CHAPTER IV

PROBLEM AREAS IN ARBITRATION

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It is not my intention, even if it were within my power, to present a formal, academic paper that is esoteric in content or professorial in delivery or even replete with properly annotated footnotes. I will omit the "id ests" and "ibids" and instead I would like to talk over with you some random thoughts and ideas concerning arbitrators and arbitration in the field of labor-management relations.

You are all, of course, experts in interpreting labor contracts. This is your profession, so to speak. When someone like myself, or when someone from management sits down with a group of you in the relaxed atmosphere of a hotel room with the conversation, and sometimes something liquid, flowing freely, the hours pass pleasantly by in discussion of the niceties of promotion clauses, seniority rules, concepts of discipline in industrial plants, and what have you. These are usually probative, informative and thought-provoking sessions on a high intellectual plane, which is as it should be. These conversations, however, largely conceal the essence. The drama and emotion which go into negotiating the cold and formal language of the contract often become lost in the mist of words and phrases.

What makes a labor contract, of course, are not words—but hard tough bargaining by people; people sometimes with a common purpose, often with a conflicting one which yields to compromise. The string of words and commas that comprise

* Vice President, UAW. Luncheon speech, January 29, 1959.

a single sentence prosaically setting forth some seniority rule may be the result of workers and their families sacrificing on the picket lines for many days. Struggle in one form or another is the stuff out of which contracts are made. Dull words and sentences are the result of that struggle.

It is of paramount importance that arbitrators never lose sight of this plain and simple truism. It is so easy for the expert and the professional to fall victim to the "ivory tower." It is so easy for them to notice only the bargaining maneuver that caused the contract settlement and fail to appreciate the people who struggled through it and the ideology that motivated them. The words of labor contracts should never be disassociated from the people who made them. For to do this is to lose sense of the vital and exciting essence that brought the contract into being. Words should never be allowed to become a curtain which hide from view the vibrant stage action which gave them life. These thoughts, by the way, hold true for the labor representative and the management representative as well.

Nothing could be more disastrous than to view a labor contract as a lifeless document unrelated to the struggle of people. The ultimate result of such a view is the sterile cynicism of the unenlightened professional and the inability to feel and comprehend the reality that is collective bargaining.

Arbitrators are, essentially, creatures of the labor contracts. They have no existence in that capacity except as the contract reads life into them. This is, perhaps, a rather harsh way to put it, but it is, nevertheless, a fact. This means that arbitrators cannot stand aloof and apart. They are an integral part of the collective bargaining process, even though in a different sense from those who actually participate in the negotiations. There is no ivory tower. There is no separation from the hard facts of industrial life.

Even in the course of an arbitration hearing, the same human problems out of which the contract language was born are still very much evident. The decision on a seniority question

may determine whether hundreds, or even thousands, of certain workers have jobs or do not have jobs. The drama of the case involving a discharge lies in the worker's real and pressing problem of providing bread and butter for his wife and children. These are not matters merely of words and interpretations—they are matters of intense feeling and conflict.

This is one basic reason why arbitrators generally, and other experts in the field of arbitration have come to the sensible conclusion that extreme legalism and formalism have no place in the arbitration proceeding. Workers do not comprehend the intricacies of the legal form or the politeness of the formal procedure. Too much of either will tend, in the long run, to detract from the effectiveness of arbitration as a means to the settlement of contractual disputes; since for arbitration to be successful it must be understood and appreciated before it is wholly accepted. It is not necessary, I am sure, to expand before this audience the need for avoiding pitfalls that are created by too great an emphasis on formalism and legalism in the arbitration hearing. To my mind, resort to such procedures merely represents a form of escapism and reliance upon the path of least resistance.

Of course, any reference to legalism must be understood in its deeper sense and not simply as a matter of form. Any overlegalistic handling of human situations, which tends to sacrifice individual equity, is essentially wrong. When either party to the contract indulges in this sort of behavior it should be subject to correction by the arbitrator. Only thus can equity be given its proper weight.

So much for philosophizing. There are two other areas of discussion which I would like to raise with you. They concern certain needs that unions and companies have in the field of arbitration.

Arbitration in the interpretation of labor contracts, as you know, has grown by leaps and bounds and has now reached such proportions that it ranks almost in importance with the

negotiation of the contract itself. There are times, as a matter of fact, when the arbitrator's award may be even more important to the collective bargaining relationship of the parties than the negotiations which settled the contract. Arbitrators' decisions and attitudes need to be studied as closely as the parties evaluate the background, character and personality of the negotiators sitting across the bargaining table.

Over the years, thousands upon thousands of arbitration awards in the field of labor-management relations have been issued. They cover many subjects dealing with the most intricate and detailed problems of industrial life. Literally thousands of arbitrators of many walks of life are in the field waiting for or seeking out business. It is not possible for any company or union to be familiar with all the arbitrators in the immediate geographical location—to say nothing of the nation as a whole. There is, therefore, a real need for a more detailed study than is currently available of arbitrators and arbitrators' awards.

There should be a listing of the names of all arbitrators in each geographical location, with a report on their biographical background and an analysis of their decisions. Such a listing should include for each name information as to the number of awards rendered, the companies and unions involved, and the number of years each has been arbitrating cases. It would be of value too, in writing the biographical background of the arbitrators, to include such information as the current major source of income. This would advise whether the arbitrator involved is a professional arbitrator whose chief source of income is derived from arbitrating in the labor-management field, or whether he is a teacher or a management or labor consultant, a lawyer, a judge, a businessman, etc. His affiliation with a given company or union should also be available.

