

CHAPTER V

ARBITRATION AND CONTRACT DISPUTES

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Voluntary Arbitration of Primary Disputes

It is the purpose of this paper to discuss the use of voluntary arbitration to determine disputed terms of new contracts, when deadlocks develop in negotiations. Such disputes are often called "contract disputes" or "primary" or "interest" disputes. My thesis is that management and unions in the United States might profitably give more consideration than they generally have in the past, to voluntary arbitration as an alternative to a strike when negotiations fail. As we all know, arbitration in this country is used extensively to settle deadlocks over grievances. On the other hand, it is used at present only to a very limited extent to settle deadlocks over new contract terms. The usual pattern is that if collective bargaining does not bring a settlement and if mediation fails, a continuing dispute is almost certain to result in a work stoppage.

I suggest that the parties have not adequately considered the possibilities of using voluntary arbitration in this situation. Despite several studies of contract arbitration, there is little general knowledge of the cases in which the terms of new or reopened agreements have been determined by arbitration. In this paper, I propose to look at some of the recent figures on contract cases and to consider the attitudes and views which labor and management have expressed concerning contract arbitration.

Compulsory Arbitration a Threatened Alternative

Recent events make discussion of this topic of voluntary arbitration especially timely. The large number of recent, serious industrial disputes has raised once again the proposals for compulsory

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arbitration of major disputes. For example, both Governor Nelson Rockefeller and former Governor Adlai Stevenson have advocated the passage of laws which, under certain circumstances, would impose compulsory arbitration on the parties. These are only two of the numerous advocates of this course of action. They are mentioned simply because of the prominent position they both hold in national politics.

In common with, I feel sure, most of you in this room, I deplore laws which outlaw strikes and which provide, in peacetime, for mandatory settlement by some government agency. The reasons most students of industrial relations hold this view with respect to compulsory arbitration are well known and we need not go into them here. I fear, however, that unless we achieve better methods of settling deadlocked disputes, we may one day find an impatient Congress passing laws calling for compulsory arbitration. Both for this reason and because of the economic loss occasioned by strikes, it is vital, I suggest, that all avenues for peaceful settlement of industrial disputes be scrutinized by unions and management. Hence I feel there may be value and timeliness in an analysis of the possible greater use of voluntary arbitration.

Voluntary Arbitration Only After Failure of Negotiation and Mediation

Past experience has taught me that it is very easy to be misunderstood when one is discussing this topic. In order to avoid such misunderstanding, may I make the following clear: I am not suggesting that voluntary arbitration should replace direct negotiation or mediation. On the contrary, I would urge and insist that the parties enter collective bargaining negotiations with the aim and thought that it is their responsibility to conclude a settlement and with the idea that they will conclude such a settlement. If direct negotiations do not bring a settlement, then mediation by Federal, State, or local agencies should be invoked and again should be engaged in with the idea that it will bring a settlement.

Only if and when both direct negotiation and mediation have been carried on extensively and have failed should the parties consider voluntary arbitration.

It follows from the foregoing that I would not suggest that the parties write into one agreement that arbitration shall automatically be invoked if an impasse in negotiation on the subsequent agreement is reached. Such a procedure might well bring the parties

initially to the bargaining table with their eyes unduly focused on the arbitration which both parties rather expect. The result might be to discourage that compromise and accommodation which is vital if agreement is to be reached in direct negotiations. This may come about since, if parties from the first expect the matter to be arbitrated, they may be loath to make concessions since they feel that the eventual arbitration will result in an award which is somewhere between the Company's last offer and the Union's last demand.

I would suggest that, rather than having arbitration of primary disputes agreed upon in advance, recourse to the arbitral process should be a last resort, available but not expected, possible but not likely, since the parties expect that they will, by themselves or with the help of a mediator, be able to reach a settlement.

With some notable exceptions, the general, conventional attitude of both unions and management in the United States is that voluntary arbitration is not a suitable and appropriate instrument for the settlement of disputes over the terms to go into new agreements. Suggestions that such disputes might be settled in this way are often swept aside by union and management spokesmen as completely impractical. For example, a friend, who is the industrial relations director of a small firm, had the typical reaction when we were discussing a strike in his plant. He told me that the plant had been shut down for two weeks because they were unable to agree on the terms of a new contract. I asked if there had been any consideration given to the possibility of arbitrating the dispute and his reply was: "Apparently you misunderstood me. This is not a strike over a grievance. This is a dispute over the new wage scale asked by the union." Like my friend, many in labor and management have, I believe, never seriously considered the possibility of arbitrating contract terms.

Frequently, when one discusses this possibility with representatives of labor or management, the response which one gets is: "These disputes should be settled by the parties themselves." To this response, I would reply: "Without question you are right. These disputes should be settled by the parties themselves. The question is, however, if the parties are unable, without a prolonged and costly strike, to settle it themselves does not voluntary arbitration present an alternative method of settlement which should be given serious consideration?"

While the general attitude is to hold that such arbitration is not useful or suitable, it is interesting to note that in some of our

recent major disputes, one side or the other has suggested arbitration of contract terms. In 1958, Walter Reuther suggested to the major automobile companies that their contract dispute be arbitrated and in 1959 the major steel companies proposed that the issue of work rules be submitted to arbitration. In both cases, the offer was refused by the other side, but the offer was made. It has been suggested by some that in each case the offer was made because it was felt that the other side would certainly refuse it and that therefore it was not made in good faith. Whether this is true, it is impossible to say. It is worth noting, however, that here we have, in important disputes, labor in one case and management in the other case suggesting arbitration. It might also be noted that a mid-November Associated Press dispatch from Boston reported that an eight-day strike by the International Typographical Union against six Boston newspapers ended when the workers voted to accept the publishers' offer to arbitrate unresolved issues concerning wages and fringe benefits.

