Chapter III

ARBITRATION: A MANAGEMENT VIEWPOINT

C. W. AHNER *

It is an honor to be asked to speak to you and a pleasure to appear before arbitrators under these circumstances. You will pardon the observation that my usual "appearances" (I think that is one of your words) before arbitrators are occasions for feelings that cannot be accurately classified as pleasant.

The program lists the title of this paper as, "The Arbitration Process as Seen from Management's Point of View." What is here proposed may please few arbitrators and even fewer members of my own profession: more work for arbitrators, but less arbitration — at least, less arbitration of the extremely formal type which seems to be developing.

At the outset it should be said that I am an industrial relations counselor, and to avoid any misunderstanding we should add immediately that this implies no facilities for purchasing underwear at wholesale. My clients range from the small shop with a dozen employees to the fairly large corporation with as many thousands. Association with them has afforded some opportunity of appreciating how diverse habits and patterns of labor relations actually are and has left me with the settled conviction that arbitration procedures cannot and should not be uniform. We should not proceed as though only General Motors and UAW arbitrate; nor can we safely assume that what is good for them is good for everybody. The experience of people with arbitration is as wide as the range in size of establish-

* C. W. Ahner is an industrial relations counselor with Ahner Associates, St. Louis, Missouri. His paper was read and amplified by his associate, Robert P. Vining.

ments and type of occupation. With some parties issues reaching arbitration have been thoroughly screened, efforts at prior settlement realistic and searching and the parties appear before the arbitrator well aware of the risks involved, seeking and needing only a decision on the basis of the facts and the contract. In other cases, and by no means only where the firm is small, the parties arrive at arbitration scarcely knowing the difference between arbitration and mediation, or knowing it, apparently unaware of the risks that may be involved in seeking decision from a third party on a matter which should be settled and perhaps as a practical matter can only be settled satisfactorily by negotiation. These parties need assistance and guidance which experienced arbitrators often are able to give but which the arbitration process increasingly fails to afford. The conduct of arbitration in such circumstances is in large part the subject of this paper.

To avoid any misunderstanding let it be asserted that there is a place and need for that kind of proceeding where the arbitrator adheres severely to what some people would call a judicial role, meaning, I sometimes think, preservation of an olympian disregard for the size, direction, or velocity of the judicial chips, which he lets fly where they will. I would prefer to call such arbitration "forensic," using the word "judicial" to include also those cases when the arbitrator, like an experienced judge, promotes settlement out of court where it is preferable to a decision from the bench. If in the balance of this paper little or nothing is said about forensic arbitration, it should not be concluded that it is regarded as unimportant, but only that I prefer, in the limited time available, to address myself to other matters.

I have been asked to state my views of management problems in the arbitration process. The problem, as I see it, may be encapsulated in the observation that most difficulty has arisen from management's inability to reconcile the concept of an informal forum for the resolution of a mutual labor problem with the fact of an adversary proceeding followed by a judicial type decision.

Further, I should like to make it clear that the first suggestion made below is not intended as a substitute for arbitration,

but, rather as an additional mechanism for the resolution of a labor problem in appropriate instances and then only by consent of the parties.

This paper will propose:

1. More widespread use of third-party mediation as a substitute for arbitration.

2. In arbitration itself a completely realistic and therefore less narrowly legalistic approach.

3. Greater exploration of the educational possibilities of arbitration.

Among the reasons behind the recommendation for increased third-party mediation are the following somewhat pedestrian but significant facts: (1) Many issues being arbitrated can be better settled by negotiation; others satisfactorily settled only by negotiation. (2) The arbitration award often is not the application of a pre-existing agreement to a definite set of facts but the writing by the arbitrator of an agreement for the parties. This the parties should do themselves. (3) Finally, the formal issue has little relation to the basic grievance, and its resolution only leaves the parties with their problem unsolved.

