CHAPTER 4

THE ROLE OF LAWYERS IN ARBITRATION

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Only a few decades ago there was widespread belief that lawyers had no legitimate place in collective bargaining or arbitration. By training and experience, it was felt, they were stuffily conservative, enamored of formalism, wordy, devious, overly technical, and utterly unable to comprehend, let alone conform to, the overriding necessities of the collective bargaining relationship. As late as 1947 this view was espoused by one of the towering public figures in labor relations—William Leiserson.[1] But as the incidence of collective bargaining and arbitration increased, and as most attorneys who became involved seemed to adapt to the new medium, this prejudice became less prevalent.

Since 1950, moreover, guidance for the uninitiated lawyer has been available in the Code of Ethics for Labor-Management Arbitration, developed jointly by the American Arbitration Association and the Academy. This declares that the parties should approach arbitration "in a spirit of cooperation with the arbitrator" and particularizes that:

> Parties should be fair and courteous in their examination of witnesses and in their presentation of facts. Concealment of necessary facts or the use of exaggeration is not conducive to a good or

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1 See Leiserson, "How Unions May Use the Taft-Hartley Act," 20 LRRM 74, 80 (1947).

"But in proceedings before . . . ordinary arbitration boards, lawyers are better kept out, just as I am sure most of you have found that it is better to keep lawyers out of collective bargaining negotiations. . . . Attorneys are trained in the law and not in labor relations, even though they may have studied labor law. They rarely have had the kind of experience or education to understand the psychology and economics of labor relations. . . . The injection of lawyers into labor relations cases promises to retard rather than help amicable settlements by collective bargaining, cooperative compromises, and mutual give and take."

> sound determination of the differences between the parties. Acrimonious, bitter or ill-mannered conduct is harmful to the cause of good arbitration.[2]

Few will be heard to deny that these provisions embody a desirable ideal. Over the years since 1950, moreover, there have been countless efforts by the AAA, by educational institutions, by arbitrators, and by the Academy to sell this concept of the role of the parties' representatives in arbitration. The AAA consistently has preached that arbitration should be informal and non-technical.[3] Courses, seminars, conferences, and speeches throughout the country have spread the message. Law professors and others have beamed it particularly to law students and lawyers.[4]

These efforts reached something of a climax at the Academy's 1957 meeting, when John Sembower spoke of the necessity of "Halting the Trend Toward Technicalities in Arbitration," and enjoined the parties and arbitrator alike to cleave to the merits and eschew technicalities. In this he was seconded ably by Allan Dash with a moving description of some of the legalistic pratfalls he had observed.[5]

In view of these strenuous efforts, it came as something of a

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[2] "Code of Ethics and Procedural Standards for Labor Management Arbitration," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), Appendix B, p. 161.

[3] For a description of AAA efforts to this end, see Joseph Murphy, "Preparation and Presentation of an Arbitration Case," 10 *Vanderbilt Law Review* 807, 811-12 (1957).

[4] As, for example, Willard Wirtz, "Collective Bargaining: The Lawyer's Role in Negotiations and Arbitrations," 34 *American Bar Association Journal* 547 (1948); Benjamin Aaron, "Some Procedural Problems in Arbitration; 10 *Vanderbilt Law Review* 733 (1957); Charles Livengood, "The Lawyer's Role in Grievance and Arbitration," 9 *Labor Law Journal* 495 (1958); Archibald Cox, "Some Lawyer's Problems in Grievance Arbitration," 40 *Minnesota Law Review* 41, 1955).

[5] "When the simple, inexpensive and expeditious procedures they (the parties) previously followed . . . have substituted for them the complex, expensive and time-consuming procedures of pre-hearing briefs, arbitration stipulations, arbitrability arguments, stenographic records, post-hearing briefs, rebuttal briefs, etc., their growing consternation can be readily appreciated. When, in addition, the actual arbitration hearing is conducted in a pseudo-court atmosphere, with swearing of witnesses, examination, cross-examination, re-examination and re-cross-examination of witnesses, objection to witnesses' competency, objections to witnesses' expression of opinions instead of facts, objections to leading of witnesses, objections for the record, exceptions noted in the record because of the arbitrator's ruling or refusal to rule on objections—when these occur, the growing lack of confidence in the arbitration process by the union and the company personnel may well reach the breaking point." *Critical Issues in Labor Arbitration* (Washington: BNA Incorporated, 1957), p. 109.

rude surprise late in 1958 to encounter an editorial in the AAA *Arbitration Journal* titled "Creeping Legalism in Arbitration." This decried the "growing superstructure of legal trappings which has been increasingly evident in arbitration cases," and quoted with approval a judgment of Professor Emanuel Stein that "a frustrating kind of legalism has crept into labor relations because *the arbitrator has come to function like a judge and the parties have come to treat arbitration like litigation,* with all the canons of construction familiar to the law of contracts." [6] (Emphasis supplied.)

Thus we have twin indictments of the parties and the arbitrators, the former because they have come to treat arbitration like litigation, the latter because they function too much like judges. Underlying both indictments, one might suppose, is an assumption that lawyers and legal methods have no proper place in arbitration. In fact, Professor Stein seemed explicit to this effect when he wrote that "a party feels virtually naked coming into arbitration unless he is accompanied by counsel . . . and with the lawyers come all the trappings of legal proceedings."

No doubt it would be erroneous to view such comments as representing either an official American Arbitration Association position, or a final judgment by its editorial writer, who sought primarily to combat specific, seeming abuses. The *Arbitration Journal* provides a valuable forum for exchange of views, none of which need be regarded as definitive in order to be useful. Thus such an editorial expression almost necessarily implies an invitation to further thought and comment by others equally concerned with the healthy development of labor arbitration.

In any event, these expressions already have engendered vigorous reactions. It may be merely an unfortunate coincidence that two of the most eloquent have come from attorneys—or even more unfortunately, it may be no coincidence. Benjamin Aaron's commentary in 1959 analyzed the use of the term "creeping legalism" with characteristic felicity:

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[6] 13 *Arbitration Journal* 129 (1958). Partial text of Professor Stein's earlier speech appears under the title, "Arbitration and Industrial Jurisprudence," 81 *Monthly Labor Review* 866 (1958). The term "creeping legalism" earlier appeared in Julius Manson, "Substantive Principles Emerging from Grievance Arbitration: Some Observations," *Sixth Annual Proceedings, Industrial Relations Research Association,* 136, 147 (1954).

> Use of that rhetorical device is regrettable because it suggests something stealthy and unwholesome—a condition to be resisted as strongly as "creeping subversion." We would be better advised, I submit, initially to concentrate on the particular practices or attitudes under attack; after they are identified and evaluated, there will be time enough to determine whether they are creeping, toddling, or galloping.[7]

Only a few months ago this trenchant comment was supplemented ably by Robert Levitt's article in the *New York Law Forum*.[8] It would not be seemly to cudgel further either the AAA editorial or Professor Stein; Aaron and Levitt have left little to be added—especially by still another lawyer. My more limited objective here is to expose for reflection some of the more fundamental, underlying considerations bearing upon each of the separate indictments, which may not yet have received due consideration.

The Lawyer As Spokesman

First, let us consider the lawyer as spokesman in arbitration. Until reading the AAA editorial, it had been my comfortable assumption that most lawyers in labor arbitration had come to understand the needs of collective bargaining and had adapted to the environment successfully. There are few greater privileges in arbitration than to preside where the parties are represented by seasoned, intelligent, and cooperative attorneys who understand the facts, the real problems involved, and the medium in which they operate. There is even greater satisfaction over the years in watching a green and awkward young attorney, with the right basic abilities and instincts, develop to the point where he can make such a contribution.

