CHAPTER 3

CONSTRAINT AND VARIETY IN ARBITRATION SYSTEMS

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Our assignment from the Program Committee was to make a comparative analysis of permanent arbitration systems in the United States. This is an assignment which probably could never be accomplished in any literal sense. A recent survey showed that members of the National Academy of Arbitrators currently hold about 235 "permanent" appointments in arbitration systems, and undoubtedly there are many other systems in which the permanent arbitrator is not an Academy member. A comprehensive survey of the characteristics of such a large number of systems would require a small army of research assistants and generous donations of time by hard-pressed arbitrators and by labor and management representatives; and while voluminous statistics might be gathered by this approach, there is danger that the process of condensing, generalizing, and quantifying would obscure rather than highlight the basic nature and unique problems of the systems under study.

Instead of undertaking a comprehensive survey, we have chosen to present a subjective, interpretive, and speculative essay. Our focus is on differences in concepts of arbitration and how they originate, and on what seem to be some uniformities in the evolution of arbitration systems. Some of our observations are based on our own experiences in some fifteen permanent arbitration systems in which we have served. We have also read some of the rather scanty literature dealing with such systems, and we have talked with some of the participants in several of the major sys-

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tems that we discuss. We recognize, as we hope our audience will, that at best such a presentation will be provocative rather than definitive.

The Roots of Modern Arbitration

In 1940 General Motors and the UAW set up a permanent arbitration system. This was a great landmark in the modern history of labor arbitration because General Motors was the first major corporation in heavy manufacturing to agree to such a system. But it would be erroneous to regard 1940 as "Year One" in labor arbitration. The fact is that in 1940 there were two distinctly different types of permanent arbitration systems in the United States, both with quite long histories and strong advocates. These two types merit our close attention because the failure to distinguish between them has been a source of a great deal of confusion in discussions of arbitration over the last twenty or twenty-five years.

The Impartial Chairman System

The first type was the impartial chairman system. The first successful system was established in 1911 in the Hart, Schaffner & Marx factory in Chicago. The architects of this system were Sidney Hillman of the Amalgamated Clothing Workers and Joseph Schaffner, a civic-minded businessman. The man that they chose as their impartial chairman was John Williams, a one-time coal miner who had had some experience as an arbitrator in the bituminous coal industry in Illinois.[1]

The basic characteristics of this system were the following: (1) the collective bargaining agreement was quite brief and was stated in general terms; (2) the scope of arbitration was very broad, in that *any* problem arising between labor and management could be submitted to the impartial chairman; and (3) the settlements were achieved primarily by a process of mediation.

A contemporary of John Williams has written an excellent summary of the procedures and approach developed by this pioneer:

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[1] A good account of the early years of this system is found in Matthew Josephson, *Sidney Hillman, Statesman of American Labor* (Garden City: Doubleday, 1952), pp. 59-85.

> His method was primarily that of a court of equity rather than a court of law; but, though acting as a judge, he functioned as the administrator of the law as much as its interpreter. In other words, he saw the duties of industrial arbitrators as much the same as those of a Workmen's Compensation Board or a Public Utilities Commission. Their functions are quasi-judicial, partaking both of a court and an administrative officer. He would not decide cases merely on the merits of the briefs or arguments of the parties, for it would not help the industry or either party to have the other party lose a case if it was right but happened to present its case poorly or had its arguments wrong. He would make investigations on his own initiative, get all the facts in the situation, and then decide on the basis of those facts regardless of what might have been presented or omitted in the argument of the case. In making these investigations he often consulted each party separately and in confidence. He found it necessary to do this to get the real truth in industrial cases, which as in ordinary law cases are often hidden by the trial. But it was also necessary at the same time to retain the confidence of both parties in his honesty and impartiality. He was able to accomplish both these things; and thus he laid the basis for a successful industrial jurisprudence.[2]

Other accounts make it clear that the purpose of the "consultation" mentioned in the foregoing description was usually mediation of the issues involved in particular cases. Williams also participated actively in the contract negotiations of the parties. In a few years, as the union extended its organization, most of the men's clothing industry in Chicago was brought under this impartial chairmanship. Similar systems were subsequently established in other major men's clothing centers and in other branches of the garment industry. A number of popular magazine articles were written about the impartial chairman systems during the 1920's, so that this approach became rather well-known—at least to people with an interest in labor-management relations.

Another landmark in the history of this type of system was the establishment of the impartial chairmanship in the hosiery industry in 1929.[3] This was the first such chairmanship to cover an entire industry on a national basis. The first chairman was the late Paul Abelson, who had served in similar arbitration systems

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[2] William M. Leiserson, "Constitutional Government in American Industries," *American Economic Review Supplement*, March 1922, p. 65.

[3] See George W. Taylor, "Hosiery," in *How Collective Bargaining Works* (New York: Twentieth Century Fund, 1942); and Thomas Kennedy, *Effective Labor Arbitration* (Philadelphia: University of Pennsylvania Press, 1948).

in garment manufacturing in New York City. Abelson served for only two years. Then he was succeeded by George W. Taylor, who served for ten years. Under Taylor, the hosiery chairmanship gained considerable fame and became a training ground for several leading arbitrators of today.

At least in its early years, the hosiery chairmanship had the same basic characteristics as the earlier men's clothing systems. The first hosiery agreements were relatively brief, considering their nationwide coverage and the complex wage structure in the industry. The impartial chairman was given a broad grant of authority. All disputes arising during the term of the agreement, "including but not limited to" questions of interpretation or application of the agreement, were within his jurisdiction. He could not change the terms of the agreement, but if he found that either party was using its rights under the agreement "oppressively," he could remedy that. The primary method of dispute settlement was mediation.

