sel about its own posture. If the employer is pleading inability to pay, he should be prepared to substantiate this defense with data. If the union is arguing prevailing wages, it must, of course, have the facts and give thought to the arrangement of its data to make an orderly and convincing presentation.

The arbitrator, in his seat of eminence, authority, and impartiality, is just beginning his work when he calls a hearing to order. The advocate is going on stage for the final act of his performance. If both sides have done their best in prehearing preparations, then hopefully the post-hearing problems of the arbitrator will be lessened.

IV. APPLICABILITY OF PRETRIAL PROCEDURES TO ARBITRATION

ALBERT BRUNDAGE*

Commencing with *Lincoln Mills,* followed with the oft-cited *Steelworkers* trilogy and a series of landmark cases thereafter, the United States Supreme Court has labored during this past decade to formulate the interrelationship between the judicial and the arbitral process, in an attempt to differentiate the scope of jurisdiction between the arbitrator and the judge, and to assign to each his proper functions and responsibility.

The line of demarcation between the role of the judge and the arbitrator, particularly with respect to substantive issues, still remains somewhat hazy and indistinct, but far less obscure is the division of labor between the arbitrator and the judge insofar as procedural matters arising in the arbitration process are concerned. Here, the preeminence of the arbitrator has been recognized. As stated in *Wiley,* procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

The delegation of power by the court to arbitrators, I believe, presents unique opportunities to the arbitration profession. Unlike the judge who is constrained by judicially promulgated or legislatively enacted procedural rules, and unlike the NLRB, which is inhibited by statute, the arbitrator has virtually free scope

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to experiment, to implement, to improvise, to adopt, and to adapt procedural techniques which are calculated to improve and to perfect the arbitral process.

Necessarily, arbitrators must look to the procedural rules and techniques which have been developed by the court and by various administrative agencies in the field. Obviously, he must utilize in part at least, time-tested devices to get at the truth. But in this process it is hoped that the arbitrator will not strive to become what Professor Edgar Jones refers to as a legal oracle. It can be hoped that arbitrators will not become bogged down with formalisms and legalisms, but instead will recognize that arbitration is, after all, essentially a different process from that of the judicial and administrative, and that they will scrutinize and sift, modify and adapt, the existing rules or procedure to fit the arbitral process.

These general observations are applicable to all procedural questions, but for purposes of my discussion I would like to confine them to very limited aspects, namely, prehearing statements or briefs, prehearing conferences, and discovery techniques.

General Objective of Pretrial Procedures

Pretrial procedures have long been established in the federal courts. A number of state courts have similarly adopted pretrial systems. The principal objective of pretrial is to improve the adversary system so that it is no longer a game of chance but a supporting element of justice. One California court has referred to pretrial as a procedure designed to relieve the members of the legal profession and the members of the court of nonessentials at the trial. Another has referred to the underlying purpose of pretrial as placing the case in focus as quickly as possible.

Obviously, to the degree that the pretrial procedures can be adapted to accomplish these purposes and to the degree that they can be adapted for the purpose of conducting the arbitration process more effectively and more efficiently, with obviously decreased costs to the litigants, pretrial is a natural complement and accords with the purpose of the arbitration process. Of course, no uniform or inflexible rules applicable to all cases can be established. The extent to which the arbitrator may choose to propose to the parties that they utilize the prehearing procedures will depend upon a variety of factors: the type of case, the complexity

of the issues, the nature of the evidence to be adduced, the professional skill of the advocates, and the time to be consumed in the hearing. But on one point all students of pretrial procedures appear to agree, namely, that the judge or the hearing officer plays the critical role. Therefore, it must rest with the arbitrator to determine on the basis of his skill, his knowledge, his experience, and his expertise the type of prehearing procedures and the degree to which these prehearing procedures can be employed effectively in the particular arbitration.

Even though no uniform or inflexible rules can be prescribed, I think there are certain general considerations which we might accept. It appears to me that prehearing procedures can be much more profitably employed in the contract interpretation situation, that is, in the so-called arbitration of rights, than in the contract negotiation dispute or dispute with respect to interest.