True enough, these experiences contrast with one of some years ago, in a case involving a protest that employees were being required to perform a duty not specifically listed in their job description. They wanted an award advising the company that they could not be required to perform this particular duty. The evidence was presented easily, and all was proceeding in routine

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[7] Benjamin Aaron, "Labor Arbitration and Its Critics," 10 *Labor Law Journal* 605, 606 (1959).

[8] Robert Levitt, "Lawyers, Legalism and Labor Arbitration," 6 *New York Law Forum* 379 (1960).

fashion until the union attorney triumphantly announced that the case was controlled by the *ejusdem generis* rule.[9] I doubt if anyone in the room—and surely not the lawyer himself—understood what this "rule" meant as applied to a job description. A startled silence ensued during which the faces of the employees involved settled into expressions ranging from amazement to disbelief. This argument met with the success it deserved in the subsequent opinion and award. Not too many months later, the attorney disappeared from the scene.

If such an instance serves to illustrate that some attorneys may be unable to adapt adequately to the labor relations medium, it may illustrate as well that the parties are not without a remedy if they wish to use it. Attorneys are not necessarily less expendable than arbitrators.

No one seems ready to disagree—at least openly—with the broad proposition that the arbitration hearing should be regarded as a cooperative endeavor to develop all the necessary facts for a sound decision. Informal hearings, avoidance of technicalities, and minimum use of formal procedures, should be the order of the day.[10]

It is the clash between these idealistic sentiments and certain inherent harsh realities of arbitration which may underlie much criticism of lawyers who serve as spokesmen in such a large proportion of cases.

Arbitration often must be adversary in nature. When a dis-

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[9] The curious may be gratified to have the following partial definition. "*Ejusdem Generis*. Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the '*ejusdem generis* rule' is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named, nor does it apply when the context manifests a contrary intention." (H. C. Black, *Black's Law Dictionary*, fourth edition by Publisher's Editorial Staff, St. Paul, Minnesota: West Publishing Co., 1951, p. 608.)

[10] Perhaps fairly typical is the approach in *Procedural Rules of the U.S. Steel and United Steelworkers Board of Arbitration*, with joint approval of the parties. "Hearings will be conducted in an informal manner. The arbitration hearing is regarded by the Board as a cooperative endeavor to review and secure the facts which will enable the Board to make equitable decisions in accordance with the requirements of the provisions of the labor agreement. The procedure to be followed in the hearing will be in conformity with this intent."

charge case turns ultimately upon which witnesses are believed, and to what extent, there is no way in which the facts can be illuminated as well as by skillful and intensive examination and cross-examination of the witnesses. If this generates heat, it still may be a small price for getting as close to the truth as possible. No one yet has devised a more effective technique, consistent with the basic values of a free society. Even the most cooperative spokesmen can be—*and often are*—misled by their own witnesses' faulty or wishful memories, or by others who shaped the grievance as it moved through the procedure.

This adversary quality often runs hand in hand with a built-in zest for victory[11] among those represented, which may make it well nigh impossible for the spokesman to conduct himself as if he were on a nature hike. As one Steelworker official has put it, "The most legalistic guys in my union are about one million guys who never went to law school."[12]

Some years ago, I came to know a competent and personable management representative with fifty or more companies as clients in a large metropolitan area. From time to time thereafter, mutual friends would tell me how—despite his fine personal qualities—he was a legalistic pettifogger both in bargaining and arbitration. This was so bad, ran the story, that in self-defense many local unions had to retain counsel to cope with him. A few years later, I learned quite by accident that this "legalistic" spokesman never had studied law.

Then there's the case of the union representative who never went to college, let alone law school. A brilliant protagonist, he understands and is fascinated by the legal process. For a first-rate legal analysis—when this suits his purpose—or a devastating cross-examination, he has few equals. By turns he can be wholly cooperative or unbelievably obstreperous. No deep reflection is required to realize that these varying approaches cannot be ex-

[11] At the third Annual Meeting in 1950, Eli Oliver spoke of this from the viewpoint of a labor leader, observing:
". . . He knows that not alone a vindication of his judgment, but also the future acceptability of arbitration, depends upon the outcome of these individual cases. He is fighting not alone for the laurels of victory, but also for the future of this process for settling labor disputes." (Panel discussion, "The Status and Expendability of the Labor Arbitrator," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), p. 61.

[12] *BNA Daily Labor Report* #54, p. A-11, March 19, 1959.

plained merely in terms of personality or moods of the moment rather than as carefully conceived strategy or tactics.

For every technical lawyer in my own experience, I can recall an equally technical layman. Lawyers have no monopoly on tedious examination of witnesses. Windy presentations of simple issues are as dreary by non-lawyers as by lawyers. It is interesting that General Motors and the UAW have been said to have "legalistic" arbitration, yet they use no lawyers.[13]

All this, of course, does not excuse the overly technical, contentious, long-winded, or ill-prepared lawyer, since presumably his training should enable him to do better than the layman—all other things being equal. Thus, I am not relieved from grappling with the ultimate question posed by my title. Perhaps, however, the problem may be restated: Are lawyers *as such* more likely than other representatives of the parties to impede cooperation in seeking sound determinations of differences in arbitration?

Frankly, my own background of experience is far too limited to justify any firm answer to this question. But I am comforted in the belief that those who would answer it in the affirmative have not proven their case. It is not the quality of beauty alone which is in the eye of the beholder. Our own attitudes and preconceptions determine in good measure what we see in interpersonal relationships.[14] And even when perception is relatively accurate, generalization from particular experience is risky. As wise and salty William H. Davis once said: "No generalization ever is completely true—not even this one."

The published version of Professor Stein's speech does not tell us what study or evidence led him to his conclusion that lawyers tend to impede effective arbitration. Presumably, it was based on personal observation and experience. The AAA editorial rests on slightly firmer ground since it cites, as evidence of excessive legalism, five cases in which arbitrators apparently went too far in relying on so-called precedents in the form of other arbitrators' or court decisions. In the most extreme of the five cases, the arbitra-

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[13] See discussion of Gabriel Alexander, "Impartial Umpireships: The General Motors-UAW Experience," *Arbitration and the Law* (Washington: BNA Incorporated, 1959), p. 158.

[14] Mason Haire, "Interpersonal Relations in Collective Bargaining," eds. C. M. Arensberg and others, *Research in Industrial Human Relations* (New York: Harper and Brothers, 1957), p. 182.

tor is said to have used twenty-six citations of other cases in deciding a simple discharge grievance.

Granted that the cited instance in the editorial may be extreme, we cannot say either that they represent a norm or that all use of precedent is bad. In deciding one of my own most difficult cases, it seemed helpful to analyze or note no less than 78 earlier decisions in the steel industry—75 decided by the U.S. Steel Board of Arbitration (under its various chairmen going back to 1945) and three in other companies. This laborious task was undertaken not only as an indispensable aid to sound decision, but also to enable the parties to know as fully as possible its bases and implications.

Of course, one might point out that—being a lawyer—I necessarily would write legalistic opinions. Then, how about an outstanding non-lawyer and former President of the Academy—Allan Dash?

Allan topped the figure of 26 with a review of 64 so-called precedents in a famous contracting-out case.[15] No one will accuse Allan of being too legalistic—particularly after his 1957 speech to the Academy decrying some of the legalisms he had encountered. Nor can it be denied that Allan did a brilliant job in analyzing the so-called precedents pressed upon him in that case.[16]

As a practical matter, reliance on precedent hardly would be very widespread without the organizations which publish arbitrators' decisions. Within less than a year after its "Creeping Legalism" editorial appeared, the AAA itself began to provide this type of service.

Outside of the steel industry (where due regard for internal "precedent" generally is recognized as essential to practical administration of the agreements in each major bargaining relationship), my own occasional experience with so-called precedent has been neither extensive nor fruitful. Usually it is *language* which is cited—culled from an opinion where the facts and agreement bear no resemblance to those in the given case. It is at least an open question as to whether lawyers or non-lawyers are more

[15] *Celanese Corporation of America and United Mine Workers of America, District 50*, 33 LA 925 (1959).

