CHAPTER VII

THE USES AND MISUSES OF TRIPARTITE BOARDS IN GRIEVANCE ARBITRATION

HAROLD W. DAVEY *

Arbitrators are fond of stating, particularly in academic journals, that the choice of procedures is for the parties to make. On occasion these statements take on a tone of Uriah Heep self-deprecation. Without going to the opposite extreme, it can be said that the customers are *not necessarily right.* It is salutary to recall that professional arbitrators are experts on which procedures work best and which pitfalls should be avoided.

The typical arbitrator eats, sleeps, and breathes arbitration. He is properly concerned about his role in the process. He is also intensely interested in improving the workings of arbitration. It is unfortunate, therefore, that the mechanics and customs of *ad hoc* arbitration usually inhibit meaningful dialogue between the arbitrator and the parties as to how the process can be improved. Most practitioners would properly take a dim view of an *ad hoc* arbitrator who undertook to lecture them on their procedures a few hours after he met them for the first and perhaps the only time. Consequently, most arbitrators, being prudent and thoughtful men, generally keep their views to themselves.

With such constraints in mind, the chance to deliver a formal paper on the uses and misuses of tripartite boards in grievance arbitration offers a rare opportunity to the practicing *ad hoc* ar-

* Member, National Academy of Arbitrators; Professor of Economics, Iowa State University, Ames, Iowa.

bitrator.[1] Although it is a temptation to take advantage of such a distinguished captive audience, I shall attempt to be as brief and fair-minded as possible. The four workshop sessions will, it is hoped, provide adequate First Amendment opportunities for massive retaliation.

Considerations of both scientific probity and professional ethics require full disclosure that I do not have an open mind on the subject at hand. The record discloses, for example, that back in 1955 I was "reasonably certain that in time the tripartite board will become completely vestigial as far as grievance arbitration is concerned." [2] In 1958, I conceded that I might have been "somewhat premature in announcing the death of three-man boards," but persisted in my view that "the use of three-man boards is not consistent with the judicial approach to grievance arbitration." [3]

Today I continue to hold a strong preference for the single arbitrator system in both *ad hoc* and permanent arbitration relationships. The evidence is clear, however, that many practitioners and arbitrators prefer the tripartite board device for grievance arbitration. The issue of single versus tripartite is not one on which any knowledgeable person appears to be neutral. Each procedure has its devotees. The writer has made a conscious effort to discount his biases at appropriate stages in order to present the case for tripartitism in its best possible light.

However, it should be said at the outset that my bias against tripartite boards derives from two fundamental convictions which can be stated in summary fashion:

1. The optimal value from final and binding arbitration as the last step in contract grievance machinery can best be achieved when the parties agree (and the contract so provides) that the *only*

[1] The bibliographical search in preparation for this paper produced one article so superior to the rest that it deserves citation in solitary splendor. This is a December 1954 article in the *Harvard Law Review,* coauthored by Bernard Gold and Helmut F. Furth, at that time third-year editors of the *Review,* who were assisted in field interviewing by other unnamed members of the editorial board. Many of the analytical points developed for the present paper were covered by Gold and Furth in their enterprising survey conducted in the spring, summer and early fall of 1954. See "The Use of Tripartite Boards in Labor, Commercial, and International Arbitration," 68 *Harvard Law Review* 293 (1954), especially pp. 293–314 on labor dispute arbitration.
[2] See Harold W. Davey, "Labor Arbitration: A Current Appraisal," 9 *Industrial and Labor Relations Review* 85 at 87, n. 12 (1955).
[3] See Harold W. Davey, "The Proper Uses of Arbitration," 9 *Labor Law Journal* 119 at 124 (1958).

grievances which may be appealed to the arbitration step are those which raise questions of either contract interpretation or contract application.

2. Neither management nor union representatives should go to arbitration unless they are firmly convinced that the contractual merit of the case in question can be demonstrated in open hearing before a single impartial arbitrator.

The first of these statements reaffirms my unflagging adherence to the judicial school of arbitration.[4]

The second statement embodies the view that the parties are entitled to *only one bite at the apple.* If a party does not have a case that he can present fully and convincingly in open hearing before an experienced and competent professional arbitrator, he does not deserve what amounts to a second chance in the executive session that is customary in tripartite-board arbitration.

If this be naiveté, so be it. Time after time, the rationalization can be heard that the parties are not "really sure" that the arbitrator will comprehend the "true essence" or the "crucial importance" of the case at hand. Therefore, it is urged, an executive session with knowledgeable, expert, partisan board members is mandatory to make certain that the arbitrator appreciates the mystique of a particular case.

If the parties don't have a case that can be developed properly in open hearing and understood by a competent and experienced impartial arbitrator, they have no business being in arbitration. They should have granted, adjusted, or dropped the grievance, as the case may be, prior to the ultimate step of final and binding arbitration.

By now, we should be sophisticated enough to eliminate most (if not all) of the so-called "face-saving" cases. We should also have

[4] For a full exposition of my views on why I adhere to the judicial school of arbitration, see Harold W. Davey, "The Arbitrator Views the Agreement," 12 *Labor Law* Journal 1161 (1961); and also, "The Supreme Court and Arbitration: The Musings of an Abitrator," 36 *Notre Dame Lawyer* 138 (1961). The classic statement of the problem-solving-school thesis is that of George W. Taylor, "Effectuating the Labor Contract Through Arbitration," in *The Profession of Labor Arbitration* (Washington: BNA Books, 1957), pp. 20–41. See also William E. Simkin, *Acceptability as a Factor in Arbitration Under an Existing Agreement* (Philadelphia: University of Pennsylvania Press, 1952).

achieved that degree of maturity in contract administration required to eliminate arbitrating cases where "brinksmanship" has been unsuccessfully attempted.

Recent Empirical Evidence as to Prevalence of Tripartite Boards in Grievance Arbitration

Morris Myers, general counsel for the Federal Mediation & Conciliation Service, advises that for fiscal 1967 (including a total of 1,977 awards), over 93 percent (1,841 awards) were awards by single arbitrators, whereas slightly less than 7 percent (136 awards) were by tripartite boards.[5] For fiscal 1966, the percentages were roughly the same.

