It may be reasonable to advance the thesis that the labor arbitrator can surmount the vagaries of his acceptability problem only by striving to do a more professional job in handling the hearing and composing his decision; that if he accomplishes this, it is jointly recognized by the parties as indicative of the professional ability they jointly require. As demonstrable reason modifies emotion, the arbitrator faces less jeopardy in maintaining his acceptability.

Is not the high continuing acceptability of many arbitrators one proof that the private arbitral process is needed by the management-union relationship? Is it not also proof that consciousness of the arbitrator's need for acceptability is but a minor problem and that it is not a corrupting force on the arbitration process?

Is it not a fair and reasonable proposition that a private litigation system requiring the free selection of private judges whose returnability is tested by the judgmental efficacy of their case handling is a safer method for obtaining a higher level of judicial service? Would the imposition of a judge on the parties be a better guarantee? Cannot more be said for full private control than for some form of public control? Attorneys know that, where possible, they try to pick the judges they come before in the civil courts. Would this not be true of labor courts? Should not the personal risk of the arbitrator be listed as an asset on the balance sheet reporting the gains for private control by the parties in the resolution of labor disputes?

Discussion——

HERBERT PRASHKER, ESQ.*

When I received Program Chairman Martin Wagner's flattering invitation to participate in your discussion of this subject, I had two reactions. First, I had some doubts that I, as a management attorney, would really have anything to contribute to the question of what secret influences make arbitraters rule the way they do. Second, I felt some stirrings of distant memory which I was at first unable to identify. When Professor Ryder sent me his

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excellent paper for advance reading, memory returned. I remembered that some 18 years ago at the 1950 Annual Meeting of the Academy, the very question that we are considering today was the subject of a symposium very similar to this one. For those of you who may be somewhat skeptical of my remarkable feat of recalling the agenda of this Academy's proceedings of 18 years ago, I must explain that my ability to do so in this case was due to an odd coincidence, which is probably more meaningful to me than to anyone else. In that discussion of 18 years ago, the gentleman who was asked to speak as the management lawyer—my presumed role here today—was none other than my own venerable senior partner, Jesse Freidin, from whom I learned a great part of whatever it is I know about arbitration.

Indeed, we could say loosely, speaking in an institutional sense, that our firm has been invited to talk to this group on this problem over a period of 18 years. That coincidence suggests to me at least two things:

First, the question is one that very stubbornly claims your attention and, in your minds at least, commands public hearing and discussion.

Second, I have a more or less legitimate excuse for suggesting that the question may be examined in the light of an historical perspective across this span of 18 years.

In that perspective, it seems to me, the source of the arbitrator's problem about which Professor Ryder spoke has remained more or less the same. But, as I understand Professor Ryder's paper, the arbitrator's position in response to that problem, and his concern about it, appear to have shifted somewhat.

The source of the problem, then as now, is that, generally speaking, arbitrators are selected by the contesting parties. If either of the parties doesn't want a particular arbitrator in a particular case because of some decision he has rendered in a prior case, the assignment goes to someone else, and that arbitrator does not get the business. Eighteen years ago, as now, the parties that participated in the process had the right to reject or select an arbitrator on the basis of their evaluation of his performance in prior cases. That right to accept or reject an arbitrator for the next case is the source of the arbitrator's concern about the ac-

ceptability of his award in today's case. If parties were prepared to give up their right to select or reject arbitrators on that basis, that is, if they were willing to designate some outside agency to select the arbitrator in each case, the problem of the impact of acceptability on the arbitrator would largely vanish. But management and labor generally cling to their right to reject the arbitrator for the next case because of what he did in the last case.

Eighteen years ago that power was viewed here as involving a threat to the dignity and job security of the arbitration profession. On that occasion the same subject we are talking about today was discussed under the title: "The Status and Expendability of the Labor Arbitrator." Eighteen years ago, the arbitrator member of the discussion panel was the eminent Mr. David Cole. Concerned for the status of the profession, Mr. Cole saw that the independence and integrity of arbitrators—and indeed the arbitration process itself—were threatened by the parties' insistence on victory in particular cases, their selection of arbitrators on the basis of who was most likely to give them the victories they craved, the blacklisting of arbitrators who had decided against one of them in a prior case, and the emotional cry of "kill the umpire" after some particularly unpopular opinion. And he appealed to the representatives of management and labor to be somewhat more restrained in their shouts to kill the umpire if they were dissatisfied with the results.

