II. WHY ADVISORY ARBITRATION OF NEW CONTRACTS?

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Why advisory arbitration of new contracts, the principal question I am going to discuss, is the one I assume most of you asked when you learned that the United Telegraph Workers, AFL-CIO, and the United Presss International were using it. Why would these parties use this process? Related questions you might have asked include, what is advisory arbitration of new contracts as these parties have practiced it? How have these parties used it, particularly in relation to other collective bargaining art forms? Has it been successful? These are the questions we are discussing, at great risk of being either too general and obvious or too particularized and unuseful, in this extraordinary audience which doubtless brings to this room more labor relations sophistication and expertise per square or even cubic foot than any other place in the world at this time.

The most accurate capsule answer to why these parties utilized the technique of advisory arbitration of new contracts is the relatively obvious one that they wanted for themselves a definite, additional step in the traditional or historic bargaining process. By that I mean collective bargaining between the parties, without any participation by any outsider for any purpose; and if that bargaining does not result in agreement by the contract expiration or other deadline, the parties move directly to self-help, invariably meaning strike. At that point, under the contingency of completion of collective bargaining without reaching an agreement, these parties wanted to introduce a process that might result in an agreement being executed as a result of voluntary action by the parties, a step which would thus have the potential of avoiding an open declaration of economic war.

In the case of the United Telegraph Workers and the United Press International, it is fair and accurate, however unlikely it may fall upon cynical ears, to suggest that a principal motivation was dedication to the public interest. These parties value their product so highly that they desire no interruption or cessation in its transmission to the public, by way of the newspapers and broadcasting stations and channels which are the

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customers of United Press International, unless that interruption or cessation could not be avoided.

What are the characteristics of this additional step as practiced by the parties? To attempt a definition that includes most of the significant characteristics, it is a step in the process of reaching a new collective bargaining agreement which (1) is contractual, (2) occurs after the parties have exhausted their own bargaining, (3) is an arbitration process, (4) is not binding, and (5) may be transformed easily by the parties into some other process.

First, the contractual characteristic emphasizes two qualities of advisory arbitration as these parties have practiced it. It is voluntary, the result of prior agreement. These parties have agreed in advance as to precisely what will occur as the immediate and direct consequence of their failure themselves to agree on a new collective bargaining contract. This is not true of most parties. Most parties, of course, have all sorts of options when the existing contract is about to expire and they have not yet reached agreement. There is no compulsion upon them to resort to self-help at that time if they do not desire to do so. At that time and on an ad hoc basis, they may resort to advisory contract arbitration; they may extend their contract for a specific or indefinite period and continue bargaining; they may call in the federal or state mediation service; they may agree to binding arbitration of all terms of the new contract or of the issues remaining in dispute. They may do a thousand and one things. But these options certainly remain open to these parties also. They, like any other contracting parties, can mutually agree to any bargaining technique at the time. Except for those industries in which legal procedures are imposed, such as in public employment or those governed by the Railway Labor Act, it seems relatively rare that a particular prestrike bargaining procedure is prescribed, as it has been here.

Further, the fact that these parties have definite knowledge of the prestrike step will inevitably affect their calculations and actions, at least in all but the most extreme situations. Throughout their bargaining, they are aware that if they cannot reach agreement, they will have to expose and attempt to defend their ultimate positions to an arbitrator. If this has any effect

on the parties, it must tend toward enhancing the elements of rationality and moderation in their positions. It thus seems likely that the fact that advisory arbitration is forthcoming has in fact served to narrow the differences between the parties in bargaining, to tend to force them to make their assessments and calculations on a more realistic basis, and thus to diminish the danger of an utterly irrational resort to self-help by either side.

Second, these parties have provided for this step after bargaining, certainly intending that it would not substitute for collective bargaining or in any way inhibit or affect the possibilities for their reaching agreement by themselves. I am sure that both parties aim for that result and would prefer it in every contract negotiation. Obviously they and no one else will have to live with whatever contract ultimately emerges. They will better understand the purposes and parameters of their agreement if they themselves reach it. In addition, and this is not least because I mention it last, voluntary agreement is a quicker and cheaper avenue for reaching agreement, since it eliminates the time and expense not only of the arbitration itself but also of the preparation therefor.

