CHAPTER 1

# THE PRESIDENTIAL ADDRESS: THEME AND ADAPTATIONS

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During the past year many persons have asked me how a president of the Academy occupies his time. Well, there are the usual appointments of committees, attendance at meetings, preparation of reports, and so on. But to occupy those tedious hours traveling on airplanes and buses, I have invented a delightful pastime: composing proverbs and aphorisms about our work. I would like to share a few of them with you.

The first one is dedicated to Rolf Valtin:

- All that glitters is not a coal umpireship.

And here are some more:

- He who lives by the award shall get fired by the award.
- Do not covet thy brother's paid cancellations.
- A bench decision may lead to a benched arbitrator.
- Don't cry over split decisions.
- If at first you don't succeed, try another arbitrator.
- Blessed are the piece workers, for they file incentive grievances.
- If an advocate offend thee, cut him off.
- Obey now, get screwed later.
- Three strikes are probably a violation of the contract.
- When the witness is beautiful, can justice be blind?
- Never give an oral warning unless it's in writing.
- Always give the devil his due process.
- Justice delayed is double the back-pay bill.

We have read and we have been told, during the past few years, that arbitration is in decline. There was a paper at the AAA's Wingspread Conference about "The Impact of External Law on Labor Arbitration." There was another paper at the Academy's 1976 meeting entitled "The Coming End of Arbitra-

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tion's Golden Age." And a third paper appeared in the Spring 1977 issue of the *Industrial Relations Law Journal* with the title, "Arbitration—The Days of Its Glory Are Numbered."

These titles are disconcerting; a pattern of pessimism was established. The AAA's *Arbitration Journal* covered the topic with "Labor Arbitration at the Cross Roads." And an article in the *Employee Relations Law Journal* was titled, like a gloomy melodrama, "The Gotterdammerung of Grievance Arbitration."

All these, of course, were directed primarily at the cogniscenti —namely, you and me. But the message spread, as so frequently occurs, and last November the labor specialist of the *New York Times,* picking up the numbered-days-of-glory thesis, wrote a column headlined "Arbitration: Growing Role, Possibly a Waning One Too," in which he told the world (of *Times* readers): "No one suggests that the sun is going to set on the system of industrial self-government of which grievance arbitration is the capstone, but the evidence is strong that it may be past its zenith."

As a practitioner traveling the circuit week after week, I found the emphasis misleading. My own experience, of course, is limited. I therefore decided to ask a number of colleagues, who are familiar with different industries, to share with me their experiences and impressions. In this manner I sought to obtain a panoramic view of labor arbitration as it exists in the late 1970s.

What follows, therefore, reflects a collaborative effort. To the many arbitrators who responded, I now express deep gratitude.[1]

What we have found is that from Hawaii to Puerto Rico, from the Canal Zone to Canada and Alaska, arbitration is working—sometimes very well, sometimes less well. But arbitration is still young and growing. It has all the attributes of a healthy, responsive institution, including normal growing pains. It is flexible—continually spawning new methods to cope with changing

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needs. Moreover, it is used in hitherto undreamed-of situations.

Consider, for example, the dispute between a state college and a faculty union which one of our colleagues was asked to arbitrate. The issue was whether the college had violated the agreement by curtailing the academic freedom of a professor of philosophy: The college had ordered the professor to stop conducting classes in the nude.

As the evidence unfolded, our colleague learned that the professor was leading a "Workshop in Sexism." The course was described in the college bulletin as "[e]ncounter group techniques . . . to provide experimental conditions for a personal understanding of, and liberation from, those aspects of one's sex role conditioning which one considers oppressive."

The professor had proceeded in a democratic fashion. He polled the students about participating in nude exercises. Receiving a favorable response, he moved the class to his home and, thereafter, both he and his wife (who, although without faculty status, helped in the teaching) were nude most of the time.

The exercises included giving satisfaction ratings to various parts of the body, and other interesting endeavors. In what must be one of the most poignant colloquies of arbitration history, this exchange took place:

> Q. Were the genitals ever the subject of the high or low ratings such that they would be the subject of discussion?
>
> A. Not very often. People were shy about discussing genitals, particularly in the spring workshop. . . .

You may wonder whether our colleague requested on-site inspection (sometimes known as plant entry). And, if so, did he or did he not remove his clothes to get the bare facts? For the answer to this and other intriguing questions, you will have to read my book on arbitration (as yet unwritten). The chapter heading, as you might guess, will be "The Training of New(d) Arbitrators." Meanwhile, the arbitrator wrote a 30-page decision which, I learned, was banned in Boston and Atlanta, but not in New Orleans!

But, back to more mundane and, we hope, significant matters. Let us start with adaptations of the basic arbitration procedures in several industries: steel, auto, rubber, and construction. We will then examine some expedited procedures, appellate procedures, interest arbitration, and, finally, some new areas.

## Adaptations

*Steel*

In basic steel, the parties have been both innovative and flexible.

The innovation established by U.S. Steel and the United Steelworkers in the early 1960s was described by the Academy's president at our 1964 meeting. It is worth recalling for the benefit of our younger arbitrators and practitioners. Under this system, top representatives of the parties read a draft of the arbitrator's award and may raise questions about it—or have the wording and emphasis changed—before it is released. Thus can be avoided one of arbitration's pitfalls: the triggering of new grievances and disputes because of an arbitrator's inadvertent or unnecessary statements in the opinion.

An unusual procedure has been adopted by the United Steelworkers and Kaiser Steel. Here four options are available to the arbitrator: (1) a ruling "from the bench" at the hearing; (2) a ruling "from the bench" at the beginning of the next scheduled hearing; (3) a very brief decision and opinion limited to the principal reasons for the decision; (4) a conventional opinion.

It works this way: The arbitrator announces at the outset of each hearing (with rank-and-file employees as well as first-line supervisors in attendance) that he will decide whether to make a "bench" decision at the conclusion of the hearing, but he will not do so unless both parties, after learning what the decision will be, agree that he should.

