons in individual cases. The names of the 33 inexperienced arbitrators who were selected in one or more cases were submitted on 1,774 of the panels sent out during the period, and such individuals were selected in 136 cases.

A cursory examination of the biographical information available on the 168 arbitrators added to the Service's roster during this period shows that a substantial proportion are lawyers, and that of the 33 inexperienced arbitrators who developed some acceptibility, a very large proportion are practicing attorneys. (The foregoing information was supplied to us in conferences with H. T. Herrick, Jr., General Counsel of the Service.)

FMCS is based upon policies of the Service as administered under its present director, William E. Simkin. It is common knowledge that the Service's policies and methods of operation have varied over the years, due principally to differences in attitude and approach of the particular director.

Whether the agencies have adequate standards for pre-judgment of the individual's basic qualifications we are not prepared to say. In view of some of the criticisms we have received, it may be that they should be more careful than they are in adding names to their rosters. In any event, we think the procedures used by the agencies in adding new names should be given greater publicity, and subjected to constructive appraisal by all concerned. We think the agencies should include an assessment of potential acceptability among factors considered in determining whether or not to add a name to its roster, but they should be concerned primarily with basic competence, and attempt to deal with the matter of acceptability by affirmative measures designed to introduce the new man to the labor-management community.[25] Appraisals of the individual by labor and management representatives in the community are relevant considerations in the determination of his probable acceptability, but we doubt that any prior labor-management endorsement should be an indispensable prerequisite. Instead, the agency should concentrate on methods for judging potential competence and let these be the principal bases for the additions of new names.

But it scarcely needs to be stated that it is difficult to prescribe a set of educational and other standards as the *sine qua non* for prediction of success as an arbitrator. Possibly some guidance is available in an analysis of the kinds of educational and other

25 When the FMCS receives an application for addition to its national roster or "panel" of arbitrators, it requests the applicant to fill out a questionnaire giving details of his past experience and background, including previous arbitration and labor relations experience. If a review of the questionnaire shows a sufficient labor relations or arbitration background to suggest that the applicant may be qualified to serve as an arbitrator, the Service further investigates the applicant's background through what is called a Regional Director's "check." The Regional Director, or a field mediator acting under his supervision, interviews all references whose names are submitted by the applicant. In addition, persons active in the labor-management communities of the geographic areas in which the applicant has acquired his labor relations or arbitration experience are interviewed for the purpose, among other things, of ascertaining whether the applicant is deemed "acceptable." The Regional Director's reports on these interviews are given great weight by the Director of the Service when considering an applicant who has had little or no previous arbitration experience. (This information was supplied to us in conference with H. T. Herrick, Jr., General Counsel of the Service.)

backgrounds possessed by experienced arbitrators. The most obvious group available for this kind of study is the membership of the National Academy of Arbitrators, concerning whom the Academy itself has recently released some factual studies. But even if such criteria do become available, actual competence can be determined only through experience. At this point, the parties must assume some responsibility.

We can understand the natural reluctance of the parties to try out a new arbitrator, but it may be that they will have more confidence in using inexperienced men if they are more certain of their general qualifications. Providing the parties with the opportunity to appraise the agencies' qualification standards, as we have suggested, may be a step in this direction. In addition, the agencies could do more in publicizing the qualifications of its panel members, perhaps by publishing a directory of arbitrators and sending out flyers when new names are added.[26] The FMCS might also consider the possibility of decentralizing its service, at least in some respects, to its regional offices in order to facilitate the opportunity for the personal contacts with the parties.[27]

The two major appointing agencies, with the active support and assistance of the National Academy of Arbitrators, have recently undertaken unique types of arbitrator training programs designed to meet the dual problems of the "new" arbitrator—lack of experience and lack of "acceptability." The first such program was begun in the Chicago area in September 1962. Fourteen "trainees," mostly from the academic community, were selected by the appointing agencies. After a one-day "training institute," the trainees were assigned to arbitrators in the area, all of whom

26 FMCS General Counsel Herrick informs us that the Service has never published a complete directory of arbitrators listed on its national panel. In his view, the reluctance of the Service to issue such a directory is based primarily upon the administrative inconvenience and cost of maintaining an up-to-date directory, but partly on lack of evidence of any significant demand by the parties for such a directory. He points out that the list of "available" arbitrators changes constantly, for reasons ranging from the arbitrator's inability to take cases at any given time because of other commitments, to excessive delay in rendering awards or to disagreements with the Service as to fee policies.

27 FMCS General Counsel Herrick feels that it would not be desirable for the Service to decentralize its panel selection process, which is now performed by a very small staff in Washington. Centralized administration, he believes, has resulted in great flexibility, particularly in meeting local needs by submission of the names of arbitrators from distant areas, where this is indicated, and by finding arbitrators with an expertise fitted to particular types of cases. In addition, he considers that centralized administration permits the Service to use top level judgment in the selection process. Finally, he states that while the Service is criticized from time to time by parties dissatisfied with particular panels, it has never encountered substantial criticism or significant administrative difficulties which could be attributed to centralized administration.

are members of the Academy, and whose cooperation was volunteered. Each trainee attended at least one hearing, in each instance with the acquiescence of the parties involved. The program contemplated that the "apprentice" arbitrators would prepare their own analyses of the cases heard and draft opinions and awards, which were to be scrutinized and criticized by the "journeyman" arbitrator after he had rendered his decision. The program was continued until August 1963. Judged in terms of the extent to which the trainees gained actual acceptability in cases of their own up to December 15, 1963, the program was not very successful. But it is perhaps too early to form a judgment on this basis. Meanwhile, the appointing agencies have decided to initiate arbitrator training programs in two other areas, Northern Ohio and Pittsburgh. The latter is under way, and an attempt is being made to improve on the methods followed in the Chicago pilot program.[28]

One other established and sound method of developing new acceptable and experienced arbitrators is through what amounts to an apprenticeship with a busy, full-time arbitrator. A relatively small number of younger men have been brought into the field in this manner through the good offices of some of the most eminent of our veteran arbitrators.[29] This process is continuing. The difficulty, of course, is that the number of available apprenticeships fails by a considerable margin to provide enough new "journeymen." If the time ever arrives when there are firms of arbitrators, as there are in other professional fields, the opportunity for developing arbitrators through "clerkships" will be greatly enhanced.

Certain criticisms we have received of the appointing agencies do not seem serious or merited. The fact that the same names appear too frequently on the lists sent to the parties is in part due to the lack of acceptable and available arbitrators, which is especially acute in some areas of the country, and to the practice of

28 The NAA Committee on the Training of New Arbitrators, consisting of Chairman Pearce Davis, Thomas J. McDermott and Joseph G. Stashower, made a comprehensive report and evaluation on these programs at the 1964 Annual Meeting of the Academy. This report will appear in the published Proceedings of the Academy.