It is important to understand what "mediation" means in this kind of system. It is often assumed that mediation must be a process of splitting the difference, compromising principle, and ignoring contractual rights and obligations. Anyone who has this view of mediation is likely to find that having an issue mediated by an experienced impartial chairman like George Taylor is an unsettling experience. Taylor has said that the essence of mediation is to develop "the consent to lose." Where the principle or the contract right is clear, the task of the chairman may be to persuade the losing party to accept that fact. But where the contract is unclear—as in the "just cause for discharge" concept—or where it simply does not cover a particular dispute, then the task of the impartial chairman is usually to develop a consensus which will clarify or supplement the parties' formal contract. The skillful chairman tells the parties that he can and will decide an issue himself if necessary, but that the solution is more likely to be mutually acceptable if they agree upon it themselves; he helps them to explore alternatives, and may greatly influence the outcome, but decisions on this kind of problem are basically the product of negotiation. Where the contract is brief and phrased in general terms, such guided negotiation will usually be the principal method of resolving disputes. Over time, as the contract

becomes more elaborate and precedents accumulate, the emphasis may shift. This is a point to which we will return after discussion of some other matters.

We conclude this description of the impartial chairman system by suggesting that it be defined as follows: An impartial chairmanship is a system for resolving all problems that arise during the life of a contract, utilizing a technique of continuous negotiation, and centering on a mediator who is vested with the reserved power to render a final and binding decision.

The Umpire System

The other distinct type of permanent arbitration system that had become well-established by 1940 was the umpire system, which originated in the anthracite coal industry. This system was not established by an agreement between management and labor; rather, it originated in an award promulgated by the Anthracite Strike Commission in 1903. Even the Commission had not been voluntarily accepted by the coal companies. It had been forced on them by President Theodore Roosevelt with the assistance of the elder J. P. Morgan.[4]

It is possible that the award of the Strike Commission may have contemplated the establishment of a system of continuous negotiation. The Commission's award provided for a Board of Conciliation, with equal representation of management and labor, to which unresolved grievances were to be referred for consideration. Apparently the Strike Commission hoped that most grievances would be settled at this stage. Those that could not be settled were to be submitted to a neutral outsider with the title of "umpire." But this procedure evolved into something quite different from a problem-solving, continuous negotiation system. Virtually from the outset, in the great majority of cases the Board of Conciliation conducted formal hearings on the grievances submitted to it, had transcripts made, collected the relevant documents and exhibits, and then mailed this record to the man designated to serve as the umpire. The umpire sat in solitude to

[4] See A. E. Suffern, *Conciliation and Arbitration in the Coal Industry of America* (Boston: Houghton-Mifflin Co., 1915); by the same author, *The Coal Miner's Struggle for Industrial Status* (New York: Macmillan, 1926); and Stanley Young, "Fifty Years of Grievance Arbitration: The Anthracite Experience," *Labor Law Journal*, October 1957, pp. 705-713.

consider this formal record. Without any further communication with the representatives of the parties, he formulated his decision and mailed it out. This was not simply a system of "arm's-length arbitration"; it is more aptly called "long-distance arbitration."

The award of the Strike Commission provided that the Board of Conciliation, and if necessary the umpire, should have authority to resolve "any difficulty or disagreement in any way growing out of the relations of the employers and employed." From the outset, the employers refused to accept this broad grant of jurisdiction. They insisted that the Board of Conciliation and the umpire be limited to interpretation and application of the Strike Commission award. They also took the position that the award was intended to freeze all local working conditions which were not specifically changed by the award. The United Mine Workers, who were fighting for survival in the industry at the time, accepted these limitations. Later, the parties negotiated elaborate national and local agreements and they empowered the Board and the umpire to interpret them. The parties also adopted a provision specifically making all Board resolutions and umpire decisions a binding part of their body of agreements. In this system, the assignment of the umpire has been twofold: first, to construe and apply the literal language of the Strike Commission award, the agreements of the parties, and precedent decisions; and second, to decide what the "established practices" are and to enforce them. If a grievance involved a matter not specifically covered by the Strike Commission award, an agreement, or an established practice, the umpire refused to rule on it.

At the risk of emphasizing the obvious, we stress the following basic characteristics of the umpire system: (1) the collective bargaining agreement is detailed and, to the extent possible, specific; (2) the scope of arbitration is restricted to the interpretation and application of existing agreements between the parties, and disputes not covered by such agreements are not to be arbitrated; and (3) the umpire disposes of those problems that fall within his jurisdiction by a process of adjudication, which means that he promulgates a decision based on the formal record of a hearing.

These characteristics suggest the following definition of the umpireship: it is a system of adjudication of those rights and

duties which are recognized by the language of an existing agreement between the disputing parties.

Development of Arbitration Systems After 1940

The General Motors-UAW System [5]

Let us now return to those "pioneers" of 1940, General Motors and the UAW. While permanent grievance arbitration systems were unknown in heavy manufacturing industries at that time, GM and the UAW were clearly not embarking on uncharted seas. And there is evidence which suggests that both parties had studied the available charts. Company executives had had extensive discussions of the anthracite umpire system with Charles Neill, who had filled that umpireship from 1905 to 1928. General Motors also sent a representative to spend two months with George Taylor in order to observe the operation of the impartial chairman system in the hosiery industry. The Company also studied the impartial chairmanship in the men's clothing industry in Chicago. Harry Millis of the University of Chicago was the chairman at that time. The UAW had two excellent sources of first-hand information concerning the impartial chairman and the umpire systems in Sidney Hillman and Philip Murray, who both had roles in the 1940 GM-UAW negotiations. As we have noted, Hillman was one of the architects of the impartial chairmanship in men's clothing. Murray had served for many years as an officer of the United Mine Workers and was familiar with the anthracite umpireship.

