The Arbitrator and The Parties

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EDITOR'S PREFACE

This volume contains the papers delivered at the eleventh annual meeting of the National Academy of Arbitrators, held in St. Louis, Missouri, January 30 - February 1, 1958. It is the fifth such volume to be published for the Academy by The Bureau of National Affairs, Inc. The earlier volumes are: ARBITRATION TODAY (1955); MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS (1956); CRITICAL ISSUES IN LABOR ARBITRATION (1957); and THE PROFESSION OF LABOR ARBITRATION (1957).

The first four volumes made available to practitioners and students a wealth of material on arbitration in labor-management relations covering a wide range of topics. The present volume, which is introduced by Paul N. Guthrie's Presidential Address: "Arbitration and Industrial Self-Government," has as its major theme the relationship between the arbitrator and the parties to arbitration. In the chapters that follow the reader will find what might be called a tripartite symposium in which representatives of unions and management evaluate arbitrators and the arbitration process, and are themselves evaluated in turn by professional arbitrators. The emergence of still another "party" in arbitration—the individual worker, sometimes called "the forgotten man in arbitration"—finds recognition in a challenging paper by W. Willard Wirtz: "Due Process of Arbitration." The potential uses of grievance and arbitration procedures in what might be termed the "underdeveloped areas" of public employment are explored by Charles Killingsworth.

Following the precedent established last year with the publication of Harold W. Davey's study of "The John Deere-UAW Permanent Arbitration System," the current volume contains a distinctive paper on the Chrysler-UAW Umpire System by David A. Wolff, Louis A. Crane and Howard A. Cole, together with comments by the umpires under the Ford and General Motors-UAW Agreements which serve to high-

light the contrasts among these systems. These studies are part of a projected series of reports by members of the Academy who have served as permanent umpires. Ultimately the Board of Editors, under the Chairmanship of William H. Davis, plans to incorporate these studies in a single volume which will for the first time describe, analyze, and evaluate what has been the most significant institutional development in the arbitration field in the last two decades: the growth of permanent arbitration systems in mass production industries.

The concluding chapter of this volume strikes a contemporary note in a searching examination of "The Current Crisis in American Unionism" by Professor Edwin E. Witte.

The new "federal era" that labor arbitration is entering as a result of the landmark decision of the Supreme Court in the *Lincoln Mills* case, in June 1957, has been a subject of intense concern to the Academy this past year. The Board of Governors has appointed two successive special committees to study the statutory regulation of labor dispute arbitration and to make recommendations thereon to the membership. These reports are reproduced in Appendices B and C.

In conclusion the Editor wishes to express her appreciation for the excellent work of the Program Chairman, Pearce Davis, and the members of his Committee: Benjamin Aaron, Robben Fleming, Ronald W. Haughton, John Perry Horlacher, and Benjamin C. Roberts, whose careful planning shaped the design of this volume. The prompt cooperation of the contributors made the assembling of the volume an automated job. Its distribution is once again entrusted to the capable hands of John D. Stewart, Vice-President of The Bureau of National Affairs, Inc., whose invaluable assistance to the Academy is gratefully acknowledged by the Editor.

Jean T. McKelvey

Ithaca, New York
March 28, 1958

INTRODUCTION

ARBITRATION AND INDUSTRIAL SELF-GOVERNMENT *

PAUL N. GUTHRIE

President, National Academy of Arbitrators **

This is the eleventh annual meeting of the National Academy of Arbitrators. Since the time of the first meeting of the Academy, labor arbitration has experienced substantial growth and development, and has achieved a degree of maturity which augurs well for its future. We take pride in the belief that the Academy has contributed substantially to this development of a major instrument of industrial self-government.

As arbitrators we at times become so involved in and circumscribed by the detailed demands of our work that we tend to have our perspective of the nature of the arbitration process blurred. No doubt those of you here who represent management and labor have something of the same experience when you become so submerged in the day-by-day demands of your work. Therefore, it seems appropriate that we take a few moments to look at the arbitration process in its broader setting in the general field of labor-management relations. Basically, the arbitration process is a part of a system of industrial self-government created and developed by labor and management. One of the basic concepts of American life is that of self-government. That basic and fundamental concept has been adapted to substantial segments of our economic life by companies and unions. For such a system to work and achieve

* Presidential Address. January 31, 1958.