Number of Contract Cases Arbitrated

Although the general attitude of unions and management is a negative one, often including even the view that "You just can't and don't arbitrate contract cases," there has been, nevertheless, over the years a small but, it seems to me, fairly significant number of contract cases being arbitrated. Many of these were in transit and public utilities, but significant numbers occurred also in retail trade, printing and publishing, and textiles.¹ It is noted that contract arbitration has been most used in industries where the product is transitory and where the loss of markets brought about by strikes is often irretrievable.² Although there has been a decline in recent years in its use in transit and in printing, there are nevertheless a fair number of cases in these and a variety of other industries.

Mr. George Strong advises me that during the fiscal year ending June 30, 1959, the Federal Mediation and Conciliation Service appointed arbitrators for 27 contract cases. These cases involved the following industries: petroleum, aviation, chemicals, automotive, electrical equipment, retail trade, construction, dairy products, furniture, leather, machinery, printing and publishing, steel, and trans-

¹ Irving Bernstein, *Arbitration of Wages* (Berkeley and Los Angeles: University of California Press, 1954), p. 15.

² Eli Oliver, Paper given at session on "Arbitrating Wages and Working Conditions," Cornell University Conference on *Current Problems in Labor Relations*, 1954, pp. 17-19.

portation. Mr. Strong states: "Voluntary arbitration of new contract matters is not showing anything like the gain which is occurring in grievance arbitration. During the time the present Director has held office we have experienced an increase of nearly a hundred per cent in requests for assistance in obtaining arbitrators. Twenty-seven new contract cases would represent only slightly more than one per cent of the cases arbitrated."³

Statistics secured from the New Jersey State Board of Mediation indicate the same general trend. In each of the last three years, they have handled through their office exactly 14 contract cases (including some contract reopening cases). In the most recent year, this was about three per cent of the total of 414 arbitration cases handled. While their total number of arbitrations has increased steadily, the number of contract cases has been constant.

The American Arbitration Association has supplied figures which show the same situation. In 1954, the AAA handled 1,728 cases nationally, of which 46 were contract wage cases. In 1958, their total was 2,293 and the number of contract wage cases was 45.⁴

The New York State Board of Mediation reports 141 contract cases out of a total of 1,245 for the calendar year 1958.⁵ They have had a slight decline in the number of contract cases, and an appreciable gain in the number of grievance cases since 1956.

From the foregoing figures, it is clear that although small in total amount and a declining percentage of the total of all arbitration cases, there is some recourse to arbitration in contract cases in the U.S.A. This fact is in itself significant in view of the attitude which is so common that "It just can't be, or isn't done."

³ Letter from George Strong, General Counsel, Federal Mediation and Conciliation Service, December 1, 1959.

⁴ American Arbitration Association, *Procedural and Substantive Aspects of Labor-Management Arbitration*, an AAA Research Report (New York: American Arbitration Association, 1957), p. 24 and p. 33, and unpublished data from the American Arbitration Association. A substantial portion of these contract wage cases were reopening cases.

⁵ Of the total of 141 contract cases, 7 cases involving a total of 65 workers were initial contracts; 54 cases involving 28,776 workers were renewed contracts; and 80 cases involving 3,668 workers were reopened contracts. The New York State Mediation Board reported 146 contract cases out of a total of 1,184 cases in 1957, and 155 contract cases out of a total of 929 arbitration cases in 1956. Further study of tables shows that not only basic wage rates, but hours, various fringe benefits, and even clauses concerning seniority and discharge and discipline have been submitted to arbitration. Division of Research and Statistics, State of New York, Dept. of Labor, *Statistics on Operations, Series H, New York State Board of Mediation*, Vol. 9, No. 4, 1956; Vol. 10, No. 4, 1957, and Vol. 11, No. 4, 1958.

Arbitration of Major Disputes in Great Britain

Parenthetically, I would like to include at this point a short note concerning the English attitude and experience with voluntary arbitration of contract terms. Two years ago, while teaching in an English university, I had an opportunity to study arbitration in the United Kingdom. Not all unions and all managements in Great Britain favor voluntary arbitration as an alternative to strikes over the terms of a new agreement, but many do. Time does not permit an exhaustive discussion of this topic here but I would note in passing that the cost of strikes is considered seriously by the British trade unions. The head of one of the large national unions remarked to me, in a discussion of this subject, "Perhaps if the men went on strike for a month they could get tuppence an hour more from the employers than they could from an arbitrator, but how long would it take, at tuppence an hour, to make up a month's wage loss?" There appears also to be more responsiveness to public opinion on the part of the parties to a dispute in Great Britain than there is in the United States. The managing director of a large metal working plant stated: "If the Union is willing to arbitrate and I refuse to arbitrate, the public would think that I am most unreasonable and I should find myself in an embarrassing situation."

As a result of these and other factors, it is not uncommon to have major contract disputes settled in Britain by voluntary arbitration.⁶

It is worthy of note, incidentally, that the British have, as of February 28, 1959, ended their compulsory arbitration under the Industrial Disputes Tribunal, but are continuing to make rather extensive use of voluntary arbitration.⁷

⁶ The Industrial Court, which provides voluntary arbitration under the Ministry of Labour, made 36 awards in 1958. The majority of these concerned claims for increases in wages and salaries, many of them on a national scale. *Annual Report of the Ministry of Labour and National Service, 1958* (London: Her Majesty's Stationery Office), pp. 91-92. Machinery for voluntary arbitration of unsettled disputes (including terms of new agreements) is also provided in a number of individual industries. See M. Turner Samuels, *Industrial Negotiation and Arbitration* (London: The Solicitors' Law Stationery Society, Ltd., 1951).