In the 1940 negotiations, General Motors took the initiative in submitting a draft proposal which clearly contemplated the establishment of an umpire system rather than an impartial chairmanship. GM proposed that the new permanent arbitrator—to be called "the umpire"—should have sharply limited authority. Only alleged violations of certain specified clauses of written agreements between the parties were to be subject to arbitration. A separate procedure, culminating in possible strike action, was provided for

[5] Some of our factual data concerning this system are drawn from Gabriel N. Alexander, "Impartial Umpireships: The General Motors-UAW Experience," in *Arbitration and the Law—Proceedings of the Twelfth Annual Meeting, National Academy of Arbitrators* (Washington: BNA Incorporated, 1959), pp. 108-151. We have also interviewed some of the participants in the system.

disputes over certain matters such as production standards and health and safety. GM also proposed that all cases should be presented to the arbitrator in writing and that a hearing would be held only at the arbitrator's option—apparently an adaptation of the long-distance arbitration of the anthracite industry.[6] The UAW objected to the proposed limitations on the authority of the arbitrator, apparently preferring the much broader scope of an impartial chairman system. But GM stood firm, and its proposal was incorporated in the parties' agreement without substantial change.

Any possible doubt that General Motors had made a deliberate choice between the two types of permanent arbitration systems is dispelled, we believe, by the press announcement which GM issued after agreement had been reached on the new system. The announcement emphasized that "The umpire will not be an impartial chairman, but rather a judge, in that he cannot make new regulations but can only decide questions under the rules and regulations agreed to between the corporation and the union." [7]

Having established an umpire system resembling the anthracite model, these parties then chose their first umpire from among the ranks of the impartial chairmen. They called Harry Millis from the impartial chairmanship of the Chicago men's clothing industry. This choice suggests the possibility that the parties may have reached an interesting compromise in their bargaining over the arbitration system: the union accepted the umpire system proposed by the corporation, but the corporation agreed to appoint as umpire a man who had many years of experience in an impartial chairmanship.[8] The tenure of Millis was quite brief; shortly after the parties appointed him, President Roosevelt called him to Washington to be chairman of the National Labor Relations Board. Thereupon, GM and the UAW appointed another well-known impartial chairman, George Taylor, as their umpire.

Everyone who is familiar with the writings of George Taylor can readily infer that his enthusiasm for the umpire system was

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[6] In practice, the GM-UAW umpire held hearings on virtually all cases from the outset.

[7] Quoted by Alexander, *op. cit.*, p. 115, footnote 10.

[8] We must plainly label this suggestion as speculation; we have no proof, beyond the facts recited, that such a bargain was struck.

not unbounded.[9] But in his early months in the GM-UAW system he conformed to what he understood was the parties' conception of the proper role of the umpire in their system. Soon the parties were expressing surprise and even dismay at some of the umpire decisions. Taylor received a delegation of corporation executives and listened to their complaints. His reply was that an umpire system inevitably produced some decisions which one side or the other found unacceptable, and that this was why decisions were mediated rather than adjudicated in impartial chairman systems. Thereafter, with the consent of both parties, Taylor mediated the key decisions in the GM-UAW system. We should emphasize, however, that his role was considerably more limited than in the hosiery chairmanship because his jurisdiction was limited. As already noted, the parties had agreed to arbitrate only claims of violation of specified clauses of their agreement, not "all disputes" arising during the life of the agreement. In many cases, therefore, mediation consisted of informal discussion of a proposed decision with representatives of the parties prior to its issuance. On some vital points, however, such as proper cause for discipline, the agreement provided no real guideposts for decision, and the necessary principles were developed by consensus of the parties under Taylor's guidance.

Taylor issued 245 decisions before he was called to Washington in 1942 to serve on the War Labor Board. His successor as GM-UAW umpire was G. Allan Dash, Jr., who had been associated with Taylor in the hosiery chairmanship. Dash continued the Taylor practice of discussing his decisions with the key representatives of the parties prior to their issuance. But toward the end of his tenure, the practice faded away. The parties did not specifically discuss this change with the umpire; rather, the key representative of one of the parties was transferred to another assignment and no successor was designated, and obviously the umpire could not continue his discussion of proposed decisions with only one of the parties. Ralph Seward succeeded Dash as umpire in 1944. Seward had gained the impression, in meetings with representatives of both parties prior to his appointment, that

[9] See, for example, his address entitled, "Effectuating the Labor Contract through Arbitration," delivered at the Second Annual Meeting of the National Academy of Arbitrators (1949), and reprinted in *The Profession of Labor Arbitration* (Washington: BNA Incorporated, 1957), pp. 20-41.

they wanted their new umpire to follow a "strictly judicial" approach—i.e., to base his decisions entirely on the formal hearing record without recourse to informal discussions with the parties. Seward adopted this approach, and ever since there has been an unwritten rule in the GM-UAW system that there is no communication whatever between the umpire and the parties concerning a case that has been heard until a decision has been issued.

