of this stripe usually participate in these sessions when the parties sit down to decide which cases can be settled and which must be resolved in the crucible of a formal arbitration proceeding. All parties leave the session greatly relieved by eliminating the backlog, and while neither party is jumping for joy, neither is anyone trying to jump out the window. I am not necessarily recommending this process, I am merely saying it happens, and not infrequently.

Since the parties tend to put different values on the same things, what is "big" to one may be relatively insignificant to the other. If the relationship is fairly normal and the situation fluid, there are so many factors and elements involved that it should be possible for each party to come away with less than he wanted but with more than the risk of trial would justify.

### Conclusion

In summary, if you believe you are "right," if your case is sound on the merits, is sufficiently important to you, and you estimate that there is a 70-percent chance of winning with no adverse long-range effect that will result from your victory, the price of a settlement on your part may be high, but it should be explored. If, on the other hand, your case is not sound, or you think you are not right, or it's not that important, or there is something to be lost by winning or much to be lost by losing, then you had better avoid the risk of arbitration and take refuge in that old American political axiom that "you can't beat something with nothing."

## II. DEFINING THE ISSUE AND THE REMEDY

CHARLES M. HEATH*

I believe that labor and management in this country today are almost totally committed to the concept that disputes over interpretation and application of agreements shall be settled through the grievance procedure, ending, if necessary, in final and binding arbitration. They are likewise committed in principle, if not always in practice, to the concept that such disputes should be fairly resolved and expeditiously brought to a final conclusion.

* Director of Industrial Relations, Kaiser Steel Corporation, Oakland, Calif.

I begin, then, with the premise that all of us here today share a common interest, namely, that these sessions shall provide an exchange of ideas that will contribute to a more effective and expeditious handling of our disputes in arbitration. Development of procedures for meeting some of the prehearing problems on this agenda should surely be a step in that direction.

My topic, "Defining the Issue and the Remedy," is not a problem for many who are present today, but for those of us who have counterparts in the arbitration process who absolutely refuse to commit themselves, it has been, and will continue to be, a serious problem.

I was recently involved in a case where we had taken an existing building, completely cleared it, made some additions to the building, and designed, fabricated, and installed a production line to mass produce a specialty item. This job was done almost entirely with our shop employees. These shop employees were covered by separate collective bargaining agreements with several crafts. One of the crafts filed a grievance contending that the work was new construction; therefore, the field agreement was applicable and field rates, not shop rates, should be paid its members for all hours worked on this job. The issue seemed to be joined on the question of which was applicable, the shop agreement or the field agreement. However, we were unable to agree on an issue and/or a remedy and proceeded to hearing—leaving that task to the arbitrator. After days of hearing, a voluminous transcript, and a 116-page brief by the union, the record was so utterly confused that the award, although stating that the field agreement clearly did not apply, gave monetary relief to three union witnesses on the basis that they had not been properly paid under certain shop practices.

It had never been a position of the union that anyone was improperly paid if the shop agreement applied, and this came out only by chance testimony. The Union has now, however, filed a court action claiming pay under this new theory for 19 added people, contending "newly discovered evidence."

Although this is a somewhat unusual "horror" story, it happens to a lesser degree all the time. Let me make one thing clear. I am not citing this as criticism of the arbitrator; rather it is criticism of the process which lets us get to hearing without pinning down

the issues and remedy and which, in the case just described, resulted in the waste of an untold amount of time by everyone involved and, as a consequence, started an entirely new controversy.

Where there is a permanent arbitrator, rules of procedure usually have been agreed upon by the arbitrator and the representatives of the parties that satisfactorily meet their situations. Generally, where the arbitration step is handled by international staff men and/or counsel and industrial relations staff people, there are few problems. But, because of either the inability or the failure of the parties to define the issue and remedy, the issue in far too many cases being arbitrated every day is known only upon receipt of the decision.

It is my firm conviction that the efficacy of the arbitration process will be enhanced immeasurably by establishing procedures whereby the issues and remedies are clearly stated before the introduction of evidence begins. If we want the arbitrator to do something other than arbitrate, we should agree from the beginning on what, specifically, we want him to do.

*Advantages of Framing Issues and Remedies Beforehand*

The initial advantage of having the issues and remedies framed beforehand is one of time: first, the time of the award, and second, the time of the participants. If we are dedicated to an expeditious result that is final and binding, then surely a clear issue and evidence limited to that issue will give the arbitrator a better chance to make an early decision. All of us are plagued by the lack of time to prepare the case, to find mutually agreeable dates for the hearing, to hold the hearing, to read and study the transcript, to prepare and study the briefs, and to write a decision. I have read many, many cases, and I have been involved in more than the one I described, where the parties had been unable to agree on the issue, and what it was was left to the arbitrator to determine after hearing the evidence. Each party sought to leave no stone unturned in presenting exhibits and testimony to be sure that every conceivable point that might hit this unknown issue was covered. The hearings dragged on for days, the transcripts ran into volumes, and sometimes the award did not solve the real point in dispute.