[16] Perhaps the most perceptive analysis of cases involving "contracting out" to date was presented by a non-lawyer at the 1960 Annual Meeting. See Donald Crawford, "The Arbitration of Disputes Over Subcontracting," *Challenges to Arbitration* (Washington: BNA Incorporated, 1960), pp. 51-73.

prone to engage in this generally useless conduct. In one case I had a few years ago, the management spokesman was not a lawyer, but he cited 19 so-called precedents. The union attorney cited none. As it happened, the language of the agreement unmistakably supported the union. There may be a moral in this illustration.

Even in the absence of documented support for the "creeping legalism" thesis, it must be conceded that there may be numerous occasions when a lawyer-spokesman seems hopelessly ignorant, technical, or uncooperative. This usually is explained on the basis that "it all depends on the lawyer." While a valid explanation in some cases, it is quite inadequate for others. The lawyer is not always a free agent, or wholly able to control all aspects of the case.[17] Even where he recognizes that the labor relations medium is unique and seeks to adapt to its requirements, it does not follow that all concerned will live happily together forever after.

Too often we overlook the fact that it is the lawyer's duty to *represent*—within ethical limits—not to dominate and control.

An obvious exception may be the practitioner who represents enough clients to be dominated by none, and so can control the nature and content of the presentation to a greater extent than other attorneys.[18] More often, the lawyer does not formulate or control policy, and he must rely on others to evaluate the overall needs of the relationship. Also, he often is handicapped seriously by lack of practical knowledge of the industry and the operations involved, making him doubly dependent on others. This difficulty may be aggravated further when the client, consciously or unconsciously, hides behind the lawyer (or other spokesman) rather than face up to delicate bargaining problems.

Some years ago I had a hard-fought case with a bright and cooperative—but green—young attorney representing a local union.

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17 One commonly hears that in a typical law suit or purely legal problem, the lawyer is the expert in charge. He alone knows "the law" and is qualified to deal with it, and the problem is largely legal. We are told, too, that it's a one-shot operation, with a tangible goal and specific terminal point. Whether this oversimplified version of the conventional lawyer's role bears very much likeness to total reality need not detain us here.

18 How such a man chooses to exercise his practical control sometimes may be affected by factors extraneous to the given collective bargaining arrangement. And when he does "take charge," his methods may be influenced (at least unconsciously) by the nature of his practice, by long range relations he maintains with various management or union organizations, as well as by his personal values or instincts.

As the key company witness told his story, there was increasing restiveness among the union group at the table, accompanied by assertions from their attorney that the story of the company witness was "irrelevant." Something like this then followed:

LAWYER: "Again I question the relevance of this kind of evidence. I don't see what this has to do with the case."

ARBITRATOR: "Well, I think, Joe, that you will be grateful later to find that I am very charitable in what I regard as potentially relevant."

LAWYER: "This could be, I am not going to deny that. Except in this case I don't think it is relevant."

ARBITRATOR: "It is sometimes difficult, and I am now convinced, impossible, to know at the time you are discussing a question of this sort, whether an item of evidence or a subject of inquiry really will be relevant. Sometimes it doesn't appear until well after the stuff has come in, whether or not it is truly relevant. So that my policy frankly is to err, if I err at all, in the direction of letting it in."

Away from the exigencies of the moment, no doubt this attorney would agree with Harry Shulman's view that, "The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant."[19] The reason for his objection did not lie as much in conviction as in doubt, stimulated by the insistent prodding of the local union official whose ox was being gored.

Sometimes when a management or union actually has a clear-cut policy, fully communicated to its lawyer, he has no alternative but to be contentious, unless ready to seek other employment. Some managements, for example, hold that sound collective bargaining requires arbitration to be as unattractive as possible to the union, on the theory that this will enhance settlement possibilities in the

[19] Harry Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review* 999, 1017 (1955), reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1959).

grievance procedure. Such a system actually may work sometimes, in the context of a reasonably sound collective bargaining relationship, but with "dogfight" arbitration.

Still other managements and unions may have no clearcut philosophy, or strong unified leadership, concerning day-to-day labor contract administration, which unmistakably will give a lawyer an easy path to follow. Here, inadequate practical knowledge can be a cruel handicap. Even if the lawyer has a full review of the "facts" before hearing, he often gets a colored and incomplete version, with little conception of how the grievance fits into the overall picture. It may take years to develop necessary insight into such matters, by which time, of course, he is likely to have been promoted in recognition of his ability.

There is also the need at times to shape a presentation to suit some particular group[20] (industrial engineers, operating executives, accountants, industrial relations executives, or actuaries) which may have the prime stake in a given case. Often a lawyer realistically must appreciate the extent of divided opinion among interested departments (and within departments) which may not only cause a case to come to arbitration, but which also will affect the manner in which it is presented. Pressures of this sort produce perhaps their finest flower when spokesmen for both parties put on a seemingly endless display of histrionics, insults, and pettifogging. Either because of accidental mutual insight or implied understanding based on long experience, the respective spokesmen mutually contrive to put on a great show for their clients and constituents.

. One risk in this arrangement is the possibility that some arbitrator or other participant will take them too seriously. After a frightening display of belligerent intransigence, such happy coconspirators sometimes may be found together in the nearest bar. Viewing life as it is—rather than as some might like it to be—we cannot assume that such spokesmen do not perform a service for

[20] Purely for convenience, the discussion on this aspect is in terms of a corporate environment. Some may think we must differentiate here between management and union lawyers. To some extent this is true, but only superficially so. The bulk of problems and pressures of the management lawyer in doing an effective job in grievance arbitration seems to be duplicated or paralleled on the union side, though we may use different labels. As professionals, both groups have more like than dissimilar problems.

those they represent—given the basic conditions under which they operate.

In the last analysis, are we not led to inquire how many corporations and unions really are ready to entrust to their arbitration spokesmen complete authority to control the presentation, or settle the case in his own best judgment, without regard to the wishes or needs of others in the management or union group? How many spokesmen have been told in the words of the Code of Ethics that they must "approach arbitration in a spirit of co-operation," be "fair and courteous," and eschew all "exaggeration" in seeking a sound determination of grievances?

To be brutally frank, how many top management and union officials ever have heard of these provisions in the Code? Perhaps we have been beaming our message to the wrong people over the years. There may not be much value in talking to a lawyer about cooperation unless he is sure of his client's or superior's support.

These, of course, are only a few facets of the total problem involved in the charge that the parties' representatives in arbitration are tending increasingly to smother us with undue legalism. Such generalizations perhaps serve a useful purpose in stimulating efforts to improve. But real improvement is not likely to come without a good deal more study of the forces at work.[21]

Meanwhile, it would appear that lawyers are here to stay in grievance arbitration, not just because they are camels who have gotten their heads in the tent, but because the parties want them there to meet a felt need. A recent ILO survey tells us that American trade unions themselves (once generally hostile to lawyers) have become "legal minded." [22] In 1956 the AAA reported that lawyers represented one or both parties in 63.7 percent of 1183 cases arbitrated under its auspices in 1954. Of this group, nearly half (48.4%) were cases in which both parties were represented by lawyers.[23]

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[21] We have had much "human relations" research into other types of group action, but apparently none into labor arbitration. The process seems to present unique opportunities for challenging study. Interestingly enough a study is under way at the University of Chicago Law School to ascertain on what bases decision-makers formulate their judgment in commercial arbitration. See, "Soia Mentschikoff Speaks: Arbitration and the Courts," *Harvard Law Record*, p. 5, March 31, 1960.

[22] *The Trade Union Situation in the United States* (Geneva: International Labor Office, Freedom of Association Division, 1960).

