APPENDIX C

AN EVALUATION OF ARBITRATION APPRENTICESHIPS*

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Since the end of World War Two arbitration has grown to be accepted as the normal means of resolving disputes arising between management and labor during the life of the collective bargaining agreement. The universality of this acceptance is demonstrated by the inclusion of arbitration provisions in over 90% of the current agreements, and by the tremendous growth in the number of arbitration cases heard annually from a few thousand at the end of the Second World War to 25,000 at the present time, with prospects of further increases at approximately 10 percent per year.[1]

This dynamic growth has brought with it certain personnel problems arising from the fact that the increase in the number of acceptable arbitrators has not been commensurate with the increase in the number of cases to be heard. In addition it is also evident that the bulk of the cases heard today are presented to the same core of arbitrators that entered the field in the mid-1940's. This group, composed primarily of members of the National Academy of Arbitrators, is advancing in years to the point where their average age is now in the mid-fifties. As far as is known, no specific program has been set forth for expanding the corps of currently available arbitrators, or for the selection and training of successors.

The arbitration profession as we know it today had its inauguration under the banner of the War Labor Board. The policy of the War Labor Board was to direct the insertion of arbitration provisions in collective agreements so that disputes arising out of such agreements would be settled by the use of private machinery. The insertion of such provisions into collective bargaining agreements was at first rejected by managements as an infringement upon their exclusive rights of management of the business, but under the pressure of the war effort, there was sufficient opportunity for settlements, some of which managements found quite acceptable. Accordingly, upon termination of the war effort, many companies were willing to abide by, and often rely upon, the arbitration provisions, during the early post-war period. So it was, that the youthful economists, attorneys and engineers, returning to their peacetime pursuits after their experience in settling wartime labor conflicts found an increasing demand from the parties for their services as arbitrators.

THE NEED FOR COMPETENT ARBITRATORS

It soon became evident, however, from the increasing number of arbitration cases being heard throughout the nation, that there was a need for augmenting

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* This survey was initiated by Mr. Zack and prepared for publication in this volume at the request of its editor.

** Tufts College, 1953; Yale University School of Law, 1956. Associated with Saul Wallen, 1956-1960.

[1] Joseph Murphy, Vice President of American Arbitration Association, in a speech at Shulman Labor Conference, Yale Law School, March 19, 1960.

the ranks of competent arbitrators. This need was voiced by Professor E. E. Witte as early as 1948, when he told the First Annual meeting of the National Academy of Arbitrators that the further progress of industrial arbitration depended in large measure upon the development of "a larger group of qualified and experienced arbitrators."[2] These dual criteria of qualification and experience were, and continue to be, the keynote of the problem faced in expanding the ranks of arbitrators.

Many would-be arbitrators with creditable experience in their own occupations and with apparent qualifications for service as arbitrators have offered themselves to the parties. Comparatively few, however, have succeeded in acquiring the practical experience in arbitration which is essential for their acceptability to companies and unions.

The American Arbitration Association and the Federal Mediation & Conciliation Service have developed sound procedures for offering to the parties the names of individuals who they believe to be acceptable as arbitrators. Neither organization, however, has the power, in view of the voluntary nature of contemporary industrial arbitration, to place a newly listed panel member as the arbitrator in any specific case. Both have urged the parties to select new arbitrators, in many instances by including the names of several in lists of recommended arbitrators, but the parties are naturally loathe to take the risk of foregoing the services of a seasoned arbitrator in order to initiate an unknown neophyte. This problem of acceptability underlies the current stagnation in the number of active arbitrators in whom both parties have confidence.

The National Academy of Arbitrators approached this problem in 1950 when its Committee on Research and Education acknowledged that there were enough people able and willing to undertake arbitration work, although admitting a shortage of *acceptable* arbitrators in several areas of the nation.[3] It attributed this disparity to the concentration of the majority of cases among the select veterans at the expense of "a large number of others who may be potentially as able as the more popular arbitrators but are less well known and therefore less experienced," pointing out that "many of those who are now on the periphery of acceptability might well benefit from some training in the finer points of labor arbitration."