While there will of course be overlap between the two processes, the parties' preparation for negotiations is different from their preparation for arbitration. For one thing, and this is not lacking in significance because it is obvious (it may indeed be the most significant single fact in the entire process), the fact that the arbitration comes after the negotiations necessarily means that the parties' positions, and the preparation for presenting them, can be more refined, more precise, and better supported in terms of the facts and the evidence, the position adopted by the other party, and the other realities in the relationship.

Further, preparation for arbitration is different from preparation for negotiations because the process of arbitration is obviously different from the process of negotiation. It is worth remembering that advisory contract arbitration is arbitration. There is an outsider, a neutral, at the head of the table. These parties have provided for tripartite arbitration, no doubt for the same reasons that usually impel parties to have tripartite arbitration, but the impartial chairman of the arbitration board

will inevitably cast the decisive vote. The parties are attempting to persuade him and will address themselves to him rather than to each other. In negotiations, of course, you can only talk to the other party. No outside ears are present.

In advisory arbitration of new contract terms, no less than in any other arbitration, the arbitrator is a decider. At the end of the arbitral road is an award that is supposed to give clear and definite answers, and pervading the arbitral road are the touchstone and the trappings of rationality, with all the conventional assumptions and appearances of law and logic. Both the parties and the arbitrator assume there are objective criteria which are pertinent and helpful. In this relationship, these have been the familiar ones, with the inconsistencies and difficulties which have often been studied and discussed, of the wage rates and practices in the industry and in the industrial community at large, the cost-of-living, ability to pay, and so forth. In wage issues in this relationship, the standard which has been most often used by one party or the other, depending upon which side it would favor, has been the relationship to the wage rates of the Associated Press. Inasmuch as the work classifications and the locations involved are more comparable than any other to the classifications covered by this contract, this factor has a definite attraction for an arbitrator, but both the parties and the arbitrator will employ whatever factors are appropriate to best explain and defend the positions they have already reached in rational legal and logical terms.

While this is an arbitration process, it is not binding arbitration, but advisory arbitration. According to the contract terms, the parties must accept or reject the award within five days. They must have and announce a reaction, and they must do so promptly. There is obvious pressure to accept, imposed by the fact that a neutral trusted and respected by both parties has rendered his judgment. That judgment and the justifications the arbitrator gave for it are now the focus of the parties' consideration. The arbitral opinion and award exist and must be taken into account, either way. They provide a means for the negotiators if they are so minded to persuade their constituents, the members in this democratic union on the one side and the corporate managers on the other, to accept the advisory award. They provide real obstacles to negotiators who may be seek-

ing rejection, for the members or the managers may ask questions and raise issues based upon the award and the opinion and a comparison between where the parties would stand if they accepted as opposed to rejecting the award. Thus, the very process of advisory arbitration generates its own factors for acceptance.

In practice, at least in recent practice, these parties have accepted advisory awards; whether or not they accepted the substantive outcome of the process, they have reached agreement without resorting to self-help in all but one instance. For the contracts reached by acceptance of the award, the net result of this advisory arbitration is identical to that of binding arbitration. What has been awarded has become part of the parties' contract. While it has become incorporated into their contract by the parties' acceptance rather than by operation of law and the award itself, the ultimate practical result is identical to that in binding arbitration.

It is interesting to speculate, although there is no basis other than speculation, whether acceptability by the parties is more of a conscious consideration in advisory than in binding arbitration. I would doubt it, although the very fact that the advisory award is subject to acceptance would suggest that acceptability must be more of a factor in advisory arbitration. But no arbitrator is utterly indifferent to the reaction of the parties to his award, and none worth his salt would change the substance of his decision, as opposed to its semantics, on any such basis. Theoretically, and I both think and hope generally in practice, in both advisory and binding contract arbitration, and equally in both, the arbitrator decides each issue and the contract as a whole on the merits.

