CHAPTER IV

VOLUNTARY ARBITRATION OF CONTRACT TERMS

JACK STIEBER *

Contract arbitration, in terms of the number of cases decided, is relatively insignificant in the total picture of labor arbitration in the United States. But numbers cannot be equated with importance. Not only are there fewer opportunities for the parties to consider submitting contract as opposed to grievance disputes to arbitration but, more significant, contract arbitration cases almost invariably are considered more important than grievance cases by the parties, the public, and the arbitrator. The reasons for this should be fairly obvious and, in any event, will be discussed later in this paper.

Historically, contract arbitration has deeper roots than grievance arbitration in American labor-management relations as we shall see from the brief review of pre-World War II arbitration in the United States which follows. We shall then go on to consider wage arbitration since 1945 and the trend in the incidence of contract arbitration provisions and cases. The attitudes of management and union representatives toward contract arbitration as revealed by a questionnaire survey conducted by the author are analyzed in some detail. This is followed by a discussion of obstacles to arbitration of contract terms and a concluding section on the future of contract arbitration.

Contract Arbitration Before World War II

Arbitration as we know it today—involving the use of an impartial person or a board to render a final and binding decision in labor disputes—dates from about the turn of the twentieth

* Member, National Academy of Arbitrators; Director, School of Labor and Industrial Relations, and Professor, Department of Economics, Michigan State University, East Lansing, Mich.

century. Before 1900 the term arbitration was used to describe negotiations over wages, hours, and working conditions between employers and unions, with or without the assistance of a third party. This terminological problem makes any assessment of the extent of arbitration before 1900 quite unreliable. Even after 1900 statistics and information regarding third-party arbitration are hard to come by and often of dubious reliability.[1]

We do know that in the early twentieth century and up to the 1930s arbitration of wages, hours, and other contract terms was more common than grievance arbitration. One reason for this was simply that a prerequisite for grievance arbitration is the existence of a written agreement and a fairly mature collective bargaining relationship between the parties. Such a relationship did not exist in many industries until the 1930s. In others, where union recognition and collective bargaining have a longer history, the relationship was often unstable, subject to interruption as employers succeeded in breaking away from the union, and lacking in the degree of mutual acceptance necessary for the arbitration of grievance disputes. There are, of course, industries in which grievance arbitration goes back to the early 1900s, but these are exceptions.[2]

Even arbitration to settle a dispute over wages, hours, and working conditions is dependent upon the existence of a union which is strong enough to carry out an effective strike, and employers who stand to lose enough from a stoppage to accede to arbitration by a third party. These conditions were met in a number of industries which resorted in varying degrees to arbitration before World War II. The experience in some of these industries is summarized briefly below.[3]

Coal Mining

Perhaps the most famous arbitration case of all time occurred in 1902 when, after first refusing President Roosevelt's proposal of arbitration, the coal operators bowed to public opinion and agreed to submit to arbitration the issues which had led to a

[1] Edwin E. Witte, *Historical Survey of Labor Arbitration* (Philadelphia: University of Pennsylvania Press, 1952), 3-6.
[2] *Id.*
[3] Based primarily on Witte, *supra* note 1, and *How Collective Bargaining Works* (New York: Twentieth Century Fund, 1922).

bitter strike by anthracite coal miners. The award by the Anthracite Coal Strike Commission ended the seven months' strike and established the first machinery for the arbitration of disputes arising over the interpretation of an agreement. After a period during which the parties succeeded in resolving their differences through negotiation, though not without a number of strikes, they again submitted to contract arbitration in 1920. This time it was the union which at first resisted arbitration and, after the award, called a two-week "vacation strike." John L. Lewis, president of the Mine Workers' Union, charged that "the final decision was changed between twilight and dawn" due to the "operators' well-known policy of keeping close to an arbitrator."[4] This award and a few others in both anthracite and bituminous coal in the postwar years led the miners to eschew arbitration and particularly arbitration under an agreement to arbitrate issues not resolved in negotiations. Such agreements, they claimed, precluded a settlement by collective bargaining, a view still held by many industrial relations practitioners.

Street Railways

The union in this industry has favored arbitration by prior agreement since 1891. In that year a threatened strike of streetcar operators in Detroit was settled by arbitration at the insistence of the mayor. The leader of the Detroit local, who later was elected president of the Amalgamated Association of Street Railway Employees, a position he held for more than 50 years, became a champion of voluntary arbitration.[5] Under his leadership this union followed for many years a policy of including in its contracts provisions for arbitration covering both unresolved grievances and contract renewals. Today it is one of the few unions which still favors agreements containing provisions to arbitrate unresolved contract issues, although these are not as prevalent as they were before World War II.

Newspapers and Book and Job Printing

Arbitration has played an important role in this industry since the turn of the century. At first the agreement between the American Newspaper Publishers Association and the Inter-

[4] *How Collective Bargaining Works*, 53.

[5] R. W. Fleming, *The Labor Arbitration Process* (Urbana: University of Illinois Press, 1965), 3.

national Typographical Union covered only disputes arising during the term of the agreement, but this was soon extended to cover contract reopenings and new agreements. The position of impartial chairman was removed from the local and national tripartite arbitration boards in 1907 because of complaints by some locals that the chairman was "frequently taken from walks of life where he knows little about newspaper management and composing-room conditions." [6] But deadlocks occurred so frequently that in 1911 the impartial chairman was restored. By 1922 almost all contracts contained provisions for arbitration of grievances and new contract terms where they could not be agreed upon by the parties. This practice continued until 1939 when contract arbitration by agreement had diminished considerably, but the practice was so firmly entrenched that the parties usually went to arbitration when conciliation failed. The ITU usually recommended arbitration to its locals, and, through control of strike benefits, put pressure on them to accept arbitration rather than resort to strikes. The mailers, stereotypers, and pressmen's unions also supported arbitration during these years, but the photoengravers and the American Newspaper Guild were much cooler to this method of resolving contract disputes. The Guild, which was not recognized by the publishers, argued that arbitration stabilized existing conditions which at that time were unsatisfactory, that arbitrators were biased in favor of employers, and that the union was not yet secure enough to entrust contractual decisions to outsiders. As for the publishers, a spokesman for the industry remarked in 1939 that "cases now practically never arise in which the employer rejects arbitration." [7]

Arbitration of contract terms was also fairly popular in book and job printing for a time, especially in New York City and Chicago. By 1939, however, only the press assistants in Chicago were committed to contract arbitration, and the trend was definitely away from this method of resolving disputes, principally because of union dissatisfaction with decisions.

[6] *Supra* note 4.
[7] *Id.* at 59.

Men's Clothing

Starting with the Protocol of Peace, largely engineered by Louis D. Brandeis, which ended the great strike in the New York cloak and suit industry in 1910, arbitration was the accepted method of adjusting wage levels in this industry until 1922. Arbitration boards became involved in disputes over contract terms as well as over the interpretation of contractual provisions. Resort to arbitration of wage adjustments in this industry was a sign of immature bargaining. The parties lacked confidence in each other and also were afraid that their constituents—on both sides of the bargaining table—would not support them in making concessions.[8] After 1922 the "emergency clause," empowering the board of arbitration to make adjustments in wages and hours, was dropped from agreements, and adjustment of wage levels was reached through direct negotiation between the union and employers.

Hosiery

The hosiery industry had considerable experience with the arbitration of contract terms in the 1930s. In 1931 the so-called Profits Commission, which had an impartial chairman, had the responsibility of analyzing profits to determine whether wage increases could be granted. The commission made only one report recommending no change in wage rates and was disbanded. In 1933 the union's demand for a 20-percent wage increase led to arbitration by a board set up under the National Recovery Act. Wages were set by arbitration again in 1935, and in 1937 the manufacturers invoked the "flexiblity clause" of the agreement which permitted reopening by either party if there was a significant change in factors affecting wage rates. William Leiserson's award of a 14-percent wage reduction was followed by a four-day strike. By 1942, after a decade of almost complete dependence on arbitration in setting wage rates, the parties were apparently prepared to assume responsibility for making their own agreements, and the national labor agreement between the Full-Fashioned Hosiery Manufacturers of America and the American Federation of Hosiery Workers did not include provision for either voluntary or mandatory arbitration over the terms of a new agreement.

[8] *Id.* at 426.

Railroads

Various government acts from the Erdman Act of 1898 to the Railway Labor Act as amended in 1934 have provided for voluntary arbitration of contract disputes. Until World War II the parties resorted to arbitration frequently, and recommendations by presidential emergency boards, though not final and binding, were generally accepted by both unions and operators. Since World War II the parties have avoided arbitration of contract terms, and emergency board recommendations have frequently been disregarded, especially by the railroad unions.

In contrast to the abundant experience with arbitration over wages and the terms of new agreements in the above industries, a number of others had practically no experience with the use of third parties in resolving contract disputes in the pre-World War II period. This was particularly true of those industries that remained largely unorganized until the advent of the Congress of Industrial Organizations and industrial unionism in the 1930s. These include steel, automobiles, rubber, textiles, and other mass-production industries where the precondition for arbitration—the existence of a strong union capable of carrying out an effective strike—was not present. The construction industry had some experience with contract arbitration during the second decade, but generally the parties in this industry have preferred and succeeded in resolving disputes through bilateral negotiations, although often only after local strikes which shut down the industry for extended periods.

Arbitration of contract terms during the pre-World War II period was essentially wage arbitration, although other issues were occasionally also decided. Irving Bernstein has summarized this experience as follows:

> "Wage arbitration, quite clearly, has not been accepted generally or permanently in American industry. Although its use has grown since the Civil War, the expansion has come in spurts rather than continuously. At times of sharp price change, particularly during and after great wars, unions and management have employed private wage arbitration as a frequent substitute for collective bargaining. In such periods, government, both federal and state, has encouraged or required its use. When prices have been stable, on the other hand, this procedure has won little favor. A few industries, notably urban

transit, printing, garments, shoes, and (in some periods) railroads, have tended to engage in wage arbitration with some regularity over a fairly long period of time." [9]

Wage Arbitration Since 1945

While many arbitration cases involve other issues in addition to wages, few cases do not include wages as one of the issues and usually the most important issue in dispute. The record of wage arbitration since 1945 has been illuminated by two excellent studies: one covering the period 1945-1950 and the other starting after the Korean War and covering the years 1953-1964.[10] Table I shows the distribution of wage cases by year as reported by The Bureau of National Affairs, Inc., (BNA), collated by Bernstein and by Miller, and brought up to date by the author.

Bernstein has estimated that during the period 1945-1950 perhaps one in four arbitration awards in wage disputes was published.[11] This estimate is probably too high for the period since 1950. But even if one assumes that only one in 10 wage awards has been published, there is small risk in concluding that only a fraction of 1 percent of all general wage changes negotiated in peace-time years since 1945 were arrived at through arbitration—certainly an insignificant element in the total picture of wage movements and labor-management relations in the United States.

Yet the interest in voluntary contract arbitration in settling disputes which threaten or actually result in strikes has persisted and is readily understandable. Strikes are costly to both sides and put great strains on union-management relationships. As far as the public is concerned, a peaceful settlement, no matter how arrived at and on what terms, always appears preferable to a strike, at least in the short run. Besides, arbitration appears to be such a reasonable and fair way to resolve disputes, especially when one's own interests are not directly

[9] Irving Bernstein, *Arbitration of Wages* (Los Angeles: University of California Press, 1954), 4.