[23] "Procedural Aspects of Labor-Management Arbitration," 28 LA 933, 937 (1957).

It is interesting to note, too, that over 50 percent of the membership of the National Academy of Arbitrators in 1960 were lawyers; at least they had taken law degrees.[24]

The Arbitrator As Judge

With this last statistic, it seems appropriate to pass on to the charge that the arbitrator has become too much like a judge.

Frankly, I am baffled by the assumption that there is something wrong about an arbitrator functioning "like a judge." There are so many kinds of judges in this variegated society that the term can be used only very loosely. The magistrate in a Philadelphia river-ward is a "judge" (and was even before the 1951 reform in that city). So is the sociologist who sits in juvenile court.

In a loose sense, almost all arbitrators at times must act as judges do. Most parties appear to want them to; what they don't want, perhaps, is an arbitrator who begins to think he *is* a judge.

It remains to be demonstrated that any significant number of arbitrators inject undue formality or technicality into hearings on their own initiative. It is an odd arbitrator who does not adapt himself to the known or implicit needs of the parties.

Where the parties do not agree as to the fundamentals of their arbitration process, the arbitrator must develop and enforce policies as to who will proceed and when, how many spokesmen there will be, how the facts will be developed, how far afield the discussion may roam, and the like. There is no escape from this responsibility, whether the arbitrator is an economist, clergyman, engineer, or attorney.

The real difficulty here may lie in the critics' conception of the judge. If one envisages a crusty old fogey, unimaginative and lost in formalism, there are few who would want such an arbitrator, but how about a Cardozo, a Brandeis, a Warren, or one of the Hands?

Perhaps here we have a renewal of the long struggle over dif-

[24] In 1957 General Counsel Strong reported that half of the arbitrators on the active roster of the Federal Mediation and Conciliation Service were attorneys. George Strong, "Lawyer's View of Arbitration," 10 *Vanderbilt Law Review*, 801, 805 (1957).

ferent concepts of grievance arbitration, in the effort to answer the broad question: What *should* be the arbitrator's approach where the parties disagree as to the meaning of their agreement? Some of the broad language describing the arbitrator's function in the recent *Warrior* majority opinion seems likely to renew interest in this question.[25]

Some may find irony in the fact that only 10 years before its 1958 editorial, a leading official of the AAA held firmly that arbitration was a judicial process and the arbitrator a *"private judge."* In 1948, Vice President Noble Braden quoted Senator Wayne Morse with approval when the latter said:

> The arbitrator *sits as a private judge,* called upon *to determine the legal rights* and the economic interests of the parties, as those rights and interests *are proved by the records* made by the parties themselves. *The principle of compromise has absolutely no place in arbitration hearings.*[26] (Emphasis supplied.)

Braden went on to report that the AAA from its inception had been the strongest advocate of this concept and that its publications presented "almost incontestable evidence for arbitration as a judicial process." [27]

Braden was eager in 1948 to develop uniform acceptance of this view of arbitration throughout the country.[28] The AAA shortly circulated a proposed code of ethics for labor arbitration, embodying this concept and indicating that any effort by an arbitrator to mediate was unethical.

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[25] *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 80 S. Ct. 1347, 1352, 34 LA 561, 564: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."

[26] Wayne Morse, "The Scope of Arbitration in Labor Disputes," *Commonwealth Review,* March 1941, p. 6 quoted in J. Noble Braden, "Problems in Labor Arbitration," 13 *Missouri Law Review* 143, 149 (1948).

[27] Braden, *loc. cit.*

He added, "It is a quasi-judicial procedure whereby the parties . . . determine upon their own tribunal, select their own judge or judges, and agree to be bound by the decision. Arbitration is not to be confused with mediation or conciliation which are the process of bringing two parties together in order to work out a compromise."

[28] *Ibid.,* p. 168.

Proponents of mediation quickly found a worthy champion in George Taylor, with his classic presentation at the Second Annual Meeting of the Academy in 1949.[29] Dr. Taylor emphasized that grievance arbitration in a real sense was "an extension of the collective bargaining process" and that much of it entailed mediation (particularly under the "Impartial Chairman" type of arrangement with which he was so familiar). He rejected the notion that grievance arbitration was "simply a process of contract interpretation" since—as he put it—"the difficult grievances arise because the labor contract reflects only a partial or an inconclusive meeting of the minds." [30] In all such cases, the arbitrator should strive to develop an "acceptable" result.

This "acceptability" thesis and emphasis on mediation drew another broadside from Braden, who convened a meeting of some 60 arbitrators to consider the implications of Dr. Taylor's paper. Braden reported that a large majority of those present clearly affirmed that the arbitrator was a "judicial officer."[31] There was, however, significant support in the group for Dr. Taylor's thesis.

In the end, the new Code of Ethics included at least a limited blessing of mediation:

> The arbitrator's duty is to determine the matters in dispute, which may involve differences over the interpretation of existing provisions or terms in provisions of a new contract. In either event, *the arbitrator shall be governed by the wishes of the parties, which may be expressed in their agreement, arbitration submission, or in any other form of understanding.* He should not undertake to induce a settlement of the dispute against the wishes of either party. *If, however, an atmosphere is created or the issues are so simplified or reduced as to lead to a voluntary settlement by the parties,* a function of his office has been fulfilled.[32] (Emphasis supplied.)

Our familiarity with treatment of difficult issues in collective bargaining makes these pleasingly general words seem—as they

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[29] George Taylor, "Effectuating the Labor Contract Through Arbitration," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), p. 20.

[30] *Ibid,* p. 21.

[31] J. Noble Braden, "The Function of the Arbitrator in Labor-Management Disputes," 4 *Arbitration Journal* 35, 40 (1949).

[32] "Code of Ethics and Procedural Standards for Labor Management Arbitration," *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957). pp. 154-55.

are—a statesmanlike disposition of what had become (perhaps unnecessarily) a sticky problem. This happy choice of words made it possible for the Academy to join in sponsoring the new Code.

This did not put an end to argument, however. There has been no dearth of commentators since to aver that arbitration is essentially a process "for administration of justice according to law." [33] Harold Davey seemed to reflect this view in colorful fashion a few years ago when he wrote:

> If the parties prefer an arbitrator to act as a 'mutual friend,' as a labor relations psychiatrist, or as a father confessor, they are privileged to seek out an arbitrator who can fulfill such a role. If they prefer an arbitrator to adhere strictly to the traditional quasi-judicial approach, this can be made clear. . . . Personally, I continue to hold to the view that in grievance arbitration *the arbitrator's function is properly a quasi-judicial one.*[34]

Meanwhile, in 1952 Bill Simkin elaborated Dr. Taylor's thesis in a notable monograph entitled *Acceptability as a Factor in Arbitration Under an Existing Agreement.*[35] Perhaps the essence of this treatment is reflected in the following:

> Arbitration is a semi-judicial process, but it is also an integral part of the system of collective bargaining, and it includes the same necessary elements of collective bargaining—the development of willingness to modify and willingness to lose in the minds of the parties. The only essential difference between direct negotiation and arbitration is that the area of persuasion is broadened to include the arbitrator. In the last analysis, the arbitrator and the system of arbitration are successful only if the persuasive factors in the three-way equation (the company, the union and the arbitrator) are more vital than the exercise of authority.[36]

Simkin concluded his analysis with the thought, "That decision is best which is not an imposed decision but a meeting of the minds; that decision is next best which embodies a maximum of persuasion and a minimum of command." [37]

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[33] Maurice Merrill, "A Labor Arbitrator Views His Work," 10 *Vanderbilt Law Review* 789, 799 (1957).
"My own feeling is that . . . arbitration in essence is a part of our machinery for administration of justice according to law."