The most important element in this "bench ruling" procedure is the discussion among the parties' counsel and the arbitrator immediately after the hearing. This is an off-the-record, "no holds barred" exchange, in which every aspect of the case is explored. The arbitrator participates, often asking blunt questions to test the real position of each party.

If counsel for both sides and the arbitrator concur that a bench decision should be made, the hearing is reconvened. The arbitrator delivers an oral opinion and announces his award. Then, casting caution to the winds, he invites questions. Usually not many questions are asked, either because the arbitrator has covered the subject so thoroughly, or because people are somewhat timid about challenging him.

Some of the steel contracts contain a special procedure for the

processing of safety issues. An employee who claims an alleged "unsafe condition" may ask to be relieved of duty until the question is decided. The grievance procedure thereafter is short. An arbitration hearing is held within a day or two, no briefs are filed, and the arbitrator's decision is often sent by telegram.

*Auto*

Last year, General Motors and the UAW jointly sponsored a dinner to celebrate the 40th anniversary of their first contract. That in itself speaks eloquently of the relationship.

With about 450,000 employees at 145 GM plants throughout the country, the potential for chaos is immense. But the parties have developed a unique and effective means for resolving grievances.

The key is the unwritten "shakeout" step, which is held prior to an arbitration hearing. At this step, staff representatives from the international union and the corporation meet with local union and management officers. They whittle away at the arbitration docket, settling most of the grievances. Thus, in a recent year, 214,000 grievances were filed, of which about 1,150 were processed to arbitration. But fewer than 50 of these grievances were arbitrated.

The GM/UAW contract also provides for "expedited" awards. Neither the procedures nor the hearings are abbreviated, but, when both parties agree prior to a hearing, the umpire issues a "memorandum decision" within 10 days following the hearing. His decision contains the bare facts or allegations and little or no explanation. It is not to be cited in future proceedings.

In another variation, the UAW and the Bendix Corporation agreed to complete disclosure. No material facts are to be concealed, no surprises sprung at arbitration hearings.

In practice, the grievances are fully investigated in the preliminary steps. The union's international representative then meets with company representatives to discuss a group of cases. Documents are exchanged and questions of fact are either resolved or put together in a form which does not require testimony.

At the beginning of a typical hearing day, the parties exchange briefs and adjourn to read and digest the arguments. The arbitrator, having also read the briefs, then opens the hearing and

the parties submit their oral arguments. Since there are no factual disagreements under this procedure, and no witnesses appear, it is possible to hear as many as eight discharges in one day.

In 1976, however, several grievants asked to be present at hearings. Their requests were granted. When the new contract was negotiated in 1977, the parties included in the arbitration procedure the right of a grievant to be present and to speak and present evidence on his or her own behalf. In a recent docket of eight absentee discharge cases, six of the grievants made personal pleas. Each expressed the opinion, at the conclusion of the hearing, that he/she had had a full and fair hearing.

*Rubber*

There are two interesting reports concerning the rubber industry. One describes a two-track system which affords the United Rubber Workers Union the option of processing a grievance to normal arbitration, or utilizing an abbreviated procedure which results in a nonbinding, on-the-spot decision.

When the special procedure is used, eight cases are usually presented in a day. The proceedings are informal and the presentation and argument are brief. At the conclusion of each case, the arbitrator issues an oral opinion which is, in fact, written down by the parties as he speaks. If either party disagrees with the bench decision, however, the grievance is switched into the other track for a subsequent full-dress hearing.

The umpire, who served under this system for four years, reports that only one of the 500 cases processed through the informal procedure was later rearbitrated.

The other rubber report describes what one of our colleagues calls "preventive therapy" sessions. Once a year the top corporate and union brass meet with plant industrial relations managers and the presidents of the locals. The plant and local union staffs bring up any issues which are or may become the subject of grievances. The parties discuss them, compare related experiences at the various plants, and endeavor to resolve the complaints.

On occasion, the impartial chairman is invited to attend and discuss the ramifications of an award. He is not asked to change his decision, but he is informed about the "awesome" results that his decision may cause if it is not trimmed or altered in a

subsequent case. Such experiences can be traumatic, as we know, but our colleague, with commendable modesty, observes that the parties know best.

While these sessions are not as successful as the parties had hoped they would be, they have been effective in resolving some outstanding grievances and eliminating some causes of friction.

*Construction*

The construction industry is not usually thought of in conjunction with grievance arbitration. But, when a multimillion-dollar project was in the offing some 10 years ago, the Walt Disney World Company in Orlando, Florida, negotiated a no-strike, no-lockout agreement with 17 building trades unions and the Teamsters. This agreement has been renewed several times without change, and it works this way:

If a local union strikes, the international body has 24 hours in which to persuade the members to return to work in order to avoid liability. If the workers do not return within 24 hours, the permanent arbitrator must hold a hearing within the ensuing 24 hours, and render a decision within three hours thereafter.

The permanent arbitrator, who has served in that capacity from the very beginning, reports that there have been only 10 to 15 cessations of work, only two of which lasted more than 24 hours. When one considers that at the peak of construction as many as 10,000 people were employed, the record is indeed impressive.

There are thousands of miles between Florida and Alaska, but the principles established in the Disney World no-strike, no-lockout agreement were transferred to the colder climes in 1974. The Alyeska Pipeline Service Company, and its contractors and subcontractors, agreed with the building and construction and other unions that there would be no strikes, picketing, work stoppages, slowdowns, or other destructive activity for any reason—and no lockouts. This applied to all new construction work on the project. Failure to cross a picket line was a violation of the agreement.

In the event of a stoppage, the international union would immediately use its best efforts to get the work going again. Having complied with this obligation, it would not be liable for unauthorized acts of a local union.

The permanent arbitrator was required to hold a hearing

within 24 hours of notification of an alleged violation. As in the Disney World agreement, the sole issue before him was whether the no-strike, no-lockout agreement had been violated. He had no authority to consider any justification, explanation, or mitigation of the violation, or to award damages (which issue was reserved for the courts). And he had to issue the award within three hours after the close of the hearing.