[10] *Id.* and Richard U. Miller, "Arbitration of New Contract Wage Disputes: Some Recent Trends," 20 *Ind. & Lab. Rel. Rev.* 250-264 (1967).

[11] *Supra* note 9, at 14.

involved. Nevertheless, contract arbitration involving wages has been used in a relatively small number of industries and has actually declined since 1945.

TABLE I

ANNUAL DISTRIBUTION OF REPORTED AWARDS IN WAGE ARBITRATION CASES 1945–1967 [1]

Year	No. of Cases	
1945 (part of year)[2]	3	
1946	64	
1947	61	
1948	40	
1949	29	
1950 (part of year)[3]	12	
Subtotal		209
1953 (part of year)[4]	12	
1954	15	
1955	5	
1956	13	
1957	6	
1958	1	
1959	1	
1960	4	
1961	1	
1962	3	
1963	4	
1964	5	
Subtotal		70
1965	3	
1966	1	
1967	4	
Subtotal		8
Total		287

[1] Source: 1945-1950—Irving Bernstein, *Arbitration of Wages* (Los Angeles: University of California Press, 1954), 20; 1953-1964—Richard U. Miller, "Arbitration of New Contract Wage Disputes: Some Recent Trends," 20 *Ind. & Lab. Rel. Rev.*, 251; 1965-1967—The Bureau of National Affairs, Inc., *Labor Arbitration Reports.*
[2] From V-J Day.
[3] To start of Korean War.
[4] From termination of Korean War Wage Stabilization Board, Feb. 6, 1953.

Both studies of wage arbitration mentioned above found a high concentration of cases in industries affected with a public interest. Bernstein found that close to 60 percent of the cases reported in 1945-1950 were in such industries. Most important

was urban transit with 37 cases or 18 percent of the total, followed by public utilities suppliers (heat, light, power, and water), water transportation and communication, wholesale and retail trade, services, and hotels. The same industries accounted for a significant proportion of the cases in the Miller study covering 1953-1964, although the importance of transit declined while the proportion of cases in manufacturing increased. The manufacturing cases in both studies tended to involve small firms in highly competitive, low-profit industries (*e.g.*, textiles, clothing, leather). On the other hand, such important industries as mining, basic steel, automotive products, rubber, petroleum, and chemicals had no cases reported during this 20-year period. Unions frequently involved in wage arbitration were: Street Railway Workers; Brotherhood of Electrical Workers; Electrical, Radio and Machine Workers; Teamsters; Utility Workers; Retail Clerks; and Printing Pressmen.

From these two studies it would appear that wage arbitration was used most often in industries where the prospects of conducting a successful strike or the ability to resist a strike were curtailed by external forces, such as fear of provoking public antagonism or desire to avoid government intervention, and concern over the economic effects of the interruption of production on the enterprise and its employees. On the other hand, arbitration played no role in wage determination in heavy manufacturing and basic industries in which large oligopolistic firms predominated.

Miller attributes the decreasing use of wage arbitration—which is all the more significant because it occurred at the same time that grievance arbitration was being widely accepted—primarily to changes in the length of the contract period, a decline in reopening clauses on wages, and an increase in automatic adjustments during the term of the contract. To these influences we would add such other factors as the growing complexity of contract issues and the development by both unions and managements of devices to give partial protection against strike losses.

Long-Term Contracts

The duration of collective bargaining agreements has been growing longer. Before World War II one-year contracts were

almost the only kind negotiated, and this tendency continued after the war. In 1951, the Bureau of Labor Statistics reported that 71 percent of all contracts negotiated were for one year and only 2 percent were for as long as three years. By 1961 the proportion of one-year contracts had fallen to 7 percent, while three-year agreements increased to 31 percent.[12] The most recent report by BNA shows that, in 1965, 8 percent of all contracts ran for one year, 40 percent for two years, and 52 percent for three years or longer.[13]

The longer duration of contracts not only reduces the opportunity for contract disputes and arbitration, but it also increases the risks associated with arbitrating new contract terms. An arbitration award that is to endure for two or three years or even longer obviously presents a greater risk than one that will last for only one year. Conversely, the long-term contract not only gives the parties more time to prepare for a strike but also permits amortization of strike losses over a longer period, thus decreasing the likelihood that arbitration will be preferred to a strike.

Decline in Reopening Clauses

For a time during the postwar years, two- and three-year agreements with wage reopeners were common. They were adopted by the Steelworkers and other unions as their response to the UAW improvement factor cum cost-of-living escalator, first included in the 1948 General Motors agreement and extended to the rest of the automobile industry in 1950. After the Korean War, reopening clauses declined in popularity while automatic adjustment provisions increased. BNA reports that the percentage of contracts with reopening clauses on wages fell from 60 percent in 1953 to 28 percent in 1961 and 13 percent in 1965.[14] Only one reopening in seven provided for arbitration, although this method of resolving disputes could of course be used by mutual agreement without a specific provision. Deferred increases, including annual improvement factors and productivity increases, went from 20 percent of all contracts in 1953 to 58 percent in 1961 and 72

[12] Miller, *supra* note 10, at 251.

[13] *Basic Patterns in Union Contracts* (Washington: BNA Books, 1966), 36:1. These figures are based on a different sample than BLS figures and therefore are not directly comparable with those cited earlier.

[14] *Id.* at 36:3.

percent in 1965.[15] The decline in wage reopening clauses not only decreased the opportunities for arbitration but also removed the issue that the parties were most likely to entrust to an impartial outsider. Wage disputes have a long history of arbitration and lend themselves to the use of objective criteria more readily than do other contract issues. Negotiations of entire contracts are much less likely to be resolved in arbitration than contract reopenings on one or a few issues.

Increasing Complexity of Contracts

The increase in duration of contracts, the decline in reopening clauses, and the popularity of automatic adjustments were accompanied by an influx of new and more complicated issues into negotiations. Before the 1950s contracts dealt mainly with wages, hours, seniority, union security, and selected fringe benefits. Pensions and insurance were introduced after the 1948 Supreme Court decision in the *Inland Steel* case holding that pensions were a bargainable issue.[16] There followed supplemental unemployment benefits, shorter workweek provisions, subcontracting, retraining allowances, and a host of other issues that involve long-term cost commitments and do not lend themselves readily to the criteria generally employed in wage arbitration, such as intra- and interindustry comparisons, ability to pay, cost-of-living trends, productivity, substandards, and so forth. Companies are even more reluctant than usual to entrust such far-reaching cost decisions to an arbitrator, and unions recognize that breakthroughs on pioneering issues are rarely made through arbitration. In 1951, when contracts were still fairly simple, George Taylor wondered how either party could afford to give an outsider the power to decide "life and death" matters for them.[17] Certainly this question has much more substance today than it did 17 years ago. Another result of the increased complexity of contracts is that, unlike a wage award which can be compensated for by lower increases or no increase at all in subsequent negotiations, the newer benefits once instituted are well nigh irreversible.

[15] *Id.* at 93:3.
[16] 336 U.S. 960, 24 LRRM 2019 (1949).
[17] George Taylor, "The Voluntary Arbitration of Labor Disputes," 49 *Mich. L. Rev.* 787 (1951).

Students of industrial relations have long noted and wondered about the greater acceptance of contract arbitration in Great Britain and some other countries than in the United States. One reason for this may be the greater simplicity of agreements abroad with major emphasis on wages, hours, and basic conditions of employment as compared with the detailed and complex contracts which are found in the United States.

Protection Against Strike Losses

During the last decade some companies have succeeded in reducing losses suffered as a result of strikes, and unions have been able to mitigate the impact of idleness upon their members. Strike insurance protection has served to make companies in a number of industries better able to resist union pressures and to hold out longer against work stoppages.[18] On another level, the tendency of many corporations to diversify their investments and industrial interests (conglomerates) permits them to offset strike losses in some plants by profits in other operations beyond the reach of the union conducting the strike.

On the union side, the existence of strike funds and the payment of strike benefits are much more common and substantial than they were in earlier years. Years ago it was unheard of for a large industrial union to pay benefits from the international's treasury to thousands of workers idled by a strike. Such benefits were reserved for unions in construction, the printing trades, and a few other craft unions which negotiated on a local basis and conducted strikes involving only a few hundred workers at a time. Now the UAW, the Steelworkers, and a few other industrial unions have sizable strike funds and pay strike benefits, which, meager though they are, help to sustain workers during strikes and contribute to prolonging work stoppages. Even more important than strike benefits are the improved economic conditions and labor shortages induced by full employment, which make it possible for workers in some skilled trades and occupations to continue to work at other jobs while striking against their regular employers. To the extent that the employers and workers directly involved in strikes are able to reduce their

[18] John S. Hirsch, Jr., unpublished paper on "Strike Insurance and Collective Bargaining."

losses, the relative risk of arbitration as compared with the cost of a strike is increased, and arbitration becomes less attractive as an alternative to the strike.

Contract Arbitration by Prior Agreement

Unlike grievance arbitration provisions, which have increased steadily since the 1930s, agreements to arbitrate unresolved issues in new or reopened contracts show no similar growth in acceptance by labor and management. A BLS study in 1966 of major collective bargaining agreements in effect in 1961-1962 found that 94 percent provided for final and binding arbitration of unresolved grievances. Earlier BLS surveys had found grievance arbitration provisions in 73 percent of all agreements in 1944, 83 percent in 1949, and 89 percent in 1952.[19] Estimates of pre-World War II grievance arbitration provisions were that only 8 to 10 percent of all agreements provided for arbitration in the 1930s and 62 percent in 1941.[20]

By contrast, less than 2 percent of the 1,717 contracts studied by the BLS in 1966 provided for arbitration of disputes over terms of new contracts, and only 4 percent contained provisions to arbitrate disputes arising out of reopenings on wages or other economic issues during the term of the agreement. Provisions to arbitrate contract issues have held steady at 1 to 2 percent of all major agreements since 1944, but agreement to arbitrate contract reopenings appeared in a smaller proportion of all major agreements in 1966 than in 1950 and 1952 when the BLS reported 10 and 11 percent, respectively, of all agreements containing such clauses.[21] The decline in reopening arbitration clauses undoubtedly reflects a decrease in contracts containing reopening provisions. The 1966 study found 70 agreements, out of nearly 500 that contained provisions for renegotiation of economic issues during the contract term, providing for arbitration if negotiations failed to produce agreement. This represented 14

[19] U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-6, *Arbitration Procedures* (1966).

[20] Fleming, *supra* note 5, at 13.

[21] U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 780, *Arbitration Provisions in Union Agreements 1944*, at 1-13 (1944); James C. Nix, "Arbitration Provisions in Union Agreements in 1949," 70 *Monthly Lab. Rev.* 160-165 (1950); James C. Nix and Ernestine Moore, "Arbitration Provisions in Collective Agreements, 1952," 76 *Monthly Lab. Rev.* 261-266 (1953).

percent of all contracts with reopening provisions which usually ran three to five years. There were no similar figures reported for previous years.