The Committee proposed a two-fold training program, based, on the one hand, on the need to train a new generation of arbitrators in the academic aspects of industrial arbitration, and, on the other hand, on the need for perfecting the techniques of those who already had appropriate background and temperament for arbitration. Among the suggestions made by the Committee as means for achieving a solution to the problem were: the study of reported cases and literature; the attendance at arbitration hearings and mediation conferences as observers; the handling of less involved cases at lower rates by special referrals from designating organizations, and service as full time apprentice or interns under the leadership of established arbitrators. Further study of the proposal that apprenticeships be established was undertaken by the Academy's Subcommittee on Education and Training which, in 1955, suggested apprenticeships with designating agencies or with individual arbitrators as possible means of training selected individuals in the finer techniques of arbitration.[4]

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[2] *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), p. 11.

[3] *Ibid.*, p. 171.

[4] *Management Rights and Arbitration Process* (Washington: BNA Incorporated, 1956), p. 230.

Without delving into the relative merits of internships with designating agencies or of any of the many diverse roads which have brought people into arbitration, let us turn at this point to an examination of the apprenticeships with arbitrators which are currently in effect, and which have in the past few years served as successful springboards to arbitration practice.

CURRENT APPRENTICESHIPS

At the present time there are probably less than a dozen full-time arbitration apprenticeships in operation. An informal questionnaire was sent to eight individuals known to be serving with members of the Academy. Seven returned the completed forms while the eighth declined to take part in the survey. It is naturally difficult to arrive at precise, or even determinative findings with such a small statistical universe, but nevertheless an analysis of the background of the apprentices, the activities in which they engage in their employment and the progress they are making toward independent arbitration careers should aid in ascertaining the effectiveness of apprenticeship as a device for training new arbitrators.

The Apprentice: Most of the apprentices questioned did their undergraduate work in economics or political science; and their graduate work in law. One of the apprentices was a chemistry major in college, while two others did their graduate work in economics. Seven of the eight apprentices of whom anything is known, reported having two (2) academic degrees. Six of the seven who responded to the questionnaire worked in the field of labor relations prior to entering their initial arbitration employment, either in summertime employment or immediately following the completion of their formal studies. Two apprentices worked for the American Arbitration Association, two for the National Labor Relations Board, two for management consultants, one for the Federal Mediation and Conciliation Service, and one for a trade union. The average age of the apprentices at the commencement of their apprenticeships was 27 years.

The Employer: All of the apprentices work for arbitrators serving as Umpires under nation-wide agreements, although the newer apprentices are not necessarily active participants in the umpire relationships. Some, in fact, devote all of their energies to their employer's ad hoc cases until they achieve those qualities deemed necessary for their active involvement in the umpire relationship. Of the eight apprentices four have served in excess of four years.

Relations with the Parties: The newer apprentices appear to have little direct contact with the parties except for occasional attendance at hearings with the arbitrator, although the parties are usually aware of the apprenticeship. The senior apprentices graduate to a more active role as hearing officers in the umpireships, holding approximately three or four hearings per month on their own.

Decision Writing: All apprentices engage in decision writing at least to the extent of setting forth the background and facts of a particular dispute and perhaps the contentions of the parties, as well as such information garnered from the transcript (if one is taken), from the notes of the arbitrator, or from the notes of the apprentice if he is in attendance at the hearing. Most of the apprentices write draft opinions, which are either reviewed or rewritten by their employers. Those apprentices who serve as hearing officers write and sign their own decisions subject to the review and countersignature of their employer.

Compensation: Invariably, full time apprentices are paid a salary by the arbitrator himself, although one instance was reported where an apprentice, serving

as hearing officer in an umpire relationship, was compensated directly by the parties.