I am informed that Mr. Cole's address was very well received by the arbitrators present at your meeting. At all events, he was promptly elected the next president of the National Academy.

Mr. Freidin's reply to Mr. Cole on that occasion was that expendability of arbitrators must continue to be an occupational hazard if arbitration, as we know it, is to survive. He pointed out that the expendability of arbitrators is a necessary part of the parties' right to select or reject arbitrators for particular cases, and he viewed that right as an indispensable part of the whole system of labor-management arbitration.

The commentator for labor on that occasion was Eli Oliver. Mr. Oliver's comment—it seems to me over the span of 18 years —was something of an apology. He explained why there was this zest for victory, and why it was necessary for union representatives

to manifest that zest in the course of arbitration and in their selection of arbitrators. Mr. Oliver pointed out that the labor movement was in business to make advances, and he suggested that unless arbitrators vindicated the union's judgment in agreeing to arbitration in the first place, the arbitration process might not be so frequently used.

As you can see, the focus of attention 18 years ago was how to protect the arbitrator's job security as well as his integrity against the rapacity of the parties who selected him. Today, as Professor Ryder's paper makes clear, the shoe is somewhat on the other foot. The arbitrator is now concerned about how his professional acceptability may affect his decisions. He is concerned, in other words, about the necessity of protecting the parties from the arbitrator.

The fact seems to be that arbitrators remain sensitive to the challenge and the integrity of the arbitral process even though their own security today is apparently better assured than it was in the past. The fact that the Academy is prepared to put this delicate question on today's program is certainly commendable and is a tribute to the sense of candor and ethical values of the men and women who practice this profession.

Let us turn briefly to Professor Ryder's overall assessment that arbitrators have, generally speaking, accepted the reality of expendability as a necessary part of their profession. He states that in most cases the arbitrator manages to withstand the pressures of his acceptability and to make decisions based on the merits of today's case rather than on the need to be accepted as an arbitrator in tomorrow's cases. This is certainly reassuring to me as a management lawyer who has lost his share of cases.

Let me say that, in general, I agree with his assessment, although my judgment is necessarily subjective, based on limited experiences, and I don't know how I could prove to anyone else that he was right in his assessment.

The fact is that there have been arbitrators who sometimes consciously and overtly rendered their decisions to get or retain additional assignments. This, I think, is a consequence of the process of voluntary selection. But that is also one of the dangers

which the selection process itself is designed to avoid. A suspicion that an arbitrator might be tempted to "throw" a case to the other side to keep himself busy would, of course, result in his rejection by the party that thought it was going to lose as a result. In many such cases he would be disqualified on the same basis by the party which might think it was going to win, because the party's judgment in such an instance might be that the arbitrator was not a man to be trusted. And a man who can't be trusted is, of course, frequently not acceptable to either side.

In closing, I must say that I think it important to keep in mind the difference between two kinds of acceptability—an arbitrator's desire to maintain the acceptability of his award to the parties for which he is making that decision, and the arbitrator's desire to remain personally acceptable as an arbitrator for another case. I think many of the things that Professor Ryder described—arbitrators' use of conciliatory language, the mollifying efforts made during the course of the hearing to reassure the party that is going to lose that it is getting fair consideration—these things may be attributed by skeptics to the arbitrator's desire to retain personal acceptability. But I like to think that, in most cases, those efforts are properly made by the arbitrator to maintain the acceptability of the arbitration process itself and to make his award more satisfactory to the parties.

Discussion——

BERNARD KLEIMAN *

I suppose the best way to start is to express the high regard and the sincere respect which the United Steelworkers of America, as an institution, and I personally have for the arbitration profession. I think that the Steelworkers Union has demonstrated this most tangibly by its extensive utilization of arbitration in contract administration. While I have no figures, it is unquestioned, I believe, that the Steelworkers arbitrate far more cases than does any other union. Moreover, we have introduced arbitration into our collective bargaining process by providing contractually that arbitrators shall deal with certain unresolved and

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