[34] Harold Davey, "Labor Arbitration: A Current Appraisal," 9 *Industrial and Labor Relations Review* 85, 88 (1955).

[35] William E. Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement* (Philadelphia: University of Pennsylvania Press, 1952). 67 pp.

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

[37] *Ibid.*, p. 67.

Some have interpreted this to suggest that an arbitrator should look for some compromise middle ground between each party's asking price in every case, or perhaps, deftly trade off one case against another, so as to achieve a long range balance between the parties. These cynical reactions overlook Simkin's clear delineation of the varying levels of acceptability which may be possible, and his recognition that there will be cases where no mediated settlement is possible, that is, where an award must be issued with the hope of attaining some degree of acceptability, lying in an opinion reflecting full understanding of the parties' problems and "selling the decision."

A later exponent of the "acceptability" thesis, however, seems to have lent substance to the fear that it may induce an unwary arbitrator to weigh considerations other than the merits of a given case. Professor Shister wrote in 1957:

> It is implicitly assumed . . . that the requirements for maximum acceptability are the same in both the 'short' and the 'long run.' *But where the requirements differ, should the short run or the long run be the governing consideration?* The answer is a function of numerous factors. To illustrate: Will the absence of acceptability lead to serious conflict between the parties? If so, can the parties survive such a conflict? How certain is the arbitrator that he has gauged accurately the potential reactions of the parties to a given award? *How secure is the arbitrator in his position? What is the importance of the relevant arbitration duties to the arbitrator's career?* And so on." [38] (Emphasis supplied.)

It is difficult to conceive what the arbitrator's job security or interest in the particular arbitration assignment can have to do with the merits of a given case.

Apart from this possibility of misconstruction by the unsophisticated, there may be serious difficulty in applying an "acceptability" criterion in many relationships. Whose "acceptance" is to be sought? The Taylor and Simkin expositions seem to be in terms of satisfying some single individual leader, executive, spokesman, or group, in whom effective top collective bargaining authority might reside on each side.[39]

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[38] Joseph Shister, "Research in Collective Bargaining: An Evaluation," (University of Buffalo, Department of Industrial Relations Reprint), pp. 38, 60.

[39] In 1954, however, Harry Shulman emphasized that an arbitrator should strive to obtain *the confidence of all employees and management personnel involved,*

It would be a rare thing to discover a corporation or a union of any size which presented a single, unified and unchanging viewpoint as to all important matters in collective bargaining. It is doubtful that such an organization long could survive in modern society. Things may be different when electronic computers are developed to take over union and management leadership—but when someone with enough knowledge and insight to program such a computer appears, the day of the arbitrator probably will have passed too—unless it is the arbitrator who takes over the programming.

Meanwhile, we must live with the fact that large organizations are complex aggregations of many different interests, functions, and personalities. The interplay of various internal union and management forces from one case to another may be fascinating to observe, but hardly will provide an arbitrator with a sound basis to speculate upon the relative "acceptability" of various alternative approaches to the decision of a knotty case.

When parties negotiate on an industry-wide basis—or its practical equivalent— the possibility of internal differences within each "party" is compounded. Not infrequently each "party" to the ultimate bargain is sorely beset to find broad formulae or general standards which provide acceptable treatment of nasty issues within its own group.[40]

Thus, the generalities in collective agreements may reflect internal compromises within each "party" as much as compromises between management and labor. The extent to which this may be true of major issues is suggested when we consider the diffi-

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Shulman, "Reason, Contract and Law in Labor Relations," 68 *Harvard Law Review* 999, 1017 (1955).

"When I speak of the satisfaction of the parties, I do not mean only the advocates who may present the case to the arbitrator or the top echelons of management or union representatives. I mean rather all the persons whose cooperation is required —all the employees in the bargaining unit and all the representatives of management who deal with them, from the job foreman up." And at page 1021, "It is the rank and file that must be convinced."

To speak of "acceptability" in terms of all persons involved, of course, renders the term meaningless as a "criterion" to an arbitrator; it goes no further than to suggest that he do his job in a way which will command general respect and confidence.

[40] The necessity for compromise and trading within the management group in multi-employer bargaining is developed in S. Garrett and L. R. Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (Philadelphia: University of Pennsylvania Press, 1949), pp. 44-48.

culty of defining in detail—for all purposes in a large multi-plant unit—such relatively innocent terms as "promotion," "job," or "indirect worker." [41]

Perhaps it is this very complexity in bargaining which accounts in good part for the reluctance of many major companies and unions to have arbitrators undertake mediation of critical issues, and to prefer that their arbitrators interpret and apply their agreements in accordance with their reasonable intent. In such relationships, the realistic conclusion may be that the only "acceptable" approach for the arbitrator is to "function like a judge." One proponent of the acceptability thesis has recognized this in commenting that General Motors and the UAW have "needed and expected a so-called 'legalistic' approach to arbitration." [42]

In the final analysis, therefore, much of the disagreement as to the "proper" function of the arbitrator must be deemed essentially semantic. Noble Braden's fundamental misconception in the 1940's was that mediation efforts could not be part of a "judicial" process. But judges for years have sought to induce settlements, and in some jurisdictions or before some judges today, *all* civil suits may be the subject of pre-trial conferences with conciliation and settlement as a major objective.[43] At least since the late 1930's, legislation has existed in some states authorizing "Conciliation Courts" to mediate certain types of marital disputes.[44] The notion that arbitration was essentially a judicial

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[41] In large multi-plant units the parties frequently recognize the danger of seeking to anticipate all possible variables and contingencies in defining such terms. This reflects wholesome realism rather than lack of capacity to negotiate.

[42] Gabriel Alexander, "Impartial Umpireships: The General Motors-UAW Experience," *Arbitration and the Law* (Washington: BNA Incorporated, 1958), p. 157.

[43] Conferences may be held to simplify the issues and evidentiary problems as well as to consider other matters which "may aid in the disposition of the action." See Rule 16, *Federal Rules of Civil Procedure,* Title 28, *U.S.C.A.* In like vein is Rule 212, *Pennsylvania Rules of Civil Procedure.* In Allegheny County (Pennsylvania) under Common Pleas Rule 26, all civil cases are listed for "Pre-Trial and Conciliation," where counsel must be prepared to discuss all phases of their case. Whereas in earlier times some members of the judiciary were known as "hanging judges," today the label "settling judge" is not uncommon in some areas. An earlier discussion of pre-trial settlement possibilities appears in Sidney Simpson, "A Possible Solution of the Pleading Problem," 53 *Harvard Law Review,* 169, 192-95 (1939).

[44] See, for example, *Deering's California Codes, Code of Civil Procedure Annotated, Secs.* 1740, 1760, 1761. Jurisdiction here apparently is limited to marital disputes which might lead to divorce or annulment where minor children are involved.

process did not exclude the possibility of mediation, but rather included it.

Another long-standing misapprehension is the belief that a judge (or arbitrator) must look for a "meeting of the minds" in interpreting an agreement.[45] This archaic notion persists, even in recent texts,[46] despite the fact that long ago it was rejected by judges and scholars in favor of an objective theory of contract interpretation which would give a reasonable meaning to the language of an agreement even though one party or the other—or both—did not have such a specific conscious intent when the agreement was written.

There is no single rule of interpretation, or approach to interpretation, and no group of rules which, taken together, always will lead to a single "correct" understanding and meaning.[47]

As applied to collective bargaining agreements, an "objective" approach would recognize that the parties often do not achieve mutual understanding or clear expression on specific points. Rather, they choose general language establishing standards and guides which later will be given practical construction either by their own implementation or by an arbitrator who finds a reasonable and practical application of their language in the whole context of their bargaining relationship.