Provisions to arbitrate new contract terms were found in only eight industries, with five accounting for 22 of the 27 clauses: apparel, printing and publishing, local transit, utilities, and construction. The apparel industry was responsible for 26 of the 70 reopening arbitration provisions which were also found to a much more limited extent in services (laundries and hospitals), hotels and restaurants, local transit, and a few other industries. The principal unions negotiating these arbitration provisions were the Amalgamated Clothing Workers, Printing Pressmen, Brotherhood of Electrical Workers, Bricklayers, and the Amalgamated Transit Union.[22]

The 1966 BLS study found 92 agreements—5.4 percent of the total studied—that specifically prohibited or discouraged arbitration of new contract terms and reopenings. This compared with 4 percent prohibiting contract arbitration in 1950. These agreements were distributed among many industries, with the largest number in retail trade, construction, and food and kindred products. Approximately 40 unions were signatories to contracts prohibiting contract arbitration, with six accounting for one third of the contracts: the Teamsters, Machinists, Steelworkers, Iron Workers, Oil and Chemical Workers, and Retail Clerks. Since some industries and unions numbered among their agreements some requiring and others prohibiting contract arbitration, this obviously is a matter which is usually decided at the local rather than the national or industry level. However, there are four unions whose constitutions specifically prohibit contract arbitration provisions: the Newspaper Guild, Stereotypers, Bookbinders, and Electrotypers. In addition, the ITU, which once encouraged arbitration of contract disputes, now permits contract arbitration only with permission from the international. On the other hand, three union constitutions appear to encourage arbitration of contract issues: the Amalgamated Transit Union; Cement, Lime and Gypsum Workers; and Teamsters.[23]

[22] *Supra* note 19, at 101-104.
[23] *Id.* at 113-115.

The foregoing discussion relates entirely to the inclusion in agreements of provisions to arbitrate unresolved contract issues. It tells us nothing about the extent to which prior agreements to arbitrate actually result in arbitration of a new or reopened agreement. We shall see later that some unions and companies with such provisions have never or rarely used them, while others often end up arbitrating contract issues. On the other hand, an unknown number of contract arbitration cases occur as a result of voluntary agreements by the parties in the absence of prior commitments to arbitrate.

There are no reliable statistics regarding the number of contract arbitration awards rendered in any given year. Both the Federal Mediation and Conciliation Service and the American Arbitration Association, the two major appointing services for parties requesting assistance in naming arbitrators, discount the importance of contract arbitration in recent years. The FMCS reports that in fiscal 1965 arbitrators or arbitration panels appointed under their auspices rendered 24 awards in interest disputes out of a total number of 1,887 awards; in fiscal 1966 there were 22 awards out of 2,441 cases; and in fiscal 1967 only 12 out of 1,977 cases. The three-year average is just under 1 percent of all FMCS cases. [24] The AAA does not furnish statistics, but Vice President Joseph S. Murphy writes:

> "[Arbitration of] disputes involving new or renewed contracts gradually began to lose its 'popularity' after World War II. During the late forties and fifties the Association probably had 5-7 percent of its cases involving new or renewal contract terms, primarily on the subject of wages. Without statistical support for this, I would hazard a guess that only 1 percent of our arbitration cases now involve the interests of the company and the union." [25]

The FMCS and AAA figures are consistent with the evidence in the Bernstein and Miller studies and also with the BLS reports on contract provisions dealing with interest arbitration.

The only other statistical data on the prevalence of contract arbitration are found in surveys conducted by the National Academy of Arbitrators among its members. The latest survey

[24] Letter to author from Morris L. Myers, General Counsel, FMCS, Aug. 5, 1968.
[25] Letter dated Jan. 31, 1968, and quoted in unpublished paper by Sidney Rosen on "Voluntary Interest Arbitration."

found that Academy members reported that they decided 183 contract cases in calendar year 1964, which was 4.6 percent of all cases they handled. By comparison, contract arbitration represented 3.7 percent of all cases in 1952, 2.3 percent in 1957, and 3.7 percent in 1962. The cases reported by these arbitrators included both those handled under prior agreements to arbitrate and others submitted without such prior commitments. [26] The Academy survey figures are not comparable to those reported by the BLS or the appointing agencies. Academy members, who include almost all arbitrators with considerable experience, probably decide a very high proportion of all contract arbitration cases. Even so, the substantial number of contract cases reported each year, both in absolute terms and as a proportion of all cases, is surprising in view of the other evidence discussed above. It may indicate that there is more arbitration of contract disputes than is generally supposed.

Management and Union Attitudes Toward Arbitration

In order to ascertain the attitudes of union and management representatives toward contract arbitration, we conducted a questionnaire survey of union and management representatives. A description of the survey methodology is given in the appendix following this chapter. Usable replies were received from 237 management and 138 union representatives. Exclusive of union and management attorneys who represent several or many clients, companies responding employed more than 6,000,000 persons and unions had 14,660,000 members. The response rate, not counting questionnaires that were unusable, was 50 percent for management and 46 percent for unions.

The survey asked three basic questions, each having three parts. The first question dealt with grievance arbitration, on the assumption that the parties' experience with this more common type of arbitration might influence their attitudes toward contract arbitration. As it turned out, grievance arbitration was so widespread and the experience with it so satisfactory that it was not useful as a causal factor in determining attitudes toward contract arbitration. The second and third questions sought to

[26] Proceedings of the Eighteenth, Seventeenth, and Twelfth Annual Meetings of the National Academy of Arbitrators; and Selected Papers From the First Seven Annual Meetings, 1948-1954 (Washington: BNA Books, 1965, 1964, 1959, and 1957).

determine the extent of the respondent's experience with contract arbitration since 1955, whether or not he was satisfied or dissatisfied with that experience, and whether he would be willing to consider final and binding arbitration in future contract disputes. There were separate questions dealing with arbitration under a contract provision to arbitrate unresolved issues, called *prior agreement arbitration,* and arbitration agreed to during the course of negotiations as the parties approached a strike deadline, which we shall refer to as *ad hoc arbitration.* (The latter term should not be confused with ad hoc arbitration of grievance disputes which refers to the selection of an arbitrator for a particular case as opposed to the use of a "permanent" arbitrator.) Comments were solicited on each question, and almost every respondent availed himself of this opportunity to expand on his views.

Grievance Arbitration

We know from the 1966 BLS survey that 94 percent of all major agreements covering 1,000 or more workers (exclusive of railroad, airline, and government agreements) contain provisions for final and binding arbitration as the last step in the grievance procedure. Our respondents, including both large and small employers and unions and not excluding railroad, airline, and government, reflect the BLS findings. Ninety-five percent of the management representatives and 96 percent of the union respondents have grievance arbitration provisions either in their agreements or provided by law under the Railway Labor Act. Perhaps more surprising, in view of the frequent criticisms voiced about grievance arbitration, 91 percent of the management and 77 percent of the union spokesmen said their experience had been generally "satisfactory." The other respondents considered their experience "unsatisfactory," both "satisfactory and unsatisfactory," or did not answer this part of the question. Where grievance arbitration did not exist, employers and unions were held about equally responsible for the absence of such a provision.

It is interesting to note that among both management and union respondents, the most dissatisfaction with grievance arbitration was in the transportation and utilities industries. Five out of seven employers and two of the three unions in municipal government generally have grievance arbitration provisions in

their agreements despite the fact that the legal status of final and binding arbitration in government has often been questioned. On the management side, this result was probably influenced by the sizable number of municipalities that did not complete the questionnaire, some of them explaining that they could not participate in the survey because they were not permitted to engage in arbitration. The uncertain status of arbitration in government is further indicated by the fact that the union without arbitration provisions commented that it would like to have them but that municipal employers would not agree to include grievance arbitration without express statutory authority which was usually lacking.

The most common reason given by management for satisfaction with grievance arbitration is that it avoids strikes and insures continuity of operations. There is also a recognition by some companies that arbitration can help get the union "off the hook" and may help solve difficult "political" problems for the union. Some companies see it providing a "safety-valve" for disgruntled employees. One company says that it uses arbitration "not so much to win as to improve productivity." A number of comments were complimentary to the competence, fairness, and impartiality of arbitrators. For some companies the basis for their satisfactory experience is simple: They win most or almost all of their cases. A few companies say that they have never had an arbitration case, and one transit company in a southern city replies, "We have not had a grievance in 22 and one-half years."

Management complaints against arbitration, made both by those generally dissatisfied with the process and also by some who expressed satisfaction, single out such faults as: a tendency for arbitrators to take the "middle road" and to render "split decisions" rather than to give clear-cut awards, which was mentioned most often; insufficient reliance on contract language by arbitrators; prolabor bias; cluttering up the opinion with inadmissible evidence; absence of effective review of decisions which "while not tainted by corruption, fraud, arbitrariness, caprice, or abuse of arbitral authority, are just plain wrong." In the maritime industry there are complaints that arbitration has not solved the problem of "quickie strikes" and that unions ignore arbitrators' awards to return to work with impunity because the

federal courts refuse to issue injunctions due to the Norris-La-Guardia Act. A railroad employer complains that railroad unions progress too many grievances to arbitration because the service is free under the Railway Labor Act.

Despite the large proportion of union representatives who consider grievance arbitration to be generally "satisfactory," their comments indicate much greater reservation than management about some aspects of the arbitration process. Their satisfaction derives from a recognition that grievance arbitration is preferable to the use of economic power, especially on minor issues over which strikes are not practical or are too costly, and drawn-out litigation. A number of comments express satisfaction with the impartiality of arbitrators and the speed of the arbitration process. On the other hand, some union respondents who are dissatisfied and many who are satisfied complain about the delay in receiving decisions and about the cost of arbitration. Others complain about such things as: overly legalistic decisions, use of the arbitration process by employers to harasss unions, incompetence of some arbitrators, management winning too many cases, insufficient acquaintance of arbitrators with the railroad industry, and—balancing a similar employer complaint—a tendency for arbitrators to be promanagement.

Experience With Contract Arbitration

A substantial proportion of respondents in both the management and union groups have had some experience with contract arbitration since 1955. Union representatives have had more experience than management, which is not surprising since each union deals with many companies and, therefore, has more opportunities to arbitrate contract disputes than does any individual company. Table II shows a breakdown of management and union responses by industry.

TABLE II

EXPERIENCE WITH CONTRACT ARBITRATION SINCE 1955

Industry	Total Response	Ad Hoc & Agreement: Satisfactory	Ad Hoc & Agreement: Unsatisfactory	Ad Hoc & Agreement: Both	Ad Hoc Only: Satisfactory	Ad Hoc Only: Unsatisfactory	Ad Hoc Only: N/A[1]	Agreement Only: Satisfactory	Agreement Only: Unsatisfactory	Agreement Only: N/A[1]	Total with Experience: No.	Total with Experience: %	Total without Experience: No.	Total without Experience: %
							Management							
Total	*237*	*13*	*5*	*1*	*18*	*5*	*4*	*12*	*1*	*1*	*60*	*25.3*	*177*	*74.7*
Manufacturing														
Chemicals	17	—	1	—	—	—	1	—	—	—	2	11.8	15	88.2
Electrical Equipment	22	—	—	—	1	1	—	1	—	—	3	13.6	19	86.4
Food & Related Products	12	—	—	—	—	—	—	—	—	—	—	—	12	100.0
Lumber, Furniture & Paper	8	—	—	—	—	—	—	1	—	—	1	12.5	7	87.5
Machinery	17	—	—	—	1	—	1	1	—	—	3	17.6	14	82.4
Fabricated Metals	17	—	—	—	1	—	1	—	—	—	2	11.8	15	88.2
Newspapers	8	3	1	—	1	—	—	2	—	—	7	87.5	1	12.5
Oil	12	—	—	—	—	—	—	—	—	—	—	—	12	100.0
Rubber	4	—	—	—	—	—	—	—	—	—	—	—	4	100.0
Steel	9	—	—	—	—	—	—	—	—	—	—	—	9	100.0
Transportation Equipment	12	—	—	—	—	—	—	—	—	—	—	—	12	100.0
Mining & Misc.	9	—	—	—	1	—	—	—	—	1	2	22.2	7	77.8
Manufacturing Total	*147*	*3*	*2*	—	*5*	*1*	*3*	*5*	—	*1*	*20*	*13.6*	*127*	*86.4*
Construction	*9*	*1*	*1*	—	—	*1*	—	—	—	—	*3*	*33.3*	*6*	*66.7*
Services														
Wholesale & Retail	8	—	1	—	2	—	—	2	—	—	5	62.5	3	37.5
Insurance & Misc.	3	—	1	—	—	—	—	—	—	—	1	33.3	2	66.7