29 The Board of Governors of the NAA authorized a survey of arbitrators and arbitration for the calendar year 1962. An extensive questionnaire was prepared by a special committee of the Academy consisting of Chairman Irving Bernstein, William Gomberg, Richard Mittenthal, Frank C. Pierson and Arthur M. Ross, and was mailed to each member of the Academy. Some 175 responses were received. Of those responding, 19 (10.9%) had served some kind of "arbitration apprenticeship" of an average duration of 2.6 years. The Committee's report was made at the 1964 Annual Meeting of the Academy, and will appear as part of the published Proceedings.

both agencies of utilizing arbitrators within the area of the dispute unless the parties specify otherwise. The basic reason for the latter is to minimize "travel" costs. If the parties so desire, either agency will provide, upon request, the names of arbitrators in other regions. A difficult problem arises, however, when one party desires to use an outside arbitrator, and the other does not. When the parties cannot agree on an arbitrator, the agency may be forced to make an administrative appointment which may leave both parties dissatisfied. This is the type of problem which the parties themselves should resolve, but their failure to do so should not result in criticism of the appointing agency.

Both agencies attempt to provide the parties with lists of arbitrators, who, the agencies believe, can competently deal with the dispute. There is, however, no automatic rotation of names on the entire roster. When a request for a panel is received, the type of dispute is noted, and panel selections are then made based upon the agency's evaluation of the experience and capacity required to deal with the issue. The actual selection of panel names is made under AAA procedures by the Tribunal Clerk under the supervision of the Regional Manager, and under FMCS procedures by the General Counsel. All direct designations are made by the Director of the Service. Obviously, much depends upon the judgment of those who make up the lists. Certainly this is an important aspect of each agency's work, and one which should be kept under constant care and continuous scrutiny within the agency.

The agencies do not include on a panel the name of an arbitrator known to be objectionable to one or both of the parties. In selecting arbitrators for panels, FMCS reviews panels which have been submitted in current cases involving the same parties, and it avoids, wherever possible, listing any arbitrator who is on an outstanding current panel for the same parties. The AAA follows somewhat similar procedures. Each agency reviews selections which have been made by the parties in previous cases, and attempts to name people whose acceptability has been demonstrated. A name will routinely be included on a panel if both parties request this, but not upon the request of one party alone. If an objection is made to the listing of a particular arbitrator, the AAA attempts to determine the basis of the objection, and, if possible, to resolve the problem.

It should also be noted, with regard to another criticism made by some respondents, that the agencies do review the qualifications

of arbitrators. AAA regional managers maintain records pertaining to an individual's acceptability. The Regional Manager also reviews the arbitrator's opinion and award and the Tribunal Clerk's appraisal of the manner in which the arbitrator conducted the hearing. The time between the close of the hearing and the issuing of the award is noted along with the fee charged, and all of this information is recorded on an arbitrator's Service Record Card. When an objection is made regarding an arbitrator's performance, the New York office reviews this information and makes its own appraisal. The FMCS has a similar although less formalized procedure. It can be assumed that each agency on occasion utilizes its appraisals to remove an arbitrator from its roster if such action is deemed warranted, although this is probably an infrequent occurrence. When it does happen, the individual obviously should be apprised of the action and given an opportunity to persuade the agency that its judgment is wrong.[30]

It seems to us, on the whole, that the agencies are providing a helpful and much needed service in connection with the development of rosters of competent and experienced arbitrators, and in providing a procedure to which the parties may resort for the selection of an arbitrator. The quality of the agencies' work seems to be doubted by many of our respondents, possibly in some cases for lack of information concerning the internal operations of the agencies, and in others because of dissatisfaction with some arbitrator obtained through the procedures of the agency. It is obvious that any agency which assumes the role of developing and screening rosters of potential arbitrators and of culling names from this roster to submit for consideration in a particular case has a serious responsibility not only to the parties but to the arbitrators. It is equally obvious that the quality of the work of the agency will depend to a substantial degree upon the competence and good judgment of the personnel who administer the program on a day-to-day basis, as well as on the general policy standards established by the agency's "top command." Some of our respondents think that there are, or have been, deficiencies in these respects. We do not know to what extent these criticisms are justified. A

30 We wish to thank Robert Coulson, Executive Vice-President of the American Arbitration Association, Herbert Schmertz, former General Counsel of the Federal Mediation & Conciliation Service, H. T. Herrick, Jr., present General Counsel, and Mrs. L. P. Herrscher, Manager Detroit Region, American Arbitration Association for their cooperation in providing us information concerning the procedures and practices followed by the respective agencies, and for their helpful comments.

careful evaluation would require much more information than we now have concerning the quality of the personnel of the agencies and their operating procedure. One of the problems facing the agencies in dealing with their potential clientele is the aura of the "mystique" in which, perhaps of necessity, they operate.

4. *Delays in Awards*

Our respondents generally complain about delay in the receipt of arbitration decisions. Since one of the presumed virtues of the arbitration process is the speedy determination of cases, this complaint deserves serious consideration.

How much time is taken by arbitrators in deciding cases? It is common knowledge that this varies with the case and, to some degree, with the arbitrator; the extent of the arbitrator's caseload necessarily is one of the relevant factors. Fortunately, as a result of the recent National Academy of Arbitrators survey of its membership there are some interesting statistical data available.[31]

The 158 arbitrators who responded to the Academy's questionnaire issued a total of 6,045 decisions in contract grievance cases during 1962. Reports on elapsed time between date of final submission and issuance of award were submitted for 5,422 of these cases, and the tabular summary is as follows:

DAYS	NUMBER OF CASES	PERCENT OF TOTAL
1–15	1,386	25.6
16–30	2,666	49.2
31–60	864	15.9
61–90	234	4.3
Over 90	272	5.0

We think these data suggest that the complaints about delays may be exaggerated. Awards are issued in some seventy-five percent of the cases within thirty days of the close of the hearing or the submission of briefs—a time period which is reasonable despite some complaints. It would appear that it is the ten percent of cases taking over sixty days which evoke the most justified criticism.

The FMCS and AAA attempt to meet the problem of excessive delay in issuing awards by requiring that an arbitrator selected under their procedures render his award within thirty days after the case is heard and any post-hearing briefs are filed. How faith-

[31] See note 29 *supra*.

fully arbitrators observe these requirements we do not know. Presumably, in most cases the time limit is met. However, there are doubtless many instances in which the arbitrator requests and receives from the parties an extension of time, and there may even be instances of deliberate ignoring of time limits. When the latter occurs, there seems to be no effective sanction available to the parties other than complaint to the agency. There is the possibility, however, that the award could be subjected to legal attack on the theory that the parties and the arbitrator, by virtue of their use of the appointing agency, have impliedly agreed that the agency's rule or policy concerning time limitations shall be observed. Time limitations upon the rendering of awards are sometimes written into the arbitration provision of the contract, and failure of an arbitrator to meet the requirement in the absence of a waiver by the parties could produce a legal question concerning its validity (a question which we will examine on another occasion). Occasionally these contractual time limits are highly unrealistic, especially under "umpire" systems where the arbitrator may typically hear a "docket" of cases in one hearing session, and cannot as a practical matter comply with the stipulated time limitation, if his awards must be supported by opinions.