See also Adolf Sturmthal, ed., *Contemporary Collective Bargaining in Seven Countries* (Ithaca, New York: Cornell University, 1957), pp. 30-31.

⁷ The Industrial Disputes Tribunal, a government agency which had provided a special type of compulsory arbitration, inherited from the World War II period, came to an end on February 28, 1959. (*Ministry of Labour Gazette*, November, 1958, p. 414, and March, 1959, p. 119.) The Terms and Conditions of Employment Act, effective May 30, 1959, gave the Industrial Court one of the powers of the former Industrial Disputes Tribunal, but this minor exception does not affect the type of cases with which we are concerned here.

Criticisms of Contract Arbitration and Possible Answers

Let us turn now to a consideration of the major objections which labor and management in the United States level at voluntary arbitration as a method of settling contract cases.

Risks of Contract Arbitration

Probably the most frequent contention made against the use of arbitration in primary cases is that it is too risky. The contention is made that labor and management cannot safely entrust to an outside neutral the major, fundamental questions involved in determining, for example, what the wage scale for the next year should be. An error on the part of the neutral might, it is contended, so increase the wage costs of the employer as to bankrupt him. Conversely, an error in the other direction might doom the workers to a seriously substandard wage for the life of the agreement.

The issues involved in grievance arbitration, it is maintained, are relatively small and if an error is made it is not of major consequence. An error, however, in a contract case would be of tremendous significance and therefore contract arbitration is not to be seriously considered. Let us examine this contention carefully.

It is true, of course, that in the nature of the case an arbitrator in a contract dispute is being asked to make an award on broad, basic and major points. He is, clearly, clothed with considerable authority. If he makes a serious error the results would be unfortunate. The parties are, certainly, entrusting him with major responsibility. In so doing they are, undeniably, running some risk. We must consider, however, how much risk, whether there are ways in which the risks can be reduced, and what the alternatives are. Let us take up the latter point first.

I would suggest that if direct negotiations do not result in a settlement, and if mediation does not bring about a settlement, then the parties to a dispute are inescapably faced with a choice of risks. If they elect to use voluntary arbitration there are risks. If they elect not to use voluntary arbitration there are risks. The latter risks are of course all the costs and losses incident to a strike of uncertain duration. It is not uncommon for each party in an industrial dispute to underestimate the other's willingness to fight and to hold out. Neither party can know, therefore, at the beginning of a work stoppage whether a day's shutdown or three months suspension of work is involved. A prolonged shutdown, as I hardly need to emphasize, means tremendous loss of wages to workers, loss of pro-

duction and profits to the employer, in some cases more or less permanent loss of customers and markets, etc., etc. Since the duration of the stoppage is uncertain, there is no way to compute in advance the loss to both parties, and the amount they are risking by not using arbitration.

In short, the parties faced with a work stoppage do not have the choice between the risks of arbitration and a riskless situation. They can ignore arbitration and incur the risks that the stoppage will bring. Or they can invoke arbitration and incur the risks which come with it. This choice between risks is inevitable and inescapable.

Methods of Reducing Risks

Experienced Arbitrators

How great are the risks of arbitration? Will arbitration of primary disputes result in extreme, impractical, unworkable awards? Is there, in short, likelihood of a "screw-ball" decision which would work great hardship on either company or workers? I suggest that the chances of getting a screw-ball decision can be virtually eliminated by the parties if they wish to do so. In the first place, the selection of an experienced arbitrator will clearly reduce the chances of an impractical award. If our friends in the audience from industry and labor have any doubts that such men are available, they have only to look around today. The room is full of such men!

Tri-partite Boards

In the second place, the risks of an unworkable decision may be further reduced, if the parties so desire, by the use of a tri-partite board. Tri-partite boards are disappearing in grievance arbitration cases, and desirably so in my view. In contract cases, however, where the issues are greater, the executive session of a tri-partite board may serve a most useful function. If the neutral member of the board proposes some award which is extreme or unworkable, this fact will be brought into the open in this executive session and corrective action may be taken before the award is issued.

The Limited Submission

There is still a third method whereby the parties, if they wish, may further reduce the risks of an impractical decision in a contract case. This involves the submission agreement. In the agreement to arbitrate and in the formulation of the question for the arbitrator, his jurisdiction may be so limited that an unworkable decision can scarcely result. The use of the limited submission in contract

cases was the subject of a monograph which my wife and I wrote a few years ago. Time does not permit an extended discussion of the subject here. Suffice it to say that the parties in a wage dispute can specify, for example, that the award of the arbitrator shall call for an increase of not less than x cents nor more than y cents per hour. Another method for limiting the authority of the arbitrator is to have the submission spell out the criteria to be considered in making the award. Limited submissions of this type have on occasion been used.⁸ Clearly with the scope of the arbitrator thus limited, the risks of arbitration are greatly reduced. It is sometimes objected that if the parties could agree upon these limits they could go further and reach complete agreement on a new wage scale. The facts, however, do not seem to bear out this contention. It is not unusual for parties to be able to approach an agreement without being able completely to reach a meeting of minds. In such situations, limited submissions may give the parties a feeling of confidence in the arbitration process by limiting the scope of the arbitrator and thereby reducing risks.

