# III. SUGGESTED NEW APPROACHES TO GRIEVANCE ARBITRATION

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## Introduction

This speech was originally written before word got out of the passage of the new U.S. income-tax laws governing foreign conventions. Accordingly, I sought to meet the goal of brevity and, being the final speaker of the day, I expected that the briefer I was, the more time would be left for warmer reflection of what I'd said in the glow of the several pubs abounding in the hotel. But then we got the word that for this trip to be deductible for U.S. citizens, there was a requirement of longer attendance and a time clock. As the anchor man of the speakers' roster today, for those who bear with us, I will be happy to pass among you after the session to sign attendance slips for remittance to your accountants. I will also pick up any tardy IRS checks for tomorrow's mail. Needless to say, however, this added burden is not meant to apply to Canadians, who are free and, indeed, expected to remain only for the original 20 minutes for which I was contracted to speak. And those who do stay longer, Canadian or American, will find the additional ten-minute recitation of footnotes rather dull listening, but at least deductible.

Another caveat may be appropriate for those who are expecting some sort of panacea out of my paper for their day-to-day dealings in arbitration. I haven't any up my sleeves and would suggest that those of you in that market return to your rooms, remove some more labels from those Cuban cigars you want to take home, and then report back in half an hour for punch-out ceremonies. Remember—each employee must punch his own time card.

I wish to explore some of the problems that contribute to the clogging of the arbitration forum, such as the increasing volume of grievances, the increasing inability of the grievance procedure to dispose of disputes prior to arbitration, and the pressures that the volume of appeals and the external law place on the process. Thereafter, I will consider some of the innovative approaches of others and some personal experiences, which I offer as one person's contribution to solving a problem we are all confronting.

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## The Conventional Wisdom

The conventional wisdom in our business holds that the parties negotiate a grievance and arbitration system as an alternative to the strike over matters of contract interpretation and application. It is assumed that once the system is made available, the parties will make a serious effort to utilize the machinery effectively to resolve disputes at the lowest step of the procedure, and that the only cases permitted to reach the arbitration step are those of serious conflict which, despite repeated efforts at resolution, continue to elude a meeting of the minds.

The conventional wisdom also dictates that the process be used by the cooler heads on both sides and that informality, factual enlightenment, and intimacy of the parties will preclude the use of outside lawyers and thus prevent the process from becoming legalistic and too court-like. In fulfilling this goal, it is also assumed that grievants are loyal union members and that they will happily be bound by the settlement commitments of their duly elected collective bargaining agents. Likewise, the higher levels of management will readily be expected to overrule the excessive acts of subordinates to minimize resort to the arbitration step. Thus, arbitration is to be reserved for only the legitimate impasses between the parties.

Finally, as a crucial element of the conventional wisdom, it is expected that the arbitrator will stick to his knitting, that he will confine his role to the four corners of the collective agreement by which he is empowered, and that he will not stray into any other role or base his decision on any external authority.

## The Reality

Fortunately, for all of us here, much of the practice of labor arbitration proceeds in conformity with the above mold. But there is an omnipresent reality that causes even greater concern about the clogging of the process and signals an ever greater threat to the usefulness of the process and to the finality and binding quality of the arbitrator's decision. Indeed, there are, if you will, seven deadly signs or realities that must be recognized.

First, we are all aware that an increasing number of cases are rising to arbitration which should have been resolved at the lower steps. At the same time, there are more cases being appealed in which we are less certain that we are achieving the final and binding result the parties opted for in agreeing to arbitration.

The reality of the situation is dramatized in several ways. It is demonstrated by the increasing frequency during union-election campaigns of demands for return of the strike right during the life of the agreement, for removal of arbitration as the final step in resolving certain types of disputes, and for greater grass-roots autonomy in all facets of the collective bargaining relationship.

It is also demonstrated by what, to many arbitrators at least, appears to be an increasing tendency by both parties to the grievance process to pass the buck to the arbitrator. This is far more than the traditional question of whether the union officer will refuse to process a specious grievance or whether the plant superintendent will reverse the overzealous commands of his foreman. There are now more serious ramifications for both parties in the actions taken on the shop floor or even in the negotiations rooms. Union leadership, in light of the turmoil evidenced in a number of recent union elections, may properly be fearful that by squelching such evidence of rank-and-file militancy, they may be accused of controlling internal politics.

