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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does, however, bring to mind the awesome power to establish fees. Those abusers of power who are stingy with their charges will be ignored; the thrifty users do present problems.

Since the elimination of the five-star prefix to the arbitrator's identity on the American Arbitration Association's selection panel, it has become difficult to ascertain the better arbitrators. Thus, a party, naturally equating affluence with acceptability, seeks to determine the candidate's case load. Clearly, an accumulation of hearing days and opinion days of less than 400 work days per fiscal year demonstrates a lack of ingenuity or, worse, a lack of opportunity. Would it not be more equitable to the less utilized brethren of the arbitration forum to bill a higher per diem and list less thinking days? It would ease some of the anxiety of the advocates who must explain why their subordinate status should be recompensed with a higher daily charge.

In the original draft of the paper which was to be presented to you today, there appeared a statement which was deleted from the final edition and which, in substance, stated that the parties have no right to expect an arbitrator to be infallible. The deletion of that statement, if you apply the ordinary rules of contract construction, may lead to some other conclusion, but in any event, arbitral fallibility assumes many forms: an arbitrator's transcription of verbatim notes, particularly when they are more accurate when read back than the stenographic record; closer perusal of the well-worn airline schedule than the collective bargaining agreement, especially during the formulation of the issue at 10 o'clock in the morning; receiving evidence with the beguiling statement, "I'll take it for what it's worth"; diligently seeking agreement by both parties as to the disposition of an objection; demonstrating impartial cordiality by inquiring, "Who wants to go forward?" or "It doesn't matter who goes first; I'll get it all anyway"; repetitious recitation of the respective positions of the parties in the body of the opinion in a more persuasive form than either had originally presented them; consoling the losing party, as was pointed out in the principal paper, by noting that if the facts had been different, of course the result would have been different; recessing with the fellow members of a tripartite board to obtain a majority vote for a ruling on each and every objection. Only the limits of time preclude an expansion of this listing.

You have no doubt observed that none of these characteristics is of itself truly significant, which I suppose in a negative way is a

compliment not readily discernible. However, there are some serious, universally recognized problems in the system. The AAA advertisement of "speed, economy, justice" is considered by some to be more appropriately entitled "slow, expensive, and unfair." I do not fully agree, but there is legitimate frustration.

It is axiomatic that the arbitrator exists at the pleasure of the parties utilizing his services. The sources and limits of his power flow from the collective bargaining agreement. To the extent that abuses exist, the Academy, the AAA, the Federal Mediation and Conciliation Service, and others can and do exercise enormous constructive influence. The primary responsibility, however, rests finally with the parties, and I was delighted to hear Mr. Gill refer to this in his luncheon speech. The abdication of this responsibility to other agencies and organizations has in some measure contributed to dissatisfaction.

Bargaining by most unions has not included demands regarding the regulation of the arbitral process. Many days of negotiation are spent on seniority clauses, job evaluation clauses, disciplinary procedures, union security, and the like. The arbitration clause, to the contrary, most often incorporates the rules of the AAA, or leaves to the arbitrator's discretion the resolution of procedural problems.

Recognizing the difficulties and pitfalls inherent, would it still not be far more desirable for the labor organization, which is the primary initiator of arbitration, to negotiate and specify in the labor agreement the solution to delay and cost? A number of modest contract revisions for some parties in some situations could be the subject of bargaining—for example, elimination of transcripts where mutually agreeable or in specified situations; abolition of posthearing briefs; appointment of a permanent arbitrator, coupled with the proviso that in no event could the permanent arbitrator be reappointed in the next contract; specification of the amount of the arbitrator's fees in the agreement, as well as a limit on the number of decision-making days he will enjoy; a requirement, common to litigation, that the arbitrator will be available on consecutive days to complete the hearing.

It is recognized that the latter suggestion would be impractical for established arbitrators who have serious and legitimate schedule difficulties. The result may be that newer, less utilized arbi-

trators would have to be selected, a goal which everyone proclaims desirable.

Empower the arbitrator to function as a mediator, with no inhibition of his decisional function at his option. This is consistent with the philosophy of broadening the arbitrator's power on substantive issues while circumscribing the procedural aspects.

Nullify the right of party designees to a tripartite board, where such a board is required, to vote on the award except in new contract cases. In that connection, Peter Seitz made the classic statement in an arbitration case in which I had the good fortune to participate. When both parties agreed to waive the tripartite board at the hearing, he announced that he now constituted the Trinity.