Services Total	*11*	—	*2*	—	*2*	—	—	*2*	—	—	*6*	*54.5*	*5*	*45.5*
Transportation & Utilities														
Trucking	4	1	—	—	1	—	—	—	—	—	2	50.0	2	50.0
Maritime	5	2	—	1	1	—	—	—	—	—	4	80.0	1	20.0
Passenger Transport	14	2	—	—	3	2	—	2	—	—	9	64.3	5	35.7
Urban Transit	11	2	—	—	1	—	1	1	—	—	5	45.5	6	54.5
Utilities	9	—	—	—	1	—	—	1	1	—	3	33.3	6	66.7
Communications	3	—	—	—	—	—	—	—	—	—	—	—	3	100.0
Transportation & Utilities Total	*46*	*7*	—	*1*	*7*	*2*	*1*	*4*	*1*	—	*23*	*50.0*	*23*	*50.0*
Municipal Govt.	*7*	—	—	—	—	—	—	—	—	—	—	—	*7*	*100.0*
Mgmt. Attorneys	*11*	*2*	—	—	*3*	*1*	—	*1*	—	—	*7*	*63.6*	*4*	*36.4*
Anonymous	*6*	—	—	—	*1*	—	—	—	—	—	*1*	*16.7*	*5*	*83.3*
							Union							
Total	*138*	*23*	*5*	*3*	*8*	*8*	*5*	*5*	—	*4*	*61*	*44.2*	*77*	*55.8*
Manufacturing	46	5	1	—	2	—	2	1	—	3	14	30.5	32	69.5
Construction	8	1	—	1	—	1	—	—	—	—	3	37.5	5	62.5
Service	10	1	—	—	1	—	—	—	—	—	2	20.0	8	80.0
Transportation & Utilities	23	5	3	1	2	4	—	—	—	—	15	65.2	8	34.8
Municipal Govt.	3	2	—	—	—	—	—	—	—	—	2	66.7	1	33.3
Union Officer Total	*90*	*14*	*4*	*2*	*5*	*5*	*2*	*1*	—	*3*	*36*	*40.0*	*54*	*60.0*
Union Attorneys	*45*	*9*	*1*	—	*2*	*3*	*3*	*4*	—	*1*	*23*	*51.1*	*22*	*48.9*
Anonymous	*3*	—	—	*1*	*1*	—	—	—	—	—	*2*	*66.7*	*1*	*33.3*

[1] N/A—Respondent did not answer how he felt about prior experience with arbitration.

Among employers, one out of four has had experience with contract arbitration since 1955, as compared with almost one out of every two union spokesmen. In both groups, by far the most experience has been with ad hoc arbitration, although a sizable number have had experience with both ad hoc and prior agreement arbitration. A number of respondents have had contracts containing arbitration provisions that have never been used because agreement was reached by negotiation. Companies and unions in the transportation and utilities industries have had above-average experience with arbitration; 23 of 46 employers and 15 out of 23 unions in this industry group have been involved in one or more contract arbitration cases since 1955 or have had agreements to arbitrate unresolved contract issues. Employers in passenger transportation (railroads and airlines) and urban transit were particularly active in arbitration, as were those engaged in wholesale and retail trade. Manufacturing employers and unions have had less than average experience with arbitration; only 20 out of 147 companies and 14 out of 46 unions reported any experience with contract arbitration since 1955. Employers in the following industries reported no contract arbitration experience: food and related products, oil, rubber, steel, transportation equipment, communications, and municipal government. Both management and union attorneys have had relatively more experience with contract arbitration than their clients, which is to be expected since each attorney represents a number of companies or unions. Most employer and union representatives characterized their experience during this 13-year period as "occasional" or "once or twice" rather than "frequent."

Unions, though more experienced than management with contract arbitration, are less satisfied with the results; one might say they have arbitrated more but enjoyed it less. Thirty-six of the 61 union representatives with arbitration experience (59 percent) considered their experience "satisfactory," compared to 72 percent among management respondents. While ad hoc arbitration experience was more common, it was less often considered "satisfactory" among both groups than was arbitration by prior agreement. Also significant was the fact that employers and unions reporting "frequent" arbitration experience almost invariably considered their experience "satisfactory." The fact

that both union and management respondents with prior agreements to arbitrate also tended to go to arbitration more frequently than those whose experience was on an ad hoc basis may suggest a causal relationship between agreements to arbitrate unresolved issues and failure to reach settlements by negotiation.

An interesting difference appears between company and union respondents in transportation and utilities industries. Companies in this group have had the most experience with arbitration and are also highly satisfied with the process; only three out of 23 considered their experience "unsatisfactory." Unions active in these industries also have had the most experience with contract arbitration but were relatively less satisfied with the process than all union respondents; seven out of 15 rated their experience as "unsatisfactory." This would seem to indicate that unions may agree to arbitrate contract disputes even though they are not happy with their previous arbitration experience, suggesting that the nature of the industry and circumstances may have more to do with parties' agreeing to arbitrate than do their attitudes toward the process of arbitration itself. We shall see further evidence of this in analyzing responses to the question dealing with willingness to consider contract arbitration.

Management satisfaction with contract arbitration experience stems from the following factors: The arbitrator agreed with the company position; a strike was avoided; only a few issues were submitted to arbitration; issues in dispute were carefully drawn and had defined boundaries; the award was in line with negotiated wage rates. Several employers are satisfied with their agreements to arbitrate unresolved issues because they have never had to use them, since settlements were reached through negotiations. This is significant in view of the widespread belief that prior agreement to arbitrate discourages collective bargaining.

Employers expressing dissatisfaction with their contract arbitration experience have the following complaints: compromise decisions; unions going on strike when decision went against them; failure of the arbitrator to take account of the economic effects of his decision on the company; awards above the indus-

try pattern; and the belief that the availability of arbitration has tended to "negate effective collective bargaining."

The avoidance of strike action, especially where the union is in a relatively weak position, is most frequently cited by union representatives as the reason for their satisfaction with contract arbitration. A few simply state that their experience has been "satisfactory" because they achieved their demands or they considered the award "fair" and "impartial." As in the case of management, a substantial number of unions with prior agreements to arbitrate unresolved issues state that they have never had to implement this clause because settlements have been reached through negotiation.

"Unsatisfactory" union experience with contract arbitration is attributed to such reasons as: the expense involved, decisions "down the middle," inability of arbitrators to comprehend problems in the railroad industry, "chilling" effect on collective bargaining, "invariably, the employer wins," arbitration is a "face-saver" which does not satisfy the membership very long. An interesting complaint against arbitration provisions is that once such clauses are negotiated they are difficult to get rid of. One union attorney comments that some arbitrators consider a request to eliminate a provision to arbitrate from subsequent agreements as a reflection on their competence.

A recent decision shows that at least one arbitrator does not share this view. Arbitrator Harry Platt decided that a provision calling for final and binding arbitration of any matters not settled in collective bargaining should not be included in a new contract between the parties. The three employers involved wanted to continue the provision; the union favored eliminating it. Platt concluded that ". . . while a policy of terminal arbitration might be salutary and promotive of industrial peace when adopted voluntarily, it would not necessarily be either if imposed by a third party against the will of either contracting party." [27] Notwithstanding the union attorney's experience, the author believes that Platt's opinion reflects the views of the overwhelming majority of professional arbitrators.

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[27] Los Angeles Newspaper Web Pressmen's Union No. 18 and Pacific Neo-Gravure, California Rotogravure Co., and Alco-Gravure Div. of Public Corp., BNA *Daily Labor Report* No. 164 (Aug. 21, 1968).

Willingness to Consider Contract Arbitration

In view of the relatively infrequent use of contract arbitration, both management and union respondents indicate a surprising willingness to consider contract arbitration as an alternative to taking strike action at the expiration or reopening of agreements (Table III). Forty-two percent of the management representatives and 64 percent of the union representatives report that they would be willing to "consider" final and binding arbitration of contract terms, either on an ad hoc basis when a strike deadline approaches, or by including in their agreement a provision to arbitrate unresolved issues, or both. Ad hoc arbitration is much more popular than arbitration by prior agreement with both groups, 37 union and 25 management respondents saying this is the only kind of arbitration they would consider.

TABLE III

WILLINGNESS TO CONSIDER CONTRACT ARBITRATION

Industry	Total Response	Ad Hoc & Agreement		Ad Hoc Only		Agreement Only		Total Willing		Total Unwilling	
		No.	%	No.	%	No.	%	No.	%	No	%
				Management							
Total	*236*	*66*	*28.0*	*25*	*10.5*	*7*	*3.0*	*98*	*41.5*	*138*	*58.5*
Manufacturing											
Chemicals	17	4	23.5	1	5.9	—	—	5	29.4	12	70.6
Electrical Equip	22	1	4.5	2	9.1	—	—	3	13.6	19	86.4
Food & Related Prod.	12	2	16.7	1	8.3	1	8.3	4	33.3	8	66.7
Lumber, Furniture & Paper	8	1	12.5	2	25.0	—	—	3	37.5	5	62.5
Machinery	16	—	—	2	12.5	1	6.3	3	18.8	13	81.2
Fabricated Metals	17	6	35.3	—	—	—	—	6	35.3	11	64.7
Newspapers	8	7	87.5	—	—	1	12.5	8	100.0	—	—
Oil	12	2	16.7	—	—	—	—	2	16.7	10	83.3
Rubber	4	—	—	—	—	—	—	—	—	4	100.0
Steel	9	6	66.7	—	—	—	—	6	66.7	3	33.3
Transportation Equip.	12	—	—	1	8.3	—	—	1	8.3	11	91.7
Mining & Misc. Mfg.	*9*	*2*	*22.3*	3	33.3	—	—	5	55.6	4	44.4
Manufacturing Total	*146*	*31*	*21.3*	*12*	*8.2*	*3*	*2.0*	*46*	*31.5*	*100*	*68.5*
Construction	*9*	*4*	*44.4*	—	—	—	—	*4*	*44.4*	*5*	*55.6*
Services											
Wholesale & Retail	8	3	37.5	2	25.0	1	12.5	6	75.0	2	25.0