The second reality is that, as the cases get passed on up the line, so too do the efforts at researching the facts of the case, so that the burden of exploring the facts and obtaining documentation gets delayed to the period just prior to the arbitration step. In this process, to quote Washington Irving, "History fades into fable; fact becomes clouded with doubt and controversy."[1]

The third reality concerns the legal jeopardy of the parties in resolving cases that are bound toward arbitration. Unquestionably, unions, under *Vaca* v. *Sipes*,[2] and companies as well, under *Anchor Motor Freight*,[3] are justly concerned with the prospect of suit by a grievant whose case has been dissipated prior to, or inadequately processed in, arbitration. Both parties run a risk not merely of a resort to another forum for an ancillary claim, they run a risk of a lawsuit for their actions in handling a particular grievance. The cost of merely processing such a suit, let alone the liability that may flow from an adverse court decision, makes it economically feasible to go the route in arbitration in the hope that the failure-of-representation claim may thus "go away." Arbitration becomes an inexpensive prelude to the real court battles. This, too, forces to arbitration cases that otherwise would not and probably should not be there.

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[1] *Sketchbook*, Westminster Abbey.
[2] 386 U.S. 171, 64 LRRM 2369 (1967).
[3] *Hines* v. *Anchor Motor Freight, Inc.*, 421 U.S. 928, 91 LRRM 2481 (1976).

The parties are naturally wary of exerting their traditional authority to dispose of grievances prior to arbitration, and we see a growing incidence of cases in which the parties feel the need to call upon legal advice or to utilize legal counsel at the arbitration step to show their unflagging devotion to the grievant's meager cause and to demonstrate the conscientiousness of their efforts, at minimum, as protection against a subsequent suit.

The fourth reality, stemming from the foregoing, is an increasing tendency toward legalistic proceedings. Hand-in-hand with the parties' own reluctance to settle cases at the lower steps, whether because of political or legal inhibitions, has been the escalating use of attorneys to represent the parties at the arbitration step. Although most labor-management attorneys are certainly busy enough to avoid charges of champerty and maintenance in their arbitration practices, either they or the attorney advocate on the other side with whom they can settle usually arrive on the scene too late to have much impact on working out a settlement. Though they are often effective in pushing their clients to a withdrawal or a granting or a settling of a grievance, they also tend to become parties to passing the buck to the arbitrator. Perhaps even more of a problem arises from the nonlawyers who overact as lawyers—emulating the more prosecutorial styles found on the TV screens. With the lawyers, self-styled and real, appear to come transcripts, longer hearings, and posthearing briefs, which we all know add to the delays and the costs of arbitration and create a heavier workload and more study-days for the arbitrator. As a consequence, arbitrators have fewer days to take on new cases to reduce the backlog of pending cases. And the logjam of the arbitration step continues. As a result of the foregoing concerns of the parties, the legitimacy of which should not be minimized, the arbitration step has become clogged with too many pro forma cases coming up for formal hearing and decision.

The fifth reality is the burgeoning impact of public-sector collective bargaining. The obstruction in the process that has occurred in the private sector has been exacerbated by the spread of collective bargaining to the public sector, as more and more jurisdictions agree to follow the private-sector dispute-settlement model. Private-sector arbitrators, as the most acceptable and the most experienced in the procedural aspects of dispute settlement, have found themselves called upon, in the absence of adequate federal and state mediation services, to serve as mediators and fact-finders, even further restricting their availability for service as arbitrators of private-sector grievances. And then, as night follows day, the advent of

collective bargaining agreements leads to provisions for grievance and arbitration clauses. Such clauses then spawn public-sector arbitration cases for the limited cadres of acceptable arbitrators. Here, too, the delays in case investigation and the concerns for the external law come into play, as do the lawyers, some lamentably lacking in labor-relations experience, intensifying the problems already noted for the private sector.

Therefore we find ourselves in a situation in which, because of intra-union fears of dissidents and militancy, because of increased awareness of union members as to their political rights, and because of increased employee sensitivity to tenure and civil service laws, civil rights, OSHA, ERISA, and the like, the employee is no longer the mute follower of the advice of union leaders or a compliant recipient of the settlements of grievances worked out by union and management representatives at sessions prior to arbitration.