We frequently talk among ourselves about cases that should never have been brought to arbitration. To the extent that these cases are readily disposed of by the facts and the contract I am not greatly disturbed, and I do not think arbitrators should be either. Such cases often have their sufficient reason. I am reminded of a story by a friend about one of his first experiences as an arbitrator. It was a discharge, and the parties were pressing for a prompt award. He gave a bench decision, sustaining the discharge. Like a sprinter coming off his marks the discharged employee launched himself at the arbitrator, with obviously hostile intent. Fortunately intervention was prompt and adequate. The union business agent, escorting the arbitrator to his car, generously said: "I want you to know that your decision was right and fair. There could have been no other." The arbitrator then said, "How did such a case get to arbitration? Why didn't somebody tell him?" With some surprise the business agent replied, "That's simple. You saw what he tried to do to you." And so, the political arbitration,

when not overdone, is a legitimate use of arbitration. It rarely affects seriously the basic relation between the parties. What troubles me more are those cases that do not belong in arbitration because they involve an important aspect of the basic realtionship about which the parties have no agreement. Here arbitration is premature and potentially dangerous.

To be realistic about the pre-arbitration process let us lift the corporate veil and take a behind-the-scenes look at that unanimity which management presents to the outside and ask how the decision is made that a case shall be arbitrated. Who, on management's side, makes the final decision to go to arbitration? Upon his knowledge, experience, objectivity, and independence depends whether the decision to arbitrate is intelligent and realistic. You are all familiar with the typical four-step grievance procedure which would insure a thorough screening of cases advancing towards arbitration. But those of you who have seen the mechanism in operation must have observed the squirrel-cage effect that is sometimes achieved. The man who made the decision which gave rise to the grievance may also make the final decision to arbitrate. And this may happen for any number of reasons: The department-head making the original decision may be a valued production man whom no one in the organization cares to reverse. Or the lower-level supervisor may have made the original decision on the advice of the executive. At any rate the ultimate decision may be the original decision, progressively reinforced but not reconsidered as it proceeds through the grievance process.

The executive making the final decision may be a top company official, far enough removed from the original grievance to permit thorough reconsideration, and if all is functioning well the decision to arbitrate is realistic. But in how many cases is the decision predicated upon a hasty reading of labor summaries in some NAM bulletin or management service, or what was overheard at the club, or, perhaps, the plain, understandable human feeling, "they can't do this to us."

But even where the executive reviewing the facts is knowledgeable and experienced, objectivity is often a problem. A great deal depends upon who gathers the facts, and whether

his prestige is sufficient to enable him to get at facts and his experience sufficiently broad to enable him to recognize their significance as he develops them. This process of getting at the facts is not as easy for management as it may appear from the outside. Sometimes, in dealing with other company officials, both line and staff, the labor-relations man of the company researching the problem feels more like a business agent than the business agent himself. The line supervisor today is in a very difficult position. He is on the firing line every day and is subjected to many petty and needless worries, many of which stem from the productive process, but others from little grabs for power by stewards or rank-and-file union members who have their own axes to grind. A decision is made that involves a questionable interpretation of the contract, or some nebulous past practice, or possibly an innovation that, precisely because it is an innovation, has never been a subject of negotiation. When the case is reviewed by higher management or the industrial-relations staff, they frequently find a mixture of fact and emotion that is almost impossible to segregate. And, unfortunately, as the case moves through the various stages of the grievance procedure what was a minor incident may become identified with some major interest of both sides and with principles which make an adverse decision dangerous as a matter of precedent.

The literature has made us all aware that the union is a political institution and many of its decisions, both in negotiations and in contract administration, are political in nature. But management also is a political institution. The company president may recognize that a plant manager has made a wrong and potentially dangerous decision, but finds it unpolitic not to back him up. Similarly the plant manager may prefer to let the *arbitrator* make it clear to his foreman that he is wrong. And the labor-relations executive may feel that his position in future discussions with line management will be strengthened by letting the arbitrator confirm his judgment rather than trying to persuade the line officials that they are in error. Until arbitration has decided the issue there could be that lingering suspicion that the labor relations department was letting the line people down.