Outside Employment: Naturally, all apprentices devote as much time as is necessary to hear their own cases and otherwise help to develop their own practice through such devices as writing articles. In addition two apprentices engage in teaching activities which accounts for approximately 5-10% of their time—one in labor law, and the other in economics.

Own Practice: Three of the seven apprentices reporting have arbitrated cases of their own. In two instances, where the apprenticeships began at the ages of 28 and 31 respectively after previous employment in the field of labor relations and experience as hearing officer the initial cases came directly from the parties within the first year. In the third instance where the individual had had seven summers of employment in labor relations before entering the apprenticeship immediately after law school and where his role was largely in ad hoc work the initial case came from the AAA after two years. After the initial case, the more rapid rise in case load occurred in the cases of the former two arbitrators. They heard an average of 12 cases their first year, 19 cases their second year, and 28 cases their third year. The number of cases heard by the younger apprentice working on ad hoc cases increased at a much slower rate.

All three apprentices attained listing on the panels of the AAA and the FMCS within two years after commencing their apprenticeships. The two apprentices who began with cases from the parties continued to get a majority of their work directly, while the one who began through the AAA continued to get most of his cases by that means. All three have at least one permanent umpireship of their own.

Self-Appraisal: Most apprentices indicated satisfaction with their progress, although in some cases the response indicated concern over the time elapsed and the lack of assurance that they would be able to achieve an independent arbitral status. All agreed to a willingness to "do it over again," and expressed satisfaction with their employers as teachers and with their employer-employee relationship as congenial and productive for their own development.

AN APPRENTICESHIP PROGRAM

Because of the wide variations in the background of the individuals and in the character of their respective apprenticeships, it is difficult to generalize, or suggest an ideal road to becoming a successful arbitrator. Nevertheless, despite the small sample employed in this survey it is possible to note significant steps taken by some, or many of the apprentices, and from these steps to suggest some of the paths which might be of value in becoming an apprentice, and which from there, might carry the individual to the status of arbitrator.

Several things are essential to an apprenticeship program. First is an awareness that not all apprentices succeed. Assuming an individual has the academic and intellectual capacity necessary to become an arbitrator, there is still no assurance that he will "click" when on his own, even if he does succeed in obtaining some cases while still under the wing of the arbitrator-mentor. For this reason it is essential that the apprentice carefully examine his own potential, his long range objectives, and his ability to withstand the frustrations attendant upon the long period of unrecognized activity as a shadow to a successful arbitrator.

Second is a willingness to devote several years to the apprenticeship. It has been suggested that apprenticeships be modeled on the one or two year clerkships

in the state and federal court system. While this would permit more potential arbitrators to examine the workings of, and their propensity toward, arbitration, there is little likelihood that they would be productive for either the arbitrator-employer, or the apprentice, particularly in view of the different functions served by clerkships and apprenticeships. The former is an admirable device for familiarizing oneself with all phases of the law and secondarily with developing good writing technique. The latter appears to place the emphasis on independent thinking and writing with less concentration on precedents. For the employer such short term apprenticeships would require the devotion of a considerable amount of time in training in writing and thinking technique, with little opportunity for return on the time and effort invested, while for the apprentice, it would merely whet the appetite for work in the field with insufficient time to master the concepts and techniques involved, with little opportunity for getting to be known by the parties, and with the exceedingly dim prospects of unemployment and separation from arbitration only a matter of months away. Training for the field of arbitration cannot be condensed into a one or even a two year course of clerkship. Indeed, much more time is needed for maturation, as well as for the development of arbitration technique. The parties are naturally loathe to entrust their fate to the hands of a youngster less than half their age, when they can obtain the services of a proven arbitrator merely by waiting a few additional weeks. Thus it is wise to find a profitable way to mark time while the maturation process takes place.

