CHAPTER 2

THE LABOR ARBITRATION PROCESS: 1943-1963

R. W. FLEMING *

The use of the year 1943 in the title of this paper is symbolic rather than precise. Any year from 1941 to 1945 could have been used, since the intention is simply to identify the period of World War II from which modern labor arbitration dates. Only the urge toward a neat package extending back from 1963, and the fact that the War Labor Board issued its policy statement on arbitration in 1943, justify the choice of that year.

Two clearly identifiable trends in labor arbitration are discernible in the postwar years. One is the increasing use and popularity of the process, and the other, interestingly enough, is the increasing criticism of it. It is the purpose of this paper to explore the nature of the criticism and reflect upon the reasons for it.

It is a fact that grievance arbitration has enjoyed an enormous growth since the late war, but it is not true that it was unknown or even strictly limited before that time. The Anthracite Board started functioning in 1903, and between 1910 and 1915 arbitration was used widely in the apparel industry.[1] Not many other contracts, even in the 1930's, contained arbitration clauses (the estimate is that they were found in 8 to 10 percent of the contracts).[2] But in 1941 the United States Conciliation Service found that 63 percent of the 1,200 agreements in its files included arbitra-

* Professor of Law, University of Illinois. The assistance of Mrs. Leah Lee in preparing this paper is gratefully acknowledged.

1 Sumner H. Slichter, James J. Healy and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington: The Brookings Institution, 1960), p. 743.

2 *Ibid.*, at 739.

tion as a final step in the grievance procedure,[3] and in 1942 the National Industrial Conference Board noted arbitration in about three-fourths of the 163 contracts which it studied.[4] The Bureau of Labor Statistics reported that the figure had increased to 83 percent in 1949 and to 89 percent in 1952; [5] and I have been told that an as-yet unpublished study by the BLS will show that in 1961-62 approximately 94 percent of the agreements examined contained grievance arbitration clauses.

Arguably the resort to grievance arbitration would have continued almost as rapidly without the war and the prodding of the War Labor Board, but a side effect of the war was the training of men who ever since have formed the cadre of the arbitration profession. Just how much the availability of this experienced core of men, whose talents were readily convertible to arbitration, meant in the postwar development of arbitration is hard to assess.

Despite its popularity and growth, arbitration has come under increased criticism. In 1959, the I.U.D. *Digest* asked, "Why has a process once cheap, prompt, and simple become expensive, protracted, and legalistically complicated?".[6] *Fortune* echoed the same line shortly thereafter,[7] and in the pages of the *Arbitration Journal,* published by the American Arbitration Association, a number of editorials have appeared on the subject of costs [8] and "creeping legalism".[9] Some of the criticisms were not as thoughtful as they might have been, and well-warranted replies came from distinguished commentators.[10] Nevertheless, only the ill-informed would insist that all of the criticism was wholly without merit. Indeed, students of the administrative process could hardly help but detect a familiar ring in much that was said. In the early years of the century, proponents of workmen's compensation laws were sure that such statutes would, by withdrawing work injury cases

---

3 Steelman, "The Work of the U. S. Conciliation Service in Wartime Labor Disputes," 9 *Law and Contemp. Prob.* 461, 466 (1942).

4 10 LRRM 1210 (1942).

5 Moore and Nix, "Arbitration Provisions in Collective Agreements" (1952), *Monthly Labor Review* (March 1953), pp. 261-266.

6 "Our Avaricious Arbitrators," 4 *I.U.D. Digest* 108 (1959).

7 59 *Fortune* 199 (April 1959).

8 14 *Arbitration Journal* (n.s.) 1 (1959) and 14 *Arbitration Journal* (n.s.) 113 (1959).

9 13 *Arbitration Journal* (n.s.) 129 (1958).

10 Aaron, "Labor Arbitration and Its Critics," 10 *Labor Law Journal* 605 (1959); and Goldberg, "Labor Arbitration—A Dedicated Calling," 4 *I.U.D. Digest* 126 (1959).

from the courts, thereafter insure an inexpensive, expeditious, and informal procedure. But by 1953 one of the foremost students of that subject would write:

> The evidence is clear that workmen's compensation has left unfulfilled most of its major original objectives.[11]
>
> . . . advances have been made at the expense of increasing complexity, ambiguity, litigiousness, and costliness in the whole process . . .[12]

The bulk of the complaints about arbitration with respect to cost, time-lag, and increased formality are coming from labor sources, though this is not universally true. Management people are more inclined to complain that arbitrators are increasingly invading the privileged management sanctum. This is not a new concern on their part; it was one of the arguments with which proponents of arbitration had been forced to deal from the outset.[13] But there are some new aspects of the problem, to be discussed more fully later, about which management is understandably troubled.

Let us then inquire a little more fully into these two major lines of criticism in an effort to better understand where we are, where we seem to be going, and whether we ought, in some studied fashion, to try and change the direction somewhat.

I. The Cost, Time-Lag, Formality Problem

The complaint is that arbitration has become more costly, less prompt, and more burdened with unnecessary "legalisms." We are not wholly without information on these subjects. In 1957, the American Arbitration Association published a comprehensive statistical breakdown on these subjects.[14] And in 1958 Arthur Ross conducted a survey which documented the conclusion that grievances were not receiving as prompt treatment as they once had.[15]

In the hope that some new light could be shed on the problem a new survey was undertaken for purposes of this paper. Obviously,

---

11 Herman A. Somers and Anne Somers, "Workmen's Compensation: Unfulfilled Promise," 7 *Ind. & Lab. Rel. Rev.* 32, 33 (1953).
12 *Ibid.*
13 Freidin and Ulman, "Arbitration and the War Labor Board," 58 *Harvard Law Review* 309, 346 (1945).
14 12 *Arbitration Journal* (n.s.) 67 (1957).
15 Ross, "The Well-Aged Arbitration Case," 11 *Ind. & Lab. Rel. Rev.* 262 (1958).