Joseph S. Murphy, vice president of the American Arbitration Association, analyzed a "sampling" of 500 awards in AAA grievance arbitration cases in calendar 1967. His findings are remarkably close to the FMCS experience. Murphy reports that 6 percent of the contracts involved in the 500 cases provided for tripartite boards. However, the board mechanism was waived in 26.6 percent of these cases. Thus, the actual usage of tripartite boards constituted about 4.4 percent of the 500 awards covered in Murphy's 1967 survey.[6]

Possibly a somewhat higher percentage of contracts in the FMCS area call for the tripartite mechanism than may be reflected in Mr. Myers' figures. My own practice, for example, is not to check the tripartite box on the FMCS case report form where the parties provide for a board in their contract but have waived its use at the hearing and stipulated that only the impartial arbitrator's name shall appear on the decision.

FMCS and AAA data would indicate that tripartite boards are of negligible quantitative importance. However, it must be remembered that most cases in which the arbitration panel facilities of these agencies are called upon involve *ad hoc* arbitration where there would be a high incidence of single arbitrator usage.

---

[5] Personal communication from Morris L. Myers, general counsel, Federal Mediation & Conciliation Service, November 13, 1967.

[6] Personal communication from Joseph S. Murphy, vice president, American Arbitration Association, November 21, 1967.

In June 1966, the Bureau of Labor Statistics published an analysis of arbitration provisions in 1961–62 contracts.[7] The study included virtually all agreements covering 1,000 or more workers, excluding railroad, airline, and government-worker contracts. For those who enjoy detail, a careful study of Table 5 is recommended. Here we present only overall figures. Arbitration provisions in 1,609 contracts covering 7,172,100 workers are broken down in various ways. Of this total, more than half the contracts (858) provided for arbitration by a single impartial arbitrator. Over two fifths of the contracts (670) provided for arbitration by tripartite boards.

I was particularly intrigued by the finding that in 42 of the contracts, the parties gave themselves the option of using either a single arbitrator or a board. In 26 contracts, provision was made for the use of a single arbitrator on certain issues and a board on others. The remaining 13 contracts did not specify the type of agency or provided for local-plant negotiations, whatever that may mean.

The same BLS survey shows a slight increase in *ad hoc* over permanent arbitration arrangements since the previous survey of 1952 contracts.[8] It also indicates a perceptible decline since 1952 in the use of tripartite boards compared with the use of single arbitrators in both *ad hoc* and permanent arbitration systems. The comparative figures are shown in the following table: [9]

Type of arbitration agency	*Percentage of contracts* *1961-62*	*1952*
Ad hoc	85	80
Single arbitrator	42	30
Tripartite board	39	46
Single or board	4	4
Permanent	14	17
Single arbitrator	11	12
Tripartite board	3	5
Other	1	3

[7] Rose T. Selby, *Arbitration Procedures,* Bureau of Labor Statistics Bulletin No. 1425–6 (Washington: U.S. Government Printing Office, 1966).
[8] See "Arbitration Provisions in Collective Agreements, 1952," 76 *Monthly Labor Review* 261 (1953).
[9] BLS Bulletin No. 1425–6 (1966), *op. cit.,* at 36.

The discrepancy is significant between the BLS figure of about 40 per cent and the 6 or 7 percent incidence in the data just cited from FMCS and AAA relating to 1966 and 1967 cases. I submit that the difference supports a conclusion that there has been a still further decline since 1961-62 not only in the actual usage of the tripartite mechanism but also in the specification of tripartitism in collective agreements.

One further observation may be warranted by the differences between the data shown in the BLS study and the 1966-67 figures of Myers and Murphy. The BLS survey covered only contracts involving bargaining units of 1,000 or more workers. The FMCS and AAA data, however, cover all awards for the time periods specified without regard to size of bargaining units. We may thus confidently assume that these data include a considerable number of comparatively small units.

It is reasonable to hypothesize that tripartitism is found less often in "small" relationships than in those involving larger bargaining units. It seems highly unlikely that Company X and Union Y with a bargaining unit of 50 to 100 employees are going to incur the trouble and expense of a tripartite board in arbitration. In the overwhelming majority of arbitration cases involving small bargaining units, the arbitration is likely to be *ad hoc,* conducted by a single impartial arbitrator rather than by a tripartite board. My research on the labor relations problems of small firms confirms this generalization.[10]

In the course of recent interviewing on other aspects of the arbitration process,[11] it was possible to inject some questions as to the uses and misuses of tripartite boards in grievance arbitration. Preliminary interviews with some of my Academy colleagues

[10] See Harold W. Davey, "Labor Relations Problems of Small Firms and Their Solution," *Studies in the Factor Markets for Small Business Firms* (Ames: Iowa State University, 1964), pp. 199–222.

[11] My current research on arbitration concerns three distinct problem areas in arbitration: 1) a labor-market study of the demand for and supply of competent, experienced, and acceptable arbitrators; 2) analysis of how grievance arbitration procedures can be "restructured" to make more effective use of a presumed limited supply of competent professional arbitrators; 3) a study of how professional arbitrators decide cases, including both the mechanics and the philosophy of the decision-making process in grievance arbitration. Interviews with management and union practitioners deal with the first two subjects, whereas arbitrators only are being interviewed on the third.

have confirmed my initial hunch that the great majority of experienced professional arbitrators prefer the single-impartial-arbitrator approach to that of the tripartite-board procedure in grievance arbitration. This is, admittedly, a subjective conclusion at this point. It is based on a limited number of interviews, on some recent correspondence, and on personal knowledge of the arbitration philosophy of many arbitrators who have not yet been interviewed. I can also add that many, though not all, of the management and union practitioners interviewed to date share the arbitrators' preferences.

The assumption is made from here on that majority preferences are neither persuasive nor controlling. This is in recognition of the hallowed proposition that the current minority viewpoint may prove to be correct and ultimately prevail. It appears unlikely at this juncture that tripartite grievance arbitration will emerge triumphant over the single-arbitrator method as the preferred procedure. Nevertheless, the possibility of such an eventuality must be conceded.

Origins of Tripartitism in Grievance Arbitration

A look at the origins of tripartitism may shed some light on why the single-arbitrator method is regarded as unpalatable by the doughty band of practitioners and arbitrators who prefer the tripartite board procedure.