Award Approximating Negotiated Settlement

Probably the most useful way of assessing the degree of risk involved in contract arbitration is a look at the record in such cases. There are sufficient contract cases being arbitrated to give us some insight into the probability of the issuance of an extreme or impractical award. One of the best studies of contract arbitration is that made by Academy member Irving Bernstein and published in 1954.⁹ From his own study and from the study of Alfred Kuhn, *Arbitration in Transit*,¹⁰ Bernstein concludes, "The employer need seldom fear an award that is out of line on the high side and . . . the union has little reason to anticipate one that is unacceptably low."¹¹ The reasons for this, I suggest, are not far to seek. First, decision, he, nevertheless, cannot completely disregard the idea of acceptability of the award to the two parties. Secondly and even an arbitrator realizes the importance of acceptability of his award. While the parties, it is true, have agreed in advance to accept his

⁸ Cases using limited submissions of both types are described in our monograph. Morrison and Marjorie Handsaker, *The Submission Agreement in Contract Arbitration* (Philadelphia: University of Pennsylvania Press, 1952).

⁹ Irving Bernstein, *op. cit.* Bernstein analyzed 209 wage awards made between 1945 and 1950.

¹⁰ Alfred Kuhn, *Arbitration in Transit, an Evaluation of Wage Criteria* (Philadelphia: University of Pennsylvania Press, 1952). Kuhn analyzed wage changes in 394 cases occurring between 1919 and 1948.

¹¹ Bernstein, *op. cit.*, p. 113.

more importantly, in wage arbitrations one of the main determinants, and often the chief determinant, is the wage comparison criterion. What is being paid elsewhere in the industry or in the area is always a factor to which much weight is given both by the parties and by the arbitrator. Bernstein concludes, in this connection that "in general and in the long run there tends to be little difference in effect if wages are arbitrated rather than negotiated."¹² This does not sound as if the risks of arbitration were so great as to require rejection of the process.

*Criticism: Contract Arbitration is
"Legislative," not "Judicial"*

We turn now to a second broad objection to the use of arbitration in contract cases. It is argued that the arbitration of grievances is acceptable to the parties because the arbitrator is acting in a judicial capacity, and within the framework of the collective bargaining agreement. He must, in the usual language, be concerned with "interpretation and application of the agreement" and must not "add to, subtract from or amend the agreement." All of this, in grievance cases, it is maintained, gives a definite frame of reference for the arbitrator. Within the four walls of the contract, he must interpret and apply its terms.

In primary disputes, however, it is contended, there is no frame of reference. The arbitrator is acting not as a judge who interprets and applies the law made by some other party but rather as the legislative body which makes the law. Thus it is argued, the whole process is different and puts too much power in the hands of the arbitrator.

What is to be said in evaluating this argument? We would point out, first, that, as George Taylor has said on various occasions, it is not too many years since parties were arguing that the arbitration of grievances puts too much power in the hands of arbitrators and that this delegation of power just could not be tolerated by the parties. Yet today we find the arbitration of grievances well accepted by virtually all labor and management groups. The parties have found that they could safely give arbitrators that much power. Indeed they have found that the alternative, strikes over grievances, is intolerable interruptions to production and that arbitration is greatly to be preferred, even though they may, in particular cases, vigorously disagree with the award of the arbitrator. Perhaps, as Dr. Taylor has suggested,

¹² *Ibid.*, p. 112.

in the future the parties may find that they can safely, and to their advantage, give arbitrators power to settle more contract cases.¹³

Now, let us look carefully and specifically at this alleged fundamental difference between the judicial nature of grievance arbitration and the legislative nature of contract arbitration.

That there is a considerable element of truth in this cannot be denied. The arbitrator, in contract cases, is writing the rules of the game, not interpreting them. In spite of this, however, when one inspects the two processes closely the apparently completely dissimilar nature of the two becomes somewhat blurred. As has been pointed out by numerous other writers, grievance arbitration frequently in fact does involve establishing the terms of the agreement. Every arbitrator who has handled any considerable number of cases, has had cases of the following type: A situation arises which neither party had anticipated when the contract was negotiated. The union says article 27 covers this case. The company says that article 15 is clearly the controlling section. The arbitrator is quite sure from the evidence that neither section was drawn up to cover the instant case. He attempts to ascertain what the intent of the parties was when they agreed upon articles 15 and 27. In the end, since he must make a decision, he uses the best common sense that he can and makes a ruling. Is he interpreting the agreement or is he filling in a gap and really writing a part of the agreement?

Similarly, we may take the typical discharge case. In this connection it should be borne in mind that discharge and discipline cases make up a very sizeable percentage of all grievance arbitrations. Typically, the contract says that there must be "good cause" for the discharge. The arbitrator is called upon to interpret this language in the light of the facts in the particular case. Is he interpreting or is he really re-writing and amplifying the agreement when he rules that a particular set of circumstances do or do not constitute good cause? As I have suggested, what appeared to be a clear-cut distinction between contract arbitration and grievance arbitration becomes definitely blurred.

Further, is the arbitrator completely without conventional guides in contract cases? Clearly, it seems to me, the answer must be "no." His problems come not because there are no such guides, but because of a plethora of conventional standards, some of which may point in completely different directions. The arbitrator is given reams of

¹³ George Taylor, Paper given at session on "Arbitrating Wages and Working Conditions," Cornell University Conference on *Current Problems in Labor Relations*, 1954, pp. 13-15.

statistics concerning comparable wages, concerning ability or inability to pay, concerning changes in cost of living and changes in productivity. It is true that there is usually no agreement among the parties as to how much weight shall be given to each of these factors and especially concerning what shall be done if one criterion points in one direction and another points in the opposite direction.¹⁴ But to say that he has no frame of reference or no standard by which to judge is to overlook all the customary criteria cited by the parties to each other in direct negotiation. These criteria give him considerable guidance but of course do not do the whole job for the arbitrator.