Thus, a sixth aspect of the contemporary reality is the increasing frequency with which arbitrators are confronted by issues involving potential or pending claims under external law. Although it may be difficult to resist the temptation to solve the "big problem" by going beyond the traditional confines of the four corners of the parties' agreement, there are agreements which impose upon arbitrators the requirement of interpretation in conformity with existing law. Since a decision based on only the contract may not resolve the parties' problem, the arbitrator may be lured by the argument of counsel or his own overconfidence as a decision-maker to take the plunge into fields where he has little current familiarity. As Benjamin Stulberg, author of *Tailor's Progress*, said, an expert is a person who "avoids the small errors as he sweeps on to the grand fallacy." In expanding his jurisdiction, the arbitrator runs the risk of making an inaccurate ruling under the law, or of making a decision properly based on then existing law which may later be reversed to leave the grievant without a remedy under the contract. The consequences of these decisions based on law may be a reversal by the courts or, at best, an ignoring of the arbitration decision during a court proceeding based on statute and/or constitutional law.

A seventh reality is that, despite the arbitrator's good intentions in seeking to resolve a grievance based on the contract and the external law, some resolutions are unattainable without a reformation of the contract itself, which is inevitably proscribed by the specific prohibition against adding to, detracting from, or otherwise modifying the terms of the parties' agreement.

## Possible Changes in the Arbitrator's Role

In light of the foregoing chamber of horrors, it should be evident that there are increasingly greater obstacles to achieving the proclaimed labor-management goals of dispute resolution at the earliest steps of the grievance procedure. It should also be evident that, in light of the increased volume of cases, the trend to buck-passing, and the incidence of parallel law appeals, that the expected role and impact of arbitration is changing. In routinely hearing and deciding all the issues presented before him, the arbitrator is more and more frustrated in fulfilling his traditional role of returning tranquility to the workplace or in bringing an end to a dispute between the parties. And the process drags out, with longer and longer time elapsed before a grievance is disposed of. My wife Norma, in reading Stulberg's *Tailor's Progress*, pointed out to me the dismay of the parties, under Brandeis's Protocols of Peace in 1913, when a case might take as long as three months from grievance to decision!

Although arbitrators can have a substantial impact on this increasingly menacing situation by doing more than merely trying harder to do what they have been doing for decades, the burden of lessening the excessive number of cases slated for arbitration, as well as attempting to resolve voluntarily disputes threatened for subsequent legal and administrative recourse, rests with the parties even more than it does with the arbitrators. The parties themselves have initial control over their cases and the appeal to arbitration. There are a number of approaches they could take to preclude cases going to the arbitrator.

First, they could try to overcome the surprise that seems to occur ever more often at the arbitration step. Perhaps such surprise is a result of the parties' too rapid upward buck-passing of grievances to the higher levels of the procedure, delaying or ignoring investigation of facts and research of precedents until after the second or third step. Perhaps it is a function of outside counsel's not coming into the case until just shortly before the hearing when they, for the first time, request certain evidence from their clients. Perhaps it is a deliberate tactic or the litigious enthusiasm of a new generation of advocates who strive for notches in their belts rather than solutions to their problems. Regardless of its motivation, the suppression of fact runs contrary to the goals of the parties in agreeing to the grievance procedure, and it quite naturally raises critical questions as to the perpetrators' adherence to those goals. It also raises fundamen-

tal questions as to whether the grievance and arbitration procedure is all it is cracked up to be as a dispute-settlement device. Such delay in ascertaining the facts does no one any good.

To overcome this creeping cynicism, the parties could establish routine procedures for full disclosure of the facts prior to the arbitration step. Mark Twain proclaimed, "Get your facts first and then you can distort them as much as you please." In some cases the parties go so far as to exchange not only facts, but also their respective arguments prior to the arbitration step. Such frankness not only provides better opportunity for reassessment of the strength of one's case, but it might well mean that, with full disclosure, a grievance will be withdrawn or settled without the need for arbitration. After all, one can't disagree with facts; one can only be ignorant of them. The parties must at least use meetings to develop joint stipulations of facts, agreements to utilize offers of proof instead of lengthy and repetitive testimony of witnesses, and perhaps some form of pretrial discovery procedure, such as that used in the judicial system. In our effort to streamline and delegalize the arbitration system, one gets the impression that we have abandoned some of the best informal devices used by the court system.