Such an interpretive process is not the sterile and mechanical operation which some may envisage. Such critics may ponder with profit Harry Shulman's analogy between the negotiation of a collective agreement and the enactment of complicated legislation for the future, with the arbitrator being called upon, in effect, to apply a private rule of law in accordance with his best judgment,[48] after evaluating many factors not dealt with specifically in the agreement.

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45 The term "meeting of the minds" recurs frequently in Dr. Taylor's original development of the acceptability thesis. *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 20-41.

46 See F. Elkouri and E. A. Elkouri, *How Arbitration Works* (Washington: BNA Incorporated, 1960), p. 200.

47 Arthur L. Corbin, *Corbin on Contracts* (St. Paul, Minnesota: West Publishing Co., 1960). Secs. 535-36.

48 Harry Shulman, "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review* 999, 1003, 1016 (1955). The majority opinion of the U.S. Supreme Court in a recent key case borrows heavily from Shulman's analysis. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 80 S. Ct., 1347, 1351-53, 34 LA 561, 563-4.

The creative and intuitive nature of this function, as visualized by Shulman, has a counterpart in the conventional judicial process. Judges are not often driven to given results in difficult cases by the inexorable compulsion of concepts, maxims, logic, and language. Almost always there is a choice among several potentially applicable sets of principles.

One knowledgeable judge, far from a visionary, has written that the vital motivating impulse for judicial decision often is a "hunch" or intuition as to what is right or wrong for the particular case. Judge Hutcheson's explanation of the opinion-writing process will seem familiar to many an arbitrator. He went on to write that, having reached a "hunch" decision

> . . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.[49]

In the end, perhaps, there is no escape from the conclusion that both the leading proponents and the principal critics of the "judicial process" theory of grievance arbitration have proceeded on the basis of false assumptions as to the nature of the process, the former holding it to exclude any encouragement of settlement, and the latter deeming it to require a mechanical and sterile approach to interpretation of an agreement.

This is not to suggest that Professor Shulman either produced, or sought to produce, a single generalized concept of the arbitration process which would be valid for all purposes. There is infinite variety among arbitrators and arbitration systems, just as there are all kinds of judges and other tribunals. What one man will believe proper and practical in the interpretation of language will deem visionary to another under the same circumstances. One man's flair for mediation can be matched by another's distaste for it.

If such idiosyncracies in some way can be related to a man's professional background, they certainly are not controlled by it. We have seen attorneys who are outstanding mediators and economists who function brilliantly in the manner of lawyers. We

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[49] Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," 14 *Cornell Law Quarterly* 274, 285 (1929).

have seen some, indeed, who use a mediation technique in one relationship and a "strict construction" technique in another, with equal success.

Conclusion

In the end, we can count on management and labor to continue to make their own choices, both as to their spokesmen in arbitration and as to the kind of arbitration they want. We may hope that they, as well as we arbitrators, will recognize our considerable debt to men such as Braden, Taylor, Simkin and Shulman—and many others—for providing useful insights as grievance arbitration has continued its evolution. And while the process continues, it would seem well to withhold generalizations as to any presumed ideal approach to arbitration, for all parties, for all purposes, and for all occasions.

Candor compels a final thought. If lawyers who play various roles in arbitration may be lumped together as a group, then, perhaps, they must shoulder a major share of the responsibility for confused thinking about legal methods and arbitration. Some lawyers still bandy about the illusory concept of "a meeting of the minds." Some seem not to question the notion that mediation cannot be a part of a judicial process. And the very term "creeping legalism" seems to have been coined by a lawyer in a speech in 1953 before the Industrial Relations Research Association.[50]

Announcing that "the trappings of a creeping legalism are in evidence," this lawyer cited as his authority a speech in 1951 of still another lawyer—none other than the then General Counsel (Isadore Katz) of the Textile Workers Union. Katz's main concern in 1951 was the frequency with which management lawyers were raising jurisdictional objections and inducing courts to agree with them.[51] Since *Lincoln Mills* [52] and *Warrior,*[53] it is doubtful

[50] Julius Manson, "Substantive Principles Emerging from Grievance Arbitration: Some Observations," *Sixth Annual Proceedings, Industrial Relations Research Association* 136, 147 (1954).

[51] Isadore Katz, "Challengeable Trends in Labor Arbitration," 7 *Arbitration Journal* 12, 13 (1952).

[52] *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 40 LRRM 2113 (1957).

[53] *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 80 S. Ct. 1347, 34 LA 561 (1960).

that Katz now would speak with the same urgency about "legalism" in arbitration. His song is done, but the melody lingers on.

Discussion——

ALBERT BRUNDAGE*

At the outset it appears to me that we will fall into serious error if, in a consideration of this subject, we attempt to generalize and place all lawyers in the same category. There are obviously some lawyers who are more competent and skilled practitioners than others, certain lawyers whose abilities and proficiencies enable them easily to adapt themselves to the rules or procedures of the particular forum before which they are practicing, and some lawyers whose temperament, personality, qualifications and experience are such that they tend to gravitate to particularized fields of the law in which they become highly competent specialists. In this latter connection there has grown up during the past two decades, but more particularly during the last decade, a body of lawyers whose entire practice is devoted to the field of labor law and labor-management relations.

Several factors have contributed to the growth of this body of highly specialized labor law practitioners. Perhaps the single most important factor is the vast increase in legislation, both State and Federal, which regulates the fields of collective bargaining and labor-management relations. When Congress passes a law, such as the Taft-Hartley, for example, which governs the types of union security clauses which can legally be included in collective bargaining agreements, and when, thereafter, such provisions are interpreted and re-interpreted by the National Labor Relations Board and courts with severe penalties, such as "Brown-Olds" formulated when the parties incorporate improper or illegal union security clauses, it is inevitable that the parties to the collective bargaining process will have to rely upon their lawyers in negotiating and drafting such provisions in the collective bargaining agreements.

When decisions of the National Labor Relations Board and the courts determine whether a particular seniority clause is legal and enforceable, it follows that lawyers will be called upon by

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the parties to participate in the formulation of such clauses; when the Supreme Court rules with respect to so-called "Hot Cargo" and thereafter Congress, by legislation, modifies the Supreme Court's action, it is inescapable that the parties will have to depend upon the lawyers to assist in the drafting of such provisions. And when fringe benefits are negotiated into collective bargaining agreements, and such fringe benefits must meet not only the tests of the Labor Management Relations Act but tax and trust law as well, it is again inevitable that the lawyers will be brought to the bargaining table.

As the lawyers engage in and become an integral part of the collective bargaining process, it necessarily follows that they will play a much greater role in the arbitration procedure. If a lawyer, for example, is responsible for the drafting of a seniority clause, and thereafter a question arises with respect to its interpretation and application, and such interpretation finally winds up before an arbitrator, it is logical, if not inevitable, that the lawyer will be called upon to participate in this process. And, as this occurs with greater frequency, an ever increasing body of labor law practitioners, skilled and trained in the specialized fields of labor law and collective bargaining, including arbitration, develops.

When, therefore, we consider whether lawyers are necessarily an evil in grievance arbitration, and when we weigh their contributions, actual and potential, to the arbitration process, we must evaluate this, not in terms of the general law practitioner who occasionally finds his way to the arbitration table, not in terms of the criminal lawyer or trial lawyer who may on infrequent occasions engage in an arbitration case, but, instead, in terms of those lawyers whose specialty and whose daily practice is in the field of labor law and labor management relations.

With this in mind, let us turn to some of the major criticisms leveled at the lawyers in the arbitration field. Of the various criticisms there are perhaps five that appear most frequently.

First, it is said that the lawyer is overly technical in the arbitration procedure; he is excessively cautious with respect to the submission agreement; he raises such questions as which party is to proceed first, who has the burden of proof, etc. He raises technical objections to questions of witnesses on the grounds that they are incompetent or irrelevant, hearsay, self-serving, etc.