The late Professor Witte's research [12] reminds us that the term "arbitration" originally was regarded as virtually a synonym for the terms "negotiation" and "conciliation." This may be a bit difficult for the younger Academy members and practitioners to understand. However, Witte's carefully documented essay confirms that this was the case from the late nineteenth century into the early years of the present century.

As first used, the term "arbitration" was applied to *any* effort by management and union to resolve a labor dispute by methods other than economic force. Thus, the term first embraced *both* peaceful negotiation with no outside intervention *and* what we now call either conciliation or mediation by a third party. Further-

[12] Edwin E. Witte, *Historical Survey of Labor Arbitration* (Philadelphia: University of Pennsylvania Press, 1952).

more, labor disputes (where the term was applied) were usually over union recognition or over future contract terms. Some also related to what today would properly be called *legislative* changes in an existing contract, e.g., adjustment of piece rates to changing conditions. Thus, it was natural in this early period to think of dispute settlement in a tripartite frame of reference, partly because of the legislative nature of the issues involved and partly because the concept of final and binding decisions by outside parties had not yet emerged.

Even the staunchest contemporary opponents of tripartitism concede that the device has genuine utility in peacefully resolving future-terms disputes. Nearly all members of the National War Labor Board "alumni association" subscribe to the viewpoint that the Board's tripartite composition was an indispensable element in its operational success, both as a dispute-settling and as a wage-stabilizing agency.[13]

However, even before World War II a sharp distinction began to be drawn between labor disputes of a legislative nature (future-terms cases) and those arising out of an existing collective bargaining agreement where the function of dispute adjustment came to be regarded as judicial in nature.

Academic-journal battle lines quickly formed between those who conceived of grievance arbitration as a judicial function and those who regarded it as an extension of the collective bargaining process.[14] Participants tended to oversimplify and to exaggerate

[13] Robert G. Dixon, "Tripartitism in the National War Labor Board," 2 *Industrial and Labor Relations Review* 372 (1949).

[14] References here could double the length of the paper. For representative examples, see the articles cited in note 4, *supra*. The "classic" reference, ironically relied on by both devotees of the judicial school and the problem-solving school, is the excellent paper by the late Harry Shulman, originally published as "Reason, Contract, and Law in Labor Relations," 68 *Harvard Law Review* 999 (1955) (another irony since Shulman was dean of Yale Law School at the time), and reprinted in *Management Rights and the Arbitration Process* (Washington: BNA Books, 1956), pp. 169–198. It is not surprising that Shulman was quoted by exponents of *both* the judicial and the problem-solving schools of arbitration because Shulman was a past master of both the judicial and the problem-solving approaches. It would be tempting to quote here something from Shulman's perceptive essay that would fit the judicial school as such but I shall restrain myself. It is enough to state that there is no arbitrator or practitioner today who could not profit enormously from reading and thinking through the valuable insights in the Shulman valedictory. It would be presumptuous to try to characterize the special chemistry of Harry Shulman in a footnote. He was *sui generis*.

the presumed gulf between the two schools of thought. The argument over the utility of tripartite boards in grievance arbitration became one aspect of this broader academic argument between the problem-solving or Taylor school and those of the judicial school. In general, the judicial school favored single arbitrators while the problem solvers tended to favor tripartite boards for both grievance arbitration and future-terms cases. The controversy cannot be ignored since it has a bearing on how the parties use the tripartite device in grievance arbitration. In addition, the assumptions and criteria held by anyone who evaluates the effectiveness of tripartitism consciously or unconsciously conditions his appraisal of the system.

The early use of tripartite boards as the device for final and binding decision of grievances arising under existing contracts is entirely understandable since most parties were first introduced to the concept of binding arbitration as the last step in the grievance procedure by directive order of the National War Labor Board during World War II. It was standard practice for the Board to write an arbitration clause into contracts. The tripartite device was natural and familiar to the parties who had been dealing for some years with regional panels, regional boards, and the national board, all of which were tripartite in structure.

During World War II, management and union representatives were too fully occupied with other and more pressing concerns to develop a full-blooded theory of optimal grievance-arbitration procedure. It was not long, however, before experience began to have an impact on the thinking of many practitioners. Perhaps the rash of journal articles also had some influence.

In many relationships the pendulum swung away from tripartite boards in favor of single arbitrators on an *ad hoc* basis, or toward single arbitrators designated in contracts as impartial chairmen, as umpires, or as permanent arbitrators. The illuminating paper by

No one else in this distinguished profession was as perceptive and adept at knowing when to mediate and when to function judicially. Most of us who have been around any length of time and who are serious about the profession know our abilities *and our limitations.* This may be one of the more important reasons why most of us adhere to the judicial school, *but it is not the only reason.* The Ford-UAW umpireship in the early years would have had to invent a Harry Shulman if the real Harry Shulman had not been available. In more recent years, however, if Shulman had been the permanent arbitrator I strongly suspect he would have followed the judicial approach of the Academy's distinguished past president, Harry Platt.

Charles Killingsworth and Saul Wallen presented at the Academy's 17th annual meeting traced the evolving preference in permanent arbitration systems for the umpire over the impartial chairman.[15] The latter is usually (but not always) associated with a tripartite approach. The permanent umpire or arbitrator usually operates in splendid isolation as a sole decision maker. Today in *ad hoc* arbitration, as FMCS and AAA data show, most cases are heard and decided by single impartial arbitrators. However, there are important sectors where tripartite arbitration continues to flourish.

Current Practice of Tripartite Grievance Arbitration

The railroads and the airlines are important industries with a long history of tripartite grievance arbitration.[16] Each industry has special characteristics and a special history that involve unique uses of the tripartite device. However, the focus of this paper is on *ad hoc* tripartitism of the more conventional, run-of-the-mill variety.

Other industries, *or portions of industries,* that continue to utilize the tripartite mechanism include: (1) public utilities (gas and electric power), (2) communications (telephones), (3) printing, (4) steel, (5) rubber, and (6) municipal transit systems.

A survey of current practice offers the best opportunity to satisfy my debt to the distinguished chairman of this year's program committee and his associates. Professor Wagner and his committee posed nine questions to me which cover most of the problems inherent in the use of tripartite boards.