Thus General Motors and the UAW, after agreeing to establish an umpire system, accepted for a time one of the principal elements of the impartial chairman system—mediated decisions—while retaining the other elements of the umpire system, particularly the restricted scope of arbitration. We can only speculate concerning the reasons why both parties had come to prefer the "strictly judicial" approach to the mediation approach in decision-making by 1944. One apparent reason was that many of the basic principles had been hammered out by then. Another was that arbitration had become a more routine operation by 1944 and the responsibility for representing the parties had been delegated to lower echelons of officialdom than at the beginning. Taylor frequently dealt with top-level officials on both sides; but by 1944 both parties had developed permanent staffs of arbitration specialists. Finally, we have gathered from discussions with some of the participants in this system that the officials of this big union and this big corporation found that their own relations with their respective constituencies were easier if the umpire had sole responsibility for his decisions. The relatively brief tenure of most of the early umpires suggests that one of the important functions served by the incumbents was to bear the onus for unpalatable decisions.

The Chrysler and Ford Systems

While General Motors pioneered the permanent arbitration system in the automobile industry, the other two members of the "Big Three" of the industry followed the GM example in 1943. The Chrysler-UAW system was ordered by a War Labor Board directive.[10] It is interesting that the author of the WLB directive

[10] This umpireship is discussed in David A. Wolff, Louis A. Crane, and Howard A. Cole, "The Chrysler-UAW Umpire System," in *The Arbitrator and the Parties—Proceedings of the Eleventh Annual Meeting, National Academy of Arbitrators* (Washington: BNA Incorporated, 1958), pp. 111-141.

was George Taylor. The directive instructed Chrysler and the UAW to appoint an "impartial chairman" for their appeal board, which up to that time had not included a neutral member but nevertheless had been the terminal step in the grievance procedure. The directive specified that "The impartial chairman shall have the right . . . to participate in all discussions and meetings of the appeal board and shall also have the duty of assisting the parties in resolving particular questions." No doubt we may justifiably assume that when George Taylor used the term, "impartial chairman," and provided that the incumbent of this position should *assist the parties* in settling disputes, he had in mind a system of continuous negotiations presided over by a mediator with ultimate decision-making authority.

Ironically, despite the apparent intent of this directive, Chrysler and the UAW proceeded to establish arbitration machinery that was almost an exact duplicate of the anthracite umpire system. In the Chrysler system, the partisan members of the appeal board developed a voluminous written record in each case, without any participation by the impartial chairman. When the appeal board found itself unable to dispose of a case, the chairman was invited to meet with the partisan members of the board. There were no hearings in the usual sense. The board members presented the written record to the chairman and argued their respective positions. The chairman then retired, studied the record, and issued his decision without further consultation with the parties. David A. Wolff, who served as impartial chairman in this system from 1943 to 1962, often pointed out that he had never heard a witness or made a plant inspection under this procedure. His role was more that of an appellate judge than a trial judge. As in the GM-UAW system, the impartial chairman had a carefully circumscribed jurisdiction; he was authorized only to rule on alleged violations of certain specified provisions of the parties' agreements.

The Chrysler-UAW system retained essentially its original form until 1962. By then, some new faces had appeared on both sides of the bargaining table. The parties decided that they wanted broader participation in their arbitration proceedings, particularly by those directly involved in particular cases. They revamped their procedure to provide for the appearance at hearings of wit-

nesses and other company and union representatives who had previously been excluded from the appeal board meetings with the impartial chairman. Obviously, this revision was not a move in the direction of the clothing and hosiery type of impartial chairmanship; rather, it conformed the Chrysler-UAW system more closely to the GM-UAW system. Interestingly, Chrysler and the UAW chose as their first arbitrator under the revised system a former GM-UAW umpire, Gabriel N. Alexander.

The Ford-UAW arbitration system was established by the parties themselves in 1943 without a WLB directive.[11] The contract language which established the system was similar to that which GM and the UAW had adopted in 1940. But for the first ten years of the Ford-UAW system, most of the important decisions were the product of mediation rather than adjudication. The main reason was that Harry Shulman was the umpire during that period. Most people interested in arbitration know well the name and works of Harry Shulman. His decisions and his essays on arbitration are perhaps more widely quoted than those of any other arbitrator. As a reading of his essays and decisions suggests, the man himself was eloquent, persuasive, and self-assured. He originally entered the Ford-UAW relationship as a special War Labor Board mediator. His assignment was to help the parties to improve a labor-management relationship that was so tumultuous that it was hindering war production. Shulman found a union badly divided by factionalism and a management which generally lacked clear lines of authority. In this situation both sides appear to have welcomed the forceful personality of Shulman. We may never know the precise extent of his influence in the development of what is now a good working relationship between Ford and the UAW. But we do know that scores of people in the UAW and in Ford management still regard Shulman as one of the closest personal friends they ever had, and that he advised them on a great many matters, including labor relations policies.

Shulman's approach to arbitration was highly informal. Often he disposed of cases with a one-sentence award after a hearing of a few minutes. Several hundred cases were presented to him which he thought should remain undecided, and he consigned them

11 There are no published discussions of the Ford-UAW system. What follows is based on interviews with participants in this system.

to what he termed his "graveyard," without a decision. When a case presented a basic issue, he often deferred a decision until other cases presenting other facets of the same issue had been heard, and then he would mediate the terms of a broad decision. If he felt that a case had been inadequately presented by one side or the other, he would undertake his own investigation to obtain the facts that he thought were necessary for a sound decision. He felt no inhibitions about discussing past, pending, or potential arbitration cases with grievance committeemen, individual grievants, or line supervision.