At the outset it should be noted that many students of the arbitration process feel that it is highly desirable that the issue for submission be stated as clearly as possible. The rights of the parties are more easily determined; the real questions are more quickly attacked; and the basic arguments more readily presentable if the issue between the parties is clearly defined. While it may be true that lawyers trained in the art of careful draftsmanship are disposed toward giving more time and attention to these matters than perhaps the non-lawyers, it is submitted that in the long run the arbitration process is advantaged by such a practice.

On the question of which party proceeds first and wherein lies the burden of proof, these are matters which I think no longer consume extensive time or argument. While in years past on occasion argument did revolve around such issues, I think it is now generally conceded that in most discharge or disciplinary cases the employer moves ahead first, not because of any technical legal reason, but simply because it affords the grievant knowledge as to the basis on which the discharge rests and thus enables the parties to get to the issues more quickly. Conversely, I think most practitioners in the field recognize that in most other types of cases, where the union or the employee is the grievant, they should proceed first.

With rare exceptions, there are few lawyers trained in the arbitration field who would seriously contend that an arbitrable issue is determined by burden of proof, and few practitioners who would extensively argue such contention.

As to objections to improper questioning of witnesses, it is undoubtedly true that some practitioners like to "make noises like a lawyer," but this is also frequently and often more true of the layman who presents an arbitration case. On the other hand, the trained practitioner in the field will and should bring to the attention of the arbitrator by proper objection any defects in the evidence, such as irrelevant character or hearsay quality, so that the arbitrator may properly evaluate the evidence and accord it its proper weight.

A second criticism sometimes heard is that lawyers are overly aggressive in cross examination and tend to "badger' the witness. Such a comment may be justified when applied to certain crim-

inal or trial lawyers who on occasion handle an arbitration case. It frequently is even more applicable to the layman who has acquired his knowledge of courtroom tactics from viewing *Perry Mason* on television. The skilled practitioner in the field is rarely guilty of such a practice. His cross examination is usually direct and courteous. While "badgering" witnesses is, of course, not to be condoned, it nevertheless should be noted that it is the function of the advocate to assure that all competent and relevant evidence is developed. To the extent that careful and well prepared cross examination develops such evidence, it obviously benefits the arbitration process.

A third criticism sometimes leveled at lawyers is that they tend to engage in emotional arguments, dramatics and histrionics. Here again, this observation may on occasion be justified when levelled at the trial lawyer who has had little experience in the arbitration field. It must be remembered, however, that the specialized labor lawyer, who regularly practices in this area, whether he represents unions or employers, spends a substantial portion of his time, in addition to participating in negotiations, in practice before Federal and State administrative bodies. Furthermore, most of the court litigation in which he is involved concerns intricate and technical phases of labor and constitutional law. Much of his court-room activity is devoted to arguments with respect to construction and interpretation of collective bargaining provisions or existing labor legislation.

Just as the practitioner in this field recognizes that a purely emotional argument will not be persuasive with a trial examiner of the National Labor Relations Board or a judge construing a provision of the Labor Management Relations Act, so he recognizes that such an argument will not be impressive to an arbitrator.

A fourth criticism sometimes advanced is that the lawyers tend to rely too heavily upon precedent. While no experienced practitioner in the field of arbitration would contend that the doctrine of *stare decisis* is applicable in arbitrations, or that one arbitrator is in any manner bound by any decision of another arbitrator, there are, nevertheless, certain real advantages to be gained by an arbitrator in reviewing decisions dealing with substantially the same or related matters. To the extent that contractual provisions

are identical, there is, of course, from the point of view of labor and management, the desirability of uniform interpretation. To the extent that particular contractual clauses may differ but the underlying issues are the same, there is, of course, an advantage to one arbitrator in having the benefit of the analysis and reasoning of other arbitrators.

A fifth criticism is that the lawyers are intent upon winning their cases. Here I would suggest that the client, whether it be union or management, who retains a lawyer with the idea that he should not put forth all reasonable and proper efforts to obtain a victorious result, is indeed a rarity. While there may be isolated situations in which a union for political reasons or management to "save face" submits a matter to arbitration with no real desire to win, this is the exception rather than the rule. When one recognizes that the parties have frequently gone through two or three steps of the grievance procedure without resolving their differences, it is usually the case that each party hopes for a favorable decision from the impartial arbitrator.

In this connection, one is reminded of the two lawyers conversing in front of the courthouse and one saying to the other, "The thing I like about specializing in criminal law is that when you lose your case, you don't have your client around to remind you about it." In the field of labor relations a client continues to remain "around" after the case, and if the lawyer wants him to continue to remain "around" as a client, he had better not leave him with the impression that he is not making a proper effort to achieve a successful result. Stated another way, there are few lawyers who are more zealous about winning their cases than are their clients, and if this criticism is justified, it must at least be equally levelled at the client.

Although there are still other criticisms of the lawyer in the arbitration process, the foregoing would appear to be the most frequent. As I have attempted to suggest, I feel they are without justification. It appears to me that those responsible for this view are setting up a "straw man", are conjuring up the image of the old time silver-tongued oratorical trial lawyer. This is not an accurate portrayal of the specialized practitioner in the field of labor law and labor management relations who is experienced in the collective bargaining process, knowledgeable in arbitration

principles, and versed in arbitration procedures, who call upon his legal training and background to benefit the arbitration process.

Discussion——

ROBERT H. CANAN*

My overall comment with respect to Mr. Garrett's very temperate and thoughtful address is a resounding "Amen." I particularly say, "Amen", to Mr. Garrett's comments with respect to lawyers serving as arbitrators and, more particularly, with respect to his comments on the judicial aspect of the arbitrator's function.

The phrasing of the question oft discussed, "Should Arbitrators Act as Judges?" has always troubled me. Arbitrators should act as arbitrators, but in so acting they should recognize the inescapable judicial aspect of their function. This is not to say that I believe an arbitrator's function and responsibility and the rules which govern him are identical with those of a judge in a court of law. Admittedly, the arbitration proceeding at its best should be considerably less formal than that required in the courts, and the rules for the conduct of the presiding officer, as well as the representatives of the parties and the proceedings themselves, must be considerably less formal.

In the area of interpretation of the contract, as well as with respect to proceedings, the labor arbitrator must have greater flexibility than that of a judge presiding over the court. Less formality and greater flexibility do not mean that the arbitrator can ignore or escape his underlying responsibility for a proper conduct of the hearing, a recognition of what is evidence and what is not, a recognition of what evidence is material and what is not, a fair consideration of the arguments of the parties, and a decision based upon the evidence and the arguments presented at the hearing. Call it by what name you will, this is part of the judicial function. If there be arbitrators fainthearted on this subject, I urge them to read with care Mr. Garrett's address and to resist the temptation to flee from recognition and acceptance of this responsibility.

By way of emphasis only, I wish to say that I also agree with Mr. Garrett's point that this judicial aspect of the arbitrator's

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responsibility and function is in no way inconsistent with efforts to mediate in cases where that is desired by both parties. His reference to pre-trial procedures and to Courts of Conciliation presided over by judges is very much in point. In the courts in California in recent years, an extensive use of pre-trial procedure is being made. The general opinion of the Bar and Bench in California is that our pre-trial procedure is successful. It has produced settlements in many cases which might otherwise have gone to trial; and where cases have gone to trial, it has expedited the trial of the case.

With respect to Mr. Garrett's comments dealing with lawyers as representatives of the parties in a labor arbitration, I again say, "Amen," although I perhaps differ somewhat with him in judging where the responsibility lies for a misuse of legal procedures and techniques. In discussions of labor arbitration, particularly by those who emphasize its role as an extension of the collective bargaining process, it has been my impression that in some instances the discussants lose sight of the basic fact that an arbitration proceeding involves a controversy between the parties which in most cases must be decided within the framework and provisions of the labor contract.