Question 1: Do party-appointed board members ever present the case for the party?

Answer: Regrettably, in some cases they do. I used the word "regrettably" to make my bias clear. If the tripartite board mecha-

[15] Charles C. Killingsworth and Saul Wallen, "Constraint and Variety in Arbitration Systems," in *Labor Arbitration: Perspectives and Problems* (Washington: BNA Books, 1964), pp. 56–81.

[16] I have profited greatly from reading a recent study of labor relations on the airlines that includes a penetrating analysis of grievance and and arbitration procedures. See John M. Baitsell, *Airline Industrial Relations: Pilots and Flight Engineers* (Boston: Harvard Graduate School of Business Administration, 1966), *passim,* but particularly pp. 281–316.

nism is to be used, it strikes me as obvious that the company-designated and union-designated members of the board of arbitration should not also be the individuals who present the case at the formal hearing. In my own experience I have fortunately not encountered the doubling practice except where it was also stipulated that the third man should act as though he were, in fact, the sole arbitrator.

Question 2: Do board members participate in the hearing?

Answer: Sometimes they do and sometimes they don't. In my judgment, the third man should always invite the partisan board members to ask questions at their own discretion during the hearing. I see no value in their sitting at the head of the table like wooden Indians. This viewpoint is conditioned by a more basic one relating to the performance of the consultative function by partisan board members. Of couse, it is not good practice for the board chairman to permit the partisan board members to "take over" the hearing. An arbitration hearing, whether conducted by a single arbitrator or by a tripartite board, can have only one presiding officer.

Question 3: Do board members serve as advocates or as neutrals?

Answer: Again, the answer must be mixed. In *some* relationships, the company-designated and union-designated arbitrators attempt to function in a detached fashion. In most cases, however, the designated members of the board are expected to support and urge the position of the company and the union which appointed them. *How the designated arbitrators should function or how they should regard their roles is basic to the tripartite-board versus single-arbitrator question.* In my view, optimal use of tripartite boards requires that designated board members serve as consultants to the board chairman. They should not be expected to be neutral in the same way or to the same degree as the impartial board chairman.

The primary goal of a partisan board member should be to assure that the board chairman has a full and complete understanding of the pertinent evidence and arguments of his designating party. It is, of course, also the chairman's responsibility to inform himself fully and to achieve complete understanding of the relevant testimony, evidence, and argumentation in relation

to the arbitrable issue. In so doing, the chairman can be helped considerably if the designated board members function intelligently during executive session. This is particularly important if the hearing has been lengthy and involves complex or technical matters. If the partisan members of the arbitration board are knowledgeable and experienced, they can be of real service to their respective designating parties and the chairman. They can synthesize and highlight the pertinent evidence. They may even review for the final time the arguments that they believe should be persuasive.

These remarks are predicated on the assumption that the case at hand is to be decided by a majority vote, rather than mediated. If the tripartite board is expected to mediate a solution, the performance of both the chairman and the designated board members will take a different form. I leave decisions on how to function in this frame of reference to those who prefer this approach. My experience with this method has been nonexistent as far as grievance arbitration is concerned.

Question 4: How and when are executive sessions held?

Answer: Again, the practice appears to vary considerably. In some cases, it is possible for the board to meet in executive session directly following the close of the hearing if transcript and post-hearing briefs are not involved. However, even where the record is complete, one or more of the board members may not be able to stay. It is usually necessary to fix another date and place for the executive session. When transcript and briefs are involved, the executive session must be deferred until all board members have studied the record and the chairman has had time to prepare either a full or partial draft of the proposed decision. Under the best of conditions this adds one full month or more to the age of the case. When the three board members are from different cities, the difficulties of arriving at a mutually convenient date and location for the executive session are compounded.

Question 5: Are draft opinions submitted before executive sessions?

Answer: The answer would be "never" so far as my own limited experience is concerned. However, in some relationships it is customary for the chairman to circulate a draft of his decision to the other board members for comment on factual and technical accu-

racy. In many cases such a procedure may avoid the need to convene the board physically. If the board is convened, my view is that discussion should be limited to alleged inaccuracies in the proposed opinion.

Question 6: Do executive sessions result in changes in the awards?

Answer: If this question means changing the actual award from "grievance denied" to "grievance sustained" (or vice versa), I would surmise and hope that this happens rarely. Many tripartite-board chairmen follow a practice of writing only the factual summary and contentions-of-the-parties portions of their opinion. In the executive session, they do not offer the partisan board members a written statement of their proposed decision and their supporting reasoning. Some may indicate verbally how they propose to decide the case and then listen carefully to the subsequent discussion. In still other relationships, it appears to be customary for the proposed decision to be available at the executive session or even mailed to the board members in advance of the session. This procedure can and does work well in some permanent systems, but I would have grave reservations as to its utility or desirability in *ad hoc* cases.

The procedure utilized should normally depend on the expectations and preferences of the parties. However, the chairman should have a firm voice on procedure. My own view is that in *ad hoc* arbitration, the executive session, if requested and held, should be confined to a discussion designed to insure full understanding on the chairman's part but absent the requirement of a complete proposed opinion.

The *ad hoc* chairman should retain discretion as to the conduct of the executive session. Some chairmen may prefer to indicate their proposed rulings. Others may wish to use the executive session solely for clarification purposes and keep their own counsel as to how they intend to rule on the case. In a permanent arbitration board relationship, fuller utilization of the executive session is doubtless more appropriate and desirable. The nature and limits of the uses of the executive session will be largely determined by whether the parties prefer a judicial or a problem-solving approach to decision making.

Question 7: Do executive sessions change the language of an award and thereby improve or dilute it?

Answer: It would seem logical to surmise that one of the values of an executive session might be to sharpen up the language of the proposed *opinion* or to correct factual misstatements that may have been spotted by one or another partisan board member. The question, as framed, speaks of changing the language of an *award.* If taken literally, I would say that instances where the language of an *award as such* is changed, for better or worse, are comparatively rare. I should certainly hope so. Furthermore, most experienced arbitrators are sparing in the words they use for the award. There isn't much language to improve or to dilute in an award.