Cases often get to arbitration because, to be frank about it, the parties really have no agreement on the specific matter, and can't negotiate one under existing circumstances. We all of us indulge in a happy fiction that grievance arbitration consists in the interpretation and application of the agreement. We caution the arbitrator neither to add to nor subtract from the contract. Then, having reached an impasse over a matter on which the agreement is silent, we go to arbitration asking the arbitrator to apply a nonexistent agreement. Maintaining the fiction he complies, because, being a realist, he knows as well as we do that a decision is imperative and that the parties in the circumstances cannot achieve agreement alone.

When we consider all the elements on the management side and those on the union's, which I am sure are not fewer, which get cases to arbitration that do not belong there, why should there be any question about the desirability of third-party mediation? I admit that I often have a deep sense of frustration as I approach arbitration. It begins with the feeling that I have failed in my job of getting things settled by agreement. I look at the arbitrator at the head of the table and the two parties arranged as adversaries along opposite sides and ask myself whether exploring the issue under such circumstances will produce the most acceptable result. In the kind of issues about which I have been speaking there are usually two interests at stake. Arbitration with a yes-or-no answer may vindicate one interest and suppress the other. What is really needed is a process which assists the parties to find alternatives and to agree upon the one which in greater or less degree protects both interests. An arbitration award that does not give full consideration to major interests on both sides rarely settles problems, and usually makes reconsideration more difficult. The idea that an award has force only during the contract term is a fiction that has little relation to the facts.

Would it not be better to devise what Ben Roberts, one of your members, has called step 4½ of the grievance procedure, where the parties meet in relative comfort and where the seating arrangement deliberately avoids any suggestion of sides, and the third party, call him arbitrator or mediator if you will, is frankly charged with the task of exploring the issue as

a problem with a hope of bringing the parties to agreement. It seems to me that I can hear some of your expressions of dismay and disagreement. Why, you ask, bring in a third party? Are not the parties themselves sufficiently adept at the arts of compromise to reach agreement if agreement is possible? Possibly they are, but an impartial third person selected by the parties can sometimes point up implications of a potential award that the parties themselves may not have grasped. Often, too, precisely because his help has been sought the impartial person can get consideration of alternatives that the parties earlier refused to explore possibly because they were not in a political position that allowed such exploration. Moreover, the experienced arbitrator will have seen the constructive resolution of similar problems not once but many times and may suggest alternatives that did not occur to the parties. Finally, at step 4½ when the parties are before the impartial third person, they realize that the next step is a decision that neither may welcome. And this consideration often proves to be a catalyst effecting settlement where all earlier efforts have failed. Let me add one final consideration. I have seen third-party mediation operate effectively and prefer its results to arbitration whenever it can be used.

What has just been said relates to the usefulness of third-party mediation established, as such, by the parties. But to what extent should a person called upon to arbitrate indulge in attempts to mediate? On this matter opinions vary widely, and controversy has been sharp. There is a body of opinion that divides the universe of arbitrators into two classes, the good guys and the bad. The good, being strictly judicial, never mediate. The bad, according to the good, not knowing the proper function of arbitrators, may try to assist the parties to a settlement. I have often wondered what some of our better jurists who promote settlements out of court would say to the observation that they are not judicial? Whether an arbitrator should attempt mediation depends, it seems to me, upon the parties, the kind of issues, the arbitrator and the relationship he enjoys with the parties, his perceptivity and deftness. Where the parties, having thoroughly exhausted possibilities of settlement and being obviously aware of the risk of an unfavorable