to find out whether arbitration is now more costly, less expeditious, and more legalistic, a comparison with previous periods must be made. This is possible by going to the files of either the American Arbitration Association or the Federal Mediation and Conciliation Service. From that point on, the problem is unfortunately much more difficult. If simply a random sample of the cases is taken, you run into the immediate question of whether comparable issues are involved. This might not be insurmountable if it could be assumed that in all periods the spectrum of cases would be the same. The problem would then presumably be a simple one of properly devising the sample so that it would be statistically meaningful. But the spectrum is not the same, and this can be documented in a loose sense by looking through the volumes of the Labor Arbitration service published by The Bureau of National Affairs, Inc. Volume I, covering the period 1944 to 1946, includes no cases involving subcontracting, transfer of jobs out of the unit, racial discrimination, or integration of seniority lists. Volume 24, published in the year 1955, offers cases on all of the above issues. Volume 38, containing 1962 decisions, includes all of the things mentioned above and also adds decisions on the appropriate unit, plant removals, supplementary unemployment benefits, technological displacement allowances, and damages for failure to do assigned work. Admittedly this is not a technically scientific sample, but it has an inherent logic flowing from the fact that some of the issues reported in the later volumes can be tied to known bargaining results not in existence in the earlier period.

To eliminate, as far as possible, the variable arising out of trying to compare cases which involve different issues, we chose to look only at discharge cases. We did this on the theory that a discharge case was a discharge case, whether tried in 1945, 1955, or 1965. There are various reasons why this assumption may be in error, but none of them seems sufficiently important to offset the advantages of taking a single important issue which has remained much the same.

With the permission of the Federal Mediation and Conciliation Service we took from the files 100 discharge cases decided in 1951-1952 (the first year in which complete files were available), 100 cases decided in 1956-57, and a third 100 cases decided in 1962-63. From these files certain common information was obtained: How

long did the hearing take? How many study days did a decision require? What was the arbitrator's per diem? What was the arbitrator's total charge? Did counsel represent the parties? What was the time-lag between the appointment of the arbitrator and the date of the decision? (No other time dimension is readily available in the FMCS files.)

With this information, we were able to make certain comparisons which are set forth in the charts accompanying this paper. The data are subject to some rather severe limitations which should be stated at the outset.

With the passage of time certain arbitrators have established such a high degree of acceptability that they can no longer permit their names to appear on the FMCS roster, simply because they do not have time to hear cases if they are chosen. It is probably true that this group of arbitrators has a higher per diem rate than many of those who are on the FMCS roster, although it does not necessarily follow that their total fees are higher because with their greater experience they may work faster. Time-lag may be a greater problem with such arbitrators because they are so heavily occupied.

The information on time-lag which is obtainable from the FMCS files is inadequate in at least two respects. In the first place, it is universally assumed that discharge cases are decided more quickly than others because of back-pay implications, and, secondly, the files only show time from the date of appointment to the date of decision. Delay in handling the grievance up to the time an arbitrator was appointed does not appear. What emerges, therefore, is a comparison of one aspect of time-lag within a single category of cases. Beyond that, one must speculate as to whether it is representative of other areas.

"Creeping legalisms" in the arbitration process are identifiable from the files only in the sense that such tactics can be associated with the presence of lawyers in the case. Many people—perhaps including most arbitrators—think that a lawyer who understands the nuances of the labor-management relationship renders a great service in clarifying and expediting the hearing process. Others feel quite the contrary. All we can do is show the extent to which lawyers are representing the parties.

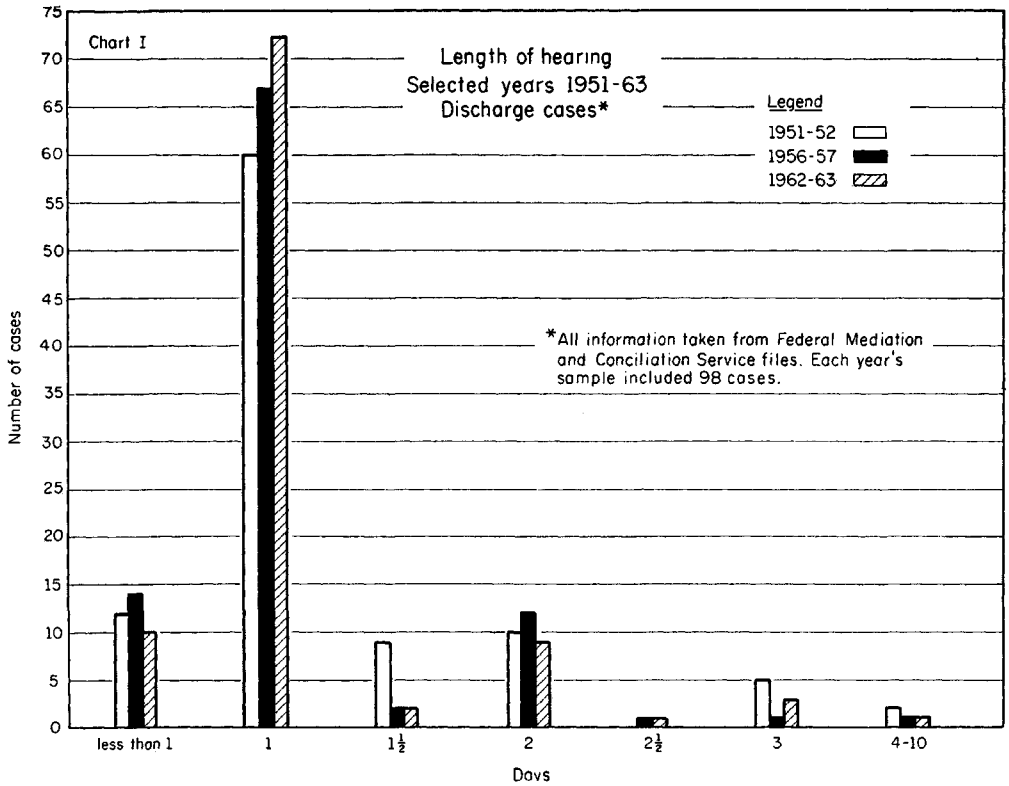
Chart I
Length of hearing
Selected years 1951-63
Discharge cases*
Legend
1951-52
1956-57
1962-63
*All information taken from Federal Mediation and Conciliation Service files. Each year's sample included 98 cases.
Number of cases
75
70
65
60
55
50
45
40
35
30
25
20
15
10
5
0
less than 1
1
1½
2
2½
3
4-10
Days