It is also interesting to speculate on the impact upon the parties' bargaining of advisory as opposed to binding contract arbitration. At first blush, binding arbitration, because it may not be rejected unilaterally, would seem to impose heavier pressures on the parties to reach agreement voluntarily in order to avoid the imposition of a binding decision from the outside. In the end, however, the conduct of each party is determined by its appraisal of whether it can likely improve its own position in arbitration as compared with the negotiations. While it

might appear that the arbitration award is necessarily less predictable than the final outcome of the negotiations, the situation will vary as the interaction of many, diverse factors, a significant one being the appraisal which a party makes prior to or early in the negotiations. Certainly any party early reaching the conclusion that for this particular contract it will do better in arbitration will, while legally bargaining in good faith, conduct itself in negotiations so as to inhibit agreement and insure arbitration. A party may be all the more encouraged to do this if the arbitration is binding, for the other party has no alternative to acceptance of the award. In advisory arbitration, on the other hand, the fact that both parties know either one may reject the award makes mutual agreement imperative at some time, after the award if not in the negotiations, if self-help is to be avoided; thus agreement in negotiations may be promoted.

There is, of course, no way of knowing whether any particular negotiation between these parties would have proceeded or culminated differently, and if so how differently, had they provided either for binding arbitration, on the one hand, or for no arbitration instead of remaining with advisory arbitration. Each negotiation is unique, and there have been great variations among negotiations as to the speed and rationality with which the parties have narrowed and composed their initial differences. This also makes comparative judgment hazardous, if not impossible. For the sake of discussion, my own reaction is that for these particular parties, partly but not entirely because of their familiarity with it, advisory arbitration has facilitated and improved the negotiations.

This is partly due to the final characteristic of advisory arbitration as practiced by these parties—that it may be transformed easily into another process. As already noted, in effect advisory is transformed into binding when both parties accept it, as these parties generally have. In addition, there is the alternative followed by the parties in two recent contracts—transforming an advisory arbitration which has already begun into mediation.

Whether to transform arbitration into mediation, and how to do it, raises difficult and delicate decisions for the parties and

for the neutral because of the fundamental differences between arbitration and mediation. Unlike arbitration, the function of mediation is not to decide but to assist the parties in obtaining agreement. The mediation touchstone is unprincipled in the sense that whatever the parties will agree on is good, without regard to any other criterion. References to or reliances upon principles of logic, law, or other, are useful and used, if at all, only as a technique for persuasion of one side or the other. Similarly, the "correct" result, given the pertinent factors and considerations characteristic of the case, which would be decisive in arbitration, are of moment in mediation only as they are of assistance in inducing the parties to modify their positions in order to move closer to agreement.

As a matter of practice and procedure, the most striking contrast between mediation and arbitration is that in mediation ex parte proceedings are very much the order of the day, rather than something which the neutral must avoid or give adequate notice in the interests of adversary proceeding due process. In mediation, furthermore, as any factor which may facilitiate agreement is pertinent, there is no such theoretical limitation to the rational and legal, as in arbitration. In his ex parte dealings with each side, therefore, the mediator may well discuss matters the arbitrator would hardly think of raising—matters probing the bargaining strength of the parties, most prominently including the practical possibilities for and the likely consequences of a strike or lockout or other self-help, and likely including at least some of the internal politics and problems involved on each side.

From the viewpoint of a party, the decision as to whether to engage in mediation when the contract arbitration is progressing involves difficult questions. Some judgments must be made as to the likely outcome of the arbitration if there is no mediation, and also if the mediation is unsuccessful, so that the arbitration has to be resumed. These are manifestly complicated and uncertain appraisals and choices.

In the two cases where these parties have agreed to transform the arbitration into mediation, they have requested the arbitrator to act as mediator. The decision to do this likewise involves delicate and difficult considerations for each party.