Another advantage of having the issues and remedies established at the outset is that this is certainly helpful to the arbitrator in

ruling on the relevancy of evidence. Although this relates to the time factor, it also results in establishing a record that is clear and uncluttered with pages of material that serve only to divert attention from the real area of dispute. Aside from the time involved, another major benefit to be derived is the clarity of decisions. By specifically defining the issue and the remedy available, the arbitrator is permitted to address himself precisely to the point without having to devote pages to the examination of arguments over what is the real point to be decided.

*Means of Achievement*

Assuming that a majority of the advocates and arbitrators are in agreement with the principle, the question is: How can it be achieved? Obviously, the first point at which it can be achieved is upon the insertion of appropriate language in the arbitration clause of the collective bargaining agreement. I have found a few agreements that have at least included language to the effect that "a statement of the question to be arbitrated shall be mutually agreed upon." We have reached such an agreement in the steel industry with respect to one limited type of case—job description and classification grievances. The agreement provides that the parties shall stipulate as to the factors in dispute and that the issue in arbitration shall be limited to those factors.

In many cases, by local agreement or custom, the parties present a statement of the issues and remedies as a part of their submission agreement. Such arrangements or practices usually exist where the parties have long experience in arbitration matters, but even then deadlocks do arise.

Many arbitrators insist at the opening of the hearing upon settling these points before proceeding, but they are not always successful. Others state that they will determine the issue after the record is made.

All these approaches have the procedural flaw of not answering the requirement of settling the issue and remedy with finality far enough in advance of the hearing date to avoid waste of time on useless preparation. Even those agreements which state that the question to be arbitrated shall be mutually agreed upon do not prevent delays when one party contends the case is not arbitrable

because there is no mutual agreement. A recent such case went as far as the circuit court of appeals [1] before the question to be arbitrated was framed. The court framed the question and ordered arbitration. The grievance was filed in March 1965, the court gave its decision in December 1966, and the arbitration hearing is still to come. This can hardly be said to be an expeditious processing of this dispute to a final conclusion.

Certainly the initial responsibility for stating the issue rests with the parties. They are the ones intimately familiar with all phases of the dispute and, therefore, best able to pinpoint the exact question to be answered. However, all too often they cannot, or will not, reach agreement because one or both prefer to place that burden on the arbitrator. My suggestion is, in this case, that the arbitrator should favorably consider a motion by either party that he listen to discussion relating to the issue and examine evidence going to that point, but hear no evidence on the merits until the question to be decided has been clearly established, either by agreement of the parties or by the arbitrator's ruling. Further, he should so rule on his own initiative, in most cases, unless it is specifically *agreed* by the parties that a different procedure should be followed. Such a ruling is clearly within the prerogative of the arbitrator because he has the authority to establish rules and procedures for the conduct of the hearing, absent an agreement of the parties on the point.

In my opinion, the arbitrator's taking such a position is consistent with his duty and responsibility to conduct a "fair" hearing, for he is surely entitled to know what is expected of him from the outset in order that he can properly weigh and evaluate the evidence as it is presented. Also, his doing so may serve to break the impasse which the contestants have reached, because they will realize they are facing the risk of having the arbitrator state a question which neither of them wants really to arbitrate.

It is recognized that this procedure could lead to a request for a postponement from one of the parties on the ground that additional time is required for preparation to meet the issue as finally

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[1] *Socony Vacuum Tanker Men's Assn.* v. *Socony Mobil Oil Co., Inc.*, 63 LRRM 2590 (2nd Cir., 1966).

stated. Although a delay may not be desirable, certainty of the point to be decided is of greater weight.

This approach would get the question to be arbitrated settled at the hearing date, but I am still concerned with a means of settling it well in advance of the hearing date. I believe an arbitrator, when agreed upon by the parties, acquires jurisdiction to take some action prior to the hearing. Under the Federal Arbitration Act and similar state enactments, this prehearing jurisdiction is recognized by provisions covering the issuance of subpoenas, order depositions, etc. Although it is not clear that the Federal Act applies to labor arbitration, the courts seem to have used it as a guide in developing substantive rules. It is my suggestion, therefore, that the arbitrator should favorably consider a prehearing motion requesting that he call a conference for the purpose of determining the question to be arbitrated. At this conference, the parties should be prepared to discuss the dispute in sufficient detail to enable the arbitrator at that time to formulate the question in the event they themselves are not brought into agreement on a suitable question as a result of the conference. I am not contemplating any formal hearing or any lengthy session, but something akin to the pretrial conferences that have aided the judicial system in handling their cases with greater efficiency. I am not aware that this has ever been tried in *ad hoc* situations, but such provisions do exist in some permanent arbitration relationships.