I presume, therefore, that Professor Wagner and his associates are asking about changes in the wording of an opinion, and that is another matter. There is probably no arbitrator, experienced or inexperienced, who could not improve his literary creation by one or more draft revision, or as a result of constructive suggestions made by the partisan board members. Parties have a right to an opinion that clearly explains the arbitrator's rationale for his ruling. They also have a right to be protected from dicta and from baroque literary effulgences that may confuse rather than clarify.

Question 8: Does the use of the tripartite system lengthen the time of the arbitration proceeding?

Answer: It is heart-warming to have at least one question that can be answered confidently. The answer is unqualifiedly in the affirmative. If the executive session was held right after the hearing closes, the time span between the hearing and the issuance of the decision conceivably would be no greater than in cases with a single arbitrator. It might even take somewhat less time if the record immediately suggested that the grievance should be denied or sustained. However, in the usual situation, the executive session is scheduled for a later time, with or without a draft opinion. The case necessarily becomes more "well-aged" than would normally be true with a single arbitrator. One can envisage a situation where the partisan board members prod the chairman to speed up his decision writing. But on balance, common sense suggests that the use of tripartite boards lengthens the time span between the end of the hearing and the issuance of

the award, and thus the overall length of the arbitration proceeding.

Question 9: Does the tripartite system increase the cost of the arbitration?

Answer: Again common sense suggests that the answer must be in the affirmative. Even if the partisan board members are from the staffs of the company and union, their services are not cost-free in a proper accounting sense. Furthermore, as implied in several previous answers, the use of executive sessions adds to the total cost. It is unlikely, however, that use of the tripartite device appreciably increases the cost of the board chairman's services beyond that for a single arbitrator (except, perhaps, for the cost of an executive session held after the formal hearing).

This completes the catechism of nine questions posed by Professor Wagner and his inquiring associates on the program committee. Although we have surveyed some of the problems of actual practice, we are left with the basic question unanswered and perhaps unanswerable in any satisfying sense. *The basic question, to put it bluntly, is whether tripartite boards are worth all the trouble.* Nothwithstanding the writer's visible and acknowledged bias in favor of single arbitrators, both candor and the evidence preclude giving a sweeping negative answer. In a significant number of relationships, the parties continue to believe that tripartite boards *are* worth the trouble. Where this is the joint desire of the parties it would be presumptuous to advise them that they are not maximizing the value of arbitration as a tool of contract administration. One can, however, note that there have been a number of instances in recent years where the tripartite mechanism has been abandoned in favor of the single arbitrator. I can think of no instance where the parties used the single-arbitrator method and subsequently converted to the use of tripartite boards. Perhaps the workshop discussions will uncover specific instances that will put the lie to this sweeping generalization.

I suspect that conversion to a single arbitrator has not taken place in some tripartite systems for one of the following reasons:

1. One party (usually the union) has become disenchanted with the tripartite device, but is not willing to make a serious issue

about changing over when the other party (usually management) continues to display enthusiasm for tripartite boards.

2. Both parties prefer not to disturb the contract provision for tripartite boards, even though they habitually waive its use when they actually arbitrate cases.

Sooner or later, the dissatisfaction of one party with a procedure will become known to the other party. After some period of time, the procedure may be changed to one that is jointly desired and approved. No procedure is likely to generate satisfactory results over time unless *both* parties are convinced that it is the soundest procedure for them.

The second factor noted is disturbing on grounds of both logic and experience. If the tripartite procedure remains in the contract and yet is rarely used, the customary rationalization is that a case *might* come along some day on which one or both parties might prefer to use the board rather than a single arbitrator. One can appreciate such a contingency. At the same time, in order to reflect long-standing practice, the contract needs to be rewritten to provide for a single arbitrator, except in particular cases where a tripartite board can be invoked by mutual agreement or upon the demand of one party or the other. Wherever possible, contractual provisions should be consistent with the practice of the parties. If this suggestion were to be adopted, we would witness a substantial change in the next BLS study, perhaps around 1970. The 1970 study would show a precipitous decline from 1961-62 levels in contracts specifying tripartite boards as such and a corresponding increase in the number of contracts specifying a single arbitrator, with the option of utilizing the tripartite board in particular cases.

The Affirmative Case for Tripartite Boards in Grievance Arbitration

The principal contentions of those who favor the use of tripartite boards in grievance arbitration may be summarized as follows:

1. The tripartite board insures a full understanding of the nature and significance of the testimony, evidence, and argumentation by the outside impartial arbitrator. The executive session

enables the partisan arbitrators to satisfy themselves that the board chairman has no unanswered questions in his own mind as a result of the hearing.

2. The tripartite board procedure makes it more likely that the actual decision in the case will be free of any "bugs" (i.e., inaccurate statements of fact or erroneous interpretation of complex or technical testimony offered at the formal hearing).

3. The executive-session requirement (with or without the stipulation that the impartial arbitrator shall present a proposed decision) precludes the possibility of hasty, ill-conceived, or unworkable decisions that can result from the single-arbitrator procedure.

4. Use of the tripartite board with post-hearing executive sessions provides the ideal milieu for a mediated solution when necessary in arbitrating cases that do not lend themselves to simple decisions. It is also ideally suited to arbitrating cases where the pertinent contract language is intentionally or unintentionally fuzzy, and to grievances relating to matters on which the contract may, in fact, be silent.

5. The executive session insures that the award will be more acceptable, if not more palatable, because the parties know that no relevant bit of testimony or evidence was allowed to escape the third man's attention. The tripartite procedure insures that the written decision will fully reflect the "crucial" considerations in the case and, by the same token, will not include matters that are peripheral to the arbitrable issue.

6. Tripartite decisions, formulated in final form only after executive sessions, can avoid the danger of imperfectly drawn or overwritten opinions that may raise more ghosts than they lay.

7. Finally, and perhaps of greatest importance, the tripartite executive session makes available to the "third man" the expertise of both management and union representatives for consultative and clarifying purposes on technical or complex cases. No matter how knowledgeable and experienced the outside impartial arbitrator may be, he cannot be thoroughly familiar with the nuances of contract language or the subtleties of industrial practice in particular situations that he normally confronts "cold" as an *ad*

hoc single arbitrator. The tripartite-board device thus benefits the parties at interest and also serves as a valuable aid to the impartial arbitrator.