Despite Shulman's remarkable abilities and the great respect which both parties had for him personally, there was a growing undercurrent of resistance to his approach to the umpire function during the closing years of his tenure. Key representatives of the company and the union appear to have concluded that they had "outgrown" the Shulman approach. Factionalism in the Ford Department of the union had greatly decreased with a consequent reduction in leadership turnover, and under Henry Ford II the company management had been thoroughly rationalized. Both parties had developed a considerable degree of sophistication and confidence in their dealings with each other. Hence, there was a growing desire on both sides for the umpire to interpret the language of their contract and stop at that, instead of counseling and advising them on all aspects of their relationship. Shulman's tenure as umpire was ended by his death in 1955. The parties appointed as his successor Harry Platt, who already had several years of service in the system as one of the "temporary umpires" who were needed to handle the extremely heavy case load. As a temporary umpire, Platt had been expected to hear cases and decide them without resort to the mediation techniques so extensively utilized by Shulman. As the chief umpire, Platt has continued to resolve cases by the techniques of adjudication rather than mediation. It is our strong impression that the parties have welcomed this change.

We have described the evolution of the GM, Chrysler and Ford arbitration systems in some detail because we believe that the pattern of development is significant. We see initial diversity and ultimate uniformity. Today, the points of similarity in the three systems far outweigh the points of difference. Does this

trial-and-error progression toward the same basic arbitration system in this industry represent a kind of Darwinian adaptation to environmental necessities? We suggest that it does. But we defer further consideration of the point while we briefly survey the development of permanent arbitration systems in several other major industries since 1940.

The Steel Industry

The initial agreements which the Steel Workers Organizing Committee signed in 1937 with United States Steel and three other major producers included provisions for *ad hoc* arbitration as the terminal point of the grievance procedure. It is perhaps self-evident that a provision for *ad hoc* arbitration almost automatically rules out the mediation approach to decision making. And it is clear that in those early days the steel companies were quite wary of any kind of arbitration. They did not relish the prospect of binding decisions by outsiders who "knew nothing about the steel industry." The first contracts provided that the *ad hoc* arbitrators would be selected by mutual agreement of the parties and there was no procedure for breaking a deadlock. The result was that few arbitrators were appointed and few cases were heard in the early years.[12]

After the beginning of World War II, there was growing pressure to cut down the backlog of cases appealed to arbitration but not heard, and the companies and the unions began to discover arbitrators that were acceptable to both. Some of the decisions undoubtedly confirmed the worst fears of company representatives concerning the ignorance of outsiders about the steel industry. In 1945, United States Steel decided that a permanent arbitration system would be a lesser evil than *ad hoc* arbitration. The union had reached that conclusion some time previously. Therefore, these parties established in 1945 what they named the Board of Conciliation and Arbitration. To help remedy the ignorance of outsiders concerning the steel industry, this Board included one permanent, full-time member representing the company and an-

[12] Developments to 1941 are discussed in Frederick H. Harbison, "Steel," in *How Collective Bargaining Works*, pp. 556-60, 562. Our description of developments in steel after that date is based on interviews with participants, plus some personal experiences. Except as otherwise noted, our discussion of other industries has the same basis.

other representing the union, in addition to the permanent neutral chairman. At first glance, it might seem that this structure would encourage the resolution of disputes by mediation—an impression strengthened by the inclusion of the word "conciliation" in the name of the Board. But as the system developed, very little conciliation or mediation was possible. The partisan members were advocates, not principals; their chief function was to win decisions, not to negotiate. Executive sessions of the Board became what amounted to rehearings of the important cases. Draft decisions of the chairman were also discussed at length in many cases. Finally, the partisan members of the board often issued dissenting opinions couched in strong language.

U. S. Steel and the union substantially modified this system in 1951. They eliminated the provision for partisan members of the board and deleted the "conciliation" part of the title. The permanent neutral is still called the "chairman," even though he is now the sole member of the "board." Despite the "chairman" title, this arbitration machinery remains essentially an umpire system rather than an impartial chairman system as we have used those terms in this discussion. There is one significant difference, however, between this umpire system and the GM-UAW model. Since 1951, the chairman of the U. S. Steel-Steelworkers board has regularly reviewed and discussed his draft decisions with designated representatives of the company and the union. But, unlike the old system, the representatives of the parties do not devote their full time to this function; they do not attend the arbitration hearings; they are at a considerably higher policy level in their respective organizations than were the former full-time board members; and they appear to function primarily as consultants to the arbitrator rather than as advocates. This system is clearly different from the impartial chairmanships that we have already described, but it is also a significant modification of the old anthracite umpire system in which the neutral's only contacts with the parties were through the post office. The U. S. Steel-Steelworkers system now appears to be working to the satisfaction of both parties. The present chairman, Sylvester Garrett, has served continuously since 1951, which suggests that the parties have not only found the right man for the job but have also evolved a system which meets their needs.

Like U. S. Steel, and probably for the same reasons, the other major companies in the basic steel industry first relied on *ad hoc* arbitration. Most of them have switched to the single permanent umpire system, generally omitting the intermediate step of a tripartite permanent board. In 1947, Bethlehem established a permanent three-man rotating panel of neutrals; but this arrangement proved to be a transitional step to a single permanent umpire. In 1952, Bethlehem and the Steelworkers designated Ralph Seward as their sole umpire, and his tenure has been continuous since that date. Some of the smaller steel producers have stayed with *ad hoc* arbitration. In several of the companies in more recent years, the union has successfully pressed for the establishment of permanent umpireships.

