Comment—

LAWRENCE M. KEARNS *

I cannot resist a simple comment on such a nostalgic occasion as this 25th anniversary to recall the greatness of three arbitrators, now deceased, before whom I had the pleasure of appearing: Maxwell Copelof, Aaron Horvitz, and Saul Wallen. I particularly remember Horvitz, who had such a great personality and who liked to refer to himself as "Dean of American Arbitrators" because he had been an arbitrator so long.

As a representative of management in the labor-management field, I find my role here an easy one because I thoroughly agree with everything Mr. Crane said and, further, I have no criticism of Mr. Bernstein. However, that doesn't mean I have no comment. A lawyer never is without a comment and usually has something to say.

I agree with everything Mr. Crane said as being basically an extension of what the role and function of an arbitrator is, and I think the reason why I agree with him so much is that he is basically saying that we use an arbitrator to decide that there is a violation of the contract, or we use him to interpret some provision in the contract on which the parties disagree. I construe this as being the same type of function as a judge in the court performs. We use the arbitrator because of his knowledge of labor relations and because of his objectivity.

Now, not everyone agrees that that is the role of the arbitrator. We have had several statements in the opinions of the Supreme Court where it is said that when an arbitrator is commissioned, he is to reach a fair solution of the problem. It is also said that the role of an arbitrator is not that of the courts and, even more expansively, that the parties expect him to bring his judgment to shop practices that affect productivity and morale on the job and whether tensions will be heightened or diminished. The Supreme Court goes on to say that the most able judge cannot be expected to make such determinations because he cannot be similarly informed.

I remember back in 1960 that I wondered how arbitrators were going to stand the inflation of their ego and get back to earth again, but we all survived that period and, as far as I can

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see, most arbitrators disagree with that type of problem-solving role described by the Supreme Court and assume the role that Mr. Crane has delineated. I suppose the result is as has been indicated—that this is what the parties want—because most people generally want that role for the arbitrator.

Now, the fact is that not only management but unions themselves agree with the concept that the arbitrator is not brought in to solve their problems. He is brought in to decide a specific issue. Let me cite you a collective bargaining agreement: "The parties recognize the proper role of the arbitrator to be that of deciding issues submitted by the parties after a full and fair hearing and not as being vested with any authority to mediate or to give advice or recommendations to the parties." Both the union and the company agreed to that.

In commenting specifically on a few of the points Mr. Crane made, I would like to pick out particularly point number one. He mentioned an abuse of power by an arbitrator in deciding the case on a basis that neither of the parties had placed before him. I think that happened only once in my experience. It seems to me that if neither of the parties had used a particular basis or theory in their arguments before him, certainly the decent thing for the arbitrator to do is to issue a warning notice to them that he intends to rely on such a basis or theory so that the parties may give him their comments before he uses it in his decision.

The second point was about arbitrators' making unnecessary comments and statements in the decision. I have found that to be a problem. Unintentionally, the arbitrator can say things in his decision which will create problems, with statements the full import of which he did not realize. This, in my opinion, is another reason for three-man arbitration boards.

A third and related point comes to mind. I can cite two instances of an arbitrator, after a hearing, going out on his own to obtain evidence. This is an abuse of power and, again, is related to doing something the parties did not anticipate.

Another point that comes to mind is the question of a remedy against a union steward who acts improperly. Certainly you have run into cases where a steward's conduct was reprehensible and contemptuous of his responsible superiors in the union. In cases where a steward spearheads an unjustified walkout in violation of

the collective bargaining agreement, we agree it is easy to conclude that he should be stripped of his union authority. I think, however, that if the arbitrator were to do this, it could have a related effect on what to do about a supervisor who acts improperly. Occasionally we may run into a supervisor who might address improper language to an employee over something he was upset about. Should the arbitrator direct the company to take his supervisory authority away from him? I can't think of anything that would make the blood pressure of management people rise more than receiving a ruling from an arbitrator that they had to remove any supervisor from his position.

There is a reported case where the supervisor had engaged in conduct of which management did not particularly approve. The grievance grew out of an incident involving this supervisor's working during the time when a machine was being adjusted. Harsh language was used. The supervisor had a piece of two-by-four in his hand during the time when the grievance was in dispute, and danger of physical harm was imminent. The remedy the union was arguing for was to have the supervisor make a public apology for this kind of conduct. The arbitrator said this: [1]

> "Management has a right to discipline its own supervisor by its own standards, just as the Union has freedom to control its own affairs by its own standards. The Company cannot reach into Union affairs, nor can the Union reach into Management's affairs. What the Union is entitled to in this case is an assurance of non-repetition of the event, not participation in the imposition of discipline."

I think this decision was correct—in the arbitrator's not getting into it. The supervisor can be handled readily by the company's taking appropriate disciplinary action, which it may have to do to be in compliance with an arbitrator's directive that the improper conduct stop. Similarly, if the arbitrator directs that a steward's improper conduct cease, the union may strip him of his duties as steward. But in neither instance is the arbitrator taking the disciplinary action. It is up to the party involved to decide how it will get the improper conduct stopped.

Another area was discussed by Mr. Crane, and I think it is perhaps important to consider it—that the arbitrator at a hearing has a great deal of procedural power as to how he handles things.

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[1] *Armstrong Cork Co.*, 38 LA 781 (1962) at 784, Vernon H. Jensen.

I would say that most arbitrators conduct good hearings, but I think that sometimes they have a tendency to take over, to a considerable extent, the examination of witnesses. This is obviously annoying to counsel, and yet counsel often doesn't want to offend the arbitrator to the extent of saying anything to him. In many instances I have been involved in, if the arbitrator had waited about five minutes, the questions would have been asked by counsel. So I think the arbitrator should restrain himself and ask as few questions as possible, except for those seeking clarification.

Yesterday I looked through some of the most recent arbitration decisions in my office. I would say that they could have been shorter and still would have covered the subject well, while at the same time running less risk of containing statements harmful to the future position of one or both of the parties.

I think perhaps one other comment on the question of newer arbitrators might be appropriate. It has been my experience that one of the problems with some senior, long-experienced arbitrators is that, at times, after about a half hour of hearing, they have already characterized the case as falling within a particular category, and they then become impatient with hearing any more evidence. I have never found this to be true with new, inexperienced arbitrators, and it is one good reason for using such arbitrators and helping them to become experienced arbitrators.

Comment—

ROBERT D. MANNING *

I appear with no claim to objectivity, and I have not succumbed to the principal paper's caution against the temptation to "dwell upon the abuse of power." Knowing that the previous three discussants would adequately analyze this excellent paper, I have chosen, for the purpose of my remarks, to act outside the scope of my authority.

The discussion will, of course, be confined to abuse of the parties, and only with those abuses that are more commonly observed—not the horror cases cited, unfortunately, without illustration. It may be of no significance that the use of power is equated by the paper with "thrifty" and abuse with "stingy." It

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