In general, as Bernstein and others have noted, arbitrators will in a particular case usually do what is being done by the parties themselves throughout the economy or the industry. The great weight given both by the parties and by arbitrators to comparable wages tends to insure this.

We may conclude that while there are important differences between contract arbitration and grievance arbitration, the differences are not so great or so clear cut as they are often felt to be. In each case the arbitrator has some standards to guide him and in neither case does he have completely clear and unambiguous standards. In each type of arbitration he is called upon to use judgment. Indeed, if there was not necessity of judgment, there would be no dispute and no need for an arbitrator.

Criticism: Arbitration May Be a Deterrent to Genuine Collective Bargaining

Another objection to the use of voluntary arbitration in contract cases is that the prospect of it prevents genuine collective bargaining. This argument has been touched upon earlier. It has validity, if at all, only when the parties enter collective bargaining with their eyes on possible future arbitration and hence are unwilling to make concessions because they feel this may put them in a poor strategic position before the arbitrator. If, as we have suggested, the parties do not consider the use of arbitration until after direct negotiation and mediation have been tried extensively and have failed, this possible problem would be avoided.

Criticism: Arbitration Confined to "Follower" Cases

Another difficulty often cited in the use of voluntary arbitration in contract cases relates to so-called "leadership" situations. It is said

¹⁴ Although weights have on occasion been indicated in a limited submission.

that when new areas are being explored in the collective bargaining relationship, when new subjects for collective bargaining are being negotiated, arbitration of disputes is not feasible. Examples of such situations are the disputes over pensions ten years ago, the arguments over supplemental unemployment benefits five years ago, and perhaps, arguments over working rules today. If a union is attempting to establish a new wage scale with an employer who is typically a "wage leader," arbitration is not likely to be accepted, it is commonly thought.

These arguments undoubtedly have considerable validity. Arbitration is more likely to be used in "follower" rather than in "leader" situations.

A further and related point that has been raised is this: The area of disputes in the industrial relations field appears to be a changing one these days. Some years ago disputes were relatively simple, it is sometimes argued. They revolved around the question of by how many cents per hour a wage rate should be increased. Now they are more intricate. We think today in terms of costs of packages including involved fringes. We are becoming involved with complex questions of working rules, problems of foreign competition, the inflationary impact of wage increases and difficult questions involving the measurement of productivity changes. Are questions of this sort suitable for reference to arbitration?

*Arbitration in Leadership Cases:
Advantages and Requirements*

The problems involved in pattern-setting leadership situations are clearly some of the most crucial that are faced in industrial relations today, precisely because of their pattern-setting implications. Not only are they often the most difficult, but they are also frequently the situations which lead to the longest, biggest and most costly strikes. The recent steel dispute is a case in point.

Bernstein and others have contended that the parties should not expect an arbitrator to rule on these leadership situations. Must we concur with this opinion and rule out the use of arbitration precisely in those areas where it may be the most needed and in which the absence of peaceful settlement will be most costly? Perhaps this is an example of an act of faith, but I would suggest that even in these difficult situations, arbitration is possible and, because of the losses implicit in these strike situations, is desirable.

It cannot, I believe, be too strongly emphasized that any question

which the parties will submit to arbitration can be arbitrated. Since it is precisely in the leadership situations that long strikes may result, these are the situations which may lead to demands for government intervention and for compulsory arbitration.

I would urge, therefore, that even in these pattern-setting, ground-breaking situations, the parties might well consider the use of arbitration. It is true that to some extent somewhat different standards and criteria would have to be used in such cases. What is being done elsewhere is not a sufficient basis for the decision, as it often is in "follower" cases. Some of the conventional standards, however, would still apply.¹⁵ Ability or inability to pay, and changes in productivity would still be pertinent and might play a larger role than in the past. Such considerations as the effect on ability to compete internationally, the inflationary impact and appropriate sharing between labor, management and the public of long-term productivity increases would be among the factors to which consideration would have to be given if arbitrators were called upon to rule on pattern setting cases. Just as in the follower cases, the objective for pattern setting cases would still be an acceptable and workable decision, and one which would approximate the answer the parties would eventually have found for themselves.

Other Types of Third Party Dispute Settlement

I would not want to leave you with the impression that I believe that voluntary arbitration is the only device for peaceful settlement of disputes which should be carefully explored by companies and unions.

Other recent developments merit careful study and consideration. There is some use being made today of private fact finders and mediators who make non-binding recommendations to parties involved in a dispute. There is real merit in this development, I believe, and the possible uses of it might well be considered.

As a part of the Kaiser Steel Company agreement with the Steel Workers Union, a novel and quite possibly very useful device is being established. Three top company leaders, three top union leaders and three of the top industrial relations neutrals in the country (all members of the National Academy of Arbitrators, I might add) will

¹⁵ The limitations of the present criteria have been discussed by Alfred Kuhn (*op. cit.*) and by Jules Backman in his recent book. See Jules Backman, *Wage Determination—An Analysis of Wage Criteria* (Princeton: Van Nostrand Co., 1959). "Social inventiveness" in improving criteria is needed to give negotiators and arbitrators better standards. They need also to know the "rational" factors and also the "economic staying power" of the parties.

attempt to formulate long-range policies for the sharing of productivity gains among workers, stockholders and the public. Here is another important example of social inventiveness which we shall all watch with much interest.

Conclusion

We have not, I maintain, sufficiently considered the possibilities inherent in voluntary arbitration. When compulsory arbitration by act of Congress has been actively discussed, it is more urgent than ever that all possible alternatives be given careful consideration. In voluntary arbitration, the parties select their own arbitrator. They use this device only if they elect to. They formulate the submission and put before the arbitrator only those questions which they mutually agree to submit. They can limit his jurisdiction in any way which they wish. With compulsory arbitration all this is changed. The tribunal before whom the case will be heard is appointed by government. Political considerations may enter the picture. The parties have no voice in the selection of their judge. Nor do they limit his jurisdiction or set his frame of reference.