Prehearing has limited applicability in the rights dispute because in the ordinary situation, the parties in contract negotiations have been in negotiations for a substantial period of time. Very frequently a federal mediator has been called in and has participated at some stage in the proceedings. Generally, the parties will have had ample opportunity to explore the particular proposal. Although an arbitrator may desire to call the parties together in a prehearing conference for the purpose of discussing ground rules with respect to the hearing that is to be conducted, in the main I think that prehearing or pretrial has only a limited application in the contract negotiation dispute.

Even in contract interpretation disputes, the effectiveness of prehearing procedures will vary, depending upon the circumstances of the particular case. Specifically, it can be argued that prehearing is less important in the situation where there is a permanent, established, well-thought-out grievance procedure and a permanent arbitrator. In this kind of situation, where you have an adequate number of grievance steps and where you also have knowledgeable parties who are committed to the proposition of exchanging information with the idea of attempting to settle their disputes before they get to arbitration, the need for a prehearing procedure is not as compelling. This is even truer where you have a permanent arbitrator who is knowledgeable with respect to the

relationship of the parties, plant practices, and the provisions of the contract.

It is interesting to note, however, that despite what I have said, in the sophisticated umpire systems in General Motors and U. S. Steel the parties submit prehearing briefs and statements to the arbitrator before the hearing.

Prehearing in Ad Hoc Grievance Arbitration

The place in which the prehearing procedures are most infrequently used, and the place where I think they can be most effectively used, is in so-called *ad hoc* grievance arbitration. Here you have a situation in which the arbitrator may have no past relationship with the parties, and he may not be familiar with plant practices or the provisions of the contract. Although it is not universally true, I suggest it is generally true that in *ad hoc* situations the parties as well as the advocates are less sophisticated and less knowledgeable than are those in the permanent-umpire system.

Prehearing Statement

With these considerations in mind, I would like to turn to a brief discussion of the prehearing statement of the grievance and its submission by the parties prior to the hearing. This procedure has a two-pronged advantage. On the one hand, it compels the parties who are preparing the case for argument to scrutinize and examine their positions so they can reduce them to writing in terms of submission to the arbitrator. At the same time, the arbitrator becomes acquainted with the matter to be considered at the hearing.

I believe the former is important, because requiring the parties to reduce their arguments to writing either may result in an actual withdrawal of the grievance by one or the other of the parties, or at least may provide an avenue for settlement of the dispute.

The latter advantage, namely, acquainting the arbitrator with the matter to be considered at the hearing, can accomplish the following purposes: Pretrial briefs can assist the arbitrator in sharpening the issue in dispute. This in turn helps the arbitrator to make certain that all relevant material and probative information is adduced at the hearing. Too frequently, because he is un-

prepared, he does not assure himself of the full and complete record that is necessary at the time he comes to make his decision. Pretrial briefs can also reduce the costs of an arbitration, a matter which, sometimes at least, is important.

Prehearing Conference

If it is properly utilized by a skilled arbitrator, the prehearing conference can also be an effective tool in reducing the amount of time actually spent in the arbitral procedure.

First, it affords the arbitrator an opportunity to analyze with the parties the issue or issues in dispute, so they can be articulated and defined with maximum precision. If the issue is clearly defined, the length of the hearing can be reduced by eliminating the introduction of irrelevant material. Moreover, clearly defining the issue enables the parties to evaluate the weakness or strength of their respective cases in relation to the real issue that will be tried. This may lead to a settlement.

Second, the prehearing conference permits the arbitrator to examine with the parties their theories, their arguments, their claims, and their defenses. This has significant possibilities.

If there are laymen advocates in the arbitration proceedings, an exploration of the major arguments, defenses, and claims will afford them an opportunity to focus on the major arguments that will be considered by the arbitrator, and him an opportunity to prepare himself with respect thereto.