Insurance & Misc.	3	—	—	—	—	1	33.3	1	33.3	2	66.7
Services Total	*11*	*3*	*27.2*	*2*	*18.2*	*2*	*18.2*	*7*	*63.6*	*4*	*36.4*
Transportation & Utilities											
Trucking	4	2	50.0	—	—	—	—	2	50.0	2	50.0
Maritime	5	4	80.0	1	20.0	—	—	5	100.0	—	—
Passenger Transport	14	10	71.4	3	21.4	—	—	13	92.8	1	7.2
Urban Transit	11	5	45.5	—	—	1	9.0	6	54.5	5	45.5
Utilities	9	2	22.2	2	22.2	—	—	4	44.4	5	55.6
Communications	3	—	—	1	33.3	—	—	1	33.3	2	66.7
Transportation & Utilities Total	*46*	*23*	*50.0*	*7*	*15.2*	*1*	*2.2*	*31*	*67.4*	*15*	*32.6*
Municipal Government	*7*	—	—	*2*	*28.6*	*1*	*14.3*	*3*	*42.9*	*4*	*57.1*
Management											
Attorneys	*11*	*5*	*45.5*	*1*	*9.0*	—	—	*6*	*54.5*	*5*	*45.5*
Anonymous	*6*	—	—	*1*	*16.7*	—	—	*1*	*16.7*	*5*	*83.3*
					Union						
Total	*138*	*47*	*34.1*	*37*	*26.8*	*4*	*2.9*	*88*	*63.8*	*50*	*36.2*
Manufacturing	46	11	23.9	14	30.5	—	—	25	54.4	21	45.6
Construction	8	2	25.0	—	—	—	—	2	25.0	6	75.0
Services	10	3	30.0	—	—	—	—	3	30.0	7	70.0
Transportation & Utilities	23	8	34.8	8	34.8	—	—	16	69.6	7	30.4
Municipal Government	3	1	33.3	2	66.7	—	—	3	100.0	—	—
Union Officer											
Total	*90*	*25*	*27.7*	*24*	*26.7*	—	—	*49*	*54.4*	*41*	*45.6*
Union											
Attorneys	*45*	*22*	*48.9*	*12*	*26.7*	*3*	*6.7*	*37*	*82.2*	*8*	*17.8*
Anonymous	*3*	—	—	*1*	*33.3*	*1*	*33.4*	*2*	*66.7*	*1*	*33.3*

These responses indicate a somewhat more favorable attitude toward contract arbitration than did two previous surveys, although the results are not directly comparable because of differences in the wording of questions. In 1951 Edgar Warren and Irving Bernstein found that 31 percent of management and 47 percent of union respondents to a questionnaire survey "favored" voluntary contract arbitration.[28] In 1949 a Twentieth Century Fund study found that 32 percent of management and 57 percent of the union leaders interviewed "favored arbitration in general" in contract negotiations.[29] The Warren-Bernstein question asked, "Should contracts contain provision for voluntary contract arbitration?" while the Twentieth Century Fund question was posited in terms of ad hoc contract arbitration.

Both management and union respondents in our survey are inclined to make their willingness to consider arbitration dependent on certain conditions; union spokesmen tend to do this more than management. In some instances the conditions are so stringent, or so unlikely to be acceptable to the other party, as to rule out contract arbitration for all practical purposes. It may be significant that in both groups there is a greater willingness to consider unconditional arbitration under a contract provision than under ad hoc circumstances.

Both union and management attorneys are much more willing to consider arbitration than their clients—82 percent and 55 percent, respectively. Companies in transportation and utilities, particularly those in passenger transportation and maritime industries, are most willing to consider arbitration. Employers in wholesale and retail trade also express a strong interest in arbitration. Within manufacturing, only newspapers (all eight indicate willingness to consider arbitration) and basic steel (six of nine companies express interest) indicate much sentiment for arbitration. Notably uninterested in arbitration are companies in the electrical equipment, machinery, oil, rubber, and transportation equipment industries. Four of the nine construction companies and three of seven municipal employers indicate willingness to consider contract arbitration.

[28] Edgar Warren and Irving Bernstein, "A Profile of Labor Arbitration," 4 *Ind. & Lab. Rel. Rev.* 200-222 (1951).

[29] W. S. Woytinsky, M. C. Bishop, and T. C. Fichandler, *Labor and Management Look at Collective Bargaining* (New York: Twentieth Century Fund, 1949), 53-69.

Among union respondents, those in transportation and utilities, like their management counterparts, express great willingness to consider arbitration—16 of 23 reporting. All three government unions indicate that they would be willing to arbitrate contract disputes under certain conditions, as do more than half the unions active primarily in manufacturing. Unions in construction and service express the least interest in contract arbitration.

One would expect that the willingness of unions and companies to consider future contract arbitration would depend, at least in part, upon their previous experience. This expectation is borne out to some extent, but there are also some surprising findings in this regard. Table IV shows that, predictably, respondents with satisfactory experience with contract arbitration (including also some who had both satisfactory and unsatisfactory experience and others who did not indicate how they felt about their experience) show a strong inclination to try arbitration in the future—88 percent in both groups. But about two thirds in each group whose previous experience had been "unsatisfactory" also indicate willingness to consider arbitration in the future. Also significant is the response of those who have had no previous experience with contract arbitration; 28 percent of the employer and 48 percent of the union respondents in this category say they would be willing to consider arbitration. In all cases the preference for ad hoc arbitration is stronger than for including provisions in agreements to arbitrate unresolved contract issues.

These responses seem to indicate that companies and unions with previous contract arbitration experience are willing to consider arbitration in the future almost irrespective of whether their experience has been satisfactory or unsatisfactory. This suggests that the nature of the industry, the union involved, and other factors have more influence on willingness to consider arbitration than a party's evaluation of his past experience with the process. The same forces which caused these companies and unions to engage in contract arbitration in the past apparently make them more amenable to arbitration in the future.

The fact that sizable proportions of companies and unions with no arbitration experience since 1955 are willing to consider it may reflect new factors which have come to the fore in re-

TABLE IV

WILLINGNESS TO CONSIDER ARBITRATION ACCORDING TO PRIOR EXPERIENCE

Willing to Consider Arbitration	Prior Experience: Satisfactory or N/A [1] No.	%	Unsatisfactory No.	%	None No.	%	Total No.	%
			Management					
Ad Hoc Only	8	16.3	2	18.2	15	8.5	25	10.5
Prior Agreement Only	3	6.1	1	9.1	3	1.7	7	3.0
Both	32	65.3	4	36.4	30	16.9	66	27.8
Neither	6	12.2	4	36.4	129	72.9	139	58.6
TOTAL	49	100.0	11	100.0	177	100.0	237	100.0
			Union					
Ad Hoc Only	11	22.9	5	38.4	21	27.3	37	26.8
Prior Agreement Only	3	6.3	—	0.0	1	1.3	4	2.9
Both	28	58.3	4	30.8	15	19.5	45	34.1
Neither	6	12.5	4	30.8	40	51.9	50	36.2
TOTAL	48	100.0	13	100.0	77	100.0	138	100.0

[1] N/A—Respondent did not answer how he felt about prior experience with arbitration.

cent years or a willingness to reevaluate their positions. A case in point is the basic steel industry in which both the union and the companies have been traditionally opposed to contract arbitration, but in 1967 they discussed the possibility of submitting unresolved issues to final and binding arbitration in the event of an impasse in the upcoming 1968 negotiations.[30] The Steelworkers' executive board vetoed the idea before negotiations started, but six of nine steel companies responding to our questionnaire said they would be willing to consider contract arbitration in the future. Another example is the construction industry which, at the 1968 annual meeting of the Associated General Contractors, approved a proposal to establish voluntary ar-

[30] BNA *Daily Labor Report* No. 220 (Nov. 13, 1967).

bitration machinery to deal with disputes over contract terms as well as differences over interpretation of agreements. It was reported that preliminary discussions had been held with representatives of several building trades unions.[31] However, responses from construction companies and unions indicate that only a minority of our sample are prepared to consider contract arbitration at this time. Municipal government is still another example of a type of employer, without previous arbitration experience, among whom the seeds of interest in the process have been implanted as a result of recent developments. In all, 48 employers and 37 union representatives with no contract arbitration experience in the last 13 years indicate willingness to consider arbitration in the future.

Previous studies have indicated that small firms tend to participate in wage arbitration more than do large ones and that small employers are more inclined than large employers to favor contract arbitration.[32] We have tabulated responses by size of employer only for manufacturing industries because we did not believe that our sample in other industries contained enough variation in size of firms to draw valid conclusions. Responses seem to indicate that companies with fewer than 5,000 employees have had considerably more experience with contract arbitration since 1955 than have larger firms. However, with respect to willingness to consider arbitration in the future on either an ad hoc or prior agreement basis, there seems to be no significant difference among large and small employers, except for companies with more than 100,000 employees which showed the least interest in contract arbitration.

The interest in contract arbitration is not nearly as strong as the bare statistics appear to indicate. Two out of every three respondents indicating willingness to consider contract arbitration do so only conditionally, and many specifically rule out certain issues from arbitration. Conditional willingness to consider arbitration is much greater among union than among management respondents. Similar reservations among those favoring contract arbitration were also found in the 1949 and 1951 surveys mentioned earlier.

[31] BNA *Daily Labor Report* No. 61 (Mar. 27, 1968).

[32] Bernstein, *supra* note 9, at 17; Miller, *supra* note 10, at 264; Warren and Bernstein, *supra* note 28.

By far the most common condition under which union respondents say they would be willing to consider arbitration is when the union is relatively weak and the likelihood of its conducting a successful strike is slight. In other words, many unions are interested in arbitration only when they see little chance of gaining their demands by use of economic power. To the extent that companies with which these unions bargain are aware of their weakness, it is unlikely that they would agree to arbitrate under such circumstances. Related to these cases are those in which strikes are prohibited by law (*e.g.,* government) or the union needs a "face-saver" to get out of a difficult situation. In a number of cases, willingness to consider arbitration is predicated on the existence of a "national emergency," or is limited to selected industries affected with a public interest, such as public utilities.

Other union responses mention the following conditions under which they would consider arbitration: where the union has a particularly "strong" case on the "facts" or where the "equities" are in its favor; only if a few items (some specified of a "minor" or "peripheral" nature) remain unresolved; in "low-wage" industries or to achieve an already established industry pattern; if the standards to be used by the arbitrator are prescribed and/or the issues clearly defined. Some respondents state that they would have a difficult time getting their memberships to accept arbitration. A few say they cannot set forth conditions in advance, that they would be "pragmatic," or that it would depend on the circumstances at the time, *e.g.,* urgency, nature of the collective bargaining relationship, pressures on the union, issues involved, and so forth. Finally, there are a few frivolous comments, such as: only if the union has complete freedom in selecting the arbitrator; "never is a long time but I can't think of an issue I'd be willing to arbitrate."

Many unions specify issues they would be willing or unwilling to submit to arbitration. No issues are clearly labeled "arbitrable" or "nonarbitrable" by a substantial proportion of the respondents. Thus, some unions say they would arbitrate only wages and money issues, while others state they would never agree to arbitrate these items. Seniority and management rights are also issues that some union leaders would be willing to arbitrate; others would not. Additional issues mentioned as not sub-

ject to arbitration are: incentives, work rules, classifications, subcontracting, automation, union security, safety, manning, basic contractual issues. Contract "language" was often mentioned as arbitrable. While the list of nonarbitrable items is formidable, it must be kept in mind that unions differ on issues to be included in this category and that no respondent specified more than a few.

When the conditions placed upon arbitration are taken together with the issues considered nonarbitrable, the large union response indicating willingness to consider arbitration takes on a rather different perspective.

Respondents unwilling to consider arbitration were also asked to give their reasons. Union respondents most often mentioned that contract arbitration would "damage," "destroy," "discourage," "compromise," or have other negative effects on collective bargaining. This fear is expressed much more frequently with respect to arbitration by prior agreement than to ad hoc arbitration, accounting for the substantial number of respondents who are willing to consider only the latter type of arbitration.