The greater use of voluntary arbitration can save companies and workers from incurring great profit and wage loss. It may obviate the possible coming of compulsory arbitration. It may thereby strengthen the process of free collective bargaining in the United States.

Discussion—

JOHN WADDLETON*

Dr. Handsaker's presentation gives us much food for thought and many springboards for discussion.

The first argument he advances is that unless the parties adopt some better method to resolve their deadlock, than striking or deciding to take a strike, they may find an impatient Congress prescribing compulsory arbitration for them, and I must agree that this point has impact. It highlights the incongruent fact that almost everyone conversant with the problem agrees that compulsory arbitration is one of the most undesirable remedies available. Yet these same people will also agree that if any remedy beyond what we already have is adopted, it will most probably be compulsory arbitration.

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However, I should like to suggest that the assumed threat of compulsory arbitration is not a sound argument for voluntary arbitration. I suggest that the issue of compulsory arbitration should be resolved on its own merits, and that the issue of voluntary arbitration should be resolved, in turn, on its own merits, rather than on a Sword of Damocles' type of approach: Which would you rather have, voluntary or compulsory arbitration?

On the merits, Dr. Handsaker attacks a number of the stated bases upon which contract arbitration is rejected. The first is that the process exposes the parties to the risk of a "screwball" decision. Here he suggests that such a result can be virtually eliminated, first, by selecting experienced arbitrators; second, by using the tri-partite board technique in which the chairman would first test his proposals with his management and union board co-members; and, third, by limiting the submission itself and by spelling out the criteria to be considered in arriving at the result.

To test this idea let's leave aside the difficulties that would be involved in agreeing upon an experienced arbitrator, a tri-partite board, or on limiting the submission or confining it with criteria. Let's assume we have a submission and go on from there.

Once submitted, the arbitrator's latitude of decision is the area from zero to one hundred per cent between the parties. Should he adopt in his decision the full or any substantial portion of the position of either party on a certain issue, his decision on that score would obviously not be "screwball" to that party nor, incidentally, to himself. But it well might be the supreme example of a "screwball" decision to the other party.

Yet the latter joined in the submission of the issue knowing such a result was at least technically or theoretically possible. Perhaps he relied too much on the experience of the arbitrator. But did he have any right to? Does he have any basis now to complain? Of course not. The decision is no more "screwball" than the position of the prevailing party.

The only real protection against what one party might classify as a screwball result is to limit the submission to preclude it. But that would most likely be the very way of insuring that there would be no agreement to submit in the first place.

I'm afraid what Dr. Handsaker might be suggesting is that experienced arbitrators be relied upon to discard those proposals from each party's position which the other party feels are "screwball." This would be a large order indeed.

Now before proceeding to the Doctor's treatment of the second broad objection, a word on "criteria." Throughout his paper Dr. Handsaker stresses the many criteria and other considerations that an experienced arbitrator would use, whether or not they would be explicitly imposed. In practically all cases, however, he is addressing himself to the criteria followed or available on economic issues.

Again, assuming for the purpose of this discussion that he is right, what about non-economic issues? What compulsory unionism provisions shall there be, if any? Shall the no-strike clause be a full or only a limited prohibition? To what extent shall seniority vis-a-vis ability dictate the reassignment of the work force? Shall overtime be compulsory or voluntary?

In these areas of non-economic issues individual managements and individual unions have very firm convictions and often these convictions do not conform to those of managements or unions generally but are founded on particular desires or experiences.

Can there be here the type of criteria that Dr. Handsaker refers to? If so, should the parties be shoehorned into practices and solutions used by others? If you answer "Yes," it seems to me you disregard the personal and particular nature of their problem. If you answer "No," then from where springs the predictability of the outcome which is urged as the basis for embracing arbitration as the solution to that impasse?

Finally, a few words on Dr. Handsaker's answers to the second broad objection to contract arbitration which he says is the mistaken idea that there is a vast difference between contract arbitration, which would be of a legislative nature, and grievance arbitration, which is a judicial nature.

Dr. Handsaker suggests that the difference is not as great as it appears, that actually a fair amount of legislating goes on in grievance arbitration and, therefore, it should not be such a giant step for the parties acclimated to grievance to embrace contract arbitration.

With these premises, I am sure that many management people would disagree, at least those who subscribe to the judicial approach to grievance arbitration. To me the difference between the two is quite real, but there is also another compelling difference. In grievance arbitration the arbitrator is confined to determining whether, in relation to a specific, detailed set of facts, the relevant contract provision, be it broad or narrow, has been correctly applied. The decision is *res adjudicata* only as to that case and becomes controlling on future cases of the same type only by agreement of the parties,

because either party is always free to raise the question of contract application on a reoccurrence of like facts. In our own experience we have seen a referee reverse a predecessor's decision and not only we, but the unions with which we deal, have, on occasion, persuaded a referee to reverse his own earlier decision.

So conceding only for the purpose of this argument that arbitrators do legislate in grievance arbitration cases, there is still a vast difference between letting them do it on a case-by-case basis and asking them to do it on a broad basis. I can't help adding here, to emphasize what I have in mind, that if you think it's difficult sometimes to interpret a contract clause in relation to a specific set of facts, you ought to try your hand at writing one without the anchor point of any particular factual details to tie to — and don't forget that the grass isn't always greener on the other side of the fence.

In short, the contract arbitrator would in fact legislate in wide areas and in so doing would take over — by voluntary default, if you will — the prime responsibility of the parties. No amount of reappraisal will convince many unions or managements to accept this.