Except for cases where arbitration is used as a tool in reaching a collective bargaining agreement, and cases where, through mediation, the parties settle without a decision by the arbitrator, the controversy must be determined by the decision of the arbitrator following the hearing. This requires, on the part of the parties, a careful analysis of the case, a determination of the issues, a recognition within reasonable limits of the difference between what is evidence and what is not, a recognition within reasonable limits of what evidence is material and what is not, an opportunity to test the evidence presented by the other party to the proceeding, an orderly presentation of the case, and an effective argument of the case. An important part of a lawyer's education consists of training in these respects. No other profession or group of people receives the same concentrated, careful and time-tested training in this process.

On its face, therefore, it would seem patent that the parties would be best advised to use lawyers to represent them in arbitration proceedings. While cost and some other factors may

account for the failure of parties to use lawyers to represent them in arbitration proceedings to the extent I believe sound and advisable, it would appear that the basic charge levelled against the use of lawyers in this capacity is the charge of "legalism." Although this charge has been well discussed, and, I submit, disposed of, by Mr. Garrett, it seems in order to address a few comments to the question, "At whose door lies the responsibility for legalism?"

Preliminarily, let me say that I understand the term legalism as used by its critics to mean a misuse or overuse of legal proceedings and techniques. Surely no one would argue against a proper use and application of fundamental legal proceedings in the presentation of any matter to an arbitrator, judge, or other third party who is to hear the case and decide it. I hold no brief, and I believe lawyers generally hold no brief, for a misuse or overuse of legal proceedings, whether before an arbitrator or a court. If something constructive is to be done about legalism, the most important matter seems to be to whom should we address ourselves? This involves the question of where the basic responsibility lies.

Does the responsibility for a misuse of legal procedures lie at the door of the arbitrator? It has been my own experience as an advocate for one of the parties that the responsibility only rarely lies at the arbitrator's door. The arbitrator who is new at the business may at times misuse legal procedures, but experienced arbitrators rarely err in this respect. While perhaps not strictly a part of the "legalism" discussion, the area where arbitrators err more than anywhere else is in a misunderstanding and misuse of precedent cases. This is not to say that a consideration of precedents does not apply in all cases. Here particularly, the education and training of a lawyer school him better for an understanding of a proper use of precedents than is generally true of non-lawyers.

Does the responsibility for a misuse of legal procedures lie at the door of the lawyer who represents one of the parties? Certainly a share of responsibility must be charged to the lawyer who represents one of the parties. It may be that in the earlier days of labor arbitration a larger share of the responsibility rested here. As Mr. Brundage stated so well in his comment today, on an

increasing trend, lawyers who represent the parties in arbitration proceedings tend to be lawyers who have had considerable experience in labor arbitration and who have an understanding of the collective bargaining process. Lawyers who understand the continuing relationship of the parties to a collective bargaining agreement, as distinguished from the type of case, such as a personal injury case, where no such relationship exists, by and large properly use legal procedures in presentation of labor arbitration cases.

The lawyer who only occasionally handles an arbitration case and more particularly the lawyer who spends most of his time in the trial of civil or criminal cases is more likely to let the momentum of the more formal and technical proceedings in court carry over into his presentation of a case in a labor arbitration proceeding. There is, of course, the young lawyer who may err in this respect, but this is also true of the young non-lawyer.

For reasons I will discuss briefly in a moment, I believe that lawyers sometimes appear to be responsible for a misuse of legal procedures when the real responsibility lies elsewhere. It is my own conviction, as I believe it to be the conviction of Mr. Brundage and Mr. Garrett, that more and more arbitrators will agree with Mr. Garrett's statement, "There have been few greater privileges in my experience than presiding in a case where each side is represented by a seasoned, intelligent, and cooperative attorney."

Does the responsibility for a misuse of legal procedures lie at the door of the client? Mr. Garrett touched on this with grace and diplomacy. At the risk of being misunderstood, and without either grace or diplomacy, I must express the judgment that I believe the major responsibility lies here.

The client who is most responsible is the client who acts as his own counsel. This is not to say that lawyers need to be used to represent the parties in every case. I recognize that there are a goodly number of cases which the non-lawyer can and does handle well, where the facts are simple and straight-forward and where no real question of contract interpretation is involved. Where an interpretation of provisions of the contract is involved, where grievances involve an attempted extension or addition to the contract, where the facts are complex, where the evidence is con-

tradictory and requires the test of cross-examination to arrive at the truth, lawyers are eminently better prepared and trained to present the case than the non-lawyer. The client who acts as his own counsel in these cases is more likely than others to misuse legal procedures in the presentation of his case. The layman who attempts to imitate what is too often a misconception of the lawyer, makes the greatest contribution to "legalism." Mr. Aaron stated this point with precision:

> In my experience, at least, no one is so legalistic as a layman imitating a lawyer. Some of the wildest irrelevancies, most frustrating procedural roadblocks or detours and most patently unfounded objections I have ever encountered in an arbitration proceeding were prefaced by the fateful words: "Of course, Mr. Arbitrator, I'm not a lawyer, but . . ."[1]

Lawyers are often placed by clients in the position of overusing legal procedures in the presentation of a case. There is a tendency on the part of some clients to call in the lawyer only in the complex and difficult case where he wants a technical and tough position taken and either feels unable to take it himself or feels it is unwise for other reasons. Some of this feeling may be summed up in the oft heard phrase when one talks about a quarrel he has with another, and concludes by saying, "I told him to see my lawyer." As Mr. Garrett stated, "It is the lawyer's duty to *represent* within ethical limits, not to dominate and control." Where it is the desire and judgment of the client that a more formal and technical position should be taken and maintained, it then becomes the lawyer's duty to carry out that desire, after advising his client of the *pros* and *cons* of such an approach. While the lawyer, therefore, may seem to be the one responsible, I submit that in these cases the real responsibility lies with his client.

Many clients, unfortunately, have a misconception of the proper function and role of the lawyer as an advocate. Some of this misconception comes from the theater world's presentation of the lawyer. Too many times the role of a lawyer on the television screen and movie screen, as well as on the legitimate stage, is portrayed as a rough, tough, dramatic, overly-clever character. Every lawyer worth his salt knows that this is not the way lawyers ordi-

[1] Benjamin Aaron, "Labor Arbitration and Its Critics," 10 *Labor Law Journal* 605, 607 (1959).

narily conduct themselves in the handling of their cases. Lawyers, I hope, do what they can to make it clear to the client that an intelligent, quiet, orderly, careful analysis and presentation of the case is almost always the most effective.

Some of the reasons for the client's failure to understand the useful and proper role the lawyer may serve in representing his client in an arbitration case is due, in my opinion, to the relative infancy of the entire field of labor arbitration. Viewed against the panorama of the centuries through which disputes between men have been decided by a judge, arbitrator or some neutral third party, the use of arbitration in the labor field is relatively new. The group of intelligent and able people who may be collectively referred to as industrial relations people in industry and the group of union representatives engaged in the interpretation and administration of the collective bargaining agreement are relatively new on the scene. It is my conviction that as both of these clients gain maturity and experience, they will come to recognize the value of the lawyer's counsel in grievance arbitration at earlier stages of the proceeding and the value of using a lawyer as an advocate to represent them in the arbitration proceeding.

In conclusion, those of us who decry a misuse or overuse of legal procedures in arbitration proceedings would do well to address ourselves not only to lawyers but more importantly to industrial relations people on the management side and representatives dealing with the administration and interpretation of collective bargaining agreements on the union side. I am convinced that when the laymen involved in these proceedings better realize and understand the ways in which a lawyer's advice and his services as an advocate can be used in arbitration proceedings, the lawyers will by then, if they do not now, handle cases in labor arbitration proceedings with an intelligent and proper use of legal procedures.