Despite the reservations with which data of this kind are presented, we consider the results "interesting."

Length of the Hearing

Chart I shows the length of hearings in discharge cases for three different periods from 1951 to 1963. Only brief study will show that there has been very little change during this period. There is an insignificant variation in the number of hearings which took less than one day. There are a few more cases in 1956 and 1963 than in 1951 which took one day to hear, but on the other hand there were more cases in 1951 which took a day-and-a-half to hear. If the two are balanced together, differences are easily accounted for by the nature of the sample. Those hearings which took more than one day tend to be about the same over the balance of the chart. It happened that in our sample there were no cases in 1951 which took two-and-one-half days, but there were more in that year than in either 1956 or 1963 which took three days.

If the information is reliable it leads to two firm conclusions: (1) the overwhelming bulk of the discharge cases are heard in one day, and (2) the passage of time has neither lengthened nor shortened the discharge hearing.

Lawyer Participation in Cases

Since the number of hearing days required for a discharge case has not changed noticeably since 1951, some judgment can be made as to the role which lawyers are playing. Either they are present no more frequently than they once were, or their presence does not noticeably affect the length of the proceeding.

Unfortunately, it is not easy to tell from the FMCS files whether counsel represented the parties. Nothing in the office files requires such a notation and only if the arbitrator lists the appearances can one tell. Accordingly, we were able to tell in only 58 of the 100 cases chosen for the year 1951-52 whether counsel were present, and in 1956-57 and 1962-63 the figures were 76 and 75, respectively. Subject to those limitations, the results are as follows:

	1951-52	*1956-57*	*1962-63*
Cases in which there were *no* counsel	21%	34%	40%
Cases in which *both* parties *were* represented	31%	22%	32%
Cases in which the company *only* was represented	36%	37%	25%
Cases in which the union *only* was represented	12%	7%	3%
Total cases in which the *company* was represented	67%	59%	57%
Total cases in which the *union* was represented	43%	29%	35%

Some of the above statistics accord with the predictions which an experienced observer might make, but others do not.[16] It is commonly accepted that companies are more frequently represented by counsel than are unions and the figures show this to be true. The union seldom has counsel when the company does not, as borne out by the statistics. It is surprising that there is no evidence that the use of lawyers is increasing; as a matter of fact, this sample leads to a contrary conclusion. The figures are misleading because the size of the sample changes, although it is about the same for the years 1956-57 and 1962-63. If it is not certain that lawyers are being used *less* frequently, it certainly is not true that they are being used *more* frequently.

Study Days

Chart II shows the number of study days which arbitrators used in preparing a decision in discharge cases at three different periods between 1951 and 1963. It is interesting to compare this with Chart I because hearing days have remained relatively static while study days have moved upward. In 1951 about 20 percent of the cases were decided with less than a day of study time, while in 1956 the figure was 9 percent, and in 1963 it was only 8 percent. The number of cases in all three periods requiring one day of study remained relatively the same. In those cases requiring more than one day, but less than two, 1951 and 1963 are not far apart, but

[16] *Supra,* note 14, at 72.

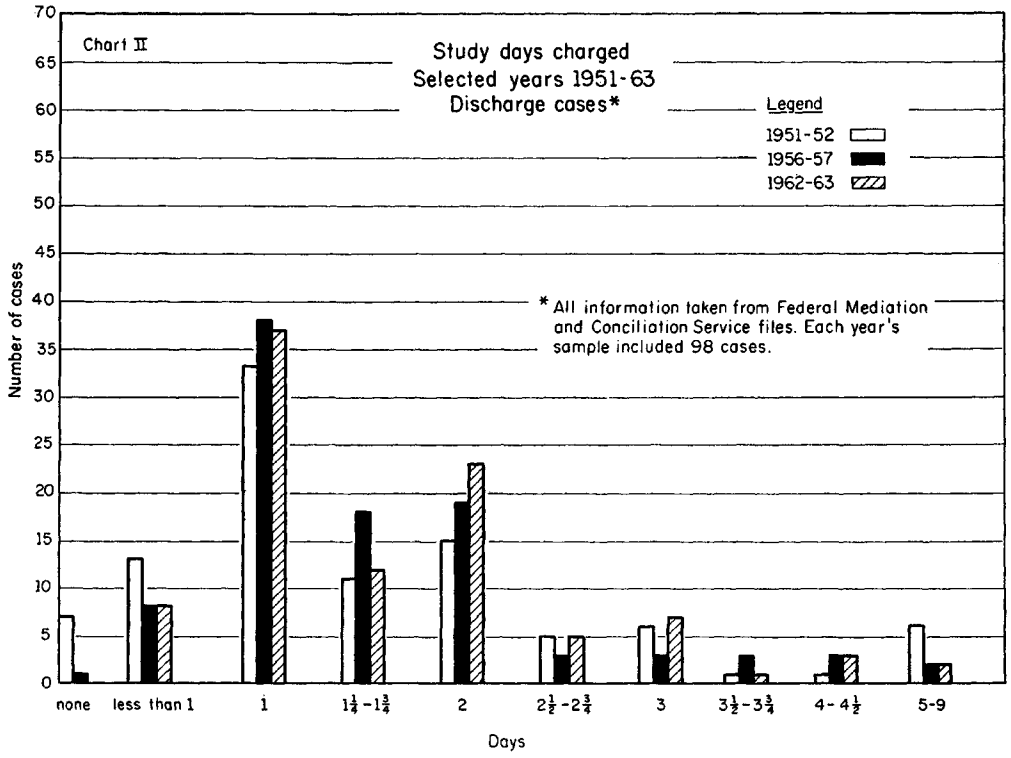
Chart II
Study days charged
Selected years 1951-63
Discharge cases*
Legend
1951-52
1956-57
1962-63
* All information taken from Federal Mediation and Conciliation Service files. Each year's sample included 98 cases.
Number of cases
0
5
10
15
20
25
30
35
40
45
50
55
60
65
70
none
less than 1
1
1¼-1¾
2
2½-2¾
3
3½-3¾
4-4½
5-9
Days