In another area, many parties have experimented with a specially tailored, expedited-hearing procedure and/or agreed to cut short the time-consuming and costly award-rendering process. AAA Vice President Michael Hoellering, in his paper for the 1974 Industrial Relations Research Association meeting in San Francisco, spelled out the details of a number of such programs.[4] GE-IUE, the steel companies and the Steelworkers, International Paper Company and United Paperworkers, Long Island Railroad and UTU, the United States Postal Service and the Postal unions, and others have negotiated special arrangements to hear cases quickly—several a day—before readily available arbitrators, without transcripts, without briefs, and without lengthy written opinions. Bernie Cushman, in his paper on the Postal Service's expedited system, pointed to the use of that system to dispose of a backlog of more than 100 grievances.[5] A number of parties have adopted the device of the memorandum or short-form decision.

Despite the dangers of litigation based on discriminatory treatment or denial of due process that may flow from the foreclosing of

[4] Hoellering, *Expedited Grievance Arbitration: The First Steps,* in Proceedings of the 27th Annual Winter Meeting, Industrial Relations Research Association (Madison, Wis.: The Association, 1975), 324-31.

[5] Cushman, *Some Reflections Upon the Postal Experience With Expedited Arbitration,* in Proceedings of the 27th Annual Winter Meeting, IRRA, *supra* note 4, 332-35.

full appeal rights in such expedited procedures,[6] many parties apparently believe that the benefits outweigh the risks. Perhaps the seriousness of the parties' concern over the delays of the present system is demonstrated by the request I received from a Maryland school district last fall for an arbitration under their expedited rules which, they explained in response to my inquiry, required a decision within 30 days.

Another, perhaps more controversial, device for reducing the logjam is mediation of grievances. The late Saul Wallen, who taught me all I ever learned in this field, utilized this device in a number of situations. With one set of clients in Bristol, Rhode Island, he designated a young Harvard Law School graduate student, Joel Bell (now, less than 10 years later, vice president of Petro-Canada), to serve as a mediator, receiving brief, informal presentations of the parties' facts and arguments and providing oral "nonbinding recommendations" for the resolution of those disputes. Although the arrangement permitted either party to appeal a case to Saul as arbitrator de novo and without precedent or prejudice, not one of the more than 100 cases so handled was ever appealed.

Saul attempted a similar effort at the Clarksville plant of B.F. Goodrich, using pending cases selected by the employees' representative, the Rubberworkers union. Although he himself heard cases on only one occasion under that system before he went on to become head of the New York Urban Coalition in 1968, I utilized the same procedure at other plants of the system when I succeeded him as umpire. We heard as many as eight or nine cases per eight-hour day, based upon one- or two-page typed presentations offered by the parties at the start of each case, with minimal resort to witnesses and with informal, nonbinding indications at the end of the day as to how the case might be resolved if appealed to formal arbitration. I would estimate that about half of the cases submitted to the process were settled by the parties directly, or settled after a settlement-suggestion from me without need for a contract-based recommendation. Despite the repeated assurances that cases might come out differently if appealed to formal arbitration, none of the 100 or so cases submitted to that system during my years at Goodrich was actually appealed to the formal step.

In recent years other parties have requested the use of such a procedure to clear up backlogged cases pending arbitration. In such

[6] M. Murray and C. Griffin, Jr. *Expedited Arbitration of Discharge Cases,* 31 Arb. J. 263 (December 1976).

situations, it is my practice to require the parties to prepare and exchange their respective views of the facts and the arguments in support of their case prior to the session; to have witnesses called to testify only in cases of conflict over facts; and to begin case-presentations at 9 a.m., with the presentation of the final case undertaken before 4 p.m. to reserve some time for reflection before I provide my oral, nonbinding recommendations at the end of the day. In most cases, the group present is sufficiently small to facilitate a give-and-take without the need to mediate or to meet each side separately. It is my practice to decline to serve as arbitrator on any case for which I have been wearing my "informal hat." Under such a procedure, many of the cases are settled by the parties prior to the hearing, after their exchange of presentations or in joint exploration of the facts. Others are settled in the hearing room. Some are settled when I am in my role as mediator. In only a minority of cases has it been necessary for me to give a recommendation for settlement based on what an arbitrator might do if he decided the case on the contract.

If management and unions were willing to experiment with the several procedures discussed above, there would be some hope of expanding the channels of communication that lead to settlement. At the least, utilization of such procedures as expedited arbitration or mediation of grievances would reduce a backlog of pending cases and restore some measure of faith in the claimed speed and efficiency of the arbitral process.