This leads us to a third essential for a successful apprenticeship program, that is a background in the field of labor relations. Formal academic training is not sufficient to train a person in the field of labor relations. Most scholastic treatment of labor relations problems is handled theoretically, frequently at the hand of a teacher who has had little actual experience in the field. Of much greater value would be some post-academic experience with employers and/or unions if this did not tend to block one's future entry into arbitration. Aside from this practical experience and the unquestionable insight it develops, the next best opportunities currently are provided by the state and federal mediation services, the AAA, some unbiased and non-controversial governmental agencies, the practice of law, and finally teaching. Each of these employments has unique advantages.

Experience with the mediation services is unquestionably of great value for an apprentice particularly if there is an opportunity to serve as a mediator. It gives him specific knowledge of the orientation of the parties, a familiarity with his potential clients and an opportunity to gain a unique understanding of the peaceful settlement of industrial conflicts.

Service with the AAA provides the potential apprentice with knowledge of the procedural elements of arbitration, with an opportunity for meeting many labor and management people, and with an opportunity for observing and discussing actual arbitration cases with a diversity of arbitrators, one of whom might come forth with the desired apprenticeship.

At present governmental participation in the field of labor relations (other than the FMCS) is likely to be of limited value. Although there is a great advantage to be gained from actually dealing with particular problem areas in labor management relations, the advocacy which one is required to advance in a particular case, or for a particular agency, is likely to result in the imposition of a pro-management or pro-labor label which might ultimately prove to be damaging in an arbitration practice. If the governmental employment is of a type which

avoids this tendency to become labelled, then it can certainly prove to be profitable.

Law practice itself is likely to contain this same hidden danger if it be directly in the field of labor relations. Although there are a few practices which service clients on both sides of the fence, the general tendency is for a labor relations practice to be heavily weighted either on the side of management or labor. Taking part in a general practice, of course, removes this danger, but it also removes the practitioner from the field of labor relations and from the likelihood of meeting potential clients. Certainly a general practice provides worthwhile training in investigation, marshalling of facts, reasoning and writing. It also provides the potential apprentice with roots in another profession should his drive toward arbitration be thwarted, or should it prove to be only partially successful.

Finally, teaching offers unquestioned advantages. Not only does it often provide direct entry into arbitration without recourse to any apprenticeship, as it has in the case of several newly established arbitrators, but it also provides the opportunity for fruitful research in the field, the aloofness from day to day involvement on the side of either labor or management, the financial cushion provided by the practice of law, and the widespread respect of the parties and the public.

All of these routes to maturity provide not merely the post-academic, pre-apprenticeship experience which can do much to train for the arbitral status, but also provide alternatives to the graduating student professing interest in arbitration, which might in fact prove to be more alluring, and thus help to weed out those who might be attracted solely by the alleged glamor of arbitration.

Once the potential arbitrator, equipped with the necessary ability and academic education has acquired the practical experience and necessary maturity, he is ready to undertake the fourth essential step in the apprentice training program—service as an apprentice under a suitable arbitrator.

At present the selection of an arbitrator for whom to work is a haphazard proposition. Through one's prior experience in labor relations it is possible to meet many employers. However, very few practicing arbitrators are in a position where they can undertake the financial obligations accompanying the employment of an apprentice. Where a choice of arbitrators is available it would seem more desirable to work for an arbitrator located in an industrial area and serving under one or more umpireships. Although work under such umpireships may limit one's contacts with potential clients and may lead to specialization in the problems and contracts of one company or one industry in contrast to the wider perspective obtained under an ad hoc system, it is also likely to bear more immediate rewards in the form of a hearing officership and the resultant opportunity to display one's personal wares directly before the parties. In addition, such an apprenticeship might prove to be more economically secure since the parties themselves might make arrangements to finance the hiring of an assistant to the arbitrator.