1956 climbed above both. However, the number of cases is not significant and may well be accounted for by the small size of the sample. Cases requiring two days of study have shown a steady upward trend from 1951 to 1963, although once again the movement is slight. The remaining data simply demonstrates that few cases require more than two days of study.

Conclusions from this data are tentative, but they do indicate that there is a drift away from less than a day of study for the decision in any case, and that there is a slight upward drift in the number of days, up to two, which are charged for preparing the decision. Beyond two days there is no discernible trend.

Per Diem Rates and Total Fees of Arbitrators

Charts III and IV show per diem rates and total fees of arbitrators for the cases in question. Chart III indicates that in 1951-52 over half of the arbitrators were charging less than $100 per day. Practically all of the others were listed at an even $100. In a relatively few cases the rate was a bit higher than $100.

By contrast, in 1956-57 less than 10 percent of the arbitrators charged less than $100 per day. Approximately 58 percent had a per diem rate of $100, almost 18 percent charged $125, and 14 percent charged $150. In 1962-63 the rate had moved up so that no one charged less than $100, 24 percent were charging a flat $100, 38 percent had a fee of $125, and 30 percent worked for $150 per day.

If one calculates the average rate for the respective periods, he finds that it was $84 in 1951-52, $110 in 1956-57, and $129 in 1962-63. The percentage increase between the first and the last periods would then be 54 percent. Oddly enough this is almost the same as the rise in average hourly earnings of production workers in manufacturing during the same period. Bureau of Labor Statistics figures show that when one excludes overtime the average hourly earnings of production workers in manufacturing between July 1, 1951, and July 1, 1952, were $1.55. For the period from July 1, 1962, to July 1, 1963, the same average jumped to $2.34. The difference is 79 cents, about 51 percent more than workers were receiving in 1951-52.

Chart IV shows total fees for arbitrators in each of the three periods, but does not show that average total fees have not risen by the same percentage as have per diem fees, however this can be derived from the chart by calculating averages. Thus the average fee in 1951-52 was $277 and $402 in 1962-63, a difference of 45 percent, as contrasted with a 54 percent rise in per diem fees and a 51 percent rise in average hourly earnings of production workers in manufacturing. Thus the average total fee rose 9 percent less than the per diem fee did. This would suggest that arbitrators raised their per diem fees but cut back on their study days. This conclusion would appear to be in conflict with the chart which shows a slight rise in study days. The explanation may be that those arbitrators with higher per diem fees charge fewer study days.

Averages are, of course, deceptive and the above comparison has no great value except to point up the fact that in this sample arbitrators' fees have not risen inordinately.

The Time-Lag Problem

For reasons already indicated, the time-lag data gathered in the course of studying these discharge files has very limited usefulness. It does show, however, that even in discharge cases it took about two weeks longer in 1962-63 to have a case decided, after appointment of the arbitrator, than in 1951-52. In this sense it confirms the disturbing evidence presented in Arthur Ross' earlier and much more comprehensive survey.[17] Grievance decisions through arbitration are not as prompt as they once were.

Chart V, a graph of time-lag in these cases, shows a curious rhythm in the issuance of awards. Offhand, the line would be expected to rise to a peak, at which point the bulk of the decisions would be issued, and then gradually decline again to zero. On the contrary, during each of the periods under study there is a series of peaks and valleys corresponding remarkably well. This can probably be explained by known variables having to do with the award process. Many cases do not involve transcripts or post-hearing briefs. In that event the issue is ripe for decision as soon as the hearing is over. If briefs are to be submitted, but there is

[17] *Supra,* note 15.