award come prepared to present evidence and try a case on its merits, an arbitrator would be unwise to attempt mediation. And the arbitrator who is unable to recognize such a situation could not successfully mediate anyway. But when an arbitrator finds the issue before him to be one that is quite obviously a matter for negotiations, when he finds that attitudes have not completely crystallized, it is my feeling that he has a responsibility to explore the possibilities of settlement. The guiding rule should not be what taboos have been erected around arbitration proceedings, but rather what will improve the relationship between the parties. The important question, it seems to me, is not whether the arbitrator should attempt mediation, but how to go about it. A blunt proposal that the parties return to negotiations will rarely succeed. A series of questions that reveal the interest each side has at stake, the extent to which those interests are conflicting, which alert the parties to possibilities of compromise of which they may have been unaware, while at the same time alerting to implications of possible decisions of which they may have been equally unaware, should reveal to the arbitrator whether there is any genuine possibility of settlement. These questions should also elicit information that will enable the arbitrator to write an award, should it prove necessary, that falls within the range of expectations of the parties.

Labor arbitration is beginning to take on the lineaments of an institution and perhaps inevitably is becoming more professionalized. The time has come when we must ask whether it is also becoming less flexible and, to that extent, less useful as an instrument for promoting sound industrial relations. To put it another way, I do not believe it is the sole function of arbitration to act as a substitute for strike action. As I go through published awards two characteristics of many of them strike me—their length and the fact that they seem to have been written for the professional reader. One of the great advantages of arbitration should be its promptness, and it is difficult to believe that there is no correlation between the length of the opinion and the time spent by the arbitrator in deciding the case. But even more important, if the award is to serve as an instrument in promoting labor relations, it should

be written, it seems to me, neither for counsel of the parties nor for posterity but for the men in the shop.

The tendency of some awards to multiply citations is also somewhat disconcerting. Few arbitrators accept awards of other arbitrators as having the force of precedent. Yet, awards are quoted and distinguished as judges handle law, not so much to show a consensus of opinion, as to establish the weight of authority. Even more disconcerting is what appears to be an increasing tendency to decide cases on some principle borrowed from Williston. I am fully aware of the problems of construction that sometimes confront arbitrators, especially when they are given the task of finding the meaning of the parties when circumstances make it clear that the parties in negotiation had never given thought to the issue. The arbitrator has to find the basis for an award wherever it reasonably can be found. But it should be made clear that historic principles of construction that were elaborated for contracts usually specific and limited are to be applied only with appropriate modification and insight to the labor agreement that is essentially an accord stabilizing an employment relationship. Time does not permit me to particularize my comments on this matter. It should be obvious, however, that those sections of the agreement that were the product of carefully cultivated obscurity to avoid, at some midnight hour, the possibility of opening up an issue that would have made the signing of the agreement impossible, are not usually adequately disposed of by holding that language should be interpreted most severely against its author.

That, of course, is a sound principle of contract interpretation, but has a much narrower application in labor arbitration than it is sometimes given. The classical example of one-sided authorship is the insurance policy that is handed ready-made to the subscriber. The labor agreement is usually much more of a joint product even though in the final drafting the attorney for one side or the other may be holding the pencil.

It should be equally obvious that the use of offers and counter-offers made during the process of negotiation are sometimes unsafe guides to the meaning of the contract that was finally made. We might well investigate the extent to which reliance upon such offers in arbitration actually limits

the parties in their efforts at future settlements in negotiations because they are unwilling to have them used against them at some future arbitration. In fact, in actual practice, knowing the tendency of arbitrators to take into consideration proposals and counter-proposals, I have found it necessary to prevent a Company from making proposals or counter-proposals where there was little or no chance of acceptance by the Union.

Take a contract that is not explicit about the Company's right to require a physical examination on transfers or on return to work after illness. The Company maintains that even in the absence of any specific provision it has such right if the conditions reasonably require it. The Union, although recognizing the necessity for such physicals, will not for political reasons admit such right contractually. During negotiations the Company is in no position to bargain about inclusion of such provision in the contract. Were the proposal made the Union would refuse it. Should this question arise in any subsequent arbitration the Company would run serious risk of having an arbitrator decide that the parties never "intended" within the present wording of the contract that the Company have such right solely on the basis that the proposal had been denied. As a result an area which might have been clarified by negotiation remains clouded, because arbitrators have used the concession of bargaining as an index for ascertaining the rights and intentions of the parties.