The Case Against Tripartite Boards in Grievance Arbitration

The principal contentions of those who oppose tripartite boards in grievance arbitration may be summarized as follows:

1. The tripartite mechanism is more cumbersome, costly, and time-consuming than the single-arbitrator procedure.

2. The tripartite board does not demonstrably yield any better decision-making than does the single-arbitrator approach. The extra cost and time are not worth it by any *quid pro quo* or cost-benefit standards.

3. The tripartite board is basically inconsistent with the judicial approach to grievance arbitration.

4. Use of tripartite boards may encourage any and all of the following practices or results, none of which is deemed to be consistent with salutary and equitable procedures:

   a. decisions based on or influenced by, directly or indirectly, evidence not introduced during the formal hearing;

   b. increased chances for resort to rigged or consent decisions where the true basis of the decision is not made known to some of those who participated in the formal hearing and who are to be affected by the decision;

   c. increased possibility of poorly prepared or presented cases in formal hearings because of reliance on getting a second time at bat in subsequent executive sessions.

5. Habitual waiving of the tripartite-board contractual requirement speaks eloquently as to its vestigial character. The mechanism is allegedly retained in the contract only for the "rare and unusual" case. However, if such a case arises, the contract can provide that the parties have the option of choosing a board upon joint agreement or upon the demand of one party.

6. The alleged value of the expertise of the partisan board members to the impartial arbitrator is greatly exaggerated. Their

services are not worth the time and expense involved to the parties. A prudent single arbitrator who realizes after the hearing that he has not understood certain testimony can always reconvene the hearing. Or he can issue a statement simultaneously to both parties asking for a joint briefing on complex or technical testimony in executive session. He can even ask for assistance from an independent expert.

7. Finally, use of the tripartite-board system implies inherent lack of confidence in the ability and/or integrity of the single impartial arbitrator. The notion that tripartitism achieves greater acceptability of the decision is a snare and a delusion. Parties should not be arbitrating when they do not believe in the contractual soundness of their position or if they doubt their ability to present their case fully and comprehensively in an open hearing before a qualified impartial arbitrator.

Are the Formal Arguments the True Ones?

Is there a difference between the formal arguments against tripartite boards and the basic reasons that the majority of practicing arbitrators are opposed to them? Some staunch defenders of the tripartite mechanism are bold enough to suggest that the real reason for opposition to tripartite grievance arbitration is the unwillingness of the third man to set forth his decision orally or in writing in a face-to-face encounter with the losing party. Those who advance this argument are, by hypothesis, fearless men. They do not flinch at administering unpleasant decisions personally rather than by mail. Perhaps they even take some pleasure in the task.

A more accurate explanation for opposition to tripartite executive sessions may lie in the unwillingness of third men to be placed in a position where they may be required to defend verbally a decision that may have taken agonizing hours of reflection and study to produce. Many of us are more articulate in writing than we are in speech. Therefore, we frequently take refuge in the familiar disclaimer that the "decision speaks for itself." This is difficult to do, however, in an executive session where the partisan arbitrators have just heard the news and one is smiling contentedly and the other is outraged and also highly articulate. The

problem is compounded by the usual tendency to consider the award first and the opinion second. The "shooting from the hip" begins before there is sufficient time to absorb (and possibly be persuaded by) the third man's reasoning.

Preliminary interviewing of experienced arbitrators as to their procedures in decision-making clearly indicates that arbitrators do not come from one mold. Study techniques, writing methods, and ways of achieving the arbitral hunch in difficult cases vary. Thus, equally experienced, competent, and acceptable arbitrators can and do differ drastically in their procedural approaches to the decision-making function.

How can this knowledge be applied in assessing the merits of the charge that third men lack the courage to announce their decisions on a face-to-face basis? Posing the question suggests the answer. Some arbitrators clearly would not relish the prospect of direct confrontation and the need for instant defense, explanation, and/or argumentation. Other arbitrators are not bothered by such a necessity and may even welcome it. This does not mean that the arbitrators in the first category are deficient in either courage or ability. Nor does it mean that those in the second category are endowed with superior courage and ability. All that can properly be said is that some arbitrators like the process of announcing and discussing their proposed decisions in executive session. Others do not.

The rationale of those arbitrators who do not favor the confrontation approach is not a simple one. It combines reasons relating to their philosophy of arbitration and their personality or temperament characteristics. Most arbitrators who subscribe to the single-arbitrator method and lack enthusiasm for the tripartite device believe that grievance arbitration should be confined strictly to contract-interpretation or -application disputes where the parties have exhausted the possibilities of settlement. They have arrived in arbitration with a mutual understanding that they have *agreed to disagree.* Hearing cases on this basis, the arbitrator should not offer to mediate a solution. Nor should he do more than decide the case in terms of the contract issue as presented. He has a right to assume that the parties do not wish him to

function as an industrial statesman, plugging apparent gaps in the contract wall with arbitral mortar of uncertain quality.[17]

Optimal Use of the Tripartite Mechanism

Many companies and unions that remain wedded to the tripartite device do not appear to make optimal use of the procedure in grievance arbitration. The principal operational shortcomings have already been suggested in previous sections of this paper and need not be repeated. If optimal value is to be obtained, I suggest the following as relevant considerations:

1. The partisan members of the tripartite board should not attempt the impossible by trying to appear to be impartial and nonpartisan either at the hearing or at the executive session. They should admit that they are partisans. However, they should play their roles in a more detached fashion than advocates presenting the case.

2. The third man should regard his board-member colleagues primarily as resource persons to assist him in achieving full comprehension of technical points in the evidence, essential industrial background on the case, etc. He should not regard them as fellow decision-makers. He should never forget that he is the one who must determine ultimately whether the grievance should be sustained or denied under the contract.