So to conclude, the route to elimination of the strike as the means of resolving bargaining impasses is free collective bargaining characterized by a willingness by each party to give thoughtful consideration to the legitimate aims, desires, and needs of the other. The cynic may discard this as being a pious cliché, but the fact is that in large and significant areas of our economy free collective bargaining works and where it works it does so because this spirit prevails. Where it does not work it will be most difficult to overcome by legislation, either formal or informal, the problems that arise where the parties are not so motivated.

Because I am of this conviction you will understand my remaining of the opinion that voluntary arbitration of bargaining impasse represents the road to abandonment, rather than preservation and enhancement, of the process of free collective bargaining.

But I am sure that you are not too interested in personal opinions. So let me quickly add that it must be recognized that there might well be instances in which the nature of the issues and the negotiating climate—I'm sure you will agree that that is a critical element—will combine to create a situation peculiarly adapted to settlement by voluntary arbitration.

All that Dr. Handsaker is really asking is that when unions and managements find themselves in these circumstances, they more adventurously and objectively appraise their positions to the end that they

do not reject out of hand the possibility that voluntary arbitration is the key to the solution of their difficulties. I can only add that no one, management or union, especially people who are supposed to have acquired the habit of keeping an open mind, can quarrel with Dr. Handsaker's advice.

Discussion—

BERNARD CUSHMAN*

Professor Handsaker has written a very thoughtful paper. I think it is true that the full potential of voluntary arbitration for purposes of establishing the terms of new or renewal contracts when negotiations and mediation have failed has not been tapped. I would agree with Professor Handsaker also that voluntary arbitrations can be useful in major disputes such as those we have recently had in the steel industry.

Arbitration of new contract disputes is neither unusual nor rare. Indeed, arbitration in that area has a long and honorable history. Historically, arbitration of such disputes generally preceded arbitration of grievance disputes. The practices of arbitrating new contract disputes goes back to the 19th century.¹ Unions and employers, particularly in public utilities, have been arbitrating such disputes for many years. This practice is, of course, particularly well developed in the local transit industry and the printing industry.² And in the latter part of the nineteenth and the early part of this century, arbitration of contract terms or wages was not unusual in the coal and clothing industries. Kuhn says, in his study of arbitration in the transit industry, Foreword, p. vii, "The transit industry has engaged in more than six hundred new contract wage arbitrations between 1900 and 1949, inclusive." Arbitration of disputes over new contracts on the railroads has a long history and has often been used in recent years despite the availability of presidential emergency boards. As you know, the Railway Labor Act requires the National Mediation

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¹ Witte, *Historical Survey of Labor Arbitration*, University of Pennsylvania Press, 1952, pages 10-15.

² See, Schmidt, *Industrial Relations in Urban Transportation* (1935) pp. 193-207; Witte, *op. cit.*, p. 15; Kuhn, *Arbitration in Transit*, University of Pennsylvania Press, 1952; Loft, *The Printing Trades*, pp. 234-237, 239 ff; *Written Trade Agreements in Collective Bargaining*, National Labor Relations Board, Bulletin No. 4 (1939), p. 53.

Board to proffer arbitration as its final step before ending its mediatory efforts.³ Indeed, Section 7 of the Act has specific and detailed provisions for the voluntary arbitration of *any controversy*.

My own experience corroborates the notion of most students in the field of labor relations that voluntary arbitration is far superior to compulsory arbitration as a means for the determination of unsettled labor disputes. My own experiences with the Florida compulsory arbitration law were somewhat traumatic. In 1949 I served as counsel for one of the locals of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, in a compulsory arbitration proceeding in Pensacola, Florida. The Governor appointed as chairman of the board a local Kaiser-Frazier automobile dealer who himself ran a non-union enterprise. He had no experience as an arbitrator and seemed not to know how to conduct the proceedings or how to approach the issues. While the fact that he chewed tobacco is probably irrelevant, I have an unforgettable picture of the chairman spraying the meticulously dressed late Herbert Syme with tobacco juice as he shot for the cuspidor near which Mr. Syme was sitting. Midway through the proceedings the chairman resigned. Ultimately, he was replaced by another gentleman with no experience as an arbitrator, apparently qualified for his position, in the mind of the Governor, by the fact that he was the local sandwich man. The new chairman denied any increase whatsoever to the employees whose wage rate was very low and at a time when the wage level in American industry and the transit industry was rising rather rapidly. Shortly thereafter I participated in an arbitration proceeding in Jacksonville, Florida, involving a local transit system there. In that case the Governor appointed an arbitrator who had had no experience but who was an accountant. He granted an increase of one penny. The company proceeded to supplement the award by an additional 3¢ to alleviate a hardship that the award created. These are, of course, extreme examples. But they do illustrate some of the dark places into which compulsory arbitration can travel.

I was asked to indicate a tentative conclusion as to whether employees have fared better in strikes than in arbitration of contract disputes. It is doubtful that such a question can be answered. Since the results of any strike at any given time are conjectural depending on so many complex factors, there is no insulated laboratory in which one can isolate controlled factual situations and compare results and arrive at a fair conclusion as to whether employees do better in strikes than they do in arbitration. Whether a particular award would have

³ Section 5 First, Title 45 U.S. Code Chapter 8.

been bettered, improved upon, or worsened had the employees gone on strike is often debatable. The results of both strikes and awards depend so much on so many factors and, not in the least, on the human equation. Union leadership in one place may be outstanding and in another mediocre. The same thing is true of management leadership, or, indeed, of the mediators who may be assigned to a particular dispute, or the community leaders who may interest themselves in such a dispute. What I do think can fairly be said about the arbitration process, as I have experienced it in new contract disputes on railroads, in transit and in electric light and power, and elsewhere, is that when the process brings together parties who are desirous of making it work and when the chairman of the arbitration board is possessed of experience and insight, and a sense of timing, the civilized process of arbitration works better than a strike for all concerned — the management, the employees and the public. On the basis of that experience, there is a part for voluntary arbitration to play in the field of major contract disputes.