The Alyeska agreement (it was called the Trans-Alaska Pipeline System Project Agreement) also called for the arbitration of grievances and of jurisdictional disputes. What was unique, according to one of our colleagues who served on the grievance arbitration panel, was the need to institute and crank up the machinery rapidly since the project had only a limited life. While initially there was widespread acquiescence in the ignoring of contractual time-limits, it soon became apparent that these requirements had to be rigorously enforced since witnesses and even records became unavailable as portions of the project were completed and subcontractors left the state.

## Expedited Procedures

Such limited time-strictures on the arbitrator are unusual, but many industries these days are "expediting" their arbitration procedures.

### *Steel*

The procedure devised by the United Steelworkers and U.S. Steel is an example. Here members of special panels of arbitrators—and not the umpire—hear the so-called "one-shot" grievances. The decisions are short and, the parties agree, cannot be used as precedent.

### *Brewery*

A novel system was developed by the Teamsters and Anheuser Busch Brewery Company. Until about two years ago, unresolved grievances were submitted to a multiplant grievance committee consisting of company and union appointees. But this committee often deadlocked, and the time required to process grievances to arbitration was unsatisfactory. The union and its members demanded a more responsive approach.

Following a four-month strike over contractual issues, the

parties redesigned the grievance and arbitration procedure so that no dispute would take more than two months to resolve. They placed a permanent neutral on the multiplant grievance committee (which now became a five-member body), and they arranged for monthly meetings of this committee so that there would be no delay at the final stage.

The new approach works in this way:

1. The committee "rides the circuit," meeting in a different city each month.
2. Before a case is appealed to the committee, the local parties stipulate all the facts, both those agreed-on and in dispute; and they secure affidavits to support their respective versions of the disputed facts.
3. They then present their fact stipulations, affidavits, and arguments to the committee. Witnesses are rarely present.
4. The committee goes into executive session. If the company and union members agree on the disposition, the neutral does not vote. But if the four members deadlock, the neutral casts the deciding vote and prepares a brief opinion to explain it.

In this manner, 20 to 30 cases are disposed of in two or three days.

The neutral member finds himself playing many roles. He is an arbitrator when his vote resolves the deadlock, but in other cases he may serve as a consultant, mediator, or sounding board.

One of the reasons for the frequent meetings and immediate decisions is the "status quo" provision in the new agreement. Management cannot carry out most disciplinary actions and some subcontracting, if protested, unless the committee has heard the dispute and resolved it in management's favor.

This system contains a built-in danger: When the arbitration forum becomes so accessible and the process so speedy, the local parties may not bother to try to settle their differences. It is easier to let the committee provide a quick answer. A new creative effort may therefore be required to prevent the erosion of responsibility at the local level.

*Fabricating*

A unique procedure is used by Allis Chalmers and the Machinists union at some Pennsylvania plants. The parties obtain dates from the arbitrator. When a date is agreed upon, they send

him written briefs which he studies on the specified date and then renders a short decision without opinion. He may, however, ask for a hearing. This procedure is used only when there is no dispute about the facts.

*Airlines*

Some employers and unions in the airline industry have also traveled the expedited route. This industry is characterized by tripartite system boards of adjustment. It is also known for unique grievances. Let me share one such experience with you.

An airline passenger agent at St. Louis, with time on his hands, decided to perfect his skills on the computer keyboard at the ticket counter. He typed out: "Now is the time for all good men to go f--- themselves." As he typed, the words appeared on that little green computer screen above the keyboard. Then, along came a buddy who looked at the screen, leaned over, and pushed the button marked "Enter." By this action he conveyed the message to the computer. Seconds later, in a printout at company headquarters, there appeared this most unusual directive from St. Louis. The passenger agent was disciplined. An arbitration ensued.

Well, the arbitrator listened with a straight face. He heard a witness explain that words and phrases can be removed from the computer's memory only by using predetermined symbols, but there is no known key for the passenger agent's magic phrase. Thus, at any time, at any station or ticket office, someone may accidentally clue the computer in, and there will appear on a small green screen, "Now is the time for all good men to. . . ."

You should also know that arbitrators occasionally turn the tables. One such instance occurred during a hearing concerned with the propriety of a rule banning male flight attendants from wearing beards. The arbitrator, as fortune would have it, was one of our attractive nonmale colleagues. As part of its case, the union brought in a dozen or so neatly bearded, currently employed airline employees from various classifications to show how unreasonable the rule was. After each man, one more handsome than the man who had preceded him, had been paraded before the arbitrator, she announced demurely: "I'm not sure whether these gentlemen are witnesses or exhibits. But you

should know, if they are the latter, that it has always been my practice to take exhibits home to study at my leisure!"

But back to "expedition."

Eastern Air Lines and the Machinists union have created what they call a "time controlled" procedure. There are no transcripts or written briefs. Each side has one hour in which to present its case and must include, within the hour, its opening and closing arguments, direct examination of its own witnesses, and cross-examination of the opposing party's witnesses.

*Broadcasting*

In what must be one of the earliest expedited procedures, the National Association of Broadcast Engineers and Technicians and the National Broadcasting Company agreed, in 1959, that the parties could request arbitration of certain disputes within 48 hours of an occurrence, and the arbitrator was to hear the case within 72 hours thereafter and to render an award within 48 hours after the close of the hearing.

The procedure worked well, but grievances began to accumulate at an unusual rate. The umpire then suggested what came to be called "meditration." Under this procedure, the parties selected a series of grievances, summarized the facts and their positions on each case, and presented the material to the umpire, who attempted to settle them through mediation. If mediation failed, he decided the issues immediately, based on the information contained in the written statements and arguments.

A new provision in the 1967 agreement permitted either party to file a grievance directly with the umpire, who had to commence his hearings not more than 24 hours later. The umpire had to render his award no later than 24 hours after the close of the hearing, but he could send his opinion later. In this unusual industry, where time is of the essence and the show must go on, the umpire was given authority to provide injunctive or any other appropriate relief.