There is another aspect to this that is also important. Frequently, the advocate, whether he is a lawyer for either side or an international representative, has not participated in any of the grievance procedure meetings. The prehearing conference affords him an opportunity to meet with his adversary to explore defenses, arguments, claims, and so on.

Third, the prehearing conference can be of great importance in regard to evidentiary matters. No one present would argue seriously that the technical rules of evidence should apply in the arbitral procedure, but arbitrators have been criticized, with some justification, for not utilizing any rules of evidence, thereby allowing cases to drag on endlessly while parties put in immaterial testimony and evidence. I don't want to overstate my case, but I do suggest

that arbitrators would do a service to the arbitral process if, in advance of the hearing, they held a prehearing conference in which certain ground rules were established with respect to what type of evidence would be acceptable and what type would not. This would be particularly helpful to laymen advocates who are not familiar with the rules of evidence. The arbitrator could take this opportunity to present and explain to them the underlying considerations of the rules he will apply. In the long run, I suggest this time will be well utilized, because it will result in a more effective presentation of evidence.

Fourth, the prehearing conference affords the arbitrator an opportunity to become thoroughly acquainted not only with the issue, but with the arguments as well. Too frequently, I think what happens is this:

The arbitrator leaves the hearing with the record. He examines the record for the first time when he begins to prepare his decision. He finds the record is not sufficiently complete, that there are certain facets of the case that should have been explored, but he has a real reluctance to reopen the hearing. This may be due in part to his professional pride, but in part it may stem from his desire to keep costs at a minimum. Thus he proceeds on a record which is incomplete and which results in an unfortunate decision.

Fifth and finally, the prehearing conference can promote settlement of grievances. As has been suggested by each of the speakers, the aim of the game is not necessarily to win a particular dispute. In this connection, during the prehearing conference the arbitrator can move his role from arbitrator to mediator, so that with the indicated information and evidence he can play this role effectively.

Discovery Techniques

Let me turn very briefly to the matter of discovery devices. Not all forms of discovery devices are important, and I want to emphasize this: The discovery devices will not work if the arbitration is conducted in a technical fashion. Certain of the procedures—depositions, for example—are not useful or adaptable to the arbitral procedure. In this connection, as lawyers know, and I am afraid the parties also know, depositions are too frequently used as

fishing expeditions, a method of prolonging the matter and increasing the cost of litigation. I do not believe the disadvantages of the deposition can be eliminated; therefore, depositions cannot be effectively used in arbitration.

Interrogations, however, can be very useful in the arbitral process. They can be used in one of two ways. Prior to the hearing each of the parties can submit to the adverse party the interrogatory with respect to matters to be considered at the hearing. In the event the adverse party chooses not to respond to any or all of the questions, because they are considered irrelevant or whatever the ground may be, the arbitrator can then, in a prehearing conference, indicate to the parties his views with respect to the pertinency or relevancy of the particular interrogatory submitted to the other side. An alternative is that the interrogatories can be submitted to the arbitrator in the first instance. He can scrutinize them, determine which ones are sound, and forward these interrogatories to the other party. The use of either one of these procedures will afford an opportunity for an exchange of information prior to the time the parties get to either a hearing or a prehearing.

Another useful discovery device is that of inspection of documents. Motions for the inspection or production of documents or for cross-examination in regard to some document that has been introduced are frequently made by advocates during a hearing. Sometimes this is for the purpose of discrediting the witness, but it can also be for the purpose of establishing the authenticity and relevance of the document. In either event, the hearing is prolonged.

I suggest an arrangement whereby the arbitrator, in advance, permits either party or his representative to have an opportunity to inspect the documents that are to be introduced in the arbitration procedure. Hopefully, there would be an agreement upon the documents to be introduced. This could be most beneficial.

Finally, we come to a device used in judiciary discovery—stipulation of facts. I suggest that the time we can save in prehearing in getting stipulations of facts can be of inestimable value. We would save more time in the long run by taking time in the prehearing conference to obtain a stipulation of facts than by per-

mitting the parties to develop facts during the hearing. Many facts can be stipulated very easily.