Finally, we suggest that the parties may be placing too much emphasis upon the delays attributable to the arbitrator, important as this matter may be. We suspect that these delays are minimal on the whole when contrasted with the time consumed by the parties themselves in handling grievances through the pre-arbitration steps in the grievance procedure. The "well-aged" grievance is not an unusual phenomenon.[82] Difficulties in setting hearing dates and postponements of dates frequently occur. There are many instances in which the parties cause delay by insisting on the filing of post-hearing briefs when they are not needed, and by delaying their filings through mutual agreement. What we have is a pervasive problem, attending the entire process of grievance handling, and the malady should receive a complete clinical examination rather than one confined to only a part of the anatomy.

5. *The Costs of Arbitration*

Our survey reveals a substantial amount of criticism, principally from union sources, concerning arbitrators' fees and the general costs of arbitration. This complaint is not new, and it appears to

[82] See Ross, *The Well-Aged Arbitration Case*, 11 IND. & LAB. REL. REV. 262 (1957-58).

be increasing—so we are advised by the appointing agencies. One union has carried its concern to the point of calling together the arbitrators in the Detroit area for a discussion of the matter.

Any appraisal of this complaint should begin with an inquiry into the facts. We have not undertaken any direct research in the matter of fees and total costs, but some relevant data are available. The arbitrator's "per diem" rate has a significant although obviously inconclusive bearing on his total charge. The American Arbitration Association, in analyzing over 1,000 cases decided in 1954, found that per diem rates "were clustered around the $100 per day mark," and ranged between $25 and $200.[33] We are informed by the Association that during 1962 the per diem rates of arbitrators who handled the bulk of the cases ranged from $100 to $150, and that the average was approximately $125. (The Academy survey, incidentally, reports a 1962 average in grievance cases of $126 per day.) These data thus show increases in per diem rates of approximately twenty-five percent for the period 1954 through 1962.

In the 1954 AAA study it was found that the "most common total fee was within the $200 to $299.99 group," that "the next most common fell within the $100.00 to $199.00 total fee range" and that "more than 85% of the total fees were within the $399.99 or less category." Other data compiled by the Association and made available to us show that arbitrators' fees per case per hearing day, as shown by an analysis of records of arbitrators who received more than $1,000 in fees during the year, have increased from $276.82 in 1958 to $301.06 in 1961, and a slightly higher figure for part of 1963. These data are not easily evaluated because of the variables involved, *i.e.*, hearing and study time per comparable case and per diem rate.

A more meaningful study which takes into account these variables is that recently made by Professor R. W. Fleming, the results of which were reported at the 1964 Annual Meeting of the National Academy of Arbitrators.[34] His study was based on a random selection of 100 discharge cases decided in 1951-1952, another 100 decided in 1956-1957, and a third 100 decided in 1962-1963. His analysis indicates that the average per diem rates were $84 in 1951-1952, $110 in 1956-1957, and $129 in 1962-1963, which is

[33] PROCEDURAL AND SUBSTANTIVE ASPECTS OF LABOR-MANAGEMENT ARBITRATION 12-13, 19 (American Arb. Ass'n).

[34] Fleming, *supra* note 1.

an increase of fifty-four percent over the period (which, incidentally, he observes "is almost the same as the rise in average hourly earnings of production workers in manufacturing during the same period"). His analysis further shows that the average total fee per case was $277 in 1951-1952 and $402 in 1962-1963—an increase of forty-five percent.

It is Fleming's over-all conclusion that even though arbitrators' fees have increased, they have not done so "to an inordinate degree" in the type of case from which his sample was drawn, and that his data probably "fairly represent the arbitration picture today . . . if one considers only those kinds of cases to which we have all grown accustomed over the years, *e.g.*, discipline and discharge, seniority, job classification, etc." He suggests that "new and complex issues growing out of the emphasis upon job security may fall into quite a different pattern."

There is little we can add on the question of the extent to which fees and total costs (attributable to the arbitrator) have been increasing beyond what can be inferred from the data reported above. More information is needed. We understand FMCS is making a study of the matter. It is not doubted that there are some examples of excessive and extreme over-charging, but the evidence we have seen does not seem to sustain the claim that arbitrators' charges have increased alarmingly, or disproportionately as compared with the prices charged for other kinds of services or with other indices, such as the increase in the cost of living.[35]

This conclusion, if justified, nevertheless may not be a complete answer to the complaints about arbitrators' fees. Arbitration historically has had a "public service" aspect, and it may be that its increased professionalization, of which increased fees may be some evidence, has tended to indicate a change in the character of the arbitrator's function, as both he and the parties conceive it. The parties seem to expect increased competence and "expertise," based on experience with increasingly complex types of problems and, we think, expect more serious attention to the basic issues involved. Arbitrators may have justifiable reason, therefore, for thinking their services are worth more than in times past, and it

[35] In the first place, the increases in the average per diem rate and in the average total fee per case are not necessarily accurate reflections of the increase, if any, in average net income per case because overhead costs and other expenses of arbitrators, especially those maintaining their own offices, may have increased even more. It is of some interest that, according to one survey, 38.6% of the 1954 gross income of lawyers was expended for overhead. AMERICAN BAR ASS'N, ECONOMICS OF LAW PRACTICE SERIES, PAMPHLET No. 1, THE 1958 LAWYER AND HIS 1938 DOLLAR 9. In view of the general upward trend in the

is understandable that they may have a tendency to compare their services, in terms of qualifications and income levels, with those of the recognized professions.

Any such standard of evaluation of the fee problem—*i.e.*, looking at arbitration as a profession—probably would require the conclusion that arbitrators are not as a whole overpaid when compared with other professional groups; indeed, they may be underpaid. Moreover, again pursuing this analogy, if arbitrators are professional people, it can be expected that the usual variations exist in their competence, or at least in their reputation for competence, and that the clientele may be expected to pay more for the services of some arbitrators than for others. This would be true even for the so-called "routine" case. Arbitrators serving under some umpire systems with large corporations and large unions are much more highly compensated than are *ad hoc* arbitrators or those serving under some "lesser" umpire systems. This is some indication of acceptance of the concept that arbitration has become a true profession.