It became apparent to the umpire, after a while, that considerable time was spent at the hearings in discussions which would normally take place at the first step of the grievance procedure. At his suggestion, a preliminary step was established to provide for an ad hoc exchange between the parties before they appeared at the arbitration hearing.

By 1976, the office of the umpire was flooded with requests

for expedited arbitrations, and NBC and NABET sought to stem the tide. In their 1976 master agreement they established a combination of local umpires and a national umpire, and they confined the expedited procedure to complaints concerning actions not yet effectuated. It is utilized now only when time does not permit the processing of a grievance in the regular procedure. But the parties have also underscored their intention to permit changes in operations to take effect pending the outcome of an arbitration.

In the first year of its operation, our colleague reports, the system has worked fairly well, reducing the number of grievances submitted under the expedited procedure and heard by the national umpire, and permitting more availability for the "emergency" cases. The preliminary interchange has also helped to reduce the number of disputes submitted for arbitration.

## Appellate and Quasi-Appellate Procedures

*Publishing*

Appellate procedures in arbitration are unusual, but not unknown. The first such procedure, to our knowledge, was established more than 75 years ago in the newspaper publishing industry. The year was 1901. The parties: the American Newspaper Publishers' Association and the International Typographical Union. A few years later the ANPA entered into a similar agreement with the International Printing Pressmen's Union.

Actually, the parties negotiated two arbitration agreements. The first bars strikes and lockouts and provides that the individual publishers and local unions submit all of their differences—including differences with respect to new contract terms—to a local arbitrator or a board of arbitration.

The second of these agreements is called an International Arbitration Agreement and Code of Procedure and provides for an international board of arbitration to hear and decide appeals from the decisions of local arbitrators or arbitration boards. The parties here are the international union and the association.

The international arbitration board is composed of three directors of the union, three members of the association's labor relations committee, and a neutral member who serves as chairman. The reason for the appellate body, according to

a colleague who has been its chairman for many years, was to correct certain miscarriages of justice which occurred during the early years because local arbitrators or chairmen were unfamiliar with the newspaper industry or inexperienced in arbitration.

No evidence is taken at the appeal level, and all arguments must be based on the evidence presented and the record made at the local arbitration proceeding. The parties are normally represented by attorneys who make oral arguments and, if they desire or the board requests, file written briefs.

In a landmark decision in 1964, the chairman compared the authority of the international arbitration board to that exercised by federal courts of appeals in reviewing decisions of district judges in nonjury cases. The international board reviews the entire record, findings, and conclusions of the local arbitration tribunal to determine whether the local tribunal's findings and conclusions were erroneous or the result of an erroneous view or misapplication of the agreement. The board does not reverse the findings of the local tribunal, however, because of a mere difference in judgment on the facts.[2]

The issues most frequently appealed to the board are wage rates, press manning, and working conditions, especially those which involve substantial operating costs and benefits or earnings. Interpretive questions are also submitted.

*Bituminous Coal*

Of great current interest has been the appellate system in the bituminous coal industry. In effect for a little more than two years, its success must be judged by the historians. For the present I can only describe briefly what has occurred.

As a fifth step in their 1974 grievance procedure, the Bituminous Coal Operators and the United Mine Workers provided for an appellate review that permitted either party to an arbitration to appeal a decision of a panel arbitrator to a tripartite review board. (There were 18 such panels.) There were three grounds for appeal:

1. The panel arbitrator's decision was in conflict with one or more prior decisions on the same contractual issue.

[2] *Newspaper Agency Corp.*, 43 LA 1233 (1964).

2. The decision concerned the interpretation of a substantial contractual issue which had not previously been decided by the review board.

3. The decision was arbitrary, capricious, or fraudulent.

From the outset, the review board operated under a handicap. Although it was to have been established in February 1975, the parties did not designate their members until November, so that by the time operations were under way there was already a backlog of 150 appeals. Furthermore, before starting to review appeals, the board had to establish the rules. Issued in late December 1975, they covered such fundamental matters as whether to require rigid adherence to the record made at the panel level; whether to involve the panel arbitrator in the board's procedures; whether a panel decision should be implemented pending appeal; whether the board should write opinions and, if so, should there be dissenting opinions, and so on.

The parties had estimated that there would be between 500 and 700 arbitrations a year. Had this been so, the appeal caseload would have been manageable. In fact, however, the more than 6000 panel decisions rendered during the term of the agreement resulted in about 600 appeals. This was far more than the board was set up to handle. By the time the agreement expired in December 1977 (and the chief umpire's tenure as well), the board had issued 126 decisions which disposed of about 150 appeal cases.

Was this experiment in appellate arbitration effective? It was, in many respects. The decisions of the review board established precedents and principles in many areas. These decisions were sent to the parties in the coalfields and to the panel arbitrators, thus providing them with the guidance they needed to make uniform interpretations. As a result, the parties found it unnecessary to rearbitrate many issues.

But the cases to be appealed were inadequately screened. Another problem was the fifth-step delay. The volume of appeals exacerbated these delays so that, while panel arbitrators were able to complete their decisions within three to four months from the time the grievance was filed, the review procedures added 12 months more to the process. The delays will, of course, be reduced as fewer issues are left for adjudication.

*Railroads*

A quasi-appellate system has been utilized in the railroad industry for more than half a century.

For many years tripartite boards met in Chicago and decided cases on the basis of written submissions and transcripts of disciplinary hearings which had been conducted by carrier officials. In 1966, however, Congress amended the Railway Labor Act to provide for so-called public law boards. Although the public law boards now hear witnesses, the underlying concept remains that of an appellate rather than a *de novo* proceeding.

Ironically, the amendments, one purpose of which was to expedite the process and reduce the backlog, led to an increase in the number of pending cases. There were more than 12,000 cases pending at the beginning of 1976, with another 1400 ending up before the National Railroad Adjustment Board. As one of our colleagues has commented, "The continued success of Public Law Boards raises questions as to whether it will not create its own demise."