The high value placed on collective bargaining is illustrated by such comments as: Contracts should be settled by bargaining, not arbitration; arbitrators are never able to appreciate fully the situation as well as the parties; the parties should not lose control of the situation; collective bargaining is the "counterpart" of free enterprise; the "emotional content" of collective bargaining is lost in arbitration. Many replies point out that collective bargaining must include the right to strike and that unions should never give up this right.

Other reasons given by unions for opposing arbitration are: the absence of standards to guide arbitrators; lack of familiarity with the industry on the part of arbitrators; the union would never get more from arbitration than from bargaining; employers always fare better than unions in arbitration; arbitration "saps the militancy" of the rank and file and destroys the need for a union; arbitration always favors the weaker side; and the parties can achieve a "more lasting solution" by themselves.

Most employer representatives say they would be unwilling to consider either ad hoc contract arbitration or to include a pro-

vision in their agreements to arbitrate unresolved issues. Like their union counterparts, many believe that contract arbitration cannot coexist with collective bargaining. Also, like many union respondents, a sizable number of management representatives consider arbitration by prior agreement a greater threat to collective bargaining than ad hoc arbitration. These people reason that the parties "can always agree to arbitrate if they cannot settle otherwise" or that they "would rather not be locked in to something like this." One employer put it this way: "A crutch known to be available in advance is worse than deciding to arbitrate after collective bargaining has failed to result in agreement." Another prefers to "reserve the ability to be selective" on the issues to be arbitrated and does not believe that advance agreement to arbitrate would permit this.

About equally important as the deterrent effect on collective bargaining is the view held by many management respondents that to permit an "outsider" to decide contract issues would be an "irresponsible" delegation of management authority and an "abdication" of management responsibility. In the words of one respondent: "We cannot constantly scream to high heaven that our rights to manage are being usurped by the union and out of the other side of our mouths, when we run into a stalemate, run to a third party for the solution." Some include the union as having a joint responsibility with management to reach agreement since they both have to "live with the consequences" while an arbitrator does not.

In addition to not having to live with their decisions, arbitrators are also considered unqualified to decide contract issues by some business executives for the following reasons: not having a "feel for local conditions"; lacking an understanding of company problems, and intimate knowledge of the industry, or the complicated issues involved; the absence of "guidelines" to reach a decision; a tendency toward "compromise" which always favors the union as the party making the "demands." Many employers differentiate between an arbitrator's competence to decide grievance disputes and his ability to arbitrate contract issues, without expressly explaining the basis for the distinction. Several respondents say that unions, unlike companies, are not bound by an arbitrator's decision in a contract dispute, as their members can always refuse to ratify the agreement. Others

express faith in "economic power" and the need to retain the right to strike or lockout to make collective bargaining work. As one employer put it: "The strike threat keeps both parties honest." Another explains his opposition to arbitration quite simply: "We are strong enough to win a strike."

Some employers in municipal government and in government-owned operations (*e.g.*, local transit) say that they cannot consider arbitration because it would represent an unlawful delegation of responsibility for budgetary items which the taxpayers have given only to their elected officeholders. On the other hand, a few transit companies state that they are required by law to submit issues not settled in negotiations to arbitration. It would appear that whatever the legal obligations of elected officials to taxpayers, they are subject to modification by the appropriate legislative authority.

Most employers willing to consider contract arbitration specify certain conditions or rule out various issues, some of which are the following:

Only if agreement has been reached on all but a few issues.

Where arbitration is necessary to resolve a political problem within the union.

Only if the parties can agree on the exact issue to be arbitrated.

If the arbitrator's authority is strictly circumscribed and limits set on the minimum and maximum that he can award.

Provided all maritime unions would submit the same issues to the same arbitration panel.

Where circumstances are unfavorable from the viewpoint of political climate, imports, profitability, political situation in the union, and so on and where compulsory arbitration under government directive might be the alternative, as in steel.

To avoid crisis bargaining.

In time of national emergency or where the national welfare is involved.

Depends on the power structure, where the industry is weak vis-a-vis the union, or where the product is perishable.

A series of disastrous strikes has made arbitration more palatable to management.

As in the case of union respondents, management representatives do not always agree on issues they would be willing or unwilling to arbitrate. "Money items," including wages, and "noneconomic issues" appear on both lists. Almost all companies specify "management rights" or "prerogatives" as nonarbitrable, often without indicating what is included in these terms. Some are more specific, including under "management rights" such issues as manning, subcontracting, operating methods, limitations on productivity, production scheduling, and layoffs. Other issues considered not subject to arbitration by one company or another are a no-strike-no-lockout clause, working practices, union security, classifications, local issues, pensions, insurance and welfare, and "matters of principle." A public employer excludes from arbitration any issue that might result in a deficit to the city.

A comparison with the union list of nonarbitrable issues shows that many items appear on both lists. Again, as in the case of union respondents, each employer specifies only a few items that he would be unwilling to arbitrate. In order for arbitration to be a viable alternative, the parties in a particular dispute must of course agree on the issues that they are prepared to submit to arbitration. Judging from the conditions imposed by both unions and companies, this can represent a serious impediment to arbitration of contract disputes.

Obstacles to Contract Arbitration

The results of our survey indicate that even management and union representatives who are not unalterably opposed to contract arbitration consider it far inferior to collective bargaining as a way of settling disputes, and that those who are willing to consider arbitration have serious reservations about the process. We have seen that wage arbitration has declined since the 1940s and early 1950s largely due to changes in some structural aspects of collective bargaining agreements, such as longer duration, fewer reopenings, a tendency toward automatic adjustments, more complex issues, and greater ability of unions and companies to support and resist work stoppages. In this section we shall examine some other reasons why contract arbitration has not been more widely used and will probably continue to

be unpopular with unions and managements in the United States.

The contrast between the widespread acceptance of grievance arbitration and the infrequent use of contract arbitration calls for some explanation. The acceptance of grievance arbitration is due to the recognition by both unions and companies that individual grievances which affect one or a relatively small number of workers and involve disputes over the application and interpretation of existing contractual provisions are not worth the cost of striking or taking a strike. As Walter Reuther put it to the UAW General Motors Council in 1938: "You cannot strike General Motors plants on individual grievances. . . . I don't want to tie up 90,000 workers because one worker was laid off for two months. That is a case for the umpire." [33] The risk to General Motors of closing down an entire plant and possibly many other plants because of a grievance dispute is equally obvious.

Grievance arbitration clauses were found in many agreements even before World War II, and the 1945 Labor-Management Conference, which agreed on little else, did agree that collective bargaining agreements should provide for "final determination of any unsettled grievances or disputes involving the interpretation or application of the agreement by an impartial chairman, umpire, arbitrator, or board." With respect to contract renewals or reopenings, the conferees suggested that if negotiations failed "the parties should make early use of conciliation, mediation, and where mutually agreed to, arbitration." They explicitly rejected "compulsory arbitration, that is, arbitration not voluntarily agreed to by the parties." [34] Today, almost 25 years later, this remains the position of labor, management, and most students of industrial relations.

The rationale for grievance arbitration as distinct from contract arbitration, so obvious to the practitioners and the experts, is less clear to the general public. To the layman, all strikes are harmful, whether they occur as a result of an unresolved grievance or a dispute over wages, hours, and working conditions. Why, if arbitration works so well in grievance disputes, is the

[33] Fleming, *supra* note 5, at 14.
[34] *Id.* at 18-19.

same principle not applicable to contract disputes which present an even greater threat of strikes? The answer lies in the different view of the strike and the alternatives as seen by the parties and the public. The public, considering only its own well-being, convenience, and needs, sees all strikes as bad and consequently welcomes an alternative, such as arbitration, which appears to avoid strikes and at the same time seems to be fair to both sides. The parties, considering their own self-interest, see grave risks in the arbitration of contract terms both in terms of economic costs and, perhaps more important, in the threat it presents to free collective bargaining and their institutional survival.

Economic Considerations

The economic risks of contract arbitration derive from the kinds of issues involved, the absence of standards governing the arbitrator's award, the nature and predictability of the award, and the arbitrator's qualifications. By way of illustration, let us compare grievance and contract arbitration with respect to these items.

Issues. Grievances usually, although not always, involve the application or interpretation of one or more contractual provisions to a specific situation. Typical are disputes over employee discipline or discharge, job classification and evaluation, holiday and overtime pay, management's right to subcontract work, job assignments, transfers and promotions, and so forth. The first, if not the only, question the arbitrator must answer is: "What did the parties mean by the language they jointly chose to use in their agreement at some time in the past, and how does it apply to the instant dispute?" The parties have, or should have, considered the actual and the potential costs involved in agreeing to provisions included in the contract. By contrast, contract disputes involve issues that have not been agreed to, have not been costed-out, and are rooted in the future rather than in the past. They may include such traditional matters as the amount of a wage increase, the number of additional paid holidays, liberalization of paid vacations, or hours of work. But contract disputes may also involve new or pioneering issues never before dealt with or included in the parties' agreement. They are understandably more reluctant and ap-

prehensive about letting an outsider decide these issues than those involved in grievance disputes.

Union and management representatives see a clear and important distinction between grievance and contract issues. They are reasonably well satisfied with grievance arbitration, not because they win most of their cases, although this may be a factor, but because it is a way of settling the dispute. Even losing a case is better than having to resort to economic power to resolve a grievance. This is not true of contract disputes. Here the issues are paramount and a "bad" decision can have serious and far-reaching consequences which the parties are reluctant to entrust to an outsider.

Standards. Grievance arbitration calls for the arbitrator to make a judicial determination of existing contract rights based on the agreement that the parties have themselves negotiated. The arbitrator may have to use his judgment to decide who is telling the truth where there is conflicting testimony or to determine the intent of the parties in using specific language. But it is always the contract that he looks to in reaching his decision. In contract arbitration, criteria are more nebulous, although some standards, especially in wage disputes, are used more frequently than others. Each party tends to submit criteria favorable to his position, and it is up to the arbitrator to determine the relevancy and the weight to be accorded to them as well as to other standards which he may himself consider appropriate. The parties may, of course, agree on criteria, and even the weights to be accorded them, in submitting the dispute to arbitration. Some respondents to the questionnaire survey said that this was the only condition under which they would be willing to consider contract arbitration. Such submissions, however, are unlikely since, having come this far, the parties would probably have reached agreement through negotiations. The absence of standards was cited often by both union and management representatives as a reason to avoid contract arbitration.

The Award. In grievance arbitration, the parties expect, and usually receive, an "all or none" award. That is, the grievance is usually upheld or denied; management has either acted in violation of or in accordance with the agreement; either the union or the management is right in its interpretation of the

agreement. Unions and companies complain about compromise decisions, and every arbitrator can cite cases that deviate from the foregoing rule (discharge cases in which the penalty is modified are perhaps the most common), but they are the exceptions. Were it otherwise, grievance arbitration would soon lose its acceptability as a way of resolving disputes under the contract.

The situation in contract arbitration is almost exactly the opposite. Neither side expects its position to be sustained in full. The union demands more than it expects to receive, and management offers less than it expects the arbitrator's award will require it to give. The award is almost invariably somewhere between the parties' "final" positions. Indeed, arbitrators have often been accused of "splitting the difference" between the parties.[35] Fleming has argued and persuasively demonstrated that there is a high degree of predictability in grievance arbitration. Some would contend that arbitrators' awards, at least on wage issues, are also predictable within fairly narrow limits in contract cases.[36] But while predictability may be a virtue in grievance arbitration where the choice is between settling the dispute in the grievance procedure or appealing it to arbitration, it may serve as a deterrent to contract arbitration. Here the parties have another alternative—the use of economic power—to which they may resort in order to achieve objectives which they could not attain through either peaceful negotiation or arbitration. Only where economic power is neutralized by being relatively equal will the parties, in the absence of external pressures, choose to go to arbitration.