Similar problems arise when arbitrators base their rulings upon the traditional rules of evidence of doubtful applicability. Take exclusions of evidence on the basis of hearsay. I have never encountered a plant manager or supervisor who understood the rule. When evidence, pertinent to them, is so excluded, or is admitted condescendingly, and the decision refers to it as hearsay, their reaction is simply that they have not been afforded a full hearing. This defeats one of the basic purposes of arbitration.

There frequently exists a doubt as to whether the legal maxim cited by the arbitrator is the basis for this decision or merely a rationalization justifying it.

There is, too, the situation in which the arbitrator appears to base his decision on bits of evidence that the parties regard

as trivial. Take a recent case in which I participated. The issue was a job evaluation, and the parties had agreed upon the system of evaluation to be applied. One job was in question. The testimony was exhaustive. In course of a three-day hearing it was developed that the Company had changed its method of issuing protective work smocks for the job. To put it crudely, rain-coats were formerly hung on hooks and people took their choice. Subsequently the Company issued each man his own coat. This change had nothing to do with the job content. Yet it was made the basis of the decision.

Both parties were astounded. The Union first regarded the decision as a huge joke on the Company, but then began to wonder whether they could trust their interests to such an unsound procedure. I do not like to lose cases any more than other attorneys, but what troubled me was not the loss but the unpredictable and unsound basis of decision. How can one build clients' confidence in a system that presumes to dispense industrial justice but bases its decisions on trivial and inappropriate factors whether they are drawn from Wigmore or Williston or simply snatched from the flotsam and jetsam of the hearing.

It is exceedingly difficult to explain to management prior to arbitration that a decision may hinge upon some technicality not within the contemplation of either party when the contract was drawn or when the event happened that occasioned the grievance.

May I say to you gentlemen at this point that in my own experience in numerous instances, management has resorted to an unpalatable agreement with the Union because, having no such experiences, it was unwilling to take a chance on the arbitration process.

One other observation and I am finished. It seems to me that we are not making the fullest use of the educational possibilities of arbitration. On this point I have a plea and a suggestion. The plea is that arbitrators occasionally show themselves somewhat more tolerant of the irrelevant. Often at arbitration hearings there are experienced and responsible Union and Company officials who were not present at earlier stages of the grievance procedure. The irrelevant remark that some foreman or some employee is trying to make may reveal much

more about the basic problem which gave rise to the grievance than the formal grievance itself. It may give these higher officers an insight into a shop problem that otherwise they would not have. Let the individual get it off his chest. Even if his remark is of no importance for the disposition of the case or for what it may reveal about shop tensions, he will feel that he has had his say and be more inclined to accept an unfavorable award.

The suggestion is this: That arbitrators be willing to accept invitations by companies to talk to supervisors and explain why they decided a case the way they did. Companies and Unions have their educational programs. They strive to explain the details of the agreement and its operation. But I have found that it is much more instructive to take a case that has been lost and let the arbitrator explain why the case was lost. This, I recognize, puts arbitrators in invidious positions. But they are accustomed to be put there and the contribution which they can make to the education of supervisory personnel and Union stewards is incalculable.

Discussion—

MAURICE S. TROTTA *

Mr. Ahner has presented to us today some new ideas and constructive criticisms. Constructive criticism and new ideas, whether they be controversial or not, should always be welcomed. Before proceeding with my analysis of Mr. Ahner's paper, I believe I should point out that whereas Mr. Ahner's frame of reference is that of a management consultant, my frame of reference is that of an arbitrator. Moreover, we must recognize that the ideas expressed by both of us are, in large measure, an expression of our personal experiences. I think it would be somewhat presumptuous for me to claim that whatever ideas I express today are held by arbitrators generally.