In conclusion, it seems to me that the effective use of prehearing briefs, prehearing conferences, and certain discovery devices outweighs any disadvantages associated with them. I recognize that not all students of the arbitration procedure agree with my position. But I believe if we utilize these techniques, not in a technical manner but adapted to the arbitral process, there is much more to be gained than lost.

Interpleader Between Parties

I have also been assigned the topic, although I don't think it is particularly part of prehearing, of interpleader between the parties. It would be presumptuous of me to suggest that I can discuss this complex subject intelligently in the limited time available.

In *Carey* v. *Westinghouse,* the Supreme Court held in substance that because the NLRB has jurisdiction over representation matters, this does not preclude the parties from pursuing the grievance and arbitral procedure under their collective bargaining agreement, even though the dispute is a jurisdictional one between two unions. If Union A has a contract with the employer and is contending that the employer is violating the contract and demands arbitration, the effect of *Carey* is that the employer is compelled to arbitrate the matter, even though Union B, with or without a collective bargaining agreement with the employer, is claiming the same jurisdiction. Furthermore, even though Union B is not a party to the arbitration proceeding, either voluntarily or joined by any other procedure, the right to arbitration holds. This represents one of the most interesting procedural problems facing arbitrators.

There has been for some time a very provocative and penetrating dialogue taking place between Professor Edgar Jones of UCLA and Professor Merton C. Bernstein of Ohio State. Although the best service I can render you is to give you the citations to their articles, I would like to take a moment to attempt to summarize the position of each of these men, because, while I don't know that

either one has a perfect solution, I suggest that this is one of the most difficult problems confronting arbitrators.

First, under the Jones "Point Six" program, if Union A seeks to prove that the employer is violating the contract and wants to go to arbitration, the courts should order arbitration under Section 301. The court should simultaneously provide, however, that the arbitrator should determine whether the matter is a bilateral one, just between Union A and the employer, or whether it is trilateral, that is, a situation in which there is another union involved.

Second, the arbitrator should then proceed to hear the matter, at least to the extent of determining whether the matter is bilateral or trilateral. If it is a matter involving the employer and two unions so that it becomes trilateral, then he should issue a bilateral award holding that the matter is not arbitrable unless within a specified time Union A joins Union B.

Third, should Union A decide not to join Union B, then, as I understand it, the arbitrator can dismiss on the ground that it is not an arbitrable question. This protects the rights of Union B.

Fourth, if Union A decides to move to join Union B, then the arbitrator extends to Union B the opportunity to join by requesting its position in writing. If Union B decides to join, the arbitrator can then go ahead.

Fifth, if Union B declines to join and does not have a collective bargaining agreement with the employer, the arbitrator should then proceed to hear the dispute bilaterally and issue an award.

Sixth, the right of either the employer or Union A to go to the courts to have a joinder issued compelling Union B to participate in the hearing is provided. This procedure, hopefully, will resolve the industrial dispute and still preserve due process insofar as Union A and Union B are concerned.

Professor Bernstein disagrees. He believes this procedure entails a certain amount of coercion on the parties and feels that the consensual basis of arbitration is somewhat hurt thereby. He suggests as an alternative that Union A and Union B agree with the employer under their respective contracts—that is, that there be a three-way agreement—to use arbitration to decide this particular matter.

If you examine the decisions under Section 301, I think it is quite obvious that the court has now recognized the importance of the role played by the arbitrator. If you examine the recent decisions of the NLRB, I think you cannot help but see the deference which the Board is now giving to arbitral awards. And if you examine what is taking place in Congress at the present time, it seems to me quite clear that arbitral procedures are going to play a much more significant role in the settlement of our industrial disputes in the future.

For these reasons, I urge each arbitrator to utilize all his skills, his abilities, his intelligence, his ingenuity, and his special expertise to devise and adapt procedural techniques that will enable the arbitral process to play this important role.