Comment—

STUART BERNSTEIN *

I really don't consider myself as appearing here as a representative of management. I would hope that in this environment problems can be approached with a degree of objectivity and that we need not be unduly concerned about the particular interest we may represent. However, I would caution those arbitrators among you with whom I do business from time to time that I reserve the right to disagree with anything I might say here today.

The last time I appeared on an Academy program, a water main broke and we were without water for a day and a half. If the lights should happen to go out while I am speaking, I suggest serious consideration be given to the implications of Lew Gill's remarks relating to the propriety of continuing to invite outsiders to participate in your meetings.

One of the interesting considerations that emerges from Lou Crane's paper is the problem of defining arbitral power. It is clear that it cannot be measured in terms of self-enforcement. We all agree that the arbitrator himself has no unique enforcement power. He cannot impose his own views; he can direct that an employee be reinstated, but if the employer refuses, there is nothing more the arbitrator can do. If the arbitrator finds a strike to be in violation of contract, he cannot stop the strike. In short, no award is self-enforcing. Other institutions—including possible self-help by the parties—must be used for this. This is as true of the traditional back-pay award as it is for a cease-and-desist order.

And proper use of arbitral power cannot be defined in terms of that which is judicially enforceable. In many of the instances of abuse cited by Mr. Crane, courts would not hesitate to enforce the award that flowed from the abuse. Cease-and-desist orders—from which Mr. Crane would have arbitrators desist—have been judicially enforced. Courts are not supposed to examine the merits of awards, and decisions based on provisions not cited by the parties are not thereby voidable. Gratuitous comment, however brilliant and irrelevant, would not disturb judges who invented the art.

* Partner, Mayer, Brown & Platt, Chicago, Ill.

Neither can abuse of power be tested by what is not judicially enforceable, since the function of court and arbitrator is not the same. The debate over whether the arbitrator should confine himself to the bargaining agreement or should also take account of supervening law or regulation has been carried on long and loud before this Academy. My conclusion is that those on the side of arbitrator as contract, not law, interpreter seem to be more numerous, and I take it Mr. Crane counts himself among these. For myself, I do not select an arbitrator because I expect him to be an expert on the law, although his decision might have legal implications. The law is not so exact or certain that I would want any avenue of appeal limited because a court might give the same deference to the views of the arbitrator on questions of law as on questions of contract interpretation.

If the dispute is how much is due under a cost-of-living clause, I expect the arbitrator to decide what the contract requires and not to tell us that it exceeds the Pay Board guidelines. If an employee is terminated for a long beard, I want the arbitrator to decide whether that is a just-cause discharge, not that the beard is a manifestation of Afro-American culture and, therefore, protected by Title VII of the Civil Rights Act.

We were recently involved in a work-assignment dispute. The decision of the arbitrator, while contrary to the company's position, was nonetheless based on a reasonable construction of the contract. But the contract as so construed violated the hot-cargo provisions of the National Labor Relations Act, and we went to the NLRB to defeat this application. But the award was a proper one, and it never occurred to me that it represented an abuse of arbitral power because of the resultant NLRA violation.

In short, while we may not want arbitrators to decide disputes on the basis of what they think the law is, we do not expect courts or administrative agencies to ignore defenses or allegations of illegality if enforcement or impeachment is sought. Thus, judicial enforcement is not the test of proper use of arbitral power. Enforceability is really irrelevant and accidental.

Mr. Crane's analysis of use and abuse of power is based on arbitration as a private system in which the parties retain the ultimate power to select the judge, whose authority is limited to the dispute at hand and who has no continuing jurisdiction over the parties. Once the private judge is selected, there is not quite

as much flexibility in controlling the course of resolution of the particular dispute. But the ultimate power is again available the next time around.

I conclude, then, that the definition of arbitral power which emerges from Mr. Crane's paper is this: It is that capability which an arbitrator has by virtue of his office and mandate that, if he exercises it properly, will enable to get him more mandates. And if he abuses it, he will soon have to find another job.

Tested against this definition, there cannot be much quarrel with the five general propositions advanced by Lou Crane. A few amplifications or modifications occur to me which I do not believe would jeopardize the arbitrator's future standing.

Generally, the arbitrator should avoid remand. The parties do not like to be told they messed things up so badly that the arbitrator cannot decide the issue. There are instances, of course, where it is crystal clear that the parties never explored the issues during the grievance procedure and where the temptation to send the case back must be overwhelming. But the danger is that the arbitrator may be tempted to send back all tough questions. The parties are really entitled to make fools of themselves. The neutral may be more clever than the parties, but then again he may only think he is. Or maybe the parties think they know as much about the issues as does the arbitrator, even if they do not. It comes out the same way. If he wants the parties to welcome him back—our test of proper use of power—he will conduct himself with a certain amount of humility.

One exception to the avoidance of remand arises when the employer has interposed a procedural objection during the grievance procedure and has refused to discuss the merits. Here I believe most advocates would consider it quite proper for the grievance to be sent back to the parties for exploration on the merits if the arbitrator decides the procedural defenses have no merit.

I have a slight disagreement with Mr. Crane's view that the arbitrator should limit himself to the contract provisions discussed at the hearing. After hearing, and while contemplating the record, the arbitrator may find contract provisions which appear relevant but which have not been considered at the hearing. Or he may be concerned that there are implications in a contem-

plated award that may have consequences not anticipated or desired by either party.