** Paul N. Guthrie is a professor of economics at the University of North Carolina, as well as an arbitrator. He served as Vice Chairman and Public Member of the National War Labor Board, 4th Region, 1944-45, and as Director of Wage Stabilization, National Wage Stabilization Board, 1946.

its potentialities, arbitration is an indispensable instrument. Attempting to develop a system of industrial self-government without an arbitration facility is roughly similar to political self-government trying to operate without a judicial system whereby unresolved differences are determined only by conflict or surrender.

Perhaps it would be well to look briefly at the history of American industry in an effort to see how the present system has developed, as well as to indicate some of the reasons for the necessity of an effective method for the resolution of differences.

The growth of industry in the United States has been phenomenal. The years from 1790 to the present, a comparatively short period in the perspective of history, have witnessed the development of industry from the small shop to the giant industries of today—an industrial revolution unparalleled. As this process has gone on, larger and larger units of business enterprise have come into being carrying with them greater and greater deposits of economic power. This has meant to a considerable extent the removal of the ultimate voice in management from the local scene in the shop or factory to a far distant national office, sometimes concerned more with finance than with production.

Along with, and as a part of this transformation, a technological revolution has been involved. Out of this development has come a very complex and interrelated system of production which requires close cooperation between management and labor. The increased size of production units has made necessary the bringing together of large numbers of workers in a particular enterprise. Their respective duties and responsibilities are highly interdependent, and the actions of one may vitally affect the interests and concerns of all. The average working force is no longer a collection of so many individuals, each working on his own and independent of the others; rather they are all, in a real sense, members of a productive team.

In order to operate such a complex structure, these large units of corporate business enterprise have had to develop a bureaucracy as a matter of necessity. Like all bureaucracies,

whether governmental or private, they tend to be impersonal and to strangle individuality and personal expression.

In the face of such changes, the role and status of the individual employee were greatly changed. The disparity between his individual bargaining power and that of his corporate employer became greater and greater. No longer did he have the ear of the owner or the final determiner of policy in the business enterprise. This was a far cry from the simple face-to-face relationships which characterized comparable associations at the beginning of the 19th Century. Having lost his sense of individual significance to the enterprise, he turned to organization as a way of restoring identity and significance by collective effort.

Where large groups of people work together, differences inevitably arise, interests and counter interests clash. In such a context facilities had to be found for the resolution of differences, both individual and group, while at the same time permitting production to go on. The resort to force by the parties could not be had every time a dispute arose without tremendous cost, both to the employees and the company. The results of such resort to force not only affected the parties directly involved but the public interest as well. The growth of modern industry in power and scope served to magnify the role of the public interest. When the public interest becomes great and pervasive, there is always the tendency, and at times the necessity, to provide the essential regulation by legislation. Given the nature of modern industry, it is essential that some type of industrial government should exist. The net effect of this is to present the alternative of dynamic and responsible self-government or increasing control and regulation by political government on behalf of the public interest.

From the early days we have insisted upon a distinction between the economic and the political realms. We never have accepted the proposition that these realms should be merged into one bureaucracy. Consequently, we normally have used political instruments to regulate or control the economic realm only when the public interest clearly demanded it.

Fortunately, I think, many years ago industry and labor began to develop collective bargaining as a way of devising a

pattern of relationships between management and employees. Beginning with the early union price list and evolving into the comprehensive collective bargaining agreement of today, industry and labor have gone far in fashioning a system of self-government which makes unnecessary excessive intervention of governmental authority in industrial relations. This does not mean that the full potentialities of collective bargaining have been achieved, nor does it mean that there will be no additional efforts to extend governmental regulation and control.

Collective bargaining, like any other instrumentality in a dynamic and changing world, must be prepared to meet the new challenges that arise, as well as to preserve its past accomplishments. This is basically a call for labor and management to perfect the collective bargaining process. It is their surest way to control the conditions of their respective futures, rather than abdicate such responsibility and thereby leave it to the state. It is an understandable thing for either labor or management to become frustrated in trying to realize the full possibilities of free collective bargaining. Consequently there is a great temptation to seek aid from government as a short cut. However, it is well for him who thinks he will find an advantage there, to remember that tomorrow such control and regulation may just as well work to his disadvantage.

