

CHAPTER 3

THE QUALITY OF
ADVERSARY PRESENTATION IN ARBITRATION:
A CRITICAL VIEW

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I have been asked to speak to you this morning about the quality of adversary presentation in arbitration. This is a broad subject. The quality of adversary presentation—the knowledge, experience, and understanding that advocates bring to arbitration and (quite as important, I think) their interest in it and attitudes toward it—affects all aspects of the arbitration process: case preparation, the presentation of evidence and argument, briefing, and (since an arbitrator must work within the framework of evidence and argument that the parties have erected) the process of decision itself. Moreover, it is a subject about which useful generalization is very difficult, except at the most elementary level.

The task of an advocate and the problems and objectives which test his performance necessarily vary from industry to industry, bargaining relationship to bargaining relationship, case to case, and situation to situation. The problems an advocate faces in presenting a rolling-mill incentive case in the steel industry, for example, before a permanent umpire, against an elaborate background of prior decisions, and involving the application of a detailed set of contractual rules to an intricate system of engineering standards, are obviously poles apart from those an advocate must face in dealing with a three-day penalty layoff for absenteeism in a recently organized textile mill that has never had an arbitration case before. And both of these differ from the problems involved in a promotion case in a machine-tool plant which has frequently arbitrated on an ad hoc basis, but which has never before had a grievant who is claiming racial discrimination, is asking to be represented by his own

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lawyer, is threatening the union with a suit for failure to represent him properly, and is bringing a parallel proceeding against the company in the courts. I suggest that what is required of the advocate for high-quality presentation in any one of these cases differs substantially from what is required in each of the others.

And this is not all. The judgments one makes about the quality of presentation in these various situations necessarily depend on where one sits—in other words, on one's particular values and objectives. A lawyer who takes expert advantage of every opportunity to complicate, obstruct, or delay a proceeding may, from the point of view of his client, be putting on a stellar performance. In the mind of the arbitrator, on the other hand, he may merely be raising doubts about the strength of his case on the merits and about the desire of his client to have the issues really faced. And if he were to be rated in terms of the effect of his conduct on the long-range relationships between the parties and on their trust in each other and in arbitration as a means of settling grievances, he might, conceivably, deserve very low marks indeed.

This is, then, a very broad and varied subject, and the first thing I must do is to block out certain areas and aspects of it and try to reduce it to manageable size.

In the first place, I am not going to spend our brief time this morning recounting the horror stories we arbitrators are apt to tell when we get together and discuss that inexhaustible topic, "Advocates I have met." You all know what I mean: the advocates who prepare their cases in the anteroom just before the hearing, while the arbitrator sits in lonely majesty, talking to the court reporter; the lawyers who would much rather spend their energies fighting with each other than explaining to the arbitrator what the case is about; the advocates who write briefs overstating the evidence in the record and sometimes indicating that things are in the record that simply aren't there—hoping or assuming, I suppose, that we arbitrators never read a transcript or study the evidence. The list could be strung out endlessly, but this is not what I want to talk about this morning.

In the second place, I am not going to try to give to this sophisticated audience a compressed course in good trial practice—a set of maxims and rules about how to prepare your case for hearing; how to analyze the issues, investigate the facts, assemble documentary evidence, and get your witnesses to tell you the truth so that you are not later caught by surprise; or how

to present your case at the hearing, examine and cross-examine witnesses, and resist the temptation to over-cross-examine or to try to prove your own case through your opponent's witnesses; or how to write clear and cogent briefs which deal adequately with the complexities of a case without getting lost in them and which persuade without sacrificing objectivity. I suspect that at one time or another all of us at the arbitration end of the table have wished that we could interrupt a hearing and ask both advocates to go take such a course. But it would be presumptuous indeed for most of us—and certainly for me—to try to teach it.

In the third place, in blocking out the subject, I am not going to be talking specifically about the arbitration of new contract terms or about arbitration in the public sector. The special problems advocates