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

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was 25 years ago, except that it is far more ritualized and formal.

In addition, there are still occasional arbitrators who either do not understand the questions or whose awards do not answer the questions or whose awards, in turn, require interpretation and give rise to, rather than resolve, the dispute.

In fact, Mr. Crane raises the problem in another way by stating:

> "If the arbitrator does not understand the factual situation, he is free to ask questions. He also is free to ask the parties for any otherwise undisclosed information they may have, if he feels he needs it in order to help him reach a conclusion. By the same token, he may ask the parties any questions he may have about their contractual positions."

It is one thing to ask questions about a factual situation; it is another to assume that the arbitrator is engaged in a commission of inquiry in the search for eternal truth. I do not believe that the arbitrator is charged with the responsibility of trying the case for either of the parties. I think he does have the obligation to understand the case, to understand the theory of the case, and to comprehend the facts. However, I have attended many hearings where the arbitrator, bored with the voices of the parties, prefers to bore them by the examination or cross-examination of witnesses or by the exposition of theories of contract, turning the hearing into something other than an arbitration proceeding intended to resolve a dispute.

The first obligation of the arbitrator is, therefore, to understand the nature of the dispute. The second obligation is to resolve it within the framework of the contract. If there is no provision in the contract that can resolve the dispute, he ought to state that the contract does not provide for the contingency which occurred and advise the parties that they would have to give him the authority to make a determination, go back and negotiate a resolution satisfactory to them, or accept the fact that they will have to wait until negotiations are legally open before the problem can be resolved. They are not looking to the arbitrator to fashion a contract clause. They are asking him to fashion a remedy for a violation of the provisions of the contract.

That statement should make it evident that the arbitrator's power is really a limited power. It is not a search for truth and justice.

I have negotiated contracts or represented people who have, and the contract did not result in justice. I have rarely met a man working in a shop who, faced with a contract prohibition or inhibition, or an employer who, faced with a contract restriction, regarded the contract as being just. I suggest, therefore, that one of the ways in which we avoid abuse of power is by recognition of the source of the power itself.

As your president told you in his address, arbitrators do not exist without customers. The customers are the parties, and it is they who are going to determine whether they are going to avail themselves of the services of the third party—the arbitrator. They are the ones, and indeed the only ones, who are affected by the arbitrator's decision—they and the people they represent.

Mr. Crane's caveat, therefore, that an arbitrator does not have a roving commission nor is he being solicited for industrial relations advice is exactly correct. If one looks at the use and abuse of power in this perspective, there is still high purpose in the arbitrator's function. While he may not be searching for truth and justice, he does represent the impartial parties. He speaks with the voice not of the union or of the employer, but with their joint voice in articulating the contract's meaning. I submit, therefore, that the arbitrator, as the embodiment of both parties, is doubly blessed and, in the light of the Supreme Court's language, not only doubly blessed but sanctified.

I know that it is hard for arbitrators to convince themselves that they are not performing a judicial or quasi-judicial function and divest themselves of their robes as judges. The arbitrator is not the judge in the legal, literal, or figurative sense. He is not finding what is just or equitable or, indeed, what is legal. He is articulating what the parties meant by the contract.

Since the function of the arbitrator is the articulation of the parties' intention, arbitrators should not expand their horizons beyond the absolute minimum necessary to answer the questions which have been asked, either in the submission or by the grievance. For that reason, I am much amazed by the defensive attitude taken by arbitrators when I criticize the volume and length of opinion-writing. I admit that there are many cases where opinions are of tremendous value. But if I were a trained statistician, I would wager that not one in a hundred would meet

the relevant criteria. No court in this country is as prolific and few as long-winded.

I am told by arbitrators that they write opinions because parties want an explanation. As a frequent party, my response is that this is often not true. I can tell you as a practitioner in this field that I do as Mr. Crane says I do—I turn to the award and find out whether I won or lost. If I won, I really am not concerned with why I won. If I lost, I may read the opinion in order to confirm my conviction created by the award that the arbitrator was, is, and undoubtedly will continue to be as blind as a bat and as ignorant as an ass.

I do not believe, as I previously stated, that the arbitrator has the power to ask questions about the applicability of uncited provisions of an agreement or unrecited facts. The contract, insofar as it is before him, calls for the interpretation of a specific clause or clauses of that agreement. If one or the other party calls his attention to some other provision in the agreement to help in that construction, that too should be considered. If neither party does, he is in effect expanding his role to interpret not only the contract clause in dispute but other clauses about which the parties are apparently not in dispute.