Other Industries

Although collective bargaining agreements were signed by the Rubber Workers Union and the major firms in the rubber industry in the late thirties, there was virtually no arbitration in this industry prior to World War II. The reason was stated in familiar terms by a student of the industry writing in 1941: "It is the general sentiment of most management and union representatives in the rubber industry that arbitration by an outsider is not desirable because no outsider understands the problems of a particular concern as well as the local management and employees." [13] When the war-time no-strike pledge made strikes and slow-downs contrary to national policy, the major companies and the union somewhat reluctantly accepted *ad hoc* arbitration. After several years of *ad hoc* experience, Goodyear, Goodrich, and U. S. Rubber each agreed to the establishment of permanent umpireships with company-wide jurisdiction. Firestone tried this kind of system for a time but reverted to a permanent panel of arbitrators. In 1963 Goodyear also replaced a single umpire with a panel, in part because the case load in this company is so heavy that it is difficult for a single umpire to keep up with it. Several of the rubber companies have utilized tripartite boards, with the neutral member functioning essentially as an umpire, but the trend in this industry appears clearly to be away from this arrangement.

[13] Donald Anthony, "Rubber Products," in *How Collective Bargaining Works*, p. 669.

We will not attempt a detailed survey of arbitration systems in the remainder of American industry. The major thrust of union organizing activities in the thirties and forties was in the mass-production industries. We believe that we can safely put forth these rather broad generalizations: *ad hoc* arbitration is the most widely used system in most of these industries; where permanent arbitration systems have been established in these industries, the umpire model has been followed rather than the impartial chairman model, without any important exceptions known to us. The impartial chairman system has been retained in those industries such as clothing where it was established many years ago. The jurisdictional disputes board in the construction industry also functioned as an impartial chairmanship during the many years that John Dunlop headed it. In recent years Ted Kheel has developed what appears to be essentially the impartial chairman system in several industries or segments of industries in which he is active as a neutral.

The Influence of Environment

Despite the persistence of the impartial chairman system of arbitration in a few industries, it is undoubtedly true today that umpire systems cover a far greater number of employees. The great majority of active arbitrators today have never functioned as impartial chairmen. Probably most arbitrators, as well as most present-day labor and management representatives, would subscribe to the proposition that detailed collective bargaining agreements, limited powers for the arbitrator, and decision-making by adjudication are among the eternal verities in the field of labor arbitration. Yet 25 or 30 years ago the consensus—at least among the professional arbitrators of that day—strongly favored the impartial chairman system. Why has the umpire system flourished in the past quarter-century while the impartial chairman system has faded, at least in relative terms?

Our view is that each of these systems is appropriate to a different industrial environment, and that the new arbitration systems of the past 25 years have been established in collective bargaining relationships that do not provide the kind of environment to which an impartial chairman system is adaptable.

Let us review briefly the characteristics of those industries in which impartial chairmanships have flourished. Clothing and hosiery provide reasonably typical examples. Perhaps the most fundamental characteristic of these industries has been fierce competition among a number of relatively small plants. Consequently, in many plants the ownership, general management, and direction of labor relations have all been vested in a single person; and centralized authority has been common on the union side. Although many of the employers initially opposed union organization, they quickly saw advantages in close cooperation with the union once their employees had joined. One of the important advantages was standardization of labor costs among unionized firms. Hence, once collective bargaining was established, labor-management cooperation was the general rule rather than the exception. In small, one-plant firms, there is generally little need for highly formalized policies and procedures; hence, at least in the early years, collective bargaining agreements in such firms tended to be extremely brief by modern-day standards. Indeed, some companies maintained satisfactory relations with the union for many years without any written agreements at all.

What we have just described can be characterized as an *unstructured* environment. There are few guideposts for decision-making. When impartial chairmanships were established in these industries, the men appointed as neutrals found that the major constraint on their power was the requirement for achieving a consensus. The impartial chairmen typically dealt with the topmost echelon of authority on both the company and the union sides; if the company and the union representative were persuaded, then they were in a position to persuade their constituents. There was less fear of precedent in these single-plant firms than in a giant corporation with scores of plants.

The anthracite industry, where the umpire system originated, provides a number of sharp contrasts to the foregoing environment. The anthracite industry is geographically concentrated, and by 1900 ownership control had also become concentrated in a few companies, which were themselves largely controlled by a few railroads. Concentration of control had permitted virtual elimination of price competition in the industry. Indeed, one reason why Theodore Roosevelt was able to force the Strike Commission on

the operators in 1902 was because public indignation had been aroused against "the anthracite trust." [14] The industry saw no advantage whatever in dealing with the union, and even after the establishment of the umpire system in 1903 the industry withheld formal recognition of the union for many years. In this kind of arm's length relationship, decision-making by consensus was obviously impossible. Those who really controlled the industry from afar delegated day-to-day supervision of operations to subordinates but gave them little discretion in labor relations matters. On the union side, top leadership tended to give more attention to the larger bituminous branch of the industry than to anthracite.

In this environment, management insistence that the only power of the umpire was to enforce those rights and obligations that were clearly set forth in written agreements (or to enforce the maintenance of the status quo) was a way of limiting the scope of collective bargaining. The umpire found it necessary to return many cases to the parties without decision on the ground that he had no authority to decide these cases. Despite a no-strike clause in the agreement, the union engaged in local strikes over many of these cases; but management was confident of its power to resist the economic strength of the union. Long-distance arbitration also made it possible for the subordinates at the site of operations to disclaim any responsibility for the decisions of the umpire. After all, they never even saw him.