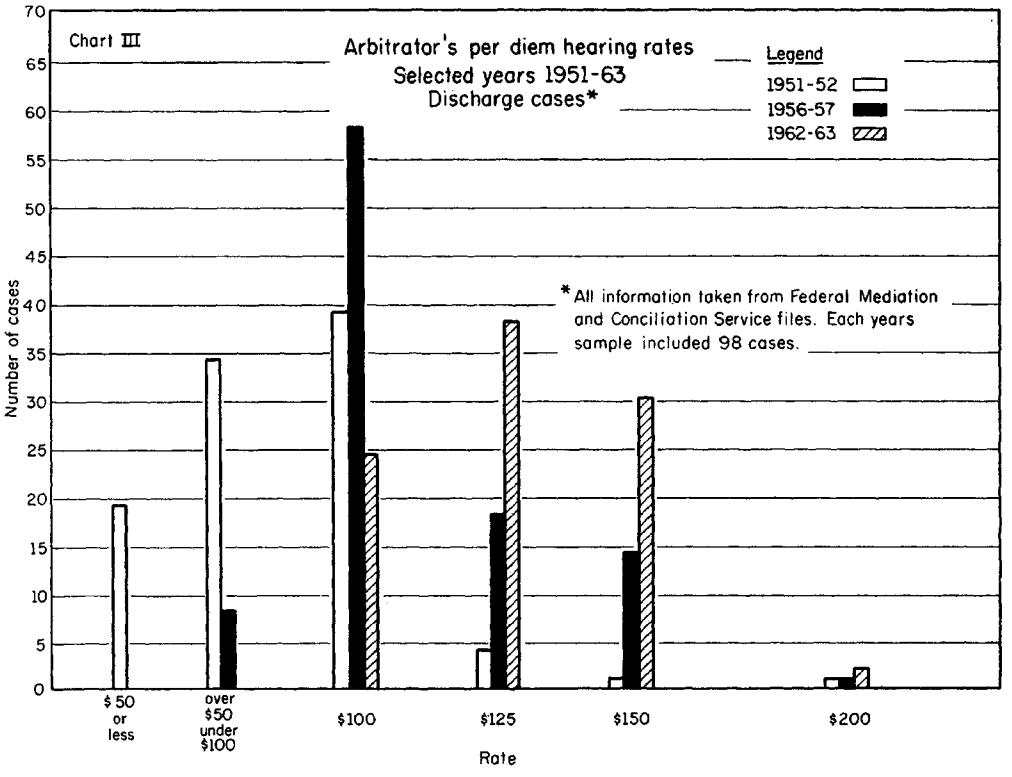
Chart III
Arbitrator's per diem hearing rates
Selected years 1951-63
Discharge cases*
Legend
1951-52
1956-57
1962-63
*All information taken from Federal Mediation and Conciliation Service files. Each years sample included 98 cases.
Number of cases
70
65
60
55
50
45
40
35
30
25
20
15
10
5
0
$ 50 or less
over $50 under $100
$100
$125
$150
$200
Rate

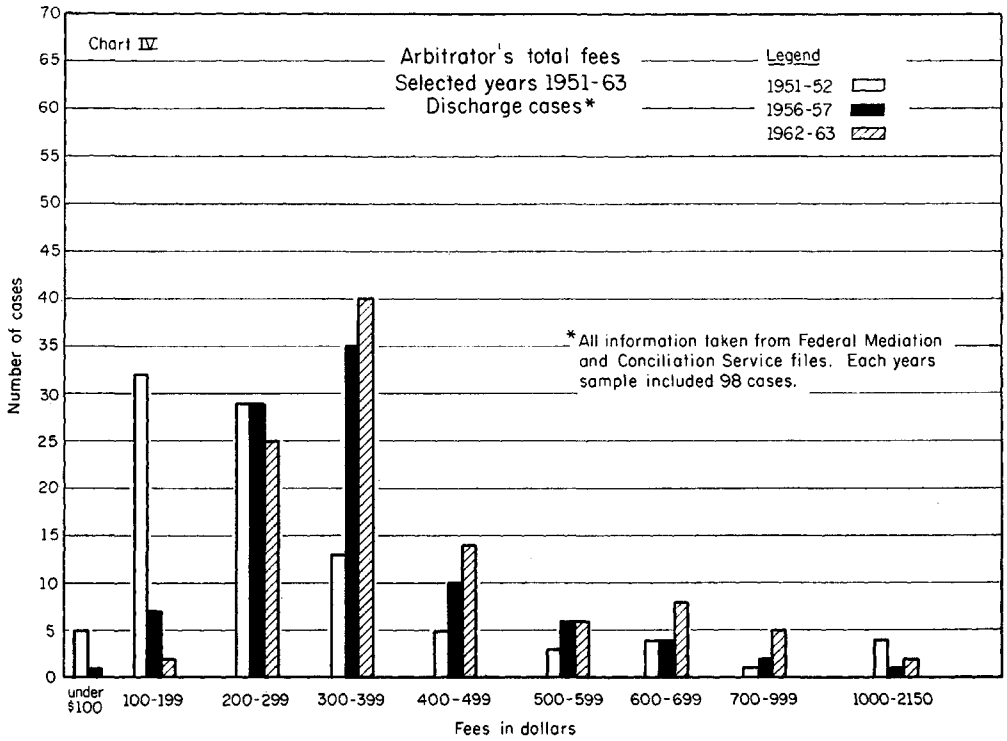
Chart IV
Arbitrator's total fees
Selected years 1951-63
Discharge cases*
Legend
1951-52
1956-57
1962-63
*All information taken from Federal Mediation and Conciliation Service files. Each years sample included 98 cases.
Number of cases
0
5
10
15
20
25
30
35
40
45
50
55
60
65
70
under $100
100-199
200-299
300-399
400-499
500-599
600-699
700-999
1000-2150
Fees in dollars

no transcript, there will be some delay while briefs are written. If there was a transcript and briefs are to be written after the transcript is made available, there will be a further delay. At the actual decision stage it may be true that a tripartite board will be involved. In such cases the neutral chairman often prepares a decision which is distributed to the board members prior to an executive session. Convening the board requires additional time. It is probable that the peaks and valleys shown in the graph represent variations of the above process.

If the above explanation of the rhythm of discharge decisions is valid, it serves as a useful reminder to the parties that speed in getting a decision will vary directly with their insistence upon a transcript and briefs or a tripartite board. This does not necessarily lead to the conclusion that transcripts, briefs, and boards should be abandoned. It does mean, however, that the parties must frequently make a choice. Which do they prefer, speed or certain kinds of procedures?