It is not only important, however, to know about the arbitrator and his background. It is becoming equally important to know what he thinks, what is his outlook on life, what he

stands for. This does not mean, of course, that there should be an FBI-type investigation of each and every arbitrator. The information sought goes primarily toward an analysis of the arbitrator's findings in arbitration cases. All arbitrators express their ideas through dictum as well as through their final award. There should be a source for finding this kind of information which would make available to management and labor clues concerning each arbitrator's technique and his expressions with respect to specific subject matters.

The National Academy of Arbitrators would do a service to labor and management if it could undertake such a task.

As the compilation of arbitrators' awards grows larger and larger, basic concepts and principles have developed which represent, in effect, common law governing the interpretation and application of labor contracts. Thus, most arbitrators (where their jurisdiction permits) accept the "theory of corrective discipline," the principle involved in the "double penalty" and in the assessment of "equal penalties" for like offenses, etc. Such common law in labor-management arbitration could be compiled in systematic fashion together with the listing and examination of highlight awards setting forth specific examples. Appropriate citations, moreover, covering various types of subject matter will afford valuable clues to the proper arguments to use in handling cases involving such subjects.

The basic purpose of such a compilation, of course, is to establish guideposts for settling pending grievances. Arbitration machinery should be designed to induce the parties to settle grievances rather than to arbitrate them. I am not sure that this particular audience may be overly receptive to this, and I am not at all sure that I am being entirely wise to propose it here, but theoretically, you know, all arbitrators should be working toward the elimination of their own jobs.

The Commerce Clearing House and The Bureau of National Affairs, Inc., compilations are helpful for general research and review. A more thorough study, however, along the lines which I have suggested would indeed be helpful.

One of the major complaints which management and labor receive from arbitrators concerns inadequate preparation and presentation of cases. Generally speaking, those unions and managements which do not use trained experts to handle their arbitration cases face the problem of educating their people in the preparation and presentation of arbitration cases. There is a great need for expert advice as to the most advantageous way of preparing and arguing various types of arbitration cases. The preparation and argumentation involved in a classification dispute is considerably different from the preparation and argumentation in a discipline case.

Conferences and seminars concerning these matters are currently sponsored by universities and the American Arbitration Association. These are informative, educational and helpful. The problem is that they usually are two or three day affairs, comprising a few workshops and a lot of speeches. What is needed is educational classes on a sustained basis, dealing in some detail with the specifics of arbitration procedures, investigation and preparation of cases, and the basic principles of contract interpretation as established through the common law of arbitration awards.

Arbitration, as a means of settling grievance disputes, has become so vital a part of the collective bargaining relationship and is so frequently used by the contracting parties that the time has now come when the parties, particularly the unions, are looking long and hard at the cost of arbitration. Arbitrators' fees have been increasing and in some areas and for some small local unions have become alarmingly high. Just consider the cost of arbitrating a case which a small union of perhaps a thousand members must meet. In most cases it must pay half the arbitrator's fee and half the arbitrator's expenses. It must pay lost time and expenses for union representatives who present the case. It must pay lost time and expenses for union witnesses who appear in behalf of the union's case. In some instances, there are attorney fees and expenses. There is the

expense connected with preparation and pre-arbitration investigation of the case as well as, in some cases, the preparation of post-arbitration briefs. In some instances, they must sustain the cost of minutes of the arbitration hearing and of secretarial help. And, of course, there is always the expenditure for photostats, pictures, drawings, etc., when necessary.

Many local unions are small and the cost of arbitration can become so burdensome that the arbitration procedure and machinery becomes difficult to maintain. This places such unions at a disadvantage. Company refusal to bargain out grievances which compels processing them to the arbitrator could bankrupt a local union. In any event, a small treasury causes such a union to be unable to make full use of the arbitration machinery which, in turn, creates dissatisfaction among members whose legitimate grievances are dropped because it becomes too costly to process them.

Arbitration costs are continuing to increase. A way must be found to keep such costs in line for otherwise the arbitration machinery will tend to break down with the resultant ill effects upon the collective bargaining relationship. Fighting it out with an open-ended right-to-strike grievance procedure becomes unduly attractive.

In this regard, the UAW is now undertaking a study among its local unions in the Michigan area to seek some solution to this serious problem of arbitration costs. We will shortly convene our local unions to obtain facts concerning the cost of arbitration in order to have a better picture of the problem. Thereafter, when we have compiled as much of the necessary information as we can obtain, we plan to invite the arbitrators in the immediate area to a meeting to discuss the problem with them.

This matter of arbitration costs is now becoming a problem of sufficient seriousness as to warrant close attention. I believe it would be salutary for you, whose interests are directly involved in this problem, to be thinking about and discussing the matter as well.

As I said at the outset, my purpose today was to talk over with you some random thoughts concerning your profession. I guess, on occasion, it is a good thing for a labor representative to be able to shed his ideas concerning arbitrators and arbitration. I have thought about these things for some time, and now that I have had the opportunity to divest myself of them and burden you with them, I can forget about them while you find the solutions. After all, solution-finding is your chosen job. So go to it.