This approach to arbitration has an inherent tendency to generate more and more constraints on or guideposts for decision-making. Management seeks to add to the agreement language which prevents or nullifies decisions which it finds unacceptable; and the union seeks new language to create new rights and obligations which the umpire can enforce. In addition, of course, the accumulation of past decisions provides a body of precedents on which the parties and the umpire rely as guideposts for new decisions. By now, the anthracite industry has what must be one of the longest and most detailed collective bargaining agreements in

[14] Waldo E. Fisher, "Anthracite," in *How Collective Bargaining Works*, pp. 280-82, 291.

the world, and the umpire decisions fill more than 30 fat volumes. Hence, this is an elaborately structured system for decision-making.

Even if the impartial chairman system had been developed in 1903, it would have been fatally incompatible with the environmental characteristics of the anthracite industry. By 1940, the impartial chairman system was probably a much better known type of arbitration than the umpire system. But the environmental characteristics of the great mass-production industries were much more comparable to those in anthracite than to those in the garment trades. The automobile, steel, rubber, and other industries were dominated by a few large, multi-plant firms. Most economists would agree that the nature of competition in these industries is quite different from that in the garment trades; a union could make little contribution to the stabilization of competitive conditions in these mass-production industries. For many years after the first contracts were signed, most managements in these industries sought to "contain" the unions if not to eliminate them. Therefore, managements insisted that the sole source of rights and obligations was the written agreement. To have set up arbitration machinery with authority to resolve *all* problems which either side brought up during the life of the agreement obviously would have defeated the basic policy of containment of the unions. Moreover, in these industries, the ownership, general management, and the direction of labor relations were usually vested in different people, and labor relations officials often lacked authority to make basic policy decisions. Finally, there was (and is) considerable wariness of the "problem-solving" approach to grievance settlement in multi-plant operations. Both labor and management often fear that a "solution" which is satisfactory to both sides in a particular plant might be urged as a binding precedent under the different circumstances in another plant. In view of the foregoing characteristics of major mass-production industries in the late thirties and forties, the insistence of management representatives on the umpire system of arbitration was predictable.

We have described the use of mediation in decision-making by Taylor in General Motors and by Shulman in Ford, which represents the transplantation of one essential element of the impartial chairman system into umpireships. In neither situation did the

transplant survive. It is significant that in both of these companies these experiments took place in the early days of arbitration, while the decision-making environment was still relatively unstructured. It is also significant that *both* parties, at both GM and Ford, came to favor the adjudication approach to decision-making rather than the mediation approach.

The Tendency Toward Uniformity

We have sharply distinguished the major elements of impartial chairmanships and umpireships, and the environments with which each is compatible. Now we must point out that some of the distinctions that we have emphasized are not as sharp today as they were 25 years ago. The maturing of arbitration systems, and the industrial relations systems underlying them, generate some tendencies toward greater uniformity.

We have said that impartial chairmanships are usually established in a largely unstructured decision-making environment in which the principal constraint on the arbitrator is the necessity to achieve a consensus of the parties. Yet the process of problem-solving and decision-making inevitably creates precedents. In some systems, efforts have been made to preserve flexibility by the adoption of agreement provisions that past decisions have no precedent value—but even in these systems, the impartial chairmen and the parties themselves have gradually come to place some reliance on the precedents of the past. No doubt most people regard reasonable consistency as an essential attribute of fairness. Hence, the development of a body of past decisions almost inevitably adds to the constraints on the impartial chairman and reduces his room for maneuver in mediation. There also appears to be a general tendency in all types of industrial relations systems to develop more rather than less detailed agreements. Therefore, as arbitration systems mature, the guideposts for decision-making tend to become more numerous, more detailed, and more explicit.

This elaboration of the intellectual structure for decision-making has two important effects on the arbitration process. One is that arbitrators tend to become interchangeable. In many present-day umpireships with heavy case loads, a number of arbitrators are employed to decide cases with a minimum of co-

ordination with each other.[15] The implied assumption is that any reasonably competent arbitrator is likely to decide a given case in the same way that any other competent arbitrator would. The proliferation of guideposts makes decisions more predictable.

When this stage is reached, it becomes easier for the parties themselves to settle their own disputes by reference to the applicable guideposts. In some of the industries which have had impartial chairmanships for many years, there is by now little or no arbitration. And in some of the major umpireships, there have been dramatic reductions in case loads since the early years. In the GM-UAW umpireship, more than 200 cases per year were arbitrated at the outset; the current volume is only 10 or 15 percent of the earlier figure. In the Ford-UAW system, five or six hundred cases per year were arbitrated for many years; since 1958, the average has been less than a hundred a year. Goodyear and the Rubber Workers have reduced their case load by about 50 percent in the past several years. Many other similar examples could be cited.

On the other hand, there are many arbitration systems in which the case load has remained stable or has even increased over the years. Many of these systems must hold some latent possibilities for reducing the volume of arbitration and thereby cutting its costs. We suggest that in some of these systems, the failure of the parties themselves to apply the available guideposts is probably attributable to the political structure of the union or the company or both; it may be "safer" to put the burden of decision on the arbitrator even when the answer is obvious. In other words, we believe that excessive case loads today are less often the result of ignorance of the guideposts, or the unavailability of guideposts, than they are the result of insecurity or lack of authority on the part of the company or union representatives who must decide whether to settle or to arbitrate. Therefore, in these situations, the reduction of case loads is not likely to be achieved by exhortation or educational programs. If a reduction of the case load is taken as a desirable objective (and some union and management representatives would insist that there are more important objectives),

[15] Examples are the U. S. Steel system, the Bethlehem system, and the Ford system (up to 1958); in each of these systems, some coordination is provided by the chief umpire. But in rotating panel systems, as at Goodyear at present, each arbitrator decides cases entirely on his own responsibility.

then more authority and security for the staff people who process appeals or the involvement of higher echelons of authority in a screening procedure may be necessary to achieve such a reduction.

