CHAPTER III

ADVISORY ARBITRATION OF NEW CONTRACTS: A CASE STUDY

I. AVOIDING CONFRONTATION BY ADVISORY ARBITRATION

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Members of the Establishment, the National Academy of Arbitrators, and Their Guests from the System: You have achieved success, but you are in trouble. Most of the present members of the Academy started out bright-eyed to make a contribution to the age-old struggle of men to live together harmoniously. Now you are at the top of the heap. However, the mass below is churning and exploding. Blacks, youth, and increasing numbers of females in the work force don't give a damn for triumphs of my generation that give them collective bargaining and binding arbitration of grievances. They want to be heard on their complaints that the entire setup is frustrating them and their aspirations.

Many of them favor the solution in the cartoon of either a conciliator or an arbitrator, who tells the parties, "Gentlemen, instead of trying to settle this thing, why don't you just slug it out." In fact, there is an accelerating increase in the numbers of wildcat slowdowns, disruptions, and strikes that many top union leaders do not favor. The current turmoil is spawning innovations by some unions that are upsetting to the traditionalists. One is coordinated bargaining as in the recent General Electric negotiations and strike. Another is the "No Strike Strike" presently being practiced by several unions: (1) The Air Traffic Controllers in large numbers are reporting that they are sick. (2) The printers in New York City hold chapel meetings during working hours at *The New York Times*. (3) Teachers have study days. (4) Scattered, but large, groups of truckers refuse to work without an official strike being called.

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All of this shows the urgent need of new methods—especially for determining the terms of collective bargaining agreements. There have been various suggestions:

1. Legally required binding arbitration and labor courts are a couple. It doesn't strike me that this is the time for a pressure cooker without a safety valve.

2. Another is for the Federal Mediation and Conciliation Service to recommend terms of settlement. I, for one, believe this added function for mediation would dilute and hurt the effective work that is being done now by that service.

3. One more is the public fact-finding board as under the Railway Labor Act. Such boards often have more prestige than prescience and satisfy no one. This fact has been recognized by President Nixon in a recent message to Congress.

I am happy to report that there is a collective bargaining bouillabaisse available that has advantages of arbitration, conciliation, negotiation, and outside recommendations—all tastefully blended. It is advisory arbitration of contract terms which has been extensively tested in a limited area by the wire services, United Press, and Associated Press with the United Telegraph Workers, AFL-CIO. It has been going on for many, many years.

The earliest contract I could find providing for this procedure is one of four pages (Glory Be!) dated July 1, 1923, between United Press and the Telegraphers, who once employed Morse "bugs," but now are basically teletype operators. The pertinent provision reads:

> "In the event of failure to agree upon a new contract on or before June 30, 1924, . . . this Agreement shall continue in full effect for a period of thirty (30) days from July 1, during which time the points in dispute shall be subjected to arbitration.
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> "Arbitrators shall consist of two persons, elected one by the union and one by the United Press. If the two persons thus selected fail to reach an agreement within forty-eight (48) hours, they shall select a third person, the majority to decide the points at issue. . . . The decision of the arbitrators having been announced both parties bind themselves to accept or reject the award within five (5) days of its simultaneous announcement to the union and to the United Press."

With just minor changes in words—not substance—the same clause has continued through the years into a new agreement signed in February 1970.

I've been involved in the United Press-Telegraphers matters since 1946, and advisory arbitration has been a multisplendored thing.

In 1946, United Press suggested making the arbitration award binding. A union representative refused on the eminently logical basis that "it would put us in the position of having to be bound by the arbitrator's decision."

In 1947, the United Press general business manager and chief negotiator told Arbitrator Aaron Horvitz that it was a "screwball clause." In those days it was standard practice to have just one perfunctory negotiation meeting preceding the arbitration. The Horvitz award was turned down by the union by a vote of 185 to 10 and further negotiations were necessary. This too was normal over a period of years. In fact, United Press asked the arbitrators to leave room for further increases in later negotiations.

In 1948, William E. Simkin commented in his decision:

> "The second feature of this case which requires comment is the nature of the arbitration clause and the history of its use in the past. It will be observed first that this is not a final and binding award. Either or both parties can reject it in whole or in part. This gives the award the status of a recommendation rather than a necessary final conclusion of the dispute. In recent years, while conditions have been generally favorable to labor, an arbitration award under this contract has been used by the union as a jumping off place for increased negotiated benefits. . . .
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> "In my considered judgment this award represents the maximum total labor cost increase which the union could rightfully or reasonably expect at this time either by negotiation or arbitration. For this reason, the union representatives and the membership have a moral obligation if not a legal one to accept the award. Acceptance of a fair award is essential to continued good relations. And if arbitration is to serve a useful purpose in the future in this relationship, no attempt should be made to use this award as the jumping off place for larger benefits."

In spite of this eloquent plea, the union membership rejected.