We suggest, however, with some diffidence that the attempt

price of commodities and services over the past decade, as may be seen below, overhead costs both for arbitrators and law practitioners certainly have increased. Thus, the percentage rise in net income of arbitrators may be less than Fleming's figures would suggest.

AVERAGE GROSS AND NET RECEIPTS OF SOLO LAWYERS, PHYSICIANS AND DENTISTS FOR PERIOD 1951-1960

		1951	1960	Increase
Lawyers	Gross:	$8,011	$13,981	75%
	Net:	4,408	7,257	65%
Physicians	Gross:	18,235	29,388	61%
	Net:	10,466	17,183	64%
Dentists	Gross:	12,902	22,411	74%
	Net:	6,560	11,511	76%

Data for 1951 derived from U.S. TREAS. DEP'T, IRS PUB. NO. 79, STATISTICS OF INCOME FOR 1951 at 88 (1952). Data for 1960 derived from U.S. TREAS. DEP'T, IRS PUB. NO. 453, STATISTICS OF INCOME FOR 1960-61 at 11 (1962).

CONSUMER PRICE INDEX PERCENTAGE INCREASE—1953-1962 (1957-1959 = 100)

	1953	1962	Increase
All Items	93.2	105.4	13%
All Services	87.5	109.5	25%
Medical Care Services	83.0	116.8	40%
Transportation Services	85.2	111.2	31%
Hospital Rates	74.8	130.4	74%

Data derived from BUREAU LAB. STAT., BULL. NO. 1351, PRICES: A CHARTBOOK, 1953-62 tables A-1, A-59, A-60, A-84, A-86, A-87; BUREAU LAB. STAT., BULL. NO. 1351-1 (Supp.), PRICES: A CHARTBOOK, 1953-62, table 1.

to analogize arbitrators to lawyers, physicians or other professional groups (a tendency we do not necessarily ascribe to most arbitrators) may be unsound, and, indeed, that we may have used the term "professionalization" improperly in relation to the arbitration process. Arbitrators do, indeed, serve a "clientele," who pay for the services rendered, and we have no doubt that the services rendered call for many of the qualities of education, skill, and expertise which characterize the professions. But arbitrators are called upon to adjudicate disputes, not to act as counselors or advisers. They serve not only the parties but also the public interest in peaceful industrial relations. Their work is the kind which is performed by judges in some other countries, and, indeed, would be performed in many instances by judges in this country if the parties were to discard voluntary, private arbitration. It may be more appropriate, therefore, to compare arbitrators with judges and others who render a high level public service rather than with lawyers and doctors in appraising the fee question and comparing income data.

A final point to bear in mind is that the arbitrator's charges may well be (and we suspect ordinarily are) a minimal part of the total costs involved in processing a grievance or other case through arbitration. Employee, union, and management investigation and preparatory time is involved, from beginning to end, and lawyers are frequently used. We do not mean to minimize the significance of the cost factor attributable to arbitrators, but we think in all fairness that the actual facts concerning trends in their charges, as well as other costs relating to the grievance and arbitration process, should be developed and studied carefully before criticisms are made. It may be that some parties, especially small unions, need an arbitration forum which costs them little or nothing for the resolution of grievances. If so, the answer may lie in special statutory enactments.

We assume, for purposes of this appraisal, the desirability of continuing our system of private arbitration. Perhaps the cost and some other elements inherent in the system warrant review of this assumption and consideration of the substitution of labor courts. But even within the general framework of private arbitration there are ways to meet the problem of costs in the case of parties who genuinely need relief. The arbitrators themselves could (and we suppose sometimes do) undertake such cases without charge, or at reduced costs, and through local associations such

as the NAA regional groups could devise a procedure for determining the merits of taking and then of assigning cases on this basis. Alternatively, state or federal agencies could be authorized, as in some states, to provide such a service.[36]

6. *The Arbitrator—His Qualifications, Role, and Decision-Making Processes*

Almost without exception our respondents take the view that the arbitration process would be improved if arbitrators were more competent. The remark of one respondent, "The principal difficulty which we now experience with the arbitration process lies with the arbitrator," and that of another who refers to the arbitrator as "the weakest link in the chain," reflect the views of many.

The basis for such reactions is not always explicated. Where stated, the range of views is interesting, to say the least, and reveals both emotionalism and cynicism, as well as judgments which are sober and reflective. Management representatives seem to be more critical than union representatives, which is perhaps understandable since they are usually on the "receiving" end of contract grievances. Some believe arbitration would be improved if arbitrators had more industrial experience and included fewer "social reformers," especially of the "academic" variety. Some are suspicious of all arbitrators for the reason indicated in the following expression from one of our respondents:

> "Arbitration is a business. If an arbitrator decides too many cases in favor of either party, he will be put out of

[36] Under Michigan law it is provided that ". . . the board [Labor Mediation Board] may, upon the request of the parties and the finding that the parties, or either of them, are unable to bear the expenses of the arbitration, designate an arbitrator for the dispute, in which event the expense of the arbitration, including a per diem fee of $50.00 and necessary expenses of the arbitrator, shall be paid out of the general fund. . . ." MICH. STAT. ANN. § 17.454 (10.3)(2)(b) (1960). So far as we are aware, this provision has had little, if any, use.

Under a recently adopted policy, announced by Richard E. Wanek, Minnesota State Labor Conciliator, he and members of his staff of conciliators have made themselves available to serve as arbitrators without cost to the parties. The policy, apparently, is to limit this service to instances of "small cases where the parties cannot afford the expense and services of arbitrators from private employment." Comment of Conciliator Wanek, 3 CCH LAB. L. REP., STATE LAWS, ¶ 49514 (1963).

The extensive arbitration services rendered in New York State by the State Board of Mediation are well known. This activity is unique in the quantity of free arbitration services provided. Wisconsin also has provided this kind of service under the supervision of the Wisconsin Employment Relations Board since 1939, and in 1961, for example, the service was utilized in 64 cases, most of them involving small employers. See Mueller, *The Role of the Wisconsin Employment Board Arbitrator*, 1963 WIS. L. REV. 47. Interestingly enough, a similar and active service is provided in Puerto Rico. *Id.* at 49.

> business. This factor must affect an arbitrator's decision. I have heard arbitrators say otherwise. I am not convinced, any more than I am convinced that my third step answers are determined solely by whether or not there has been a contract violation."

One of our respondents remarked, with considerable profundity, "If all arbitrators . . . could combine the best qualities of all the ones I have encountered, there would be little need to worry about improving the 'process' as an institution." The problem apparently is the universal one, common to all human institutions and endeavors, of seeking movement toward this kind of lofty goal.