I do have a disagreement with regard to what Mr. Crane calls "a waste of power," and I do not agree with the implication in my old friend Stuart Bernstein's paper than an arbitrator should not be familiar with the law. For, as I have told you, arbitrators have the wisdom of both parties and are looked to to provide remedies for contract violations. Therefore, if the remedy sought is a cease-and-desist order or for declaratory judgment, and the facts warrant the issuance of such an award, it should be issued. Obviously, arbitration awards are not self-enforcing. Neither are court orders. But, procedurally, you can't get a court order and its enforcement without an arbitration award if there is an arbitration provision in the agreement.

Under those circumstances, the only thing I can do is go to an arbitrator and say: "There is a continuing violation of the contract. Tell the company to stop." If the arbitrator agrees and tells the company to stop, and the company continues to violate the contract, and I have the award, I have established the condition precedent to going to court and saying to it: "Look at that

company. They are violating the contract; they are violating the award, and I want a mandatory injunction telling them to cut it out, and if they don't I want the right to ask the court to punish them for contempt." This is not a waste of power or an abuse of power. This is the appropriate exercise of power which is necessary in order to provide a remedy ultimately enforceable in the courts. This does not mean, I hasten to add, that I believe that the arbitrators never abuse their authority.

I can recall, for example, arbitrators trying to resolve situations by withdrawing seniority or pension rights in cases where they either should or should not have sustained the discharge. That kind of interference with other contractual rights is destructive of arbitration because it brings the arbitrator into the position where he has renegotiated contractual clauses and other relationships which were not before him and not legitimately of his concern.

He does and should have the right to fashion remedies consistent with the contract: the right, for example, to reduce or eliminate disciplinary action; the right to fashion a viable remedy within the limitations of the contract; the right to provide a remedy that will result in the avoidance of continuing or repeated contract violations. In other words, I think the power of the arbitrator is the power of the parties to have done the same thing within the framework of the contract between them.

I would suggest to you as arbitrators that the parties are really neither as inept or lacking in the knowledge of their problem as a few of you sometimes believe. The parties do know what the issue is. The parties do know the remedy they seek. They may be in disagreement as to both, but they do know they have a problem which needs resolution. The fact is that labor arbitration provides the forum for that kind of resolution, and it has expanded to the extent it has and has become acceptable to the extent it has largely because arbitration initially provided a place where a simple, inexperienced advocate, not exactly a lawyer—indeed, not usually a lawyer—could explain in his own words and in his own language what the problem was within the framework of the contract.

Most contracts even today are not drawn by sophisticated lawyers who are careful in the selection of words. They are drawn by

industrial relations personnel or management functionaries and business agents, and it is important that the arbitrator learns to listen to them so that he can determine what they meant and what they intended, rather than what some skilled, artful advocate reads into that language. And it is the arbitrator's function that he determine what those parties mutually intended and answer the question that was put to him explicitly and briefly.

I suggest to you that the longer it takes to hear a case, the longer it takes to decide it, the longer it takes to write the opinion, the longer the opinion is; the less you as an arbitrator are performing the function you were selected to perform.

And so I have come full circle and repeat again that the arbitrator really is a unique creature in that he is called upon to arrive at a decision as to what the two separate contracting halves intended and to articulate it clearly in response to the specific question posed to him. On the other hand, if arbitration continues to become more formalistic and ritualized, it will be of far less service to the parties. It would indeed be more analogous to the following fable:

> "An old waiter who was troubled with his feet went to the doctor. The doctor told him that he should spend several hours a day soaking his feet in salt water. He asked the doctor where he should go to get salt water, and the doctor told him 'Coney Island.' (For you non-New Yorkers, Coney Island is the southern-most part of the borough known as Brooklyn.) Early the next morning he went to Coney Island and rented a room, and then he went to the beach. There was about 10 feet of sand there. He asked a lifeguard, 'Is this the beach and is that salt water?' The lifeguard answered in the affirmative. He asked the lifeguard, 'How much is a bucket of water?' The lifeguard said, 'A quarter.' He paid the money, collected his salt water, went home, and sat all day with his feet in the pail. He decided, before retiring, that he would get a fresh pail of salt water (if there is such a thing). Anyway, he went back to the beach. The tide had gone out and there was a vast expanse of sand. He went to the lifeguard and said, 'Is this the same place I was this morning?' The lifeguard answered in the affirmative. The waiter then said, 'Are you sure this is the same place?' and the lifeguard answered, 'Yes, it is'—to which the waiter responded, 'Boy, did you do a business!' "