After all, the essence of mediation is that each party will confide the strengths and weaknesses and doubts about its case to the mediator, if not with the same candor characteristic of its own internal deliberations, surely with far greater self-exposure and frankness than would ever be characteristic of its presentation in a purely arbitration proceeding. Each party does this on an ex parte basis, relying upon the judgment of the mediator, whom it trusts and respects and who has been selected by mutual choice, in holding the information given him in absolute confidentiality from the other. If the mediation proves successful, both parties are pleased, the proceeding is terminated, and the problem does not arise. But what if the mediation is unsuccessful in resolving the parties' differences? If the parties are then to complete their advisory arbitration, as the contract would call for, they are faced with an arbitrator who has been told much more about their internal deliberations and individual positions than either party would have disclosed in arbitration. Each party has surrendered its formal and rational arbitration posture and exposed additional factors which may or may not be consistent with its arbitral posture. Concessions may well have been laid on the mediation table that would never have been placed on the arbitration table. The concessions proposed in mediation may no longer be legal tender if arbitration is resumed, but the arbitrator obviously knows what they were and what they signal with respect to that party's position. He may seek to strike it from his mind, but it would obviously seem a most difficult thing to do—more difficult by far than not considering proffered evidence which has been excluded. Moreover, even though the arbitrator may be able to isolate the various factors, and certainly can set them down in his decision so that he does not appear to be relying upon what he has heard in mediation, the fact remains that the party which comes out second best in the arbitration may well have the feeling that what he disclosed in mediation contributed to his arbitration defeat.

If the decision is to proceed with mediation, one question is the procedural format. Shall the arbitration proceed? Shall it be suspended? In this relationship, a variety of different procedures have been utilized. While recognizing that they have shifted to mediation, these parties have to some extent con-

tinued in arbitration, in the feeling that this was the most effective and expeditious way of presenting the entire basic position of the parties and the differences between them. Both processes would be going on simultaneously. Scheduling would be spontaneous. The day might be devoted entirely to one process or the other; or it might be divided—adversary arbitration in the morning and ex parte mediation in the afternoon.

Manifestly, the entire process is a fluid one, a progressive one, truly an art form, in which the instinct and feel of the situation is critical on all three sides—company, union, and neutral who has his arbitrator's robe or his mediator's shirtsleeves on or is changing from one costume to the other. While there are obvious difficulties, the fact remains that on both occasions when these parties attempted it, the arbitration-mediation process was successful in securing agreement.

It is likely that the fact that the mediator is still arbitrator and may yet render an award operates to facilitate agreement. The pretrial judge is helpful in inducing settlements because he is a judge, in addition to the intrinsic merit of his analysis of and reaction to the case. While binding arbitration may also theoretically be transformed into mediation, it somehow seems less likely than in the advisory arbitration process where the parties' contract has elected against binding arbitration and opted for a more voluntary and flexible format. In practice, one of the advantages of advisory arbitration of new contract terms to these parties has been its transformability into other processes leading to agreement.

Finally, the question whether advisory contract arbitration for these parties has been a success, I would answer in the affirmative. In one sense its very survival is testimony; the parties would not, or at least should not, maintain a technique that has not served them well. In another sense it has been successful in that the parties have accepted awards or otherwise reached agreement with but one exception; to put it another way, there has been only one strike in the history of this relationship. This is one response to the criterion I would apply: whether advisory contract arbitration has assisted the parties in reaching agreement and making their collective bargaining work. I would say it has, not only in the agreements which

have actually been reached via the awards rendered in the process, but also in tending to clarify issues, refine positions, and narrow differences. This step has necessarily imposed on the parties a concern with an outsider's objective, rational view of their positions. That, it seems to me, is a good thing.

While some of the reasons for the success of advisory arbitration with these parties is attributable to the special interests and qualities of these parties, the advantages of its flexibility strongly suggest that its use will grow. We are in a period when collective bargaining is increasingly under attack, and the public interest in the results of bargaining and the consequences of strike are emphasized more and more. Collective bargaining needs to muster all the defenses it can and employ all available techniques to protect and defend itself. Advisory arbitration of new contract terms is surely one technique that has proved its value in the service of free collective bargaining.