Arbitrators' Qualifications. Over the years unions and companies have come to believe that experienced arbitrators are qualified to render fair and reasonable judgments in grievance cases. With the help of the American Arbitration Association, the Federal Mediation and Conciliation Service, and some state agencies which maintain lists of qualified arbitrators, supplemented by an intricate network of internal communications among themselves, the parties select acceptable arbitrators to resolve every conceivable type of grievance arising under the contract. The parties are

[35] For a defense of "splitting the difference," see Carl Stevens, "The Analytics of Voluntary Arbitration: Contract Disputes," 7 *Ind. Rel.* 79 (1967).
[36] Bernstein, *supra* note 9, 113-114.

less confident about the ability of arbitrators to render "sound" decisions in contract disputes. "Soundness" as used here refers not to the competence of the arbitrator or even the fairness of his decision, but to the effect of the decision on the enterprise or the union involved. In this sense the parties are right: An arbitrator cannot and should not feel the same responsibility for the enterprise or the union as the principals. If, indeed, the issues involved in a particular dispute are "critical" to the company or the union, they should be made by those with responsibility to the stockholders and the members and not entrusted to an "outsider." The problem, of course, is that in collective bargaining neither the management nor the union leadership is in a position to make the decision it believes best for its constituents, unless it can get agreement from the other side. Under these circumstances, a decision to go to arbitration may well be a responsible exercise of authority and in the best interests of the enterprise and the union.

In the questionnaire survey, management representatives, much more than union leaders, stressed responsibility to their constituents, the stockholders, to explain their unwillingness to entrust contract issues to an arbitrator. Years ago the same argument was advanced against grievance arbitration. The fact that attitudes toward grievance arbitration have changed is not attributable to the availability of better qualified arbitrators but to the evolution of management thinking with respect to labor-management relations. This is not to suggest that the same change in attitudes will take place toward contract arbitration, but only that, if and when contract arbitration becomes more acceptable on other grounds, arbitrators' qualifications and the "soundness" of their decisions will not be important deterrents to the increased use of such arbitration.

The foregoing differences between grievance and contract arbitration have led the parties to conclude that the economic risks of contract arbitration are much greater than those of grievance arbitration. There are exceptions, of course, and some awards in subcontracting disputes, incentive-pay cases, piece-rate grievances, and others have involved millions of dollars. As for the individual employee, what can be more costly than denial of a grievance in a discharge case? Still, in purely economic

terms, the net gain or loss resulting to either side from all grievances arbitrated during the term of a contract is likely to be far less than that involved in a contract dispute between the same parties.

Arbitration and Collective Bargaining

The rejection of contract arbitration does not derive solely or even primarily from a cold calculation of the economic costs and benefits of going to arbitration as opposed to calling or taking a strike in a particular dispute. In fact, despite a willingness to "consider" arbitration under certain conditions and on some issues, the parties are pretty well agreed in their opposition to arbitration of contract disputes. Their agreement derives primarily from a jointly shared view that contract arbitration, whether voluntary or compulsory, is inconsistent with and tends to undermine free collective bargaining; and since collective bargaining is regarded by labor, management, and industrial relations specialists as far superior to any other method of setting wages, hours, and conditions of employment, at least in the United States, anything which interferes with or diminishes the collective bargaining process is to be avoided, even if it proves costly to the parties and the public.

Much has been written on the relationship between arbitration and collective bargaining,[87] the discussion usually revolving around the questions of whether and to what extent arbitration of contract disputes discourages or even undermines collective bargaining. It is interesting to note that these questions are not raised with respect to grievance arbitration. The reason is that grievances are considered to arise over differences in the interpretation and application of the contract or disputes over the parties' "rights" under the agreement. "Rights" disputes as distinct from "interest" disputes are supposed to be settled by bilateral discussion over what the parties intended in the agreement and, if this is unsuccessful, by arbitration.

This is an over-simplified explanation of the grievance process. The fact is that many grievances go beyond the question of "rights" under the contract and often involve negotiations which

[87] See, for example, 12 *Law & Contemp. Prob.* 209-390 (1947); *Proceedings of a Conference on Labor Arbitration* (Philadelphia: Wharton School of Finance and Commerce, 1948); George Taylor, *supra* note 17.

are barely distinguishable from contract negotiations, the main difference being that they take place at a lower level of the management and union hierarchy.[38] The existence of final and binding arbitration causes many of these grievances to be submitted to arbitration rather than resolved through collective bargaining, with or without a strike. Actually, as every arbitrator knows, many grievances which could and should have been settled at a lower step in the grievance procedure are appealed to arbitration with little or no prior discussion. Looked at in this way, grievance arbitration tends to discourage bilateral discussion and negotiation. Yet grievance arbitration is found in almost all contracts, and no question is raised as to its effect on collective bargaining.

The fact is that the parties have recognized that one can have too much of even a good thing. Collective bargaining, desirable as it is, can be overdone. Unions and companies, therefore, have agreed to place limits on collective bargaining with respect to timing and issues. The time for collective bargaining is at the expiration or reopening of the contract, and the issues are limited to those not covered by an existing agreement. Some parties exclude certain issues from arbitration and permit them to be bargained at any time, including during the term of an agreement, because they consider them too important to be resolved by arbitration.[39] For reasons discussed in the preceding section, the parties accept grievance arbitration despite the fact that it limits collective bargaining. They take a much more serious view of the impact of contract arbitration on collective bargaining, as indicated by comments of both union and management representatives in our survey.

The effect of arbitration on collective bargaining will differ, depending whether it is compulsory or voluntary, ad hoc or by prior agreement, by a single arbitrator or a tripartite board. Compulsory arbitration has little support in this country because it is almost universally agreed that it cannot exist side by side

[38] See, for example, James W. Kuhn, *Bargaining in Grievance Settlement* (New York: Columbia University Press, 1961).

[39] John T. Dunlop, "The Function of the Strike," in *Frontiers of Collective Bargaining*, eds. Dunlop and Neil Chamberlain (New York: Harper & Row, 1967), 103-121.

with free collective bargaining.[40] Experience during wartime, in certain specified industries under some state laws, and in other countries, indicates that the parties will not engage in good-faith collective bargaining when they know that either side can force arbitration by withholding agreement. Only where strikes are deemed intolerable (*e.g.*, police and fire protection, hospitals, and the like) has compulsory arbitration been considered in the United States, and even then it has been rejected in all but a few government jurisdictions.

Voluntary arbitration, either by prior agreement or as a last resort to avert an impending strike or to end an existing strike, has found much greater acceptance, at least in the abstract. Government officials, industrial relations experts, and the public generally have long believed that voluntary arbitration is the logical, fair, and mature way to resolve contract disputes where collective bargaining has failed to achieve a settlement.[41] Unions and management are much less enthusiastic about this means of settling disputes, although a sizable proportion profess a willingness to "consider" arbitration under certain conditions. Unfortunately, the conditions which would satisfy both parties are often mutually incompatible. Thus, it is not at all unusual to read in a particular dispute that labor has offered to submit the unresolved issues to arbitration but that the company is unwilling to do so. The next day, in another dispute, it may be management which has manifested its concern for the public interest by a willingness to accept arbitration, but the union will have none of it. The net result is that arbitration is rarely used to resolve contract disputes.

Unlike compulsory arbitration, voluntary arbitration is considered to be compatible with collective bargaining. Since the parties are free to accept or reject this method of resolving their dispute, voluntary arbitration is regarded as a part of the collective bargaining process. The actual effect on collective bargaining, however, may depend upon the way in which the decision to arbitrate is reached. Voluntary arbitration may be

[40] For a different view, see Carl Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" 5 *Ind. Rel.* 38-52 (1966). Also see "Criticism and Comment," 6 *Ind. Rel.* 111-116 (1966).

[41] See, for example, remarks by William E. Simkin, BNA *Daily Labor Report* No. 22 (Jan. 31, 1964).

ad hoc—that is, designed to resolve a particular dispute, usually at the proverbial last minute before expiration of the agreement, in order to avoid a strike—or by prior agreement.

We have seen earlier that agreements containing commitments to submit unresolved issues to arbitration in negotiating new contracts have held steady at about 1 to 2 percent of all major agreements since 1944. Agreements to arbitrate under wage reopening provisions have been somewhat more common but have tended to decrease in recent years. The failure of such agreements to increase is contrary to the expectation of some labor relations experts that "voluntary arbitration will emerge as the generally accepted final step in labor contract negotiations" as negotiators become fully conscious of their responsibility to society.[42]

A major deterrent to the growth of prior agreements to arbitrate has been the reluctance of both parties to give up, in advance, advantages that might accrue to them before the next contract negotiation as a result of economic or political developments, it being assumed that the weaker party at the time of negotiations would prefer arbitration to a settlement through collective bargaining. It is also believed that the existence of a prior agreement to arbitrate will discourage collective bargaining because each side may hold back from laying its real "final offer" on the table for fear that it will become the starting point from which the arbitrator will arrive at his final decision should the dispute go to arbitration. In other words, it would have the same effect as compulsory arbitration. There is evidence that prior agreements to arbitrate have led parties to rely more on arbitration and less on collective bargaining in writing the terms of new agreements.[43] Both union and management representatives often gave this as the major argument against incorporating provisions to arbitrate future disputes into their agreements. Some spoke from experience with such provisions. Yet many responses—again from both sides—indicated that parties with such provisions in their agreements had rarely or never had to resort to arbitration because they

[42] Alexander H. Frey, "The Logic of Collective Bargaining and Arbitration," 12 *Law & Contemp. Prob.* 280 (1947).

[43] Dallas M. Young, "Arbitration of Terms for New Labor Contracts, *17 W. Res. L. Rev.* 1302-1324 (1966).

usually succeeded in reaching agreement through negotiation. A few even said that having these provisions made for more meaningful bargaining. It appears that it is not the provision to arbitrate per se which must be held responsible for the quality of collective bargaining in a particular situation. The union-management relationship, the nature of the industry, the product involved, the circumstances under which bargaining takes place, and a host of other factors are more important than whether or not the parties have previously agreed to arbitrate unresolved issues. That such prior agreement may affect the nature of collective bargaining is undeniable; whether the effect is positive or negative depends on other factors.

The objection to arbitration by prior agreement should not apply to ad hoc contract arbitration. Here the parties do not have to predict developments which may increase or decrease their bargaining power between negotiations. Nor should the incentive "to hold back something for the arbitrator to work with" be present, as it is where both sides know that arbitration is likely to be invoked. At 11:59 p.m., with the contract expiring at midnight, the parties are in a position to choose between arbitration and a strike, each with the power of veto. As Stevens points out, a joint decision to resort to arbitration made as the contract is about to expire permits the strike threat, which has been present throughout negotiations, to serve its function even though the parties decide at the last minute that it is not an efficient way to settle their dispute.[44]

Union and management representatives seem to share this view, judging from their much greater willingness to consider ad hoc arbitration than arbitration by prior agreement. We need to know more about the relationship between both kinds of arbitration and collective bargaining. There has been enough experience in a variety of industries with both types of arbitration to serve as the basis for an interesting and useful research project.