In 1950, William N. Margolis stated:

"In the main, and in past years, as in this year, the negotiations preceding arbitration are permitted to be delimited, and confined by the attitude of the parties that under their contract the so-called arbitration procedure becomes effective if no negotiated agreement is reached within the time limited. After the arbitration award, the parties have an opportunity to accept or reject it. They then generally engage in collective bargaining and intensive negotiations utilizing the arbitrators' award as the basis of their negotiations. . . . This Arbitrator, consistent with the policy adopted by at least one other arbitrator in past years, advised the parties that the award would have to be based on the evidence presented without consideration as to what utilization the parties might thereafter make of it. While these proceedings are called an "arbitration," they are in effect and in the light of the history of prior arbitrations, mere fact-finding with what amounts to recommendations."

Again the union rejected and then called a strike.

In the early 1950s, I managed to stealthily slide my seat up the United Press side of the negotiating table. I was firmly convinced that the advisory arbitration clause should be used differently. We started having vigorous negotiations prior to arbitration which narrowed and spotlighted the issues. A few times we settled without arbitration and we stopped having the awards turned down. Eventually, I became UPI's designee on the three-man board which permitted upon occasion negotiation and conciliation within the sanctuary of executive sessions of the three-man board.

In 1962, Peter Seitz commented in his opinion:

"The accompanying award (and this opinion) are signed only by the Chairman, the other members of the Board having decided to abstain. In the very special circumstances under which these proceedings were held, this is an entirely reasonable and understandable position for them to have taken.

"There are items in that 'package' which neither of the other two members of the Board regards with satisfaction and approval. To ask for their approval or rejection of individual items in the 'package' would be utterly unrealistic. Indeed, to do so would hardly serve to fulfill the purposes and expectations of the contract provisions under which it was constituted and serve no practicable purpose. Accordingly, I wish it to be known that I welcome rather than disapprove of the abstentions from signing by my two associates on the Board. This enables the award to be evalued and assessed as it should be; that is to say, as a whole: as a 'package.' "

The Seitz award was accepted by both parties.

In 1966, Abe Stockman formally became a mediator, as shown by his decision:

> "At various times the formal hearings were recessed for executive session of the Board and such sessions were also held when the hearings were finally concluded. Thereafter, at the suggestions of the Chairman, and with the approval of the parties and the members of the Board, the Chairman undertook to mediate the dispute and to stimulate further negotiations. In response to such mediation, the parties did renew negotiations and submitted their results to the Board.
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> "The Board of Arbitration, having duly heard the parties, and having duly considered their allegations, proofs, arguments, and the results of their negotiations pursuant to the aforesaid mediation efforts, awards as follows: . . . ."

In 1968, Stockman was invited to do a reprise which followed the same format.

In 1970, we settled without arbitration, both parties being worried about the inflation of arbitration costs. The union committee, knowing I was to be stumping here today for advisory arbitration, actually had the unmitigated gall to propose deleting the clause from the contract. However, it's still there.

Essential ingredients for giving advisory arbitration of contract terms a chance to work are:

1. "Noggin-knocking" negotiations, trying to settle without resorting to the arbitration process. Without this element the arbitration is just a preliminary to the main bout.

2. Knowledgeable negotiators as the company and union designees on the Board, which could be larger than three if necessary.

3. An able arbitrator for the "odd man" spot. Preferably he should have had negotiating or mediating experience.

4. Full hearings of the issues, with an opportunity for restless groups such as skilled mechanics, Negroes, or females to have their spokesmen appear and be heard.

5. Having executive meetings regularly following each evidentiary session, during which the negotiators can be prodded toward common ground by the impartial chairman.

6. Use of the executive sessions of the board for mediation of individual items or clauses in dispute. This is particularly

important when an impartial member is formulating the award in order to avoid the chance that he may create problems without realizing it.

I suspect that many of you are so busy now that you wonder why you are being bothered by this idea. There may even be some who are thinking—if binding arbitration isn't good enough, let them fight. History should alert us. The courts lost out to arbitration in labor relations because of stare decises—strict construction—stagnation—senility.

The ferment and the defiance of established institutions such as the courts is evidence that we need to try for new methods if we are to maintain the establishment to which we all belong. Binding arbitration is great, but is totally unacceptable in many situations such as the negotiation of a collective bargaining agreement. Individual and minority rights and freedom of choice are rampant. Advisory arbitration gives an outlet for these forces but still permits an orderly procedure toward understanding with face-saving all around. At the conclusion of deadlocked negotiations, if this option were offered to parties headed for a strike, either genuine or of the "no-no" type, battles might be avoided in many cases. Many of you will soon be there at the brink. When you are, please remember this ploy and give it a try. If it works for you on an ad hoc basis, it might become a part of your contract, as it has long been in the agreement of United Press and the Telegraphers.

In conclusion I submit that this vehicle could be useful in many additional areas of current conflict, such as:

(1) Logjams of grievances preventing a contract or strike settlement.

(2) Public and quasi-public employee problems. Some public officials and boards worry about their legal right to submit to binding arbitration.

(3) Campus confrontations.

(4) Civil rights problems that have not yet reached the EEOC. In fact, in one recent matter the EEOC officer in my home town of Cleveland used this basic technique with the result that the complainants withdrew their charges.