II. The Management Rights Problem

For perfectly understandable reasons management has always been concerned about its right to make and execute decisions which may determine the efficiency and profitability of the enterprise. When arbitration first appeared on the horizon, management had to decide whether it was willing to submit to third-party decision *any* area having to do with the conduct of the business. Encouraged by such powerful corporations as General Motors, a trend toward submission of issues arising out of disagreements over the meaning and interpretation of contracts developed.[18] But in recent years management has become increasingly concerned about "implied" restrictions which arbitrators find in contract clauses. In a recent article dealing with implied restrictions on work movement a leading management lawyer reached the following conclusion:

> . . . . arbitrators who imply restrictions on "work movements" are doing the institution of arbitration irreparable harm. Such restrictions come as a surprise to the management negotiators and diminish management's ability to hold down costs. Managements,

[18] Gabriel N. Alexander, "Impartial Umpireships: The General Motors-UAW Experience," in *Arbitration and the Law: Proceedings of the 12th Annual Meeting of the National Academy of Arbitrators* (Washington: BNA Incorporated, 1959), p. 116.

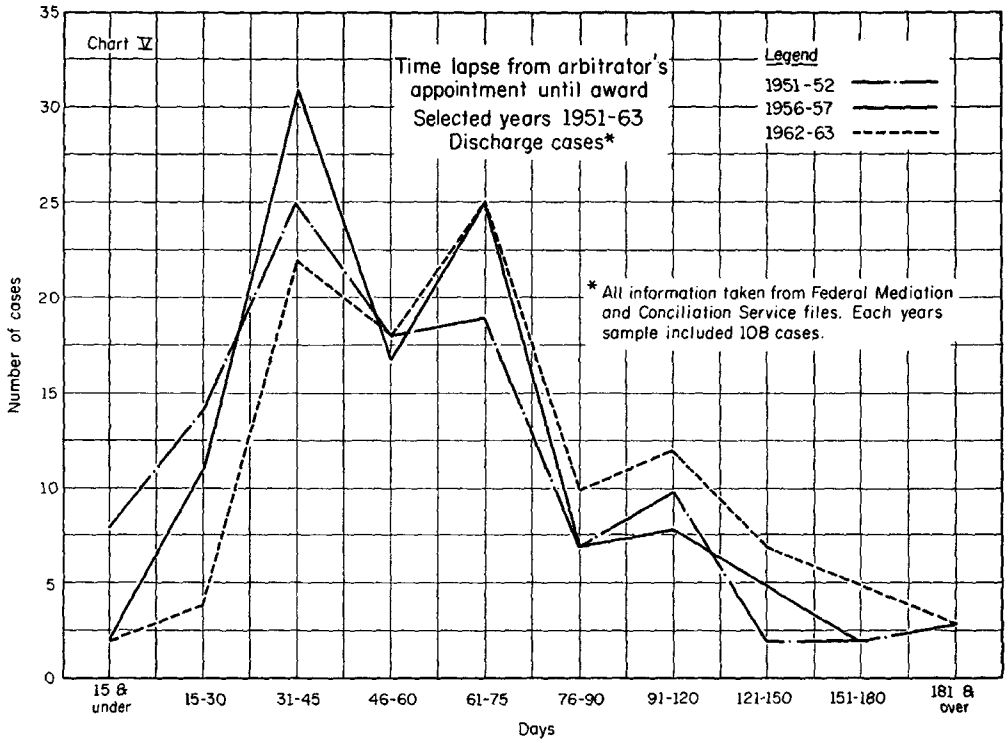
Chart V
Time lapse from arbitrator's appointment until award
Selected years 1951-63
Discharge cases*
Legend
1951-52
1956-57
1962-63
* All information taken from Federal Mediation and Conciliation Service files. Each years sample included 108 cases.
Number of cases
0
5
10
15
20
25
30
35
15 & under
15-30
31-45
46-60
61-75
76-90
91-120
121-150
151-180
181 & over
Days

> who are under pressure from all persons interested in the enterprise to operate plants effectively, will reject arbitration as the process to be relied upon to resolve disputes over contract interpretation if such surprise results become characteristic. Only if the simple and straightforward view, that managements retain all rights to manage unless they have agreed to limit these rights, is adopted generally, can thoughtful managements support this important institution.[19]

The trouble is that collective bargaining contracts, like other social compacts, take on the coloration of the times. The meaning which the parties will seek to inject into contract language will be a function of the pressures then existing on the union and on the management.

The context of collective bargaining has changed greatly in the last ten or fifteen years. Union strongholds in manufacturing have been undermined by a new technology which not only requires fewer people but often moves the old blue collar worker out of the production unit and into a white collar job. In the decade of the 1950's total employment in production increased by 9 percent while production went up 43 percent. Even this comparison is deceptive because most of the increase in employment came in administration, sales, and engineering categories while there was a net drop in the number of production employees. A clear reflection of this is contained in the recent study released by the Bureau of Labor Statistics showing that union membership had dropped by almost half a million since 1960.[20]

The new technology is often, though not always, accompanied by another phenomenon. Labor's historic weapon, the strike, is in some industries almost obsolete. The long dispute in the Shell Refineries in Houston during the past year demonstrated conclusively that supervisory personnel can keep a plant of that kind going at near capacity despite the complete and continued absence of production workers. And in the telephone industry it is a well-known fact that a very lengthy strike can be absorbed without a breakdown in service. If, as Mr. Justice Douglas said in the *Lincoln-Mills* case, "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," some manage-

---

19 Fairweather, "Implied Restrictions on Work Movements—The Pernicious Crow of Labor Contract Construction," 38 *Notre Dame Law* 518, 554 (1963).
20 54 LRRM 102 (1963).

ments may no longer have the same incentive to include an arbitration clause.[21]

Finally, with the passage of the lush war years, management has undeniably been pressed harder on the cost front. Foreign policy commitments require that American markets be opened as never before to foreign competition, and in those industries in which labor represents a significant cost factor management is under great pressure to find ways and means of cutting back.