I do not mean to imply by these comments that government has no role to play in these matters. In our system the primary function of government in labor-management relations is to use its power and influence to foster and shape those conditions that will best contribute to the ability of labor and management to work out their problems under a system of industrial self-government of their own creation and under their own direction and control.

Where does voluntary arbitration fit into this picture? What role does it play in this system of industrial self-government that I have been talking about? There are many reasons why voluntary arbitration is an indispensable part of this system of industrial self-government. I shall discuss only a few of the reasons.

There is, first of all, as I have previously indicated, the simple

fact that large numbers of people cannot work together under the conditions of modern industry without differences and disagreements with regard to their respective rights. We are concerned not only with differences regarding intangible matters such as prestige, dignity and individual expression, but also with the respective economic claims of those engaged in the productive process. These bread-and-butter issues are basic since they are intimately related to the sort of standard of living one will be able to maintain under our system of production and distribution. We have become increasingly a population of hired hands in which the vast majority of us do not produce the things we need in order to live. On the contrary, we hope to sell our services and skills to a sufficient advantage in the market to enable us to achieve an improved standard of living. Under such a system differences are certain to arise. Many years ago Mr. Justice Holmes observed:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[1]

It is no accident that in industries in which a complicated system of pay rules exists, there is almost always a large volume of grievance disputes having to do with whether the employee has been properly compensated. It is important to remember that management and employees do not see wages and compensation from the same vantage point. From the point of view of management wages are a cost, and by necessity, management must be cost conscious. From the perspective of the employee his wages constitute not cost but income.

Another reason why differences and disagreements are certain to arise is the manner in which collective agreements are

[1] Vegelahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (dissenting opinion). Quoted by Harry Shulman in "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review* 999 (1955). Reprinted in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS (Washington: BNA Inc., 1956), Appendix A.

constructed. They are by their nature products of negotiation and compromise—not infrequently concluded under a great amount of pressure on both parties. Collective bargaining agreements, like babies, seem always to be born between midnight and six a.m. The matter is further complicated by the fact that in the intricate world of modern industry it is impossible for the parties to anticipate all of the situations and problems which will arise during the life of the agreement. Therefore, even if they were otherwise wont to spell out detailed arrangements, they cannot do so since they cannot anticipate all of the problems that will develop in the future. Consequently, they must, in substantial measure, develop principles and then depend upon meeting the day-by-day problems as they present themselves. In doing this they often agree upon the language of a principle but do not have a meeting of minds upon its detailed application to various factual situations. Take for example, the matter of seniority. There seems to be no limit to the variety of factual situations that can arise involving the application of seniority principles.

For these reasons, and others which I have not enumerated, a system of arbitration as the terminal point in the grievance procedure is essential for the functioning of industrial self-government. It not only provides a final resolution of such disputes, which is very important, but it is also a system within the control of the parties. The judge who determines the dispute is selected by them, and they may agree and stipulate the powers which he will wield. Thus they have fashioned their own legislation, and have created their own scheme of administration.

Up to this point I have been referring mainly to the arbitration of grievance disputes which arise under a collective agreement. However, I do want to refer briefly to the use of arbitration in disputes over contract terms—in which arbitration is more akin to the legislative function than the quasi-judicial one. In most industries, arbitration is used infrequently in the settlement of disputes over contract terms, and there has been some dissatisfaction with its results in those few industries where it is so used.

I have believed for a long time that much greater use could

be made of arbitration in handling disputes of this type. One of the main purposes of arbitration is to resolve disputes which would otherwise be resolved by economic force. In the highly developed and interrelated economic life of today, economic force is an expensive proposition, not only for the parties directly involved, but for the public as well. It is not at all unusual for parties to reach agreement upon all of the terms of a new contract except for one, two, or three items. In many instances such remaining items could be satisfactorily resolved by arbitration. One of the reasons why the arbitration of new contract terms has been fraught with undue risk is because of the failure of the parties carefully to define the issues submitted, and to develop agreed-upon criteria for the guidance of the arbitrator. It may be said that this is difficult for disputing parties to accomplish. No doubt it is. Nevertheless, it can be done in many instances, and will, I believe, bring a more satisfactory result to the parties than the use of economic force. The greater the ability of the parties to govern themselves, the less likely they are to have their affairs regulated and controlled by outside authority. Freedom of action can be retained only if that freedom is exercised with a deep sense of responsibility.