3. The partisan board members *can* be used for discussion of a proposed decision, but the chairman should not feel obliged to use them in this fashion. In *ad hoc* tripartite arbitration, discretion as to the nature and scope of the post-hearing executive session should remain with the third man. In a permanent tripartite

[17] For example, I served as a permanent arbitrator under eight contracts involving the John Deere farm equipment company and the UAW for a six-year period, 1952–1958. It was made clear from the outset that both management and the union jointly desired the permanent arbitrator to make the assumption on every case he heard that the parties had already exhausted the possibilities of agreeing on the matter or they would not be before him. Over a six-year period, covering approximately 125 decisions, in no case did the parties know what the decision was until they received it in the mail. There was no discussion of any kind about a pending case with the permanent arbitrator once the hearing had been concluded until the decision had actually been received. For an account of a system of permanent arbitration that was strictly "judicial" by joint agreement of the parties, see Harold W. Davey, "The John Deere-UAW Permanent Arbitration System," in *Critical Issues in Labor Arbitration* (Washington: BNA Books, 1957), pp. 161–192.

arbitration system, the parties will have made clear their joint procedural wishes to the impartial chairman.[18]

4. Partisan board members should be knowledgeable on arbitration procedures as well as technically qualified to discuss the economic and contractual circumstances of the case at hand. Ideally, the partisan arbitrators should be drawn from companies and unions not directly concerned with the case, provided they come from related fields to insure their technical competence as resource aids to the chairman.

5. The tripartite device should be used selectively and sparingly rather than automatically. Its use should be reserved for cases raising complex, technical issues; for cases involving specialized industrial or contractual vocabulary that may be strange or unfamiliar to the third man; and for cases where the contract may provide for final and binding grievance arbitration on what are actually legislative issues rather than contract interpretation disputes (e.g., should the piece price on job X be increased and, if so, by how much?).[19] The tripartite mechanism is an expensive and unnecessary luxury in discharge cases or in cases raising a straight issue of contract interpretation with no dispute on the pertinent facts.

6. Executive sessions should be conducted after the third man has prepared a draft of the decision *up to the point of revealing his*

[18] Sylvester Garrett, a distinguished past president of the Academy with long tripartite-board experience in steel, underlined in spades that much time will be wasted if the partisan arbitrators are "determined primarily to reargue the cases, to berate the arbitrator, or to nit-pick his opinions . . ." Garrett made clear that this had not been *his* experience and went on to observe that "the (impartial) arbitrator must remain in command at all times; his is a leadership role; and that of the parties is consultative only. It is his responsibility to decide, not to haggle and placate." Although Garrett's remarks were made in terms of a tripartite-board permanent setup they are, in my judgment, even more applicable to *ad hoc* tripartite arrangements. See Sylvester Garrett, "Some Potential Uses of the Opinion," *op cit.*, note 15 *supra*, pp. 114–124, at p. 123.

[19] I had a short, unhappy *ad hoc* career in the shoe industry some years ago. Many of the grievances were "legislative" in that the issue was frequently whether the piece price on a particular model or operation should be increased and, if so, by how much. Speaking candidly, these were cases where consultative wisdom, had it been available, would have been helpful to the impartial arbitrator. Operating alone, my decision-making criterion in each case was whether the union had sustained the burden of justifying an increase in the piece price against management's stand that the present price was proper. In most cases I found no convincing proof and denied the grievances. The shoe-arbitration experience is at least one instance where, in my judgment, tripartitism might have been helpful both to the parties and to the third man.

reasoning and decision. This permits the partisan board members to call attention to any factual inaccuracies in the opinion. It also permits them a chance to highlight contractual arguments for his further consideration before he completes the writing of his opinion and award. In short, the objective of an executive session should be to insure accuracy and full understanding on the part of the decision-maker. An executive session should not be an exercise in high-level pressuring.[20] It should afford a last opportunity for partisan board members to persuade the third man, but the line between persuasion on the merits and pressuring should be scrupulously maintained.

7. Nothing of a factual nature that was not presented in the open hearing should be referred to by the partisan board members in executive session. The ethics of arbitration and accepted standards of procedural due process require that discussion in executive sessions be strictly limited to what was offered in open hearing.

8. The values of the tripartite mechanism would be enhanced by encouraging the writing of dissenting opinions. The mere recording of X as concurring and Y as dissenting adds little to the sum total of knowledge. The prospect that a written dissent may be filed provides an added challenge to the impartial board member to write a carefully reasoned majority decision. The practice of written dissents may also increase the responsibility of the partisan board members and may lead to improvement in the quality of appointments in this category.

9. The tripartite board system can work in optimal fashion only where the parties have a clear understanding as to their joint ex-

[20] The most pressure-packed case in my experience involving the use of the tripartite board was one involving Needham Packing Company and UPWA. Notwithstanding the importance of the case and the stakes involved, both parties were in full agreement on the ground rules for the executive session as follows: "The agreed purpose of the executive session was to permit Board members Marshall and Fischer to make such final comments to the chairman as they desired. *No proposed decision was discussed.* The Arbitration Board chairman had indicated at the hearing that he would listen to such comments as the other two Board members wished to make in executive session but would himself refrain from making any remarks concerning the merits of the disputed issues. In its executive session on April 9, 1965, the Arbitration Board agreed that the chairman should make clear at the outset that he is writing the majority opinion and refer to himself thereafter as the chairman to underline this point." (Emphasis added.) See *Needham Packing Co., Inc.,* 44 LA 1057, at 1059 (1966).

pectations from the use of this procedure. The parties should be in full accord on the nature, purposes, limits, and objectives of the tripartite device.

Future Prospects for Tripartite Grievance Arbitration

Predictions are hazardous, particularly in a field as dynamic as labor relations. Mine will therefore be made in the same manner that weathermen forecast the probability of snow or rain. On the basis of both logic and experience (with a slight touch of personal bias thrown in for seasoning), I would say that there is a 10-percent chance that use of tripartite boards in grievance arbitration will increase.

This bearish prediction is based on the following considerations:

1. The BLS survey shows a marked decline in usage between 1952 and 1961-62.

2. The Murphy-Myers data warrant the conclusion that there has been a further decline since 1962.

3. Limited personal interviewing in late 1967 substantiates the trends shown in the quantitative data cited.

4. My *ad hoc* experience since 1944 indicates that, although many contracts provide for the tripartite board, its use is nearly always waived at the outset of the hearing. In the few instances where the parties have indicated their desire to have the board meet in executive session, I have consistently listened to whatever points my board colleagues wished to stress but have kept silent on my proposed decision.[21] In no case did the parties object to such a procedure. Thus, in my experience, use of the tripartite board does not differ materially from the single-arbitrator procedure except for the extra time and expense of the required executive session.