* Maurice S. Trotta is associate professor of industrial relations at New York University, School of Commerce, Accounts, and Finance, New York City. He also is an arbitrator and served as a public panel chairman of the War Labor Board, 1942-45.

My views are based on my own personal experiences supplemented by an exchange of views with other arbitrators, union representatives, management representatives and officials of agencies that designate arbitrators.

With these preliminary remarks out of the way, let us direct our attention to some of the ideas expressed by Mr. Ahner. Mr. Ahner feels that arbitration is becoming more formal. Undoubtedly, he must have had some experiences that led him to this conclusion. I doubt, however, that it can be said that there is a general trend toward extremely formal arbitration hearings. I have questioned other arbitrators as well as persons connected with agencies that designate arbitrators about this matter and they do not feel that arbitration is becoming extremely formal. Possibly, Mr. Ahner's observations concerning formality at hearings may be explained in this manner.

No doubt, many of you in this room remember the second or third annual meeting of the National Academy of Arbitrators that was held in Washington, D. C. William Davis and Madame Perkins were the speakers at our annual dinner. Most of the arbitrators present that night were relatively young men with not many years of experience. No doubt, the manner in which we young arbitrators conducted hearings in those days reflected our inexperience with a rapidly developing semi-judicial proceeding that had few rules or precedents to guide it. Today, in spite of our early concern about expendability—I still remember Dave Cole's speech on this subject because it worried me at the time—most of us are still members of the Academy and actively engaged in the arbitration of labor disputes. We should be, by now, experienced arbitrators who can conduct hearings with a sense of assurance and greater dispatch. We have resolved at least some of the doubts we had concerning procedure, evidence, and witnesses and, in general, we adhere to certain accepted rules. To a person who remembers some of the early arbitration hearings, a hearing conducted by an experienced arbitrator, by comparison, may appear to be extremely formal.

I will agree with Mr. Ahner that the arbitration process should not become highly formalized or too legalistic. The nature of the issues presented to arbitrators and the human

relations factors usually present in a labor dispute require a flexible, informal, non-legalistic approach. Arbitrators should permit the parties to get things off their chests. Often, the arbitration proceedings act as a safety valve and are an opportunity for the parties to express pent-up emotions. Winning or losing a case is sometimes of less importance than the right to have your day in court.

Mr. Ahner suggests that there should be "more widespread use of third-party mediation as a substitute for arbitration." He recommends further that the mediation may be done by the arbitrator selected by the parties to arbitrate a dispute. In other words, when in the course of the hearing the arbitrator decides that he should mediate the dispute, he simply changes his role.

I feel that the number of cases in which an arbitrator should constitute himself a mediator is very small indeed. Within recent years, I have had only two such cases. Both of them involved emotionally disturbed employees who were being discharged. Incidentally, in one of these cases, the employee, who earned about $60.00 a week, had acquired a flock of seven children in seven years. Is there any doubt that he was emotionally involved? The basic problem was far beyond the powers of an arbitrator, although it evidently was not beyond the power of the employee.

In the other case, an employee who had been a very good worker began acquiring a persecution complex because of an unusual set of circumstances and his inability to speak or understand English. This case called for a psychiatrist, not an award. For the information of those who may be interested, I found out, as a result of this case, that in the city of New York, there are only three Spanish-speaking psychiatrists and none who specializes in arbitrators who lie awake nights trying to solve unsolvable issues.

I believe that in 95 percent of the cases where the parties select an ad hoc arbitrator, they want the arbitrator to hand down a decision, and they do not want him, on his own initiative, to become a mediator.

Only a few weeks ago, the head of one mediation board told me that he had many complaints from union officials and man-

agement representatives about arbitrators who try to mediate disputes. An arbitrator who changes his role to that of a mediator may find that he cannot, during the same case, revert back to the role of arbitrator without impairing his effectiveness. It should be said, however, that when a person is a permanent arbitrator, and has a fairly close relationship with the parties, he may at times attempt to mediate a dispute. Even this should be done sparingly.