The concern over the negative impact of contract arbitration on collective bargaining, whether ad hoc or by prior agreement, can be met to some degree by the use of tripartite boards rather than single arbitrators. The tripartite board is usually made up

[44] Stevens, *supra* note 40, has analyzed the conditions under which the parties should, in their own self-interest, choose arbitration in preference to the strike.

of one or more representatives from each side who choose a neutral chairman acceptable to both sides. Decisions are reached by majority vote. The use of a tripartite board permits negotiations to continue among board members with the assistance of the impartial chairman, who may serve in the role of a mediator with authority to cast the deciding vote. The tripartite board represents a form of modified collective bargaining and at the same time makes it more likely that the award will be "acceptable" to the parties. Taylor has suggested that contract arbitration has a future in the United States only if it makes use of the tripartite board arrangement.[45] This view would seem to find support in the fact that tripartite boards are much more frequently used in contract disputes than in grievance cases.[46]

The Future of Contract Arbitration

Voluntary arbitration of contract disputes has not been widely used in the United States. General wage changes, which are the most common issue in contract arbitration, were arbitrated less in the 1950s and early 1960s than during the immediate postwar years. This is explained, at least partially, by the declining opportunities for wage arbitration as a result of the changing nature of the collective bargaining agreement.

On the other hand, there is no evidence that unions and companies which have resorted to contract arbitration have been dissatisfied with the results. On the contrary, a majority of both union and management representatives who have been involved in contract arbitration since 1955 appear satisfied with the process and would be willing to consider it to resolve future contract disputes. Furthermore, three surveys conducted over the last 20 years have found considerable support for the idea of contract arbitration among both management and union leaders, with unions tending to be more favorably inclined in all three studies. Why then has contract arbitration not been more frequently used to resolve collective bargaining impasses in the United States?

First and foremost, we must remember that willingness to consider contract arbitration is limited to those situations in

[45] Taylor, *supra* note 17, at 802.
[46] Proceedings of the National Academy of Arbitrators, *supra* note 26.

which collective bargaining has failed and a strike is in the offing. As long as collective bargaining works, there is no need to consider arbitration. The evidence with respect to the incidence of strikes indicates that, on the whole, collective bargaining has worked reasonably well since the Korean War in enabling the parties to reach agreement without resort to strikes or lockouts in all but a small proportion of labor-management relationships.[47]

At least part of the answer to the above question probably lies in the shortcomings of the surveys themselves. The three surveys cited, including our own, undoubtedly suffer from sampling deficiencies. On the management side there are problems of industry distribution and company size which may affect the results. Union respondents have generally been international officers and staff members who do not necessarily reflect the views of local unions where the decision is often made whether or not to arbitrate a particular dispute. While there is no evidence that the sampling bias, insofar as it exists, is pro- rather than anti-arbitration, the survey findings probably exaggerate the support for contract arbitration. It is one thing to favor arbitration in the abstract or express willingness to "consider" arbitration, and another to be willing to utilize the process in a specific situation. Furthermore, in all three surveys, respondents generally made their support for arbitration contingent on the existence of certain conditions and limited their willingness to consider arbitration to specific issues or ruled out other issues. Some of the conditions specified in our own survey were sufficiently extreme to rule out arbitration for all practical purposes. Finally, both sides must agree before a dispute can be submitted to voluntary arbitration, a situation which is not likely to occur unless bargaining power is relatively equal as between the parties. This diminishes the prospects for arbitration involving respondents whose favorable response was predicated on their being in a relatively weak bargaining position.

Despite these limitations, the author believes that responses to the survey indicate that both management and unions are more open-minded toward the use of contract arbitration than

[47] U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1573, *Analysis of Work Stoppages in 1966* (1968).

is generally supposed. Over the next decade, the parties' attitudes as expressed in the survey are likely to be put to the test. The following developments suggest that prospects for voluntary contract arbitration are likely to increase during this period:

1. There is a growing intolerance of strikes among the American people which has been increased by stoppages in the public sector but is directed at all strikes which inconvenience the public. With the advent of unions and collective bargaining in public employment, strikes directly affecting the public have increased and can be expected to continue to present a serious problem. Fact-finding is being used to resolve impasses in a number of states, but there is increasing talk of the need for methods that will give greater assurance of avoiding strikes. Elected officials at all levels of government are under pressure to do something about this problem, and they, in turn, can be counted on to appeal to the parties to resolve their differences peacefully or face the threat of government intervention. Compulsory arbitration is frequently mentioned in this regard. Given their antipathy toward compulsory arbitration, unions and employers will be under great pressure to accept voluntary arbitration to avoid interruption of activities which are essential to the community or significantly affect the general public.

2. In some industries, the parties have experienced disastrous strikes which should make them more receptive to voluntary arbitration when collective bargaining has failed. Basic steel, construction, and newspapers are examples of such industries.

3. Unions are no longer considered by many people to represent the interests of the poor, the downtrodden, and the underdog. On the contrary, unions are often subjected to criticism for their conservatism, racial barriers to entry into some trades, being out of tune with the times, and being a part of the Establishment. The "labor problem" of previous years has been displaced by other more urgent problems, such as poverty and racial conflict. The net result is a decline in sympathy for unions which manifests itself particularly when they engage in strikes which inconvenience the public and appear to benefit only a small number of workers who are already relatively well off. While public opinion is not an important factor in

most strikes, unions will be under increasing pressure to consider alternatives to the strike in disputes affected with a public interest.

4. The conventional view that collective bargaining cannot exist without the right to strike is being subjected to increasing examination. The issue has been raised most provocatively by Neil Chamberlain, who argues that collective bargaining, no less than other institutions, is not immune to the need to modify its form and function in the light of the social context in which it operates.[48] Chamberlain questions whether strikes are necessary to the functioning of collective bargaining and whether it may not be possible to devise satisfactory substitutes which would preserve the function of the strike in penalizing the parties but not the public. The willingness to reexamine the traditional concept of collective bargaining and the role of the strike has obvious implications for the acceptability of voluntary contract arbitration.

5. Urgent problems, both domestic and foreign, will continue to call for large public expenditures which will only be possible if the economy continues to grow at a rapid rate. In an economy characterized by a high degree of interrelatedness between industries and sectors, strikes in one industry or even in a few large companies can affect thousands of workers outside the area of immediate impact and threaten the health of the economy. National administrations, regardless of political persuasion, cannot idly stand by and risk the possibility that such work stoppages may start an economic downturn or recession. While time can be bought through a Taft-Hartley injunction in emergency disputes, stronger measures, not excluding compulsory arbitration by congressional statute, may eventually have to be invoked. Under such circumstances, voluntary arbitration will obviously be pressed upon the parties and will merit their consideration.

The above are some of the conditions that will increase the importance of voluntary contract arbitration as a means of resolving labor-management disputes. The parties have indicated that they are much more favorably inclined toward ad hoc ar-

[48] Neil Chamberlain, "Strikes in Contemporary Context," 20 *Ind. & Lab. Rel. Rev.* 602-616 (1967).

bitration than toward arbitration under prior agreements. Bringing the unions and companies to the point of actual consideration of arbitration in specific disputes will require the assistance of skilled mediators. The FMCS and various state agencies have the major responsibility for persuading the parties to consider voluntary arbitration where collective bargaining has failed. It is incumbent upon these agencies to upgrade their mediation staffs and provide the necessary training to help them identify disputes in which it may be in the parties own self-interest, as well as in the public interest, to consider arbitration rather than resorting to the use of economic power. Given the willingness to consider arbitration as indicated by our own and other surveys, arbitration can be made a more practical alternative to the strike than it has proved to be in recent years.

We do not expect and indeed would deplore the widespread use of contract arbitration to resolve labor-management disputes. Nor is it desirable that arbitration be invoked to avoid strikes in all cases where negotiations have failed to produce a settlement. Collective bargaining must continue to be the primary method for reaching agreements between unions and companies. However, voluntary contract arbitration has proved itself as a useful and constructive method for settling disputes in the past, and there is reason to believe that circumstances will prevail which will be particularly adaptable to its use in the future.

APPENDIX

QUESTIONNAIRE SURVEY ON VOLUNTARY ARBITRATION OF CONTRACT DISPUTES

Questionnaires were mailed during the spring and summer of 1968 to 520 management and 321 union representatives.[49] Forty-eight management and 19 union representatives returned unusable questionnaires or replied that they could not participate in the survey because their companies were nonunion (the largest category), they had a policy of not participating in surveys, the union with which they dealt did not have the right to strike, and so forth. After these responses were eliminated, there remained usable questionnaires from 237 managements and 138 unions, a response rate of 50.2 percent for management and 45.7 percent for unions. Undoubtedly a number of nonunion companies did not return questionnaires but did not inform us of the reason for their nonparticipation. Had they done so, the management response rate would have been even higher than indicated. Only the following industries had a response rate of less than 50 percent: newspapers (40.0 percent), miscellaneous manufacturing (30.0 percent), construction (42.9 percent), services (16.7 percent), trucking (23.5 percent), maritime (31.3 percent), public utilities (32.1 percent), and municipal government (29.7 percent).

The management sample was drawn largely from the following sources: BNA's "Personnel Policies Forum" panel for 1967-1968, which lists 229 "top personnel officials in all types of companies, large and small, in all branches of industry and all sections of the country"; companies with more than 50,000 employees listed in *The Fortune Directory* for 1967 of the 500

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largest U. S. industrial corporations; management respondents to a questionnaire survey conducted by Professors Russell A. Smith and Dallas L. Jones for their study of "The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators and Parties";[50] and companies involved in wage arbitration cases studied by Professor Richard U. Miller. Additional management representatives were selected from trade journals and other sources to provide a representative list. Management respondents generally identified themselves as vice presidents, directors of industrial or personnel relations, or attorneys specializing in labor relations. The employment breakdown for the 147 respondents in manufacturing was as follows:

Employment	*Number of Respondents*
100,000 or more	16
50,000 — 99,999	16
25,000 — 49,999	17
10,000 — 24,999	14
5,000 — 9,999	17
1,000 — 4,999	31
1,000 or less	21
Unknown	15

No attempt was made to collect employment figures for respondents from nonmanufacturing industries because we did not expect that there would be sufficient variation in employment among concerns within these industries to draw any worthwhile conclusions regarding the relationship between size of firm and attitude toward arbitration.

The union sample was made up of the presidents and legal counsels (where shown) of the 185 unions listed in the *Directory of National and International Labor Unions in the United States, 1967,* published by the U. S. Department of Labor in 1968. In addition, questionnaires were mailed to a number of attorneys (drawn from the Smith-Jones study mentioned above) who were known to represent unions though not listed as counsel for any particular union. Where both the president (or his designated union representative) and the

[50] 42 *Va. L. Rev.* 831 (1966).

counsel of a union returned completed questionnaires, the former was tabulated as the "union officer" response and the latter as the "union attorney" response. Where the only union response came from the "house" counsel, it was tabulated as a "union officer" response on the assumption that the attorney was speaking for the union, except where it was known that the attorney represented more than one union, in which case it was considered a "union attorney" response. Questionnaires returned by attorneys representing more than one union were tabulated as "union attorney" responses. Of the identifiable 90 "union officer" questionnaires, 31 were signed by the president, 13 by another national officer, 11 by the director of research and/or education, 5 by an "assistant to the president," 19 by the attorney, and 11 by some other staff member. In a number of cases the respondent indicated that he could speak only for himself or that decisions with respect to arbitration were made at the local union level.