There is another long-run tendency toward the reduction of the differences between the two basic types of arbitration systems. As we have pointed out, the impartial chairman is authorized to consider and decide *all* problems and disputes arising during the life of a contract, while the umpire is restricted to those disputes which involve the interpretation and application of the terms of the contract. Virtually without exception, the contracts which establish arbitration systems of *limited* scope also contain no-strike clauses of *unlimited* scope. There is rarely a clear answer to the question of what disposition is to be made of those problems and disputes about which the union may not legally strike but which are not specifically covered by some provision of such a contract. The result has been the development of the familiar "management rights" versus "implied obligations" controversy. On some matters such as contracting-out, job combination and crew sizes, about which many agreements are silent, management typically argues that it retains sole discretion on all matters not explicitly covered by the agreement and the union typically argues that the recognition clause, the seniority clause, and the unlimited no-strike clause necessarily imply some limitations on management that are not otherwise specified in the agreement.

We cannot discuss here all of the facets of the management-rights versus implied-obligations controversy. The point which has pertinence for our discussion is that increasing numbers of cases which involve this controversy have been going to arbitration. Most arbitrators would agree that these are among the most difficult cases that they are called upon to decide these days. Most umpires today recognize some degree of merit in the union argument that the implications of collective bargaining agreements, as well as their bare language, must be taken into account in rendering decisions. The trend of decisions in cases of this nature provides some ground for the generalization that the scope of the arbitrator's power has gradually expanded in most umpire systems. It would be a gross exaggeration to say that the typical umpire now exercises a jurisdiction as broad as that of the typical im-

partial chairman; but we believe that the difference is substantially less than it was a quarter-century ago.

In applying the implied-obligations doctrine, umpires use the techniques of adjudication rather than the consensus-seeking techniques of the impartial chairman, and labor and management have often found umpire decisions in this difficult area particularly unsatisfactory. Moreover, under the umpire system there are still many problems which arise during the life of the agreement—particularly the problems growing out of rapid technological change—which can neither be arbitrated nor settled by a legal strike. In theory, unsatisfactory umpire decisions and unresolved problems under the agreement can be handled during contract negotiations.

But difficult problems such as these usually cannot be resolved satisfactorily in a brief period of contract negotiation under the pressure of a strike deadline. Hence, the limitations of the umpire system have been among the factors contributing to the development of continuing joint committees by labor and management to give year-round consideration and study to problem areas in their collective bargaining relationship. The best-known example is the Human Relations Committee in the steel industry, but variations of this basic theme have developed in the automobile industry, the rubber industry and others. The parties to these arrangements generally insist that the committees are simply "studying" problems and not "negotiating" solutions to them. But the basic function is remarkably similar to the continuous negotiation aspect of the impartial chairman systems. The big difference, of course, is that today the problem-solving is undertaken without any participation by neutrals (except at Kaiser Steel [16]). If—and this is admittedly a big "if"—the parties to these arrangements decide to call in neutrals to preside over their continuous negotiations, then we will have come almost full circle.

Parkinson would be quick to point out that there would be two procedures, two sets of neutrals, and two staffs, where one of each

[16] It is significant, we believe, that Kaiser Steel is one of the smallest of the basic steel producers, that it operates but a single plant, and that the chief operating officer (and his family) are among the principal owners of the firm. In other words, the element of neutral participation in continuous negotiation is found in the firm which is in many respects rather comparable to the typical firm in those industries in which impartial chairmanships have flourished.

served the purpose in the original impartial chairman systems. Our reaction is less cynical. One basic conclusion that we draw from our analysis is that the differences between structured and unstructured decision-making environments call for differences in the methodology and in the levels of authority to be utilized in dispute settlement. There is virtually no need today for top-level company or union officials to become involved in routine grievance arbitration; but the "study" of difficult problems not covered by the existing agreement such as contracting-out obviously cannot get very far without the participation of top-level representatives of the parties. Therefore, two separate, continuing decision-making systems in the same collective bargaining relationship can clearly be justified—especially where a giant company and a giant union are involved. Another conclusion that we draw is that there may be less magic in drawing today's professional neutrals into the new continuous negotiation systems than is often supposed. The great majority of present-day arbitrators have had experience only in well-structured umpire systems; we venture the judgment that the top-level representatives of the big companies and the big unions have had much more experience than the average arbitrator at operating in an unstructured decision-making environment.

We offer one more concluding observation of a more general nature. There is no one "best" or "right" approach to labor arbitration, as a few people seem to have argued in the past. An arbitration system must be adapted to the basic characteristics of the industrial relations environment in which it must operate. There are constraints on variety in arbitration systems. But the industrial relations environment in most major industries in the United States has changed substantially in the past quarter-century. These environmental changes may have opened up, to an even greater extent than is yet recognized, new possibilities for the adaptation of old methods of conflict resolution in labor-management relations.

David Riesman has argued [17] that the advancement of knowledge requires that some people should have the courage to be mistaken and the courage to emphasize some things too much. Whatever the other shortcomings of this presentation, the authors

[17] In the volume which suggested the title of this paper: *Constraint and Variety in American Education* (Garden City: Doubleday, 1958), pp. 112-114.

hope that they have not lacked those two kinds of courage. They also hope that their mistakes and their errors of emphasis will stimulate those who are better informed to improve this analysis.