Given these facts of life unions have sought in recent years to exploit new possibilities in the collective bargaining relationship. This drive is reflected in NLRB proceedings, before the courts, and in arbitration. There is presently a great furor over whether management is required by law to bargain with unions over such subjects as the closing of plants or the subcontracting of work. In general, the NLRB has been holding that there is such a requirement,[22] but the circuit courts are less certain.[23] Before long we will doubtless have a Supreme Court decision on the point. Meanwhile, management lawyers are expressing great concern about the path that the Board is pursuing.[24]

While the Board has been debating management's duty to bargain about plant closings, Section 301 of the Taft-Hartley Act has permitted probing actions in the federal courts designed to interpret collective bargaining contracts. The *Glidden* case,[25] with its doctrine of vested seniority rights, raised all sorts of new possibilities. And the *Webster Electric* case,[26] enjoining subcontracting of janitorial work on the ground that it violated the union security clause, certainly suggested to the unions that the courts might be a better source of new law than the arbitrators.[27]

---

21 *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 455 (1957), 40 LRRM 2113.

22 *Cf., Fibreboard Products Corp.,* 51 LRRM 1101 (1962), *Town and Country Mfg. Co.,* 49 LRRM 1918 (1962), *Hawaii Meat Co. Ltd.,* 51 LRRM 1430 (1962), *Darlington Mfg. Co.,* 51 LRRM 1278 (1962).

23 Cf., *Darlington Mfg. Co.* v. *NLRB,* 54 LRRM 2499 (4th Cir. 1963), and *NLRB* v. *Adams Dairy, Inc.,* 54 LRRM 2171 (8th Cir. 1963).

24 54 LRR 185 (Oct. 11, 1963); Livingston, "The Changing Duty to Bargain," 14 *Labor Law Journal* 304 (1963).

25 *Zdanok* v. *Glidden Co.,* 288 F. 2d 99 (2d Cir. 1961), 47 LRRM 2865, *aff'd on other grounds,* 370 U. S. 530 (1962), 50 LRRM 2693.

26 *Local 391, UAW* v. *Webster Elec. Co.,* 299 F. 2d 195 (7th Cir. 1962), 49 LRRM 2592.

27 Fleming, "Some Observations on Contract Grievances Before Courts and Arbitrators," 15 *Stanford Law Review* 595, 613 (1963).

Considerations of employee security, which were largely behind the NLRB and court actions described above, naturally furnished the stimulus for many arbitration cases involving such things as subcontracting, plant removals, employment rights in other company plants, etc.[28] And, as one would expect, it was not possible to seal off Board or Court actions to avoid spill-over into another area. The *Glidden* case had hardly been decided by the Second Circuit before vested seniority rights were being argued before arbitrators.[29] The same thing was true of the National Labor Relations Board's ruling adding 6 percent interest to back pay awards.[30]

From management's point of view, this three-pronged attack on its rights through different tribunals spells real danger for the future. To make matters worse, the unions' arguments are often backed by appealing human considerations. In a time of high unemployment no one derives any pleasure from seeing plants close or move, from seeing workers with many years of service displaced, or from seeing standards undercut through the subcontracting device. The generally favorable reception given the recent railway arbitration award [31] which permitted only gradual elimininination of jobs no longer needed was another indication that the public had great sympathy for the cause of workers caught in a machine society.

There is nothing management can do to control the outcome of pending NLRB cases, but the lesson of the court and arbitration cases is being read to mean that management must henceforth be more careful about the content of the collective agreement and the impact of third-party decisions. This will create additional tensions in collective bargaining. The arbitration clause was widely reported to be the toughest hurdle to a new agreement between General Electric and the IUE in their recent bargaining; the contract which emerged gave clear evidence of the company's concern about the power and jurisdiction of the arbitrator.

---

[28] *Supra,* note 19.

[29] *United Packers, Inc.,* 38 LA 619 (1962); *H. H. Robertson Co.,* 37 LA 928 (1962).

[30] *Hampton Corp.,* 39 LA 177 (1962); *American Chain and Cable Co.,* 40 LA 312 (1963).

[31] *Railroads* v. *Operating Brotherhoods,* 41 LA 673 (1963).

Some Institutional Factors

In considering criticism of the arbitration process too little attention is given to two factors which are at the root of much of the difficulty. The first is the plain but simple fact that labor and management do not share a completely common interest in the arbitration device, and the second is that events beyond their control may condition their approach to arbitration. Both of these factors require some explanation.

With relatively minor exceptions the accepted pattern of conduct under a collective bargaining contract in the United States is for the company to retain the initiative, subject to complaints on the part of the union that the contract has been violated. This has the effect of putting the company continually on the defensive. For that very reason the company will prefer as tightly drawn a contract as the union will agree to, and a clause limiting the power of the arbitrator to interfere with management's conduct of its business. The union's outlook is inherently different. By and large it stands to gain from a loose contract with maximum flexibility in the arbitrator. The kind of contract which is ultimately signed, including the arbitration clause and the authority which it gives to the arbitrator, is the product of bargaining. Once the contract is in effect the hopes and the aspirations of the parties relate back to their bargaining objectives. Success on the part of one in arbitration may mean disappointment on the part of the other. Human nature being what it is the blame tends to fall on the arbitration process, though the crux of the problem may simply be that the parties were not able to agree in bargaining on what they wanted and both ended up taking a chance.