But the parties are not alone in having an obligation to overcome some of the present disenchantment with the process or in having the resources for doing so. The arbitrator also is in a position to help goad the parties back to the original ideals of the process and to protect its usefulness for the future. He can somewhat exploit his role as the parties' mutually acceptable neutral and perhaps help them achieve dispute resolutions that are mutually acceptable but perhaps unattainable in arbitration. Among the settlements that are uniquely within the parties' control, but beyond the authority of the arbitrator, are a contract-reformation, or a voluntary termination with an extra-contractual severance payment—a buy-off.

Any innovations undertaken by the arbitrator obviously can succeed only if both parties are receptive to the idea. He was presumably hired to serve as an arbitrator and should not abuse his relationship with the parties by heavy-handed pressures which they, in their desire not to offend the decision-maker, may feel unable to fend off or reject.

But, as Harry Shulman noted in his Holmes lecture,[7] there are those cases where a settlement may be preferable to a decision. Even without prior arrangements to do so, it would not be out of place to meet jointly with the spokesmen of both parties to ask if they themselves have made any efforts to resolve the dispute without arbitration and then to withdraw from the caucus to encourage a free direct exchange. Any awkwardness in utilizing such an approach could be mitigated by initially requesting the spokesmen to work out a joint statement of the issue and/or a stipulation of the facts. Coupling thereto a mild suggestion that they try to work out the case itself could hardly offend either party. Even if the parties are unable to settle the grievance, the stimulus to discuss the issue and to stipulate to some or all of the facts provides the opportunity for the spokesmen to explore avenues of possible agreement and perhaps an actual settlement.

If either of the parties is unwilling to undertake this approach, then obviously it will not "fly." And some parties are quick to point out that (1) "we've tried," or (2) "it will be faster to get on with the case," or (3) "we can't," or (4) "we won't." But my experience has been that such goading by the arbitrator may be the excuse for a direct meeting between the spokesmen that neither feels comfortable initiating on his own. And since many of those presenting arbitration cases these days are unfamiliar with the grievance as it was processed up the line, their fresh and independent approach to the case may be what is needed to stimulate a settlement. The gentle nudge of the arbitrator may provide just that opening which was not available or acceptable in the earlier stages of the grievance. Although I have not kept any statistics on my actions in this area, my rough guess is that this approach brings settlements without the need for a hearing in 10 or 15 percent of the cases that come to arbitration. Any success in this approach depends, of course, on the relationship among the two spokesmen and the arbitrator, and my sample may even be warped by the parties having selected me in anticipation of my undertaking such a ploy.

An alternative opportunity to get the two spokesmen together to stimulate settlement may come into play during the hearing of the case itself, either after opening statements are made, during a coffee or lunch break, or perhaps even after the parties' cases have been presented. The arbitrator may have picked up a reference to an earlier effort to settle the case. Or he may suspect that an external-law situation is hanging over the issue being arbitrated. Or he

[7] Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

may conclude in a case close to pending negotiations of a contract that a decision for one side or the other may freeze the existing language and place an insuperable burden on the losing party in its efforts to revise a cloudy contract provision. Or he may have a case where the contract precludes any equitable decision or remedy, or a case that all present recognize as being pro forma. Here, again, if the relationship between the parties is right, if the timing is appropriate, if the atmosphere is sufficiently charged or sufficiently cordial, and if the evidence presented by the parties calls for it, the arbitrator may be in a position to propel the spokesmen toward settlement. But when done at this juncture, the approach requires far more delicacy, since by this time the arbitrator has probably reached at least a tentative judgment on the case before him and must be careful not to give any indication of that leaning to the parties. My practice in undertaking such a role is to call both counsel aside and say something like this: "I recognize that I am the arbitrator and that I have responsibility to decide the case, and I do not want a response from either of you to what I am about to say, because I don't want to prejudice my views. I want both of you to talk and agree to an answer to this question: 'On the basis of what we've heard, do you see any grounds for settlement at this point?' "

To me, it is of paramount importance that the parties be clear that any prejudicing response by one party may jeopardize the arbitrator's continuation in the case. The reactions to this approach tend to be of three types: In one, the parties quickly forestall any further overtures by responding after caucus that they would prefer to go forward with the case in hearing. In the second, the parties may be together for an extended period and then return with a settlement. In the third, the caucus, whether short or long, elicits a request for a further assistance by the arbitrator. This may occur, say, in a discharge case where both counsel feel empathy for a long-service employee with an otherwise clean record, who apparently violated a strictly enforced rule precipitating discharge. In such a case, both sides may recognize the dangers of an adverse decision. The arbitrator can, without showing his hand, set forth a series of possible settlements, including some beyond his arbitral authority, which might help the parties reach accord:

"You can agree to reinstate with full back pay.
You can agree to reinstate with partial back pay.
You can agree to reinstate with no back pay.
You can agree to settle the case without precedent.