*Public Sector*

Quasi-appellate procedures are now surfacing in the public sector. Thus, a police officer in Detroit, when charged with rules violations, may be brought before a trial board composed of top police-department officials. This board hears witnesses and renders a decision. If it finds the officer guilty, it may impose a penalty. But the union, in this case the Detroit Police Officers' Association, if it believes that the officer has been unjustly punished or dismissed, may appeal to a board of arbitration. The collective bargaining agreement provides that

> ". . . no new testimony or evidence shall be received by the Board of Arbitrators. If the Board decides that new evidence and testimony should be heard, it shall refer the case back to the Trial Board. If the Board . . . decides that the punishment imposed was unduly harsh . . . under all the circumstances, it may modify the findings and punishment, and its decision shall be final and binding. . . ."

Interpreting this clause, a tripartite board of arbitrators held that the board should not review a case as if it were another trial board. It should not, for example, upset the trial board's findings of fact which would include credibility determinations. While it could properly examine the ultimate finding in the case, namely, the finding of guilt, it should not be concerned with

whether it would have arrived at the same finding were it sitting as the trial board.

In another variation, the Iowa Education Law provides for special adjudicators. Here the arbitrator acts as an appellate judge. He receives the record and all of the evidence with regard to teacher discharges, and then he makes a decision as to whether the individual was terminated for cause. One of the problems, in this state, incidentally, not untypical of the public sector, is that many school boards and teacher associations have collective bargaining agreements which also contain provisions for adjudicating complaints concerning terminations for just cause.

## Interest Arbitration

*Transportation*

The use of so-called interest arbitration as a device—or as a self-imposed threat—has expanded considerably in the last few years. The unused steel-industry procedure has received the most public attention. Less well known is the continuing willingness of railroad carriers and unions to arbitrate contract disputes within the framework of the Railway Labor Act.

In fact, virtually every major carrier and labor organization in the railroad industry has participated in at least one major interest arbitration. The same is true in the airline industry. Issues submitted to arbitration over the years have included wages, hours, fringe benefits, and seniority. Some arbitrations have involved entire contracts.

Interestingly, while not required by law, the parties in both these industries have in recent years agreed to arbitrate future disputes over particular issues. In 1971, for example, the Brotherhood of Locomotive Engineers agreed with 65 carriers to arbitrate future disputes over switching limits and interdivisional runs. In 1972, a similar agreement was signed by the United Transportation Union and 140 carriers. At least 40 awards have been issued under these agreements.

Similarly, National Airlines has agreements with the Air Line Pilots Association and the Air Line Employees Association to arbitrate certain unresolved issues in future collective bargaining negotiations. The number of issues to be arbitrated is limited to 10.

Braniff Airlines and two labor organizations agreed to submit to arbitration their last offers or positions on not more than 15 open issues. The resulting agreement, by consent of the parties, will be limited to 24 months.

But faced with the prospect of appearing before one or more of our colleagues, the parties under these airline agreements have managed to resolve their outstanding disagreements short of arbitration.

To put it succinctly: no use can be good use!

*Hotels*

There is a unique plan in New York City. There, the parties to the contract between the Hotel Association and the Hotel and Motel Trades Council use the office of their impartial chairman in contract negotiations. So well have they adapted their institutions to their bargaining needs that there has, in fact, been no general strike in this industry since their first agreement was signed in 1939.

Each successive agreement covers a period of three or four years. Each has a reopening provision which allows either party to propose a change in wages or hours during the last year of the contract. Initially, the parties negotiate directly in response to a proposed change. If the negotiations are unsuccessful, the dispute must be submitted to a three-member commission composed of representatives of the two sides and the impartial chairman. A majority vote will determine the wages and hours for the last year of the contract.

Commissions have been appointed from time to time, but none has ever had to act. More interestingly, on every occasion when the reopening provision was invoked, the parties have agreed not only to the terms of the last year of the contract, but also to an extension of that contract for another three or four years. And the new agreement invariably included the reopening clause. Thus, the contract has never been terminated, the strike weapon never employed.

The availability and authority of the impartial chairman to decide the terms for the last year of the contract, our colleague in that office explains, impels the parties to come to terms on their own.

*Government: The Federal Sector*

It is not well known, but about two million employees of federal agencies are covered by a presidential executive order, issued in 1970, which provides for the compulsory arbitration of contract terms. The effect of this order at present, however, is less extensive, since only about 58 percent of these employees are represented by unions in approximately 3,500 bargaining units. But there are indications that the extent of unionization is increasing.

The President, in this executive order, established a Federal Service Impasses Panel. The panel and its staff are primarily engaged in fact-finding and in submitting recommendations for the resolution of impasses. But a seldom-used provision gives the panel the authority to specify the terms of a settlement when all other means fail. The parties have accepted most of the panel's recommendations, but a final order had to be issued in about 10 cases.

Some of the subjects of collective bargaining in this federal sector are similar to grievances in the private sector. Other issues border on national security. In one case, for example, the union representing NLRB employees demanded that two headquarters employees who shared space be assigned separate offices. In another group of cases, the panel has been told, its decisions may affect our country's defenses. This matter, raised in almost 30 separate cases thus far, concerns whether National Guard technicians should be required to wear the military uniform when performing technician duties. Other subjects on which the panel has issued orders in its compulsory-arbitration role include temporary promotions, procedures covering disciplinary actions, binding versus advisory grievance arbitration, and the content of work-report forms used by compliance officers.

Among the issues which were resolved on the basis of the panel's recommendations (but which conceivably could have required compulsory arbitration) were flexitime experiments, assignment and payment of overtime, contract duration, punching of time clocks, travel time, presence of union representative on rating panels, official time for negotiations, and an employee's right to union representation during a nonformal investigatory interview which might result in disciplinary action.

Not unaware of the various devices which can be utilized in

dispute settlement, the panel has also approved the use of a type of final-offer arbitration which, in the one case it was tried, resulted in a complete settlement prior to the hearing.

Some federal agencies not covered by the 1970 executive order have other procedures leading to arbitration as the final step in union contract negotiations, among them certain Interior Department divisions and the Government Printing Office. A statutory procedure provides for interest arbitration in the Postal Service.