Professor Handsaker has suggested that there may be a question as to whether voluntary arbitration can be used effectively in the determination of working rules. The lessons of experience are that arbitration can be successfully utilized in that area despite the protestations of both labor and management to the contrary. In the railroad industry where at the moment there is considerable heat about working rules, arbitration has been successfully used for the determination of such rules and on a nation-wide basis. For example, in 1952 the Class I carriers of the United States and the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers and the Order of Railway Conductors arbitrated a dispute as to the rule to apply to road employees performing more than one class of road service.⁴ The arbitration agreement provided that "The arbitrators shall have the right to consider whether or not any rule covering more than one class or road service shall be granted, and if so, the language of such rule." The arbitration board's award provided that road employees employed in any class of road service may be required to perform two or more classes of road service in a day or trip subject to certain terms and conditions with payment for the entire service to be made at the highest rate applicable to any class of service performed. The overtime basis for the rate was to apply for the entire trip subject to certain conditions outlined in the award and not less than one minimum day was to be paid for the combined service.

⁴ Cases Nos. A-3437 and A-3546, ARB 168.

It is not uncommon in local transit to arbitrate working rules. For example, the operations of the extra board and the method by which assignments are to be made is not infrequently one of the issues arbitrated.⁵ The size of the crew to be used to man printing presses has often been arbitrated in the printing industry.⁶

Nor is it a barrier to voluntary arbitration that the dispute involved is a pattern-setting one or one which involves pioneering in fields in which precedents are few or lacking. In the transit industry arbitration played an important role in the introduction of vacations and the subsequent evolution of the vacation provisions. Arbitration has played an important role also in the development and growth of contributory, actuarially sound, pension plans in the transit industry. Arbitrators have recognized that if arbitration is to be a viable process, it must be a dynamic process. George Taylor's often-quoted phrase in his opinion in the *Public Service Coordinated Transport* case of 1947,⁷ to the effect that holidays had been awarded in that case in order to demonstrate that new ground may be ploughed through arbitration as well as through strikes, is illustrative.

In a recent arbitration award in Pittsburgh, arbitrator Sembower recognized the dynamic nature of the arbitration process. In that case, the Pittsburgh transit company which had been a leader in the field of pension benefits insisted that no further progress should be made since it was still a leader in the industry. He said: "There is a special and unique problem which arbitrators have recognized when they have encountered the comparatively rare instances of bellwethers of wage or pension patterns. With respect to them, the conventional and wholly justified methods of comparison with the criteria already mentioned leads to a stalemate. To use such criteria in these exceptional instances is indeed like trying to pull one's self up by his bootstraps. Their literal application would lead only to the erstwhile front-runner being required to drop far back in the pack before he could move again."

In these major disputes which lead to serious strikes each party is apt to be seeking what it calls progress. It should be remembered that two of the basic social trends of our time are: (1) the continuing improvement in the position of the working man; and (2) continuing technological change. The employees reflect their view of progress in their demands for contract changes — a guaranteed annual wage or a

⁵ New England Transportation Company, August 7, 1950.

⁶ *Miami Herald Publishing Company*, 24 LA 835, *Times Publishing Company*, 10 LA 195.

⁷ 8 LA 530, at p. 537.

shorter work week or providing medical care for pensioners. The employer may see progress in his demand for crew reductions due to newly automated processes. Voluntary arbitration cannot be a "follower" process if it is to be useful in meeting the imperatives of such problems. Arbitration must have a degree of what George Taylor calls "social inventiveness" if it is to respond to the needs which lead to resort to its processes.

Experience has shown that questions of working rules, of the establishment of wage patterns, of the introduction of new answers to new problems, are not beyond the capabilities of the arbitration process. There is ground for belief, therefore, that voluntary arbitration could have been used in the steel dispute and at an early time and avoided a strike. There are few who doubt that a viable solution would have been found in the steel dispute if steel management and steel labor had submitted their dispute to a board of arbitration headed by George Taylor. It is in this direction that we must turn if we are to make collective bargaining work. Arbitration is, after all, an extension of the collective bargaining process. When it is so regarded and when arbitrators of the stature of the late Dr. Leiserson, or William Davis, or George Taylor, are employed, the process will have a far more extensive use than it does today. Surely it is a process which is far more compatible with the genius of American institutions than is that of compulsory arbitration.

There will be other major disputes affecting the public interest which will come upon the American labor relations scene. I think it would be well if the Taft-Hartley Act were amended to require the Federal Mediation and Conciliation Service and/or the Secretary of Labor, in such disputes, prior to any work stoppage, to propose voluntary arbitration. I think it should be further provided that the answers of the participants in the dispute to the proposal be publicized. At this stage in our history, it should be considered presumptively indefensible in such major disputes to refuse to arbitrate all the issues in dispute. I would leave to the participants the fashioning of their own arbitration machinery and would allow them the option of a refusal to arbitrate. I do not think, however, that we have reached a point when it is appropriate to brand those who refuse to utilize the process in these disputes of national emergency proportions as ignoring the public interest. Indeed, if we are to become more civilized, this seems a logical result. The whole history of the progress of mankind is marked by a gradual transfer from the use of force to the use of persuasion. As Alfred North Whitehead said: "The worth of men consists in their liability to persuasion."