On one point of arbitration "practice"—whether the arbitrator should act only as a judge and refrain from attempting mediation—our respondents indicate almost complete unanimity of view. They want a judge! And they tend to single out the university professor as the kind of arbitrator most likely to essay a mediatory role. This criticism is frequently associated with the view that arbitrators, in their decisions, too often "compromise," "split decisions," and base decisions on other than proper contractual grounds.[37]

The question whether the arbitrator should ever attempt to "mediate" in a case submitted to him for arbitration is one of long-standing controversy. Some distinguished and able men have debated this issue,[38] and there is no need to review the arguments,

[37] One respondent states: "We do not look for mediation but we do look for a decision based upon the applicable terms of the contract. Arbitrators should confine themselves to the contract and leave Industrial Relations to some one else."

[38] An analysis of the essential differences in these roles is made by Sylvester Garret in *The Role of Lawyers in Arbitration*, ARBITRATION AND PUBLIC POLICY 102-24 (Pollard ed. 1961). For expositions by proponents of the use of mediation, at least "when appropriate," see SIMKIN, ACCEPTABILITY AS A FACTOR IN ARBITRATION UNDER AN EXISTING AGREEMENT 61-63, 66-67 (1952); Gray, *Nature and Scope of Arbitration and Arbitration Clauses*, N.Y.U. 1ST ANN. CONFERENCE ON LAB. 197, 199 (1948); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1022-23 (1955); *Symposium on Arbitration*, 15 Lab. Arb. 966, 968 (1951); Singer, *Labor Arbitration: Should It Be Formal or Informal?*, 2 LAB. L.J. 89, 91-93 (1951); Syme, *Opinions and Awards*, 15 Lab. Arb. 953, 954-55 (1951); Taylor, *Effectuating the Labor Contract Through Arbitration*, THE PROFESSION OF LABOR ARBITRATION 20 (BNA 1957); Taylor, *Further Remarks on Grievance Arbitration*, 4 ARB. J. (n.s.) 92 (1949); *The Voluntary Arbitration of Labor Disputes*, PROCEEDINGS, MICHIGAN LAW SCHOOL SUMMER INSTITUTE ON THE LAW AND LABOR-MANAGEMENT RELATIONS 191 (1950).

For expressions of doubt or opposition, see DAVEY, CONTEMPORARY COLLECTIVE BARGAINING ch. 12 (1951); KELLOR, AMERICAN ARBITRATION 84-85 (1948), cited and quoted in 4 ARB. J. (n.s.) 182, 184 (1949); MORSE, THE JUDICIAL THEORY OF ARBITRATION IN UNIONS, MANAGEMENT AND THE PUBLIC 489 (Bakke & Kerr ed. 1948); UPDEGRAFF & MCCOY, ARBITRATION OF LABOR DISPUTES 203, 204 n.19 (BNA 1961); Bailer, *Arbitration Procedure and Practice: Arbitrator Viewpoint*, N.Y.U. 15TH ANN. CONFERENCE ON LAB. 349 (1962); Braden,

which are well known. Our contribution on this subject consists principally of our report of current feeling as expressed by our respondents. We would add only our own belief that, especially in view of the parties' expectations, the presumption should be against mediation efforts, but we are sure there are instances in which mediation can and should be undertaken, especially where there is some indication from the parties (which may have to be read into their approach to the case) that mediation would be welcomed. We know there have been situations in which sophisticated and experienced arbitrators have successfully undertaken mediation, even in *ad hoc* arbitration.

The charge that arbitrators tend to compromise and to split decisions because of the problem of acceptability is one that should be met and appraised. The pat answer from the arbitration fraternity is simply a flat denial. Indeed, the arbitrator is likely to say that to split decisions consciously is the best and surest way to *lose* acceptability, presumably because, ultimately, "the truth will out," and the parties will come to realize that they cannot be sure that a case will be approached on its merits. We share this general view (naturally), and we doubt that any arbitrator will publicly declare otherwise. All arbitrators will say that they call the shots

The Function of the Arbitrator in Labor-Management Disputes, 4 ARB. J. (n.s.) 35 (1949); Davey, *The John Deere-UAW Permanent Arbitration System*, CRITICAL ISSUES IN LABOR ARBITRATION 161, 162, 185 (BNA 1957); Davey, *Labor Arbitration: A Current Appraisal*, 9 IND. & LAB. REL. REV. 85 (1955-56); Davey, *The Proper Uses of Arbitration*, 9 LAB. L.J. 119 (1958); Davey, *Hazards in Labor Arbitration*, 1 IND. & LAB. REL. REV. 386 (1947-48); Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3 (1963); Gellhorn, *Symposium on Arbitration*, 15 Lab. Arb. 966, 969 (1951); Iserman, *The Arbitrator in Grievance Procedures: Is Arbitration the Way To Settle Labor Disputes?*, 35 A.B.A.J. 987, 990 (1949); Johnson, *Contrasts in the Role of the Arbitrator and of the Mediator*, 9 LAB. L.J. 769, 772 (1958); Livingston, *Arbitration: Evaluation of Its Role in Labor Relations*, N.Y.U. 12TH ANN. CONFERENCE ON LAB. 109, 119 (1959); McCoy, *Symposium on Arbitration*, 15 Lab. Arb. 966, 968 (1951); Merrill, *A Labor Arbitrator Views His Work*, 10 VAND. L. REV. 789 (1957); Miller, *Comments on the Doctrine of Acceptability of Labor Arbitration Awards: Mediation vs. Arbitration*, 4 ARB. J. (n.s.) 182 (1949); O'Connell, *Arbitration Procedure and Practice: Management Viewpoint*, N.Y.U. 15TH ANN. CONFERENCE ON LAB. 331, 332-34 (1962); Segal, *Arbitration: A Union Viewpoint*, THE ARBITRATOR AND THE PARTIES 47, 55-56 (BNA 1958); Trotta, *Discussion—Arbitration: A Management Viewpoint*, THE ARBITRATOR AND THE PARTIES 76, 89-91 (BNA 1958).

See also BRAUN, LABOR DISPUTES AND THEIR SETTLEMENT 150, 202 n.63 (rev. ed. 1955); Ferguson, Cooper & Horvitz, *An Appraisal of Labor Arbitration*, 8 IND. & LAB. REL. REV. 79 (1954-55); Platt, *Current Criticisms of Labor Arbitration*, ARBITRATION AND THE LAW vii (BNA 1959); Survey conducted by Yale Law School, Labor Law Section of Conn. Bar Ass'n, AAA and L-M Center of Yale University in 1951, 6 ARB. J. (n.s.) 70, 73 (1951); Warren & Bernstein, *A Profile of Labor Arbitration*, 16 Lab. Arb. 970, 981-82 (1951).