*Atomic Energy*

A subject of much attention two and one-half decades ago, the Atomic Energy Labor-Management Relations Panel has performed its work smoothly but quietly in recent years. Its informal procedures call for the dispatch of a staff member to the scene when its services are requested. If he/she thinks circumstances justify it, the panel takes jurisdiction and the parties return to, and maintain, the status quo until released, or until 30 days from the date of the panel's recommendations, if they ensue.

After taking jurisdiction, one or more panel members, with or without a federal mediator, may attempt mediation. Or, they may ask the parties to return to the bargaining table if they feel that certain issues have not been thoroughly considered. More often, however, the panel will hold a hearing and make recommendations. The parties may or may not agree to allow the panel to arbitrate.

With but two exceptions, the panel's recommendations have been accepted.

## Horizons

If there still lurks a doubt about the present vitality or the future of arbitration, consider the many new situations for which the arbitrator's talent and expertise are sought. Here are some examples:

*Sports*

"Are Professional Sports Sports or Business? Or How Much Would You Pay for Catfish Hunter?" That is the title of a talk given by an ex-baseball-arbitrator-umpire before the IRRA. Whether professional sports are characterized as entertainment

or business, it is interesting that football, basketball, and baseball have all gone the arbitration route.

Professional football first resorted to arbitration in 1970. As one might surmise, a large segment of the disputes are concerned with injuries.

Under the initial agreement between the National Football League Players Association and the National Football League Player Relations Association (as confusing a pair of names as you might want), a grievance could cover a lot of territory. A player could submit a complaint about the interpretation or application of the standard player contract, the NFL constitution and bylaws, rules, or regulations which concerned, among other things, wages, hours, and working conditions, or the application of the collective bargaining agreement. But those complaints were submitted to the commissioner of the NFL, rather than an arbitrator, and the commissioner's decision was final.

Under the 1977–1982 agreement, however, all unresolved disputes concerning the application of the collective bargaining agreement, with certain exceptions, are submitted to one of two neutral arbitrators named in the contract.

A separate feature of both the 1970 and 1977 agreements covers so-called injury grievances. The initial agreement specified that the decision of the arbitrator on the merits of the claim and on the total amount to be awarded, if any, would be final and binding. A related clause, however, stated that the commissioner of the NFL would have the right to review any decision or award for the purpose of determining whether it required adjustment by reason of the applicable provision of the league's constitution and bylaws. That proviso no longer appears.

In an injury grievance, the player usually claims that at the time his contract was terminated by a club he was physically unable to perform the services required of him because he had incurred an injury in the performance of those services. An interesting feature of the agreement provides for an examination by a "neutral physician" (chosen from a jointly approved list). The physician's findings are binding on the arbitrator. Although initially most of the seven panel arbitrators designated under this injury procedure did not know the difference between a miniscus and a hibiscus, they have learned more about the anatomy of the knee, back, and shoulder than perhaps they care to know.

It is interesting to note that among the issues excluded from arbitration under the general grievance procedure are those concerning the integrity of or public confidence in the game of professional football and disputes involving a fine or suspension imposed by the commissioner for conduct on the playing field or for conduct detrimental to the game.

A footnote: Several years ago the Iowa State Board of Regents adopted a resolution that the issue of whether one university should play a series of football games with another university should be submitted to binding arbitration. Needless to say, the arbitrator chosen was from a different state. He ruled that the University of Iowa was obligated to play against Iowa State in 1979 through 1982.

*Education*

Virtually unheard of a dozen years ago, arbitration of both interest and grievance disputes in educational institutions has grown to major proportions. Arbitrators are called at every level of education and in contracts covering professors, teachers, paraprofessionals, and custodials.

New York City, for example, uses thousands of paraprofessionals in the public-school system. One group works in the classroom as assistants to teachers; another group performs social-work-type functions in connection with student assistance, family counseling, and community work. Each group is represented by a separate union.

A "Para-professional Grievance Panel" has been established for each unit. Each panel is tripartite, but the same permanent chairman has been serving on both panels for several years.

The agreements provide for binding arbitration of disputes. Claims of improper layoff and discharge are the predominant issues. An interesting feature of these agreements are "safety-valve" clauses that permit submission of noncontractual complaints. Here the decision of the tripartite panel is binding only if it is unanimous. If the panel is split, the matter may be referred to the chancellor of the board of education.

Some teacher contracts permit the individual to process and argue his or her own case. These individuals and their attorneys are sometimes more imaginative than factual in their arguments —and they are frequently reluctant to pay their half of the bill, particularly when they lose the case, which they often do.

At the University of California, Los Angeles, one of our colleagues serves as resident hearing officer in disputes concerning nonacademic employees who range, by occupation, from janitor to editor of a scholarly journal. The reports of this hearing officer (and a backup hearing officer who also hears cases) are technically only recommendations; they may be reversed or modified by the chancellor or the president of the university. Virtually all recommendations are accepted, however.

Stanford has established a panel of arbitrators to serve as hearing officers in disputes between the university and its unrepresented nonacademic employees. The decisions of these hearing officers are final and binding. The university, interestingly, pays the full tab. But this generosity may deprive the grievant of an incentive to curtail the length of the hearing. Additional problems occur when inexperienced employees try to represent themselves or retain attorneys or professors without any background in labor relations or arbitration.

In New Jersey, an agreement between the American Federation of Teachers and the state covers eight large institutions that form a part of the state college system. In this contract, as in many others in the field of higher education, the parties have carefully delineated the issues that an arbitrator (there is a rotating panel) may decide. Thus, a question concerning the alleged arbitrary or discriminatory application of policies relating to the terms and conditions of employment may be submitted only to advisory arbitration. (It was reported that the state generally rejects most of the advisory decisions unfavorable to the college.) The arbitrator, moreover, may not substitute his or her judgment for the academic judgment already rendered on the merits of promotions or reappointments. The arbitrator reviewing such cases is limited to a consideration of an alleged violation of a specific provision, such as the no-discrimination clause.