I would think a request for further hearing, accompanied by a description of the questions to be explored, or a letter asking for written clarification of positions, would offend no one. I would find this far preferable to either alternative of an award based on theories or provisions not explored by the parties, or one formulated without regard to troublesome but undiscussed questions. An arbitrator need not play the parties' game to the point of compromising his professional integrity in his anxiety to be loved.

It is difficult to avoid examples. I had a traumatic experience with one of the Academy members who had, I thought, violated one of the Crane commandments. The issue was the right of the employer to combine jobs. The union argued the contract prohibited any combining. The employer relied on a contract provision which I thought pretty well covered the point. The arbitrator decided the contract did indeed permit combining, but it was ambiguous on the issue of whether it permitted the combining of jobs of equal pay rate; and since there was no evidence the employer had ever combined equally rated jobs, I lost. The fact was the employer had combined equally rated jobs many times, and I had the evidence but didn't present it, making the deliberate decision that it was not necessary to meet the issue raised by the union, which I felt had been adequately defended. This was a mistake in judgment, as my friend graciously reminded me in subsequent correspondence. But I felt, and still do, that if the arbitrator believed the issue was too narrowly drawn or too closely defended, he should have inquired further. He should have written to both parties, or requested further hearing, and put the question. It was not fair, and an abuse of power, to assume there was no evidence to support a point not raised at the hearing.

On the question of remedy—I agree that cease-and-desist orders are not useful, but not for Mr. Crane's reasons. He finds them objectionable as a waste rather than an abuse of power because the arbitrator has no contempt power. But, as already suggested, he has no other enforcement powers and, therefore, that reason is not sufficient.

The problem with cease-and-desist orders is that they are something like gratuitous advice in the award. They both tend to have

impact on future conduct where there may be serious and honest disagreement on whether the future conduct, when it occurs, is really within the framework of the original condition which gave rise to the award.

Here I would distinguish between conduct which is continuing at the time of hearing and conduct which has ceased but which is anticipated to be repeated. It may be appropriate to direct an employer to cease what he is then doing, or to tell a union to stop a strike which violates a no-strike provision. It may not be appropriate to tell a party that something he did in the past—but is not then doing—was wrong and that he should never do it again. The again may not be the same thing. Circumstances change results. It is one thing to rely on the earlier case as precedent and quite another to charge a party with being in violation of an outstanding cease-and-desist order.

Mr. Crane also counsels against the arbitrator's telling the parties how to correct violations he has found. Certainly, this is generally sound advice. But on occasion such direction may be appropriate. A recent case concerned the contract requirement to provide prompt transportation for an airline crew from airport to motel. The award held that this meant a car had to be waiting when the crew got off the plane—not that it could arrive 20 minutes later. The same grievance arose two weeks later and resulted in the same award. It happened a third time, and at the third arbitration the union offered evidence that the involved supervisor said he knew about, but couldn't live with or didn't care about, the prior award. The arbitrator included as part of the remedy in the final award that the company be instructed to advise its supervisors that they had an obligation to comply with awards.

A final comment: Mr. Crane wisely avoids discussion of the merits of awards. Opinions of the parties are usually sharply divided on this—in fact, evenly divided. But there are some cases where both parties must have the same expectation of how the case will turn out. One recent case contains a sentence which I must share with you because it is too good to pass unnoticed. The issue was falsification of an application by misstatement of reasons for prior employment terminations and omission of references to prior employment. This is the sentence: "Although the company so states in its brief, the record does not show that [the

employee] was fired for taking beer. The record only indicates that he was caught taking it." The advocate who won that one must have been amazed.

Comment—

STEPHEN C. VLADECK *

The title of this session and of Mr. Crane's paper is so open an invitation to file a detailed complaint about arbitration and arbitrators that it is very hard for me to avoid accepting it. I will, however, exercise the objectivity and restraint for which I have become well known and try to confine my comments to the primary paper delivered at this session.

I think the core or the thesis of Mr. Crane's paper is accurate. The parties, when they go to arbitration, are exercising a part of the collective bargaining process. They have negotiated an agreement, but they frequently do not read it in the same way. Because of prior experience, they are aware that in the course of living under that agreement there are going to be disagreements about either the meaning of language or the intention of the parties. I know that I have walked out of a negotiation with a very firm conviction about the meaning of the agreement, and I don't doubt that my counterparts on the other side of the table were equally convinced of their understanding. If at that point there had been an inquiry into our respective interpretations of what we had agreed upon, it would have been easily ascertained that we were not in agreement.

Fortunately, in the collective bargaining process most of these disagreements become unimportant because they relate essentially to the language rather than to the action by the parties under that language. It is only when an action is taken contrary to the belief as to the meaning of the agreement that we get into arbitration. At that point the parties have a right to expect an arbitrator to answer the question presented to him and to put to rest the issue after the arbitration hearing has been concluded.

It is remarkable to me that in the many years I have been appearing before arbitrators, either I or they have learned so little. An arbitration proceeding, even before the most experienced of arbitrators, is essentially not different today from what it

* Partner, Vladeck, Elias, Vladeck & Lewis, New York, N. Y.