Mr. Ahner says that arbitrators should mediate issues because "many issues being arbitrated can better be settled by negotiation, others satisfactorily settled only by negotiation." It is true that some issues are best settled by negotiation, but I do not believe that the arbitrator should take it upon himself to decide this matter for the parties. The "ad hoc" arbitrator usually knows little about the background of the issue and less about the relationship between the parties involved in the dispute.

Another reason given by Mr. Ahner for more mediation and less arbitration is that "the arbitration often is not the application of a pre-existing agreement to a definite set of facts but the writing by the arbitrator of an agreement for the parties." I agree with Mr. Ahner that the parties should write their own contracts. In the usual case, the arbitrator is asked to interpret the contract, not to add to it. I realize, however, that frequently it is difficult to decide whether in fact the award actually interprets the contract or adds to it. Where, however, it is clear that an award will add to the contract something that was not agreed to during negotiations, then the arbitrator should so advise the parties and refuse to render an award.

Of course, there are cases where the parties specifically request the arbitrator to add to the contract in order to resolve a dispute involving a matter about which the contract is silent. Although it is almost impossible to draw up a contract which anticipates every situation that might arise and is perfectly clear and unambiguous in every detail, there are too many contracts in existence that are loosely-drawn and ambiguous. I am now in the process of trying to interpret a holiday provision of a contract in which sub-division "A" provides for eight paid holidays and sub-division "B" guarantees four paid holi-

days. Maybe the reason for loosely worded contracts is that, after the parties decide on wages, they are too exhausted to be too concerned about the other provisions of the contract. Or maybe the process of collective bargaining is, as one student put it, the process of "arguing collectively."

The third reason given by Mr. Ahner for more mediation and less arbitration is that "the formal issue often has little relation to the basic grievance and its resolution only leaves the parties with their problems unresolved." It is true that the formal issue is frequently not the real basic issue but this, in my opinion, is not a good reason for the arbitrator to become, on his own initiative, a mediator. If it is clear to the arbitrator that an award on the formal issue will not solve the basic problem, he should tell the parties and suggest that they rephrase the issue. The arbitrator can even help them formulate the new issue, but I do not believe he should mediate.

Mr. Ahner emphasizes the point that many issues that go to arbitration could be resolved with the help of a mediator. I fully agree with him. A mediator could help the parties concentrate on the issue rather than talking about each other. Too frequently at the outset of a hearing, it becomes evident that the parties have never really defined the issue. The arbitrator then has the problem of getting the parties to agree on the specific points at issue. Often, when the issue is clearly stated, the answer is obvious even to the parties and settled without mediation or arbitration.

I see no real objection to a grievance procedure that provides for mediation before arbitration. Persons who normally act as ad hoc arbitrators could perform the mediation function. I do not believe, however, that it is wise for a person who has been selected to arbitrate a dispute to change his role to that of mediator on his own initiative and without the consent of the parties.

Mr. Ahner's final suggestion is that arbitrators can perform an educational function by appearing before company supervisors and union officials to explain the reasons why a case was lost. I would like to point out that when a case involves strong emotional feelings, no amount of reason will justify the award. In the eyes of most people, a disliked person can never be right.

Let me conclude by telling you of an incident that occurred in my arbitration seminar at New York University. One of my students was evidently perplexed by the fact that I would frequently argue both sides of an issue with equal conviction. One day I would appear pro-management and the next time we met, I would appear pro-union. He finally asked me point blank whether I was pro-management or pro-union. I asked him with some degree of curiosity what impression I had given to him. He hesitated, thought for a minute, as if weighing the evidence and then with the air of a judge, announcing a profound decision, he said, "I think you are mediocre."

I hope that my audience, after hearing my remarks today, has not come to the same conclusion.