There remains the situation, like the circuit court case I mentioned earlier, where the parties reach a stalemate on the issue and hence on the question of arbitrability before an arbitrator is ever selected. I expect there will always be cases where the union and the company are so hopelessly deadlocked that one or the other will have to seek the judicial forum for an order to arbitrate. I disagree with the conclusion of the court in the cited case to the extent it assumed jurisdiction to decide the question to be arbitrated. In that case the court said:

> The Company also urges that even if the dispute is arbitrable, arbitration cannot be compelled in the absence of mutual agreement between the parties concerning the issue to be submitted. Such an interpretation of the last sentence of paragraph 16 (a) would emasculate the arbitration clause. We interpret this procedural provision of paragraph 16 (a) as requiring the parties to make a reasonable

effort to agree on the statement of the issue to be submitted. As reasonable efforts were made and were unsuccessful, the court may state the question to be arbitrated.

I believe the courts should only order arbitration, leaving the determination of the question to be arbitrated for the parties and finally for the arbitrator.

This position is an off-shoot of the position I hold on the larger question of arbitrability. This problem is one of the most perplexing of those facing the courts in actions ordering arbitration and enforcing awards. Although the courts apparently have divided the question between themselves and arbitrators, I subscribe to the position and reasoning which this Academy set forth in 1960 in its preface to a proposed Federal Labor Arbitration Act. I think a portion of the statement dealing with this subject is worth repeating, and I quote:

> Section 5 of the proposed Act represents the Academy's position on the crucial question of whether an issue of arbitrability should be decided by the Arbitrator or by a court. This position is that questions of arbitrability should, unless the contract provides otherwise, be submitted in the first instance to the arbitrator for determination, subject then to subsequent judicial review within the limits prescribed in the statute.
>
> The proposed Act recognizes that this issue of arbitrability will in some instances be raised initially in a judicial proceeding. The proposal made here is that in such cases the judicial determination should be only whether there has been a valid underlying agreement by the parties to arbitrate; if so, whether either party has defaulted on its obligations under such agreement; and, if such agreement be found and no default, that the court should remand any question of arbitrability of the specific issue to the arbitrator for decision in the first instance.
>
> This proposal reflects firmly held convictions about what is necessary to maintain the integrity of free, private collective bargaining. When a company and a union agree upon the rules to govern their industrial community, including agreement that they will settle their disputes by arbitration, it is vital to the maintenance of their relationship on its most fundamental terms that this agreement be preserved. It is not preserved if either party may, seeking advantage in a particular dispute, turn to a different forum from the one agreed upon. Private collective bargaining assumes the original determination of this question by the parties' own agency of arbitration, with the right of resort to the courts kept in reserve as a function—not of original determination—but only of review.

I submit that if we are committed to settling our disputes by arbitration when our own efforts fail—and the overwhelming evidence is that we are—it is then incumbent upon labor and management and the arbitration profession to continue to seek to improve the process so that we have speedy and fair conclusions to the issues in dispute. One vital area where improvement can be made is in establishing the issue and remedy prior to the hearing.

I have suggested a prehearing conference on motion of one of the parties and a preliminary proceeding at the hearing as possible ways of meeting the problem. Certainly there can be other solutions, perhaps better ones. But I believe that, for the advancement of the arbitration process, all of us have certain rights and responsibilities in this area. Arbitrators have the right to know from the outset what they are expected to decide, and they have the responsibility to decide specific questions without wandering afield and offering gratuitous advice on other questions. The representatives of labor and management have the responsibility to exhaust every effort to agree upon the question and remedy in advance of the hearing, and the right to secure a determination of the scope of the issue and remedy prior to presenting evidence on the merits.

## III. PREPARING THE CASE FOR ARBITRATION

RICHARD LIEBES*

Having labored for some years as an advocate in labor relations, but never having donned the robes of impartiality, it is pleasant for me to speculate briefly on how an arbitrator approaches his task.

It is frequently noted that arbitration is a judicial process, and that the arbitrator, like the courtroom judge, evaluates the record made before him by counsel for the opposing parties. This analogy of the process is accurate enough. Yet there is an interesting difference between the courtroom and the arbitration room that bears exploration.

When litigation lands in the courts, regardless of the novelty of the issue that may be involved, the procedures are constant and

* Director of Research and Negotiating Service, Joint Council No. 2, Building Service Employees' International Union, San Francisco, Calif.