It is important for the applicant to seek out a personable and skillful arbitrator who is willing to take the time to train future arbitrators and who does no intend to use the assistant merely as a permanent sounding board or as a ghost writer. Such an unfortunate practice is quite unlikely to occur since those arbitrators who would be willing to take on the economic and intellectual responsibility inherent in training an arbitrator are the leaders in the profession who have, by undertaking the apprenticeships, assumed the moral obligation of helping to train their potential successors.

Once the applicant has commenced his apprenticeship he will undoubtedly discover, as have all contemporary apprentices, that the work is stimulating, non-repetitive, and often actually exciting. It is then that he begins the final waiting period of several years duration, while he commences to build up his own arbitration practice. If successful, he in turn, might ultimately find himself training a third generation of industrial arbitrators.

RECOMMENDATIONS

If the apprenticeship concept is to be furthered to fulfill the ultimate objective of training competent arbitrators in the same manner that companies, unions and professions now train their replacements, there are certain innovations which might be considered to strengthen the present framework of training. The National Academy of Arbitrators could do much to further an apprenticeship program without destroying the voluntary or individualistic aspects of contemporary arbitration, by lending its weight to the furtherance of some of the following programs.

These innovations constitute an attempt to overcome some of the obstacles faced by initiates in their efforts to become first apprentices, and later, arbitrators.

1. A public relations program aimed at the graduate and law school level to inform students of the nature of the arbitration practice and to dispel some of the myths which have become associated with the profession of arbitration; to discover those individuals who would appear to have the necessary potential to justify training them for arbitration; and to detail some of the paths which they might follow to gain the necessary academic and practical experience necessary for entry into apprenticeships. Such a program could include a national essay competition, an arrangement for attendance at arbitration hearings, and the participation of arbitrators in school classes and discussions dealing with arbitration. An effort could also be made to encourage more schools to offer courses in addition to the theoretical or procedural courses currently being taught in those areas.

2. The formulation of a policy endorsing the concept of apprenticeships as the most effective means of training competent arbitrators, explaining to the parties and the public the need for new arbitrators and setting forth to all the importance of proper training of candidates. Such a policy could detail several methods of securing these objectives, such as encouraging the selection of newly launched arbitrators, encouraging the parties to umpireships specifically to provide for assistants, urging student attendance at certain hearings, etc.

3. The development of a clearing house where individuals interested in entering arbitration could obtain information as to the nature of, and the qualifications for, apprenticeships, and the availability of employment opportunities. Such a clearing house could also serve to meet the personnel requirements of arbitrators looking for part-time or full-time assistants. It might also provide employment for a potential apprentice who wants to gain some experience in the field of arbitration. Although such work would be primarily administrative, it might give some insight into the problem areas of arbitration, and would certainly provide a good means for a candidate to meet potential arbitrator-employers.

4. The establishment of a program of summertime or graduate clerkships with the designating agencies. This arrangement might be expanded to permit the apprentices to serve as tribunal clerks, as an adjunct to their apprenticeship program, thus familiarizing them with the subject matter as well as with the techniques of arbitration, helping to fill the need for arbitration tribunal clerks and serving to bring the apprentices into increased contact with potential clients.

5. The development of a pre-apprenticeship program with labor and industry which would permit certain selected individuals to engage in direct work in a labor relations context for both companies and unions. Such a program would permit the development of insight into the positions of both parties, without raising the objections heard when a neophyte arbitrator is known to have worked for only one of the parties.

By such devices as these, the current system for training new arbitrators could be formalized into an acceptable and accepted program, attracting to it the best possible candidates.

An outstanding arbitrator pointed out recently that "Arbitrators are Accidents." This may well have been true in the past, but with proper planning and selectivity there is no reason why capable young men could not be given the final training which will increase their experience and, hopefully, make them more acceptable to the parties. There is no assurance that such training would guarantee the individuals acceptability to the parties, but current evidence is convincing that it has proved to be of value, and with more thought given to the matter, such a program might be made to work even more effectively.