You can agree to change the termination to a resignation or retirement.

You can agree to pay the grievant some money to withdraw his grievance and leave.

You can agree to withdraw the grievance and accept the termination."

A comparable opportunity may arise in a case where an external-law claim or a suit against one or both parties is pending or potential. In such a situation, the parties may appeal for assistance in resolving their quandary, in recognition that an arbitral decision that is anything short of a full grant of the grievance may still result in pursuit of the external claim. In recognition of this, and still without showing his hand, the arbitrator could posit a range of alternatives that go beyond his narrow authority under the agreement and thus open the door to a settlement that might otherwise be unattainable. In his shopping list, in addition to the earlier alternatives, he could make available the prospect of the grievant or grievants being signatory to any settlement with a signed waiver of alternative appeals, or perhaps agreement to a contract-language revision or an amendatory letter of understanding between the parties.

Although the opportunity for this form of interjection to achieve a result that is not within the routine purview of the arbitrator is rare, I agree with Shulman that it may be a much wiser course to follow in those cases where "decision with confidence seems impossible and where the arbitrator is quite at sea with respect to the consequences of his decision." Thus, I feel it is crucial to some situations that the settlement stimulus be provided. In these cases, once the overtures are made, the rate of settlements in lieu of return to the arbitration is high enough to persuade me that the parties welcome such assistance.

Up to the point that I have described, the role I posit is still within the domain of the arbitrator. No sessions are held separately with either party, and I do not make myself privy to any private partisan presentation which might impinge upon my decision-making responsibilities as an arbitrator. From time to time, however, the parties do request that I undertake the role of mediator. I do so only with the understanding that I consider myself removed from the case as arbitrator—and, absent settlement by the parties, will decide the case in my former role only when jointly requested by the parties to resume the arbitrator's function.

The foregoing approaches, whether at the outset of the hearing or at appropriate breaks in the hearing itself, do not, even if suc-

cessful, substantially reduce any backlog in arbitration. They may reduce the number of cases coming to arbitration, they may cut down the range of conflict, they may reduce the number of hearing days or think days or days for executive sessions of tripartite panels and thus make such days available for other hearings, but the impact thereof is obviously marginal.

Their value, I contend, is in an effort to achieve the resolution of conflict, which is what the grievance and arbitration article in the parties' agreement is all about. This is particularly important, it seems to me, in these days of our finality being frayed by the inroads of external law and suits against both parties. Hopefully, a more open approach by the parties and a more active, but cautious, role by the arbitrator will help to restore the faith of the parties and the grievants in the arbitration process and will strengthen the opportunity to solve the real problems with finality and equity, which may be increasingly illusory in arbitration but which may be more attainable in settlement. The alternative, I suggest, is accelerated escalation of the disenchantment with us and the process.

**Discussion—**

WILLIAM KELLY: I have a question for Paul Weiler. It seems to me that in the first part of your presentation you were building a good case for the extension of the arbitration system to the tribunal, and in the concluding part you kind of took it apart. I think you qualified it with the term "peaceful coexistence" between the two under your Section 96 system.

My point is that you used the term "garden-variety" in describing the some 700 cases processed. Have you done any evaluation of the type of grievance that comes through the system, or of the size, degree of militancy, or professionalism of the unions that have opted out of the system? I guess the final assumption is that they may be merely transferring the system and cost over to the government sector, because I understand you have quite a number of these industrial relations officers doing the mediation of grievances. Is it perhaps an abdication from the responsibility of keeping grievance arbitration a private matter, and are the really tough type of grievances going through that system?

MR. WEILER: There are a number of questions there, but let me say first of all what the primary objective of Section 96 is. In a sense, it is to socialize the cost of disposing of grievances by providing ac-

cess to a governmentally run system. That's the objective, and that's probably the justification for it.

We do quite extensive analyses of the kinds of cases that go into the system—the kinds of unions, the kinds of employers, and the kinds of bargaining units that produce the cases; those analyses are reproduced in our annual reports.