[21] In only one instance did I indicate in tripartite executive session the nature of my award. The case was a discharge where the award called for reinstatement but with no back pay for reasons that required detailed explanation in the opinion that had not been written at the time of the executive session. Security was breached and the substance of the award "leaked" throughout the plant some time ahead of the written version. No horrendous consequences flowed therefrom. However, this experience confirmed my belief that my practice in *ad hoc* tripartite cases, as described in 20, *supra*, is preferable.

5. The limited interviewing supports an initial impression that there are comparatively few instances of *ad hoc* tripartite arbitration that measure up to the standards suggested earlier for optimal use of the mechanism.[22]

These factors suggest the probable continued decline in tripartite grievance arbitration. Yet in typical weatherman fashion I predict that there is at least a 10-percent chance of an increase in its use in the years ahead.

This hedge is based on the possible impact on grievance arbitration procedures of two developments of comparatively recent vintage. One is the rapid and continuing growth of unionism and collective bargaining in the public sector at all levels, federal, state, and local. The other is the growing pressure to abandon the strike as a means of producing agreement in future-terms cases.

Collective bargaining requirements in the public sector may encourage the growth of tripartitism in dispute settlement, not only in future-terms cases but also, perhaps, in grievance arbitration. There is an overwhelming consensus against the use of economic force when government agencies are involved. This puts a premium on responsible negotiation and on more effective mediation. It also suggests that in impasse situations there will be increased use of final and binding arbitration in future-terms cases. The same considerations and pressures that made it essential for the National War Labor Board to be tripartite will operate to make future-terms arbitration tripartite in the public sector.

Considerations of familiarity, if not of logic, may well produce some carry-over effect of tripartitism into grievance arbitration in the public sector. To illustrate, collective bargaining is becoming standard practice between teachers and boards of education in many sections of the United States. A new type of expertise is required for this kind of arbitration. An experienced arbitrator of grievances in industry may well be lost when asked to interpret the phrasing of a contractual provision drawn by parties who are inexperienced in collective bargaining but knowledgeable about the "education industry." Contract clauses may thus look some-

[22] The performance of tripartite boards in permanent arbitration systems doubtless comes closer to optimizing the values of the tripartite device.

what strange and unusual to the industrial arbitrator. Therefore, it may make sense to "flank" the impartial arbitrator with the consultative wisdom of two partisan arbitrators. We can assume that the latter will be knowledgeable about the field of education if not arbitration.

In summary, the special conditions applicable to collective bargaining in the public sector may give added weight to the arguments for tripartitism in contract administration as well as in future-terms cases. It could prove to be an initial answer to the dilemma posed by the unavailability of economic force for dispute settlement *in any context.*

A second basis for a possible resurgence of tripartite grievance arbitration derives from growing recognition of the disutility of the strike in private industry. Mr. I. W. Abel, president of the United Steelworkers of America, has expressed the personal view that the possibility of an advance agreement to arbitrate unresolved issues in the 1968 steel negotiations on a one-shot basis should not be ruled out. Mr. Abel's comment might have been conditioned by the virtual certainty that *any* proposal for arbitrating future-terms issues would be rejected by steel management. In my judgment, his statement is nonetheless highly significant. It recognizes that economic force in many industries has become a luxury that the parties cannot afford if they wish to avoid pervasive governmental controls. Furthermore, it is an open secret that, from the unions' standpoint, technology has virtually eliminated the utility of the strike as an agreement-producing mechanism in such highly mechanized or automated industries as communications, chemicals, and petroleum. In such situations, supervisory personnel can "hold the fort" indefinitely should a strike take place.

If I understand what Mr. Abel seems to be saying it can be paraphrased like this: "If governmentally imposed compulsory arbitration appears to be inevitable, it may be better to relax and enjoy *privately adopted* future-terms arbitration."

Should future-terms arbitration begin to develop in steel or in any other industries, it seems logical to conclude that there might also be some carry-over or spillover effects on contract administration. This would not necessarily follow. However, increased use

of arbitration for future-terms cases might result in a companion growth of new and more flexible contract language. This could produce a joint desire to flank the impartial arbitrator with partisan arbitrators for decision of subsequent grievances arising under such language.

All this is speculative in nature. It does not alter my basic conclusion that the future prospects are not bright for increased usage of tripartite boards in grievance arbitration.

Conclusions

In the final analysis, management and unions must make up their collective minds as to what they hope to achieve through arbitration. Arbitration is an instrument of contract administration. It is not an end in itself. The procedures have no built-in magic of their own. Their effectiveness depends on whether they are suited to achieving the joint expectations of the parties and also, in great part, on the talent and efforts of the practitioners.

To my mind we are brought back inexorably to the crucial question that has dominated academic and pragmatic debate since the end of World War II: Do the parties regard grievance arbitration as an extension of the collective bargaining process or do they regard it as a terminal step for deciding disputes as to the interpretation or application of operating contract provisions?

Those practitioners who regard arbitration as essentially a judicial process will ordinarily utilize the single-impartial-arbitrator procedure. Those practitioners who conceive of arbitration as a means of accommodation or problem solving that may require the decisional approach in some cases and the mediated solution in others will generally prefer to stay with the tripartite mechanism.

If the assumption is made that the tripartite board is to function in the judicial manner, the principal value of the partisan members is the consultative one. If this is so, there is no need to burden *ad hoc* procedures with the formal board mechanism. Consultative benefits can be derived by the single impartial arbitrator through informal post-hearing discussions with the spokesmen for the parties. Clarifying discussions scheduled at the discretion of the

arbitrator are not inconsistent with the judicial approach to decision-making. In his 1964 presidential address to the Academy, Sylvester Garrett noted that when a judge is charged with formulating a decree or order on sensitive or complicated subjects he does not hesitate to call representatives of the parties into chambers for discussion as to what should be included in the decree.[23]

My own experience suggests that such post-hearing discussions for consultative or clarifying purposes are seldom either necessary or desirable. However, whenever an *ad hoc* arbitrator may desire such a session he can accomplish this without the cumbersome device of a formal tripartite board.

[23] Sylvester Garrett, "Some Potential Uses of the Opinion," note 18 *supra*, at p. 123.