*Government, General*

In recent years the number of states, municipalities, and other government divisions that have provided for the use of arbitrators in the resolution of their contract disputes has grown more rapidly than rabbits in Australia. Our Academy, in fact, has appointed a committee to keep track of interest and grievance arbitration in the public sector. Sessions at our annual meetings have been and will continue to be devoted to this subject.

Because of the political framework within which arbitration in the public sector occurs, the process is more complex than in private industry. In many ways, however, it is going through the same development that the private sector experienced 25 or 30 years ago.

Some of the problems in the public sector result from the multiplicity of laws, administrative codes, and civil service regulations affecting public employees. These are often promulgated without any recognition that a collective bargaining agreement may also be relevant. What is needed, according to one of our colleagues, is analyses of laws and codes in relation to collective bargaining agreements.

Other problems are caused by the inexperience of agency personnel and their difficulty in focusing on the correct issue. Thus, when a teachers' union and a school district disagreed on which of two teachers should become the basketball coach, they argued before the arbitrator that one candidate preferred man-to-man defense and the other a zone defense, and they sought a decision as to which defense was most appropriate for this school district.

*New York City*

In the Big Apple, a grievance can include disputes arising from mayoral executive orders as well as the collective bargaining agreements.

A number of disputes involve arbitrability. A tripartite Board of Collective Bargaining decides this question. The city and labor members of this tripartite board have established a roster of available arbitrators from which neutrals are selected for individual disputes. Additionally, impartial chairmen serve on a continuing basis in several departments such as fire, sanitation, and social service.

Substantive arbitrability questions have been resolved in about 125 cases during the period from 1968 to 1976. There has been little judicial review of these decisions, which cover such matters as management rights, appointment, promotion, assignment and transfer of employees, discipline, added duties, out-of-title work, layoffs, union activity, and civil service law and rules covering the tenure or status of employees.

*Federal*

After an on-again, off-again approach to grievance arbitration (binding versus advisory), the executive branch of the Federal Government has finally opted for voluntary binding arbitration of grievances. Since court review is not available, the Federal Labor Relations Council, which was established by presidential executive order, occupied the void and created rules for its own review of arbitrators' decisions. It grants review, however, under these limited conditions: (1) when it appears that an award violates applicable law, appropriate regulation, or the executive order itself (in the exact reverse of the private-sector approach, the council's rules require an arbitrator to consider relevant laws and regulations when deciding grievance disputes in federal agencies); (2) for the same reasons that an award in private industry may be challenged in the courts.

To further complicate the life of an arbitrator handling grievances of federal employees, a federal Back Pay Act provides that an award directing expenditure of federal funds will be set aside by the Comptroller General or the Federal Labor Relations Council where unsupported by or contrary to law. The act does allow compensation to an employee for pay allowances or differentials which would have been received but for the violation of the agreement. Remedies specifically prohibited include payment of interest on back pay, payment of consequential or cumulative damages, attorney's fees, and other litigation expenses.

Despite the restrictions and complications, the record of the federal arbitrator has been good. From 1970 through 1976, about 18 percent of the binding awards were appealed to the council, but only about one third of these were accepted for review. In just 19 cases (of a total of 774 awards) was the decision modified.

*Foreign Service*

Another executive order, in effect since December 1971, covers foreign-service employees in the Department of State, the Agency for International Development, and the U.S. Information Agency.

Even before the order became effective, and before there was an election to determine the employees' bargaining agent, the three agencies promulgated a grievance system which provided

for arbitration as its terminal point. The so-called Interim Grievance Board in the Foreign Service was composed of three public members (one of whom was the chairman) and six members of the foreign service, two from each agency. The original nominations were approved by all the employee organizations and the agencies and, interestingly, all the members of this board functioned as neutrals, each contributing his or her own special insights and understandings. Under the interim regulations, grievances were handled informally. In some cases a board member made a preliminary investigation.

Jurisdictional determinations became the biggest problem. In 1975, in fact, the board members resigned en masse because AID refused to comply with a remedial order, insisting that the board had no jurisdiction. The board, however, completed its work on cases that had been previously docketed. By the spring of 1976, a total of 286 cases had been brought to decision.

Meanwhile, Congress passed a law covering labor relations in the three agencies, which became effective at the end of November 1975. New regulations promulgated under the act became effective in June 1976.

The current statutory board is comprised of 15 public members (nine arbitrators and six retired foreign-service employees) and is supported by a full-time staff of eight persons drawn from the three agencies. The staff members investigate each case, attend the hearings as clerks, and draft the opinions.

The statutory grievance system, we have been told, tends to be more legalistic than the interim system. Previously, the majority of grievants represented themselves, and the agencies were represented by their own grievance staff members. Now, in many cases the agency is represented by its legal advisers, and most grievants are represented either by a counselor provided by the bargaining agent or by outside legal counsel. The staff members rarely mediate since the parties appear to be reluctant to bare their souls to the staff, knowing that the matter will be submitted to the board.

The personnel system in the foreign service is not unlike the military system in that it follows a policy of selection up or selection out. Thus, many of the grievants protest uncomplimentary remarks placed in their performance files. In evaluating these comments and interpreting the jargon, one of our colleagues reports, the former foreign-service members of the board are invaluable.

More than 400 foreign-service employees have utilized this unique grievance system since the inception of the program in 1971.

*Prisons*

It may come as a surprise, but some of our colleagues have been plying their trade in prisons.

In late 1974 the Youth Authority of the State of California, with the assistance of the Center for Correctional Justice and the AAA, established an inmate grievance procedure that includes tripartite advisory arbitration. The neutral is selected by the AAA from a panel consisting primarily of experienced labor arbitrators.

Grievances are defined broadly so that a grievant, known as a ward, can use the procedure to complain about an existing rule or even to ask for a policy change. Disciplinary actions, however, are excluded. The grievant selects either a fellow ward or a probation official to serve on the three-member body. The institution selects an administrator or other person.