It is of some interest to note that the 1962 survey made by the National Academy of Arbitrators reveals that 156 arbitrators responding to the questionnaire on this issue indicated that they attempted mediation in 323 cases (5.1% of the total caseload handled), and were successful in 171 of such cases for a "batting" average of 52.9%. See note 29 *supra*.

as they see them, and that if this means that twenty cases on a docket come out for one side or the other, so be it. In the belief that arbitrators do tend to split decisions, some parties, especially on the management side, consider it preferable to arbitrate only one issue at a time, and to insist upon a different arbitrator for each case. This approach may avoid the problem, if there be one, of split decisions, but it also greatly increases the cost of arbitration.

We believe most arbitrators are honest in their expression that they look at their cases "one at a time." We must admit, however, that these declarations are self-serving, and we know of no easy or reliable way to test the merits of the charge made against the arbitrators, or their answer. We would like to see a serious attempt made to research the matter. Without doubting for a moment the sincerity of arbitrators as a whole, we must concede the possibility that there may be some subconscious, psychological factor present in their mental processes, deriving from the problem of "acceptability," which would not be present if, for example, they had the tenure of federal judges.

To proceed to another point, there appears from our survey to be general agreement that the arbitrator should base his decision "on the contract," but it is not clear just what is meant by this general precept. Some say that the literal language of the agreement should be controlling; others say the problem is to determine "the intent of the parties," and take the view that the contract language is not always reliable in indicating such intent. We find among our respondents a preponderant view (perhaps because a preponderance of our replies are from the management side) that the arbitrator should disregard past practice and considerations of equity. Frankly, we find little that is useful or constructive in these generalizations. The determination of the intent of the parties on an issue of contract interpretation is frequently a thorny problem; otherwise, the case might not be before the arbitrator. An appraisal of this process is beyond the scope of this review.

We find among our replies, sometimes even from the same respondents, the complaint on the one hand that arbitrators often do not answer fully and directly the arguments made by the parties, and on the other hand that arbitration opinions tend to be too lengthy. There is some inconsistency here, although there are instances in which the undue length of opinions is attributed to an attempt to soften the blow by giving the "decision" to one side and the "opinion" to the other, or to attempt to "opine" too

broadly and thus, as one remarked, "to muddy up the decision and create new grounds for grievances." Some think there are few decisions which could not, with profit to all concerned, be reduced in length by at least fifty percent.

We simply report these complaints without attempting to assess their general validity. There is little doubt that some opinions are unduly prolix, insufficiently responsive to the precise claims presented, and, like some of our more notable Supreme Court opinions, liberally laced with "dicta" which may represent profound wisdom but not a kind of professional service which the parties have sought or desire. It is our impression that the more seasoned the arbitrator, the less guilty he is of these transgressions. It is also our impression that there are occasions when the "full" opinion is not only desired by the parties, but helpful. There are controls which are available to the parties. They can indicate the kind of opinion they want, or even agree to eliminate opinions altogether, and simply take the "award." They can also agree upon a "short form" summary opinion as adequate for particular cases.[39]

Our respondents, particularly from the management side, indicate that there is rather considerable support for the proposition that arbitrators should make greater use of "precedent" in deciding cases. The younger arbitrators, it is suggested, should pay more heed to the decisions of their older and more experienced brethren in order to reduce the likelihood of error. The point most frequently made, however, is that there should be greater use of precedent in order to increase "predictability." One management attorney remarked:

> "The only matter of any substantial nature which I find undesirable in the arbitration process is the absence of a basis to advise companies with respect to contemplated action in accordance with what arbitrators have done in similar cases. I am afraid that a few arbitrators are over-anxious in their desire to show that they are not bound by stare decisis."

This is likewise a subject of long-standing controversy. Opinion among academic "experts," arbitrators, and partisan representatives runs the gamut.[40] There are those who believe that the use

39 See Seitz, *An Open Letter to a Union Attorney*, 17 ARB. J. (n.s.) 67 (1962). This article contains an excellent discussion of why arbitrators in general believe it necessary to explain fully their awards.

40 On this subject see ELKOURI & ELKOURI, HOW ARBITRATION WORKS 243 (rev. ed.

of precedent should be eliminated altogether, and that a disservice is being performed even by the publication of awards. Proponents of this view feel that an arbitrator is employed by the parties to focus his attention exclusively on the case presented to him, and that this ought to mean that he should not dilute the purity of his mental processes through exposure to the views of others who appear to have met similar problems. Advocates of this position likewise deplore the development of a case law of "industrial jurisprudence" as introducing improper rigidities into the area of contract interpretation.

Probably the middle view, on the whole, has the most widespread support. This view holds that, while precedent should not be considered binding, and while cases typically are never on all fours with others, there is educational value in published opinions, and there is no reason why the product of the thought of other arbitrators and, indeed, the summaries of positions taken by other

1960); DEVELOPMENT OF SUBSTANTIVE PRINCIPLES THROUGH ARBITRATION, COLLECTIVE BARGAINING AND THE LAW 249-54 (U. of M. Law School 1959); Aaron, *Labor Arbitration and Its Critics*, 10 LAB. L.J. 605, 608 (1959); Ahner, *Arbitration: A Management Viewpoint*, THE ARBITRATOR AND THE PARTIES 76, 84 (BNA 1958); Carlston, *Arbitration: An Institutional Procedure*, 4 ARB. J. (n.s.) 248, 251 (1949); Cherne, *Should Arbitration Awards Be Published?*, 1 ARB. J. (n.s.) 75 (1946); Davey, *The John Deere-UAW Permanent Arbitration System*, CRITICAL ISSUES IN LABOR ARBITRATION 161, 174 (BNA 1957); Davey, *Labor Arbitration: A Current Appraisal*, 9 IND. & LAB. REL. REV. 85 (1955-56); Editorial, *Creeping Legalism in Labor Arbitration*, 13 ARB. J. (n.s.) 129 (1958); Elkouri, *The Precedential Force of Labor Arbitration Awards*, 1 LAB. L.J. 1183 (1949-50); Gray, *Some Thoughts on the Use of Precedents in Labor Arbitration*, 6 ARB. J. (n.s.) 135 (1951); Justin, *Arbitration: Precedent Value of Reported Awards*, 21 L.R.R.M. 8 (1947); Justin, *Arbitration Under the Labor Contract—Its Nature, Function and Use*, 2 LAB. L.J. 909, 918-19 (1951); Kheel, *Reporting of Labor Arbitration: Pro and Con*, 1 ARB. J. (n.s.) 420, 423 (1946); Killingsworth, *Arbitration: Its Uses in Industrial Relations*, 21 Lab. Arb. 859, 861-63 (1954); Levenstein, *Reporting of Labor Arbitration: Pro and Con*, 1 ARB. J. (n.s.) 420, 425 (1946); Manson, *Substantive Principles Emerging From Grievance Arbitration: Some Observations*, PROCEEDINGS OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 136-49 (Dec. 1953); McPherson, *Should Labor Arbitrators Play Follow-the-Leader?*, 4 ARB. J. (n.s.) 163 (1949); Merrill, *A Labor Arbitrator Views His Work*, 10 VAND. L. REV. 789, 797-98 (1957); Murphy, *Arbitration: Evaluation of its Role in Labor Relations*, N.Y.U. 12TH ANN. CONFERENCE ON LAB. 281, 284, 288-89 (1959); Platt, *Current Criticisms of Labor Arbitration*, ARBITRATION AND THE LAW vii, xii-xiv (BNA 1959); Reilly, *Arbitration's Impact on Bargaining*, 16 Lab. Arb. 987, 990-91 (1951); Roberts, *Precedent and Procedure in Arbitration Cases*, N.Y.U. 6TH ANN. CONFERENCE ON LAB. 149, 159-60 (1953); Sembower, *Halting the Trend Toward Technicalities in Arbitrations*, CRITICAL ISSUES IN ARBITRATION 98, 103-04 (BNA 1957); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1020 (1955), reprinted in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 169, 193-94 (BNA 1956); Singer, *Labor Arbitration: Should it Be Formal or Informal?*, 2 LAB. L.J. 89, 90 (1951); Singer, *Labor Arbitration: The Need for Norms and Standards*, 2 LAB. L.J. 270 (1951); Syme, *Opinions and Awards*, 15 Lab. Arb. 953, 959 (1951); Syme, *The Function of Arbitrators' Opinions*, 6 ARB. J. (n.s.) 103, 106-09 (1951); Taylor, *Reporting of Labor Arbitration: Pro and Con*, 1 ARB. J. (n.s.) 420 (1946); Warren & Bernstein, *A Profile of Labor Arbitration*, 16 Lab. Arb. 970, 983 (1951); Wolff, Crane & Cole, *The Chrysler-UAW Umpire System*, THE ARBITRATOR AND THE PARTIES 111, 115, 128 (BNA 1958).