Other minor items: contractually allowing only one postponement except in extraordinary circumstances; that the hearing on the merits be completed prior to a decision on arbitrability except where the arbitrator is prepared to indicate at the hearing that his interim decision will be likely to dispose of the case; that the employer be required to go forward in all cases (I find this extraordinarily helpful in cases in which I am ill-prepared); that witnesses need not be sworn; that opinions should not restate the parties' arguments; that an award in certain cases be rendered in a short time with the opinions to follow if, thereafter, the parties desire one.

These are just some of the bargainable areas for contract negotiation which, by and large, have been overlooked and could, if properly utilized, lead to the solution of some of the most perplexing problems that we find in the use and/or abuse of power by arbitrators.

The cease-and-desist problem, with the contract language containing appropriate penalties for continuing or repeated violations, raises a myriad of possible proposals which, if obtained, could reduce the uncertainty of the arbitrator's power to deal with these problems effectively.

You will note, understandably, that removal of lawyers in the presentation of a grievance has not been indicated, but it's reasonable to assume that it will occur to some.

Unfortunately, it does appear that the use of arbitral power is

unavoidably increasing in complexity and sophistication. Awards enforcing agreements which directly relate to the Economic Stabilization Act of 1970 and the succeeding Phases 1 and 2, the recent decision of the National Labor Relations Board deferring to arbitration certain unfair labor practices, and the relationship of equal employment statutes all affect the exercise of the arbitrator's power. It is therefore incumbent, it seems to me, that the parties contribute their talent and resources to anticipate these difficulties, to make this process more effective, and to make unnecessary in the future the need for any serious discussion of the use and abuse of arbitral power.

**Discussion—**

CHAIRMAN THOMAS KENNEDY: If any of the discussants would like to add anything at this point, we should be glad to hear from them.

MR. BERNSTEIN: I have been charged with saying that I don't want arbitrators to know anything about the law. If I said that, then that is not what I meant to say. I don't *expect* arbitrators to know anything about the law because I don't expect or want them to make rulings of law. This issue will become more critical as other agencies follow the trend of the NLRB to enlarge the area of deference and referral to arbitration. I am concerned that decisions of arbitrators on questions of law may not be subject to appellate review. The risk is that this may foreclose a whole avenue of appeal on matters of law to which I think I am entitled.

Pursuing this, I would distinguish between factual determinations which may have legal consequences and the legal determination itself. An employer terminates an employee because he or she wears an Afro hair style. I have concluded that in certain work situations this is just cause. But suppose the defense to my just cause argument is that wearing an Afro is a protected civil right under Title VII? I think the arbitrator should decide why the employee was terminated and if that is just cause in the setting of the job. The factual determination that the termination was because of the hair style might lead to further consequences before the EEOC, but I don't think the arbitrator should decide the complex question of whether hair style is a civil right within the meaning of the Civil Rights Act.

CHAIRMAN KENNEDY: We are now open for questions from the floor.

MR. VALENTINE PATRICK MURPHY: I agree and disagree with some things that were said. One of the things I agree with is maybe there shouldn't be lawyers in arbitration, or maybe there shouldn't be as many lawyers as there are in the entire labor field. This I agree with, and I don't mean to be facetious; I am very serious.

The thing I disagree with is the long litany of things that should be put in a labor contract. I foresee that this will lead to the absolute necessity of arbitration. I am totally opposed to anything that would lead us not to the banning of arbitration, but to compulsory arbitration. . . .

When it comes to abuse of power, maybe you ought to address yourselves to a question as to whether everybody, including myself, fails to realize where the abuse really culminates. I can't conceive of arbitration at all, in any number of cases, without some little worker having had something which perturbed him in the daily routine of life. The whole process of arbitration, with its battery of lawyers, including arbitrators with their expertise which is over his head, is a tribunal that doesn't suit him at all—but it wouldn't exist without that little worker.

I appeal to you as individuals: If you have any degree of organization conception as a society, take a look at the fact that as this process gets more sophisticated, it gets more and more beyond the ken of the person without whom there would be no arbitration. There is no question but that the majority of cases arise because something happens to a worker.

MR. LEO KOTIN: I listened with amazement to all the speakers because, after hearing them, one gets the conception that the arbitral process is a highly rigid, well-organized procedure, and that it somehow or other applies uniformly in every situation. Now, in my years of experience, I felt that the arbitral process has been used by the parties, as they thought best, to meet specific situations. That raises the question, first, as to the confinements of the application of the labor agreement. It has not been uncommon in my experience to have the parties say, "When we wrote the agreement, we never contemplated that this would occur." Now if that is not a request of the arbitrator to legislate, I don't know what is.