Even when the parties see eye to eye on the collective contract and the role which arbitration is to play in interpreting it, events often force one or both of the parties into a somewhat different posture. Take the case of the company that has gone along for years arbitrating discipline, discharge, seniority, and classification cases. A changing economy then causes it to build a new and more efficient plant elsewhere or to consider subcontracting a part of its operation. High unemployment and intense job security consciousness then cause the union to argue that the recognition clause in the contract (or some other clause) prohibits the company from displacing old employees who are covered by the agree-

ment. The resulting arbitration may well raise issues of an entirely new dimension so far as the company is concerned. A discipline case could be submitted with relative calm and a minimum of formality, but a subcontracting or vesting of seniority rights issue may seem to the company to challenge its very existence. The result may well be defense in depth—such as refusal to arbitrate, formidable legal talent on the company's side both in court and in the eventual arbitration if there is one, full scale transcripts, post-hearing briefs. The decision may drag out over a long period of time. To the union and its members the whole arbitration process may seem suddenly to have become very costly, time consuming, and legalistic. From the company's standpoint its new posture has been determined by having to defend itself in a much more critical area than ever before.

If events change the climate of arbitration for companies, the same thing is true for unions. Union lawyers are widely reported to feel that since the Landrum-Griffin Act they have been forced into arbitrating many grievances which would previously have been disposed of at an earlier stage of the grievance procedure. Now, under pressure of a possible claim that the union has not fairly represented the individual grievant, the union takes the case to arbitration. If, as counsel seem to feel, these cases tend to be less meritorious, the end result is that the union finds itself spending more money than before on arbitration with less to show for it.

Some Possible Alternatives

Man-made institutions are rarely perfect, and when the problem area is one in which there are strong conflicting interests the difficulties are multiplied. In evaluating private grievance arbitration it is well to remember that it is not the only available alternative. Indeed, we have some experience with several other ways of resolving such disputes.

There are periodic rumblings to the effect that grievance arbitration ought to be abandoned in favor of good old slow-down, strike, and lockout methods, but it seems unlikely that this will develop into a popular movement. One important reason is that neither side has retained much of its earlier enthusiasm for such methods,

and both are aware that the public has come to expect better of them than the law of the jungle.

A different approach to contract disputes is taken under the Railway Labor Act where tripartite boards hear and resolve grievances under governmental sponsorship. This system once worked fairly well, but it has been severely criticised in recent years because its backlog of cases includes many that are as much as six years old.[32] Decisions from private arbitrators, however long delayed, look like instant justice as compared with the railway boards.

For a brief period after the war the Federal Mediation and Conciliation Service supplied free arbitration services to labor and management, and the states of New York and Wisconsin still do, though with certain restrictions. It is not very probable that there will be a trend in this direction, because there is no disposition on the part of the government to undertake the expense.

If dissatisfaction with the present system of private arbitration should become serious, it is more probable that serious consideration would be given to a system of labor courts, such as one finds in many Western European countries, than to any of the other alternatives. It can be argued that such a system would dispose of the now difficult and sensitive problem of whether an individual is entitled to go to arbitration without the support, or even over the opposition of, his union.[33] We know relatively little about comparative operation of foreign labor courts, and it may be that an extensive investigation is now warranted.

Summary and Conclusions

Labor arbitration is being severely criticised by unions on the ground that it is no longer inexpensive, informal, and expeditious, and by management on the ground that arbitrators are increasingly invading critical areas of management rights.

Federal Mediation and Conciliation Service data comparing discharge cases tried in 1951, 1956, and 1962 show:

---

[32] *The Public Interest in National Labor Policy* (Committee for Economic Development: 1961), p. 60.

[33] Cf., *Donnelly* v. *United Fruit Co.*, 53 LRRM 2271 (1963), and see Summers, "Individual Rights in Collective Agreements—A Preliminary Analysis," in N.Y.U. Twelfth Annual Conference on Labor 63 (1959).

1. That the number of days required to hear such a case has not materially changed over that period of time.

2. That there is a slight, but not strong, trend upward in the amount of study time required by arbitrators to decide such cases.

3. That the per diem charges of arbitrators have gone up in about the same amount as average hourly earnings in manufacturing since 1951.

4. That total fees charged by arbitrators have gone up somewhat less than would be indicated by the change in per diem fees.

5. That decisions are now somewhat slower in coming down than they once were.

A legitimate question arises as to whether these data fairly represent the arbitration picture today. My own conclusion is that they probably do if one considers only those familiar kinds of cases, e.g. discipline and discharge, seniority, job classification. New and complex issues growing out of the emphasis upon job security may fall into quite a different pattern.

Union attempts to further invade the management prerogative are, in the foregoing analysis, treated as the inevitable product of a period in which vast changes are taking place in our industrial society and in which job security is at a premium. Management's response is likely to be increased attention to the language of the collective bargaining contract and to the authority of the arbitrator. This will create additional tensions within bargaining and perhaps contribute to some dissatisfaction on the part of both labor and management with the arbitration process.

Finally, it has been suggested that at the root of some of the present dissatisfaction with the arbitration process is the fact that labor and management do not have entirely common objectives with respect to the use of arbitration, and even when they do events often cause them to use the machinery in an unanticipated manner.

In their keen analysis of the frustrations which proponents of workmens' compensation feel as they look at the results of their earlier efforts, Herman and Anne Somers have observed:

> Social legislation requires continuous revision to keep it abreast of a changing environment, and it requires administrative arrangements adequate for its purposes. Lacking these, all the virtues attributable to the original intention will not prevent its distortion or decay.[34]

The essence of what has been said in this paper is that private grievance arbitration, like the social legislation of which the Somers speak, "requires continuous revision to keep it abreast of a changing environment." The climate in which arbitration takes place will continually change because we live in a dynamic society. Arbitration is now being asked to do some things and to resolve some issues which at an earlier date did not much figure in the thinking of the parties. Events beyond the control of the parties have forced them to modify their strategies and approaches.

Criticism is healthy. It draws attention to problem areas. Arbitration does not exist for the care and maintenance of arbitrators. It exists because it has in the past filled a felt need on the part of labor and management. It will continue to exist so long as this is true, and it will remain true if unions, companies, and arbitrators are open minded about change, frank in exploring deficiencies with one another, and imaginative in working out new and improved procedures.

---

[34] *Supra*, note 11, at 32.