The neutral arbitrator endeavors to help the participants reach an accommodation. If that is not possible, he tries to obtain a unanimous recommendation from his panel. The director of the Youth Authority makes the final decision.

The first arbitration-type experiment in an adult penal institution began in New York in August 1975 and went statewide the following February. Arbitrators act as recommenders, but they may consider such questions as wage rates, security, and even First Amendment and other constitutional matters.

One of the prime movers in both California and New York, incidentally, is one of our members who, I hope, will one day tell us directly of these experiments. In his considered judgment: "The inmate grievance arbitrator who is the same gracious, persuasive, articulate and knowledgeable fellow as the one who toils in the public and private arenas, can play a most useful role."

*Sheltered-Living Institutions*

A most perplexing and challenging new area is the arbitration of patient-assault grievances, particularly in psychiatric hospitals, homes for the mentally retarded, and homes for the aged.

One of our colleagues states the problem in this way: Unim-

peachable evidence exists of a patient assault. An employee is dismissed or otherwise disciplined and files a grievance. The case is brought to arbitration. Most often the grievance is sustained for lack of proof that the grievant committed the assault.

To identify the perpetrator is most difficult. It is often difficult even to ascertain how a patient incurred the injury. Weapons are rarely used; more common is the trauma suffered by a patient who "fell" from a bed or table, or "stumbled" against an object, or "fell" down a staircase. Did the patient fall? Or was he/she pushed? Even more difficult are cases of alleged sexual molestation, since evidence of bodily injury is not always apparent.

And if there was indeed an offender, who was it—another patient or an employee? And if an employee, which one? The accused employee will undoubtedly charge that the "abused" patient is "venting the fantasies of a sick or senile mind."

In a provocative paper on the subject of finding the truth, one arbitrator proposed that admissible evidence in these cases include Rorschach and other psychological test results, polygraph tests, previous employment histories of employees, and the like. He also suggested that each large facility retain a person who is an expert in interviewing to obtain information promptly from those in or near the scene of the alleged assault. Such persons could be called to testify from written reports on the results of their interrogations. Safeguards to protect the charged employee were also suggested.

*Legal Services*

The umpire for the UAW and the Chrysler Corporation heads a legal-services plan that is financed by unused supplemental unemployment benefit funds. The plan is administered by a committee of three representatives of the UAW and three independent members chosen by the umpire. He, apparently, is the repository of the "public interest," along lines similar to the UAW Public Review Board.

Legal services provided under the plan cover a wide range, including traffic violations, social security claims, misdemeanors, juvenile offenses, divorce and child custody, wills, garnishment and repossessions, bankruptcy, tax audits, and landlord-tenant disputes.

*The "No-Raid" Plan*

Not new, but not to be overlooked, is an AFL-CIO system known as the "no-raid" plan. From 1954 until 1962, participation in the plan of AFL-CIO affiliated international unions was voluntary. In 1962, however, it was incorporated as part of the AFL-CIO constitution. Now all affiliates are required to respect each other's collective bargaining relationships.

Procedurally, a complaint is first mediated by an officer of a disinterested affiliate. If mediation fails, one of the three impartial umpires conducts a hearing and makes a determination which is subject to a speedy appeal. A majority of the members of the executive council may reverse or modify the umpire's ruling. If not overruled, his determination is binding on the offending affiliate.

Since 1962 about 1800 complaints have been filed, of which approximately 47 percent have been assigned to impartial umpires. Most affiliates have complied with the determinations of the umpire. At present, only three of 107 affiliates are in a state of noncompliance.

*Overseas*

In the Canal Zone, the backlog of labor disputes was critical. Furthermore, the local unions had demanded independent hearing examiners who would not be even indirectly under agency jurisdiction. Who might fill this bill?

Since 1974, 13 of our members have traveled to the Canal Zone to hear appeals of adverse management actions, such as removals and demotions, suspensions and other disciplinary matters, and unfair labor practice complaints. All appeals are now expeditiously adjudicated, employees and their union representatives feel that their cases are impartially reviewed, and the credibility of the Canal Zone's labor relations program has been greatly enhanced.

Undaunted by possible charges of colonialism, two of our colleagues accepted an assignment in Bermuda. About two years ago, the government there had passed an emergency Labor Relations Act that permitted the Minister of Immigration and Labor to certify that a strike in specified "essential" industries would threaten the welfare of the island. The minister then could ban the strike and require arbitration by a board, to which our colleagues were named chairman and vice chairman.

The first emergency occurred in Spring 1976 in an industry that was not listed in the act as "essential," although, in fact, it was the island's basic industry: hotels. The minister thereupon, with the parties' consent, appointed a special board of inquiry to conduct hearings and report to him with recommendations. Our stout-hearted colleague, the chairman of the arbitration board, agreed to serve as chairman of the board of inquiry on the minister's estimate that the case would take three or four days of hearings. It turned out, however, that the hearings lasted 20 days, spread out over about three months, and the writing of the report took about four weeks.

In the end, the parties accepted the unanimous recommendations of the board and consummated a contract. As a postscript, the following Spring the board was reconvened to arbitrate various job-classification issues.

It was a fascinating experience, our colleague reports, since the collective bargaining issues were complicated by racial feelings, a growing split between native and "imported" employees, and some not-so-vestigial remnants of colonial attitudes. Another factor was the government's indecision as to whether to follow the British or the American approach to dispute settlement or to develop its own Bermudian way.

On the subject of overseas assignments, I have noticed that, while Canadians and Americans normally do not arbitrate in each other's countries, one of our Montreal members regularly arbitrates in New England. (As it turns out, she is American-born and thus speaks both Canadian and American.) Another colleague, whose home is in New York, spends part of his time in the Toronto area and also arbitrates in both countries.

## Conclusion

I have said enough—probably more than enough—to indicate that, while the arbitration theme may be constant, the adaptations and variations are infinite. The future is bright and challenging. What does not exist will be invented.

Clearly, the identities of individual arbitrators will change over the years. And each will be unique in her or his own way. But, whoever it may be, the role will be the same: to serve the needs of the parties—and in so doing, to serve the greater needs of society.