I question the panel as to whether they conceive of arbitration as having as its basic objective to meet the desires of the parties in each situation. Each situation is different. Sometimes I ask myself the question as to why the parties will spend the money to save four hours of call-in pay; good sense would dictate that those four hours do not merit the expense. Obviously the parties are asking for more. I recall one situation when the matter of rules arose, and in the midst of a very eager summation by union counsel, he suddenly diverged from his argument and said, "For God's sake, give us some rules!" The company concurred, and I gave them some rules.

I pose the question whether the arbitrator isn't an integral part of a continual collective bargaining relationship and, with all due respect to the confinements of the agreement, whether the arbitrator's function is not to further that process during the period of time when a situation arises that was never contemplated. . . . It is something new, so [the parties] are asking the arbitrator, in a sense, not to apply what they have agreed to, but to resolve, for an interim period, a problem that has arisen. . . . The arbitrator, in a sense, is a problem-solver, and to the extent that the labor agreement does not specifically cover the issue at hand, is he not being asked by the parties, as I know he sometimes is, to legislate to resolve the problem at least for the duration [of the contract]?

MR. CRANE: It seems to me that on this question of the parties' not being able to anticipate the complete scope of human conduct, the arbitrator is asked to decide only to the extent to which they did not anticipate the conduct. I think contracts are written more broadly than that. It seems to me that labor agreements are written to deal with specific problems, that the contract language is intended to apply to a situation, and that arbitrators are called upon to decide whether or not the contract language is applicable.

I believe the parties are sufficiently knowledgeable to cope with their own language, that their language is meant to deal with general problems. If it can be applied, then you apply it. I don't regard my selection as an arbitrator as a mandate to legislate. This is just one man's feelings. I respect your views.

MR. VLADECK: I really think the question answers itself. I do agree that the arbitrator's function is that of problem-solver and

also that arbitration is part of a continuous collective bargaining process. What disturbs me is two-fold.

First, I guess, that arbitrators ask rather than being asked. I don't want arbitrators to answer questions that have not been asked. If the parties say to an arbitrator, "We haven't contemplated this set of facts; we are looking for a solution because we can't arrive at one," I think it is the function of the arbitrator to answer it the best he can with a solution. If the parties don't like it, they can change it. But I don't think it is the function of the arbitrator to solve the problem just put before him. I also don't think it is the function of the arbitrator really to determine what the problem is.

I have been involved, and I am sure every advocate in the arbitration process can recount several incidents, in cases where the arbitrator not only decided the issue, but decided what the problem was, and not the problem the parties thought they had, not the problem they wanted resolved, and it really wasn't a problem until after the award. What I am suggesting is that the arbitrator's function should be restricted to the dispute that the parties want him to resolve, and we aren't giving him a roving commission. His authority, whether he is an impartial chairman, a permanent chairman, or an ad hoc arbitrator, and his function is to answer those specific questions that are put to him in a specific case. In that way the advantage to him is that he is furthering his own function as well as the collective bargaining relationship.

MR. KEARNS: I don't think that anybody can quarrel with the fact that the parties want the arbitrator to fill in this gap and to rule on a situation that was not anticipated. I believe the question is one of terminology—what we mean by problem-solving. If we mean solving the "problem" within the framework of the contract, that is proper. However, I think the impression here is that the arbitrator should consider the problem from a labor relations point of view and consider the best way of handling the problem according to the arbitrator's version of the best labor relations solution. It is here that there is a sort of parting of the ways, and I think the answer, as far as I am concerned, lies in the fact that I have never run into a management representative who wanted a problem-solver as arbitrator. If he wanted a problem-solver, he could get a consultant, if he didn't have the expertise in

his own company; from management's point of view, what he wants in an arbitrator is a fellow who will interpret the contract.

MR. ERROL L. JOHNSTAD: It seems to me that arbitrators in the airlines realize that airlines operate under the Railway Labor Act, and we are very much concerned about many problems which flight engineers have which are not specifically addressed in their contract. That is why, in our contract, whenever a flight engineer is unjustly dealt with, it doesn't necessarily mean that there must be a specific paragraph in our contract. It may well be a procedural change, a working condition change. With administrative backing or procedures of the company, whenever the flight engineer is unjustly dealt with, he may go to arbitration and we shall attempt to prove it. Our counsel for the Pan American chapter has reminded me that this concept of unjust dealing with an employee flows from the statute itself.