parties, should not be available for consideration, subject always to the qualification, which every experienced arbitrator understands, that it is *his* judgment that is expected by the parties. We subscribe to this view, and in any event we think it inevitable that this will be the continuing course of development.

One of the major problems, however, in connection with the use of published arbitration awards by arbitrators, parties, and students of labor relations arises out of the limitations in the process of publication, as presently practiced. Unlike the awards of appellate courts, all or most of which are systematically published, the publication of arbitration awards is a private procedure with limited publication (as, for example, in the case of the General Motors-UAW Umpire decisions), or publication by private publishing houses on a selective basis of awards submitted to them. The total of all published awards is a very small percentage of all the decisions rendered, and there is no assurance that what is published represents a proper sampling of all the decisions rendered in particular subject areas, or even a proper sampling of those submitted for publication. What, if anything, can be done to improve this situation we do not know. Possibly the various publishing houses, the appointing agencies and the National Academy of Arbitrators should establish some procedures for joint discussion of the problem.

The matter of precedent within a given employer-union contract relationship obviously presents special problems. Here there is much to be said for respecting prior decisions, especially if the parties have not repudiated them by making changes in pertinent contract language. In this context the argument for predictability is compelling. Substantial consistency in the treatment of problems of contract application probably accords with the expectations of the parties, at least under umpire systems, and contributes to the stability of the relationship. This is not to say that an umpire should not "overrule" a previous interpretation which he considers palpably wrong. It is simply to say that he should do so only after the most serious deliberation.

7. *Responsibilities of the Parties*

Our respondents concede that the arbitration process would be improved by more adequate screening of cases, so that only cases presenting bona fide issues go to arbitration. This kind of observation is so obviously correct as to be trite. Experience under

some of the major umpire systems, such as General Motors, Ford and International Harvester, show that startling results in this direction can be achieved. Adequate and responsible screening, however, is doubtless politically impossible within some unions, and may now be complicated by an increased reluctance on the part of some union leaders, due to fears of legal liability, to step up to their responsibilities. Nevertheless, as one of our respondents comments, it makes little sense to pass the responsibility on to an arbitrator to make a decision that should have been made by the parties, especially if he is then irresponsibly denounced by the irresponsible party for making a "poor" decision.

C. CONCLUDING OBSERVATIONS

It is interesting to note the general tenor of the current appraisals of the arbitration process as revealed by our survey. Emphasis appears to be centered on "legal" and procedural matters, although, interestingly enough, only one of our respondents suggests that only lawyers should be arbitrators. This emphasis is likewise reflected in the subject matter considered at the annual meetings of the National Academy of Arbitrators, and in much of the research and writing on arbitration in recent years. Many of the problems which now concern arbitrators and the parties are not those which troubled "Billy" Lieserson and Harry Shulman, or for that matter, even now trouble George Taylor.

Yet it remains the fact that many people still want arbitration to remain the informal, inexpensive, expeditious problem-solving process which, perhaps, was its chief claim for support in the past. It probably can still be that if the parties wish it that way. Our guess, however, is that for a variety of reasons, including recent legal developments, the professionalization of the arbitrator and the increased use of attorneys, the trend will be in the direction of greater emphasis upon the quasi-judicial role of the arbitrator, and upon related matters which will make the process more palatable in the light of the present state of the law concerning the finality of the arbitrator's determination.

APPENDIX

The standard form of "Individual Arbitration Agreement," suggested for use at the local level, contains the following provisions:

> "Section 1. In the event of any difference arising between the parties to this contract which cannot be adjusted by conciliation, such difference shall be submitted to arbitration under the Code of Procedure provided by the International Arbitration Agreement, effective January 1, 1963, between the American Newspaper Publishers

Association and the International Printing Pressmen and Assistants' Union of North America.

"Section 2. This contract shall cover any contract between the parties of the first and second parts whether the same is in writing or an oral understanding, subject to the conditions expressed in the International Arbitration Agreement, effective January 1, 1963, between the American Newspaper Publishers Association and the International Printing Pressmen and Assistants' Union of North America.

"Section 3. It is expressly understood and agreed that the International Arbitration Agreement and the Code of Procedure, both hereunto attached, between the American Newspaper Publishers Association and the International Printing Pressman and Assistants' Union of North America shall be integral parts of this contract and shall have the same force and effect as though set forth in the contract itself.

"Section 4. The parties hereto specifically authorize the Board of Directors of the International Printing Pressmen and Assistants' Union of North America and the Special Standing Committee of the American Newspaper Publishers Association to give public disavowal to any failure to comply with this contract as provided in Section 13 of the International Arbitration Agreement."