I can say one thing that strikes me about the system, and that is the wide distribution of employers that are affected by a very small number of cases. One of the problems we anticipated is that there might be units of the unions that would simply refuse to take the responsibility for presenting a case. They would push every grievance right up to the procedure into a Section 96. That charge was made by some employer groups. We did an extensive analysis and found that it was completely untrue.

I think there were about 410 employers who were affected by this who responded to Section 96 procedures in 1976; of that 410, 385 had one or two cases the whole year. There was a very wide distribution in every industry and a very wide distribution in types of cases.

One of the things we find is that there is a continuing and growing number of employers who initiate the process of requesting board assistance under Section 96. Some are small employers; some are small public employers who are unwilling to pay the cost of arbitration. In other cases there were employers either experiencing or anticipating work stoppages about action they intended to take which might produce a grievance or a wildcat strike; they got on the phone to the Labour Relations Board and asked us to parachute an officer right in to the situation to try to work out a settlement.

We have some 30 or 40 cases a year, consistently, from employers who initiate the Section 96 procedure, as well as the 600 or more last year from trade unions.

CHARLES J. MORRIS: This is for Paul, in two parts. You described two parts of the new statute which, while possibly not in direct conflict with each other, seem at least to be working against each other. In the first part of your paper you described a move toward a *Steelworker* trilogy-type approach to arbitration, but it seems to me that by concentrating on Section 96 you do not give the *Steelworker* approach an opportunity to work, to see whether or not it would change the complexion of arbitration in British Columbia.

The second part of my question, which is related to the first part, can be illustrated by a story about something that happened in the United States; I wonder if there is a parallel. Under the Railway Labor Act, we have—as you have in Canada—a system of compulsory

arbitration of rights disputes. Our National Railroad Adjustment Board has jurisdiction similar to what you described under Section 96, although the procedures are different. By 1966 a tremendous backlog of cases had built up because of the tendency of both parties to throw into the hopper all their cases that otherwise they might have been able to resolve themselves. There was not sufficient incentive for them to work these things out because a cheap form of arbitration was available. The government was paying for the arbitration, and it was easier to shove the cases off to the NRAB.

Is it likely that the same thing is going to happen under your system? It seems to me there are parallels. Will there be a chilling effect on real bargaining about grievances? Won't so many cases be referred to arbitration that the system will become clogged like the NRAB under the Railway Labor Act?

MR. WEILER: Let me answer these comments in the same order in which you put the questions. First of all, I think that basically the operation of Section 96, which is our original jurisdiction over grievances, is in principle compatible with the operation of Section 108, which authorizes us to supervise arbitration awards—to review arbitration awards. They are compatible because they deal with quite different kinds of problems.

What we try to do in Section 96, by and large, is to remove from the arbitration process the vast bulk of unnecessary, trivial cases that should be settled by the parties—the cases that are clogging up the system and making it less accessible to the kinds of grievances which should get a decent hearing in arbitration.

Having done that, the other side of the statutory approach, or the use of the Labour Board as an instrument of this statutory policy, is to protect the arbitration process from the relatively heavy hand of the courts—the kind of absentee management of the arbitration process that Canadian courts undertook in the 1960s and 1970s, which you described in Montreal a while ago. I think that in that sense Section 96 and Section 108 operate in tandem as separate provisions designed to achieve the same quality, which is to facilitate grievance arbitration as the preferred vehicle for settling grievances.

On your second point—does the availability of Section 96 as a procedure encourage the parties to throw these problems onto the Board rather than solving them themselves in a grievance procedure? Our analysis of the data indicates that that is not the situation. There is such a widespread distribution in the use of Section 96 that only a very few cases in each unit come in, so that it isn't

possible to infer from the data that the parties are shirking their responsibilities in general. There are cases where they do so. We see them, and when they do start producing 10, 15, or 20 Section 96 cases in a review period, we call the parties in and talk to them.

We have the industrial relations officers in the area investigate what's happening. How many grievances are they having? Is there a union raid in the background? Are there political factors? Are they actually taking certain cases to the grievance procedure and then going to arbitration? If it's a passing phase, we'll see that; if it's not a passing phase, then we take steps to remedy the problem.

In closing, the reason why this Section 96 has not evolved in the way that you describe the Railroad Act procedure is that the parties do not have access to a hearing in front of the Labour Board as a matter of statutory right. We exercise control to make sure that they do use arbitration to get adjudication.