If the full possibilities of voluntary arbitration are to be realized, both the arbitrators and the parties must assume their responsibilities. I should like to say a few things about the responsibilities of the parties in the arbitration process. We arbitrators often feel that the parties are too prone to blame the arbitrator for a bad decision, instead of looking at their own performance, for they must remember that they are part of the process also. Have they properly defined the issue? At times they can't agree upon the exact issue. More than once I have been called by the parties and asked to arbitrate a dispute, in the course of which request I was told they could not agree upon the issue in dispute and would like me to hear them, decide what the issue was between them, and then make an award on that issue. The parties should know what they wish to have decided. In all fairness, I must say that in most instances they do know, but sometimes they have not stated it carefully so as to safeguard their own interests.

Another responsibility which the parties have is to present a well-prepared case. I would venture that more poor awards result from inadequately presented cases than from any one other cause. If a case is worth presenting to arbitration it is worth presenting well. I suppose every arbitrator has had the experience of having the parties waltz into a hearing without having prepared the case, and with a very inadequate knowledge of the facts themselves. If an arbitrator is to make a satisfactory award, it is absolutely essential that the parties present the basic and essential facts.

Once the award is made the parties have a responsibility to their respective constituents to interpret the award properly in order that it may serve the most constructive purpose. There is a duty to accept the award in good faith and to apply it in the same manner. I am glad to say that most parties accept this duty and consequently act with responsibility and good faith.

The arbitrators also have a responsibility if the arbitration process is to make its maximum contribution. Competence, judgment, impartiality, and integrity are essential. The function of the arbitrator is a vital one. It is also one of great responsibility. His decisions affect the rights and interests of many people. His is the final stage of appeal available to the individual worker to make his rights and privileges secure under the collective agreement. Perhaps just as important, the arbitrator's performance can strengthen greatly, or weaken seriously, the whole system of industrial self-government. It is, therefore, essential that the arbitrator see his function not as one isolated in an ivory tower, but rather as one which is part of a whole structural context.

He must provide due process in the fullest measure. Serious and careful consideration must go into each decision. Any case which reaches arbitration is too important to be decided casually. Furthermore, the arbitrator's decision, while made in a particular case, becomes part of a developing common law of industrial relations. Increasingly, I believe, the parties look, not only for a solution of the particular case, but also for direction which will condition their future relationships. In brief, what I am saying to my fellow arbitrators is that the arbitra-

tor's function transcends the particular case and extends to a contribution to a developing system of self-government which can be exercised in freedom and responsibility by labor and management. However, arbitrators should restrain themselves from deciding questions that are not before them, even though one party or the other may at times urge them to do so in the interest of winning a particular case.

Finally, with respect to the role and function of the arbitrator, I want to say one other thing. At the risk of seeming to preach about the matter, I want to emphasize the professional aspects of the arbitrator's function. We all certainly feel that the arbitrator should be adequately compensated in keeping with the degree of responsibility he assumes and the importance of the service he renders. However, there is also the matter of dedication to a purpose that must always be kept in the forefront. It is to be hoped that every arbitrator will regard himself as serving a cause—the cause being to aid in the development of a rule of law and reason as a substitute for conflict and economic warfare.

It is perhaps with respect to this last consideration that the Academy can make its greatest contribution. In this respect the Academy has made a great contribution in the last eleven years. The emphasis upon professional ethics and upon standards of competence among arbitrators has helped to develop an awareness of the broader purposes of the arbitration process. The Academy does not propose to lessen its interest in these matters. On the contrary, it intends to work for even higher standards. In such meetings as this, labor and management can be of great help to the arbitrators by giving us the value of their observations and criticisms. These are always welcome.

Finally, the greatest contribution we can make as arbitrators, and the greatest contribution the Academy can make, is to foster and aid in the fullest measure the development and extension of industrial self-government to the end that the rule of law and reason under freedom may enrich our common life.