The "International Arbitration Agreement" between the ANPA and the International Pressmens' Union provides, among other things, as follows:

"Section 3. Any publisher, who holds an Individual Arbitration Contract under the prior Agreement between the parties hereto which terminated December 31, 1962, and whose Individual Arbitration Contract does not provide for continuation beyond December 31, 1962, shall be protected hereunder, if, before March 1, 1963, he shall have secured an Individual Arbitration Contract in accordance with the provisions of this Agreement.

"In like manner the union and members thereof shall be protected against lockouts or any other concerted action to discriminate against members of the union upon the part of the publishers, provided said union or members thereof have complied with the terms of the Agreement.

"Section 4. Subject to the conditions specified in Section 2 every member of the American Newspaper Publishers Association shall have the following guaranties:

"(a) He shall be protected against walkouts, strikes, boycotts or any action by members of the union or unions with which he has contractual relations under this Agreement (such as unauthorized vacations, or individual resignations) which shall tend to delay publication, and against any other form of concerted interference by them with the normal and regular operation of any of his departments of labor.

"(b) In the event of a difference arising between a publisher having an arbitration contract or argeement and any local union a party thereto, all work shall continue without interruption pending proceedings looking to conciliation or arbitration, either local or international, and the scale and hours provided in contract between the parties and working conditions prevailing prior to the time the differences arose shall be preserved unchanged until a final decision of the matter at issue shall have been reached.

"(c) All differences which cannot be settled by conciliation shall be referred to arbitration in the manner stipulated in this Agreement. This sub-section is hereby construed to contemplate the submission to arbitration of all questions which involve the cost, working conditions, efficiency and administration of the services of members of the I. P. P. & A. U., in the operation of the newspaper press rooms but not to include such matters as have to do solely with the internal laws of the I. P. P. & A. U. relating to its self-government.

"(d) Except as set forth in Section 8, it shall be competent on 10 days' notice in any local or international arbitration hearing for either side to raise the point that certain matters are not properly arbitrable and if the other side denies the claims, the question raised as to the arbitrability of an issue shall first be determined by the International Arbitration Board before any evidence is heard as to the merits of the issue claimed not to be arbitrable.

"Section 5. (a) It is agreed that the procedures herein provided for settling disputes by local and international arbitration of issues shall be used to the exclusion of any other means available to the parties who sign this Agreement under which all decisions are final and binding on both parties. Any rights or remedies otherwise available to the parties to this Agreement are hereby expressly waived.

"(b) It is also agreed that the procedures for the remedy of grievances and settlement of disputes provided herein are to be applied promptly. In the event either party fails to act promptly to bring a dispute to a hearing or refuses to appear at any

proceeding conducted under this Agreement, then the provisions of Section 5, subsection 11 of the Code of Procedure shall apply.

"Section 6. All differences arising under an existing written contract, or an oral understanding, which involve the application of the International Arbitration Agreement as specified in Section 2, the Code of Procedure, or any clause or clauses in contracts, or the interpretation to be placed upon any part or parts of any agreements, which cannot be settled by conciliation, shall be referred to local arbitration if so required by the local contracts, but if not, shall be submitted to the chairman of the Special Standing Committee of the American Newspaper Publishers Association and the president of the International Printing Pressmen and Assistants' Union of North America, together with the arguments and briefs of both parties, and an agreed statement of facts in the controversy, accompanied by a joint letter of transmission, certifying that each party is familiar with the contents of all documents. In case these two officials cannot reach a decision upon the issues involved, their differences shall be submitted to the International Board of Arbitration.

"Section 7. All differences other than those specified in Section 6 of this Agreement, including disagreements arising in negotiations for a new scale of wages, or for hours of labor, or in renewing or extending an existing scale, or in respect to a contract, which cannot be settled by conciliation, shall be referred to a local board of arbitration in the manner stipulated in the Code of Procedure as set forth in Exhibit 'B'. But the International Board of Arbitration may, in its discretion, assume jurisdiction over any dispute that is jointly submitted by the local parties signatory to this Individual Arbitration Agreement.

"Section 8. The question whether a department shall be union or non-union shall not be classed as a "difference" to be arbitrated. A department shall be interpreted to mean the entire press room and not any portions of this department. Union departments shall be understood to mean such as are made up of union employes and in which the union has been formally recognized by the employer.

"Section 9. If either party to a local arbitration shall be dissatisfied with a decision by a local board, appeal may be taken to the International Board of Arbitration to be constituted as hereinafter provided. Such appeal may also be taken to the International Board by either party if for any cause a decision shall not have been rendered by a local board within ninety days after the questions to be arbitrated have been duly determined under the Code of Procedure.

"Section 13. At the request of either party to an arbitration the International Board shall determine whether evasion, collusion or fraud has characterized either the local or international proceedings, or whether either party has failed to comply with, or refuses to fulfill its obligations under a decision, or has omitted to perform any duty prescribed therein, or has secured any unfair or fraudulent advantage, or has evaded any provision of this Agreement or any rule of the Code of Procedure, or is not acting in good faith. At the conclusion of such inquiry it shall be wholly within the power of the International Board to reject all that has been previously done and order a rehearing before the International Board, or before a new local board; or it may find against the offending party or annul the Individual Arbitration Contract. In the event of either party to a dispute refusing to accept and comply with a decision of a local board which is not appealed, or with a decision of the International Board, or with any of the provisions of this International Arbitration Agreement, as determined by a decision of the International Board all aid and support to the employer or the local union refusing acceptance and compliance shall be withdrawn by both parties to this Agreement. The acts of such recalcitrant employer or union shall be publicly disavowed and the aggrieved party shall be furnished by the other with an official document to that effect, signed by the Board of Directors of the International Printing Pressmen and Assistants' Union of North America and the Special Standing Committee of the American Newspaper Publishers Association."

Section 9 of the International Agreement, it will be noted, provides for an "appeal" of a local arbitration decision. Of interest, also, is the breadth of the arbitration provisions. Apparently, under section 7 of the International Agreement even disputes over the terms of a new agreement are arbitrable.

The "Code of Procedure" prescribed for local arbitration is quite detailed. With respect to appeals to the International Board, it provides:

"Section 9. When either party to a local arbitration shall desire to appeal to the International Board, written notice to that effect must be given to the other party (specifying the points on which it wishes to base its appeal), within five (5) days after the local decision has been rendered, and the appeal shall be filed with the

International Board within thirty (30) days after such decision. When an appeal is under consideration by the International Board of Arbitration it shall not take evidence, but both parties to the controversy may appear personally or may submit the records and briefs of the local hearing and make oral or written arguments in support of their several contentions. Each party shall submit eight copies of any brief for appeal that he may desire to present for consideration of the International Board. They may submit an agreed statement of facts, or a transcript of testimony, properly certified to before a notary public by the stenographer taking the original evidence or depositions. They may agree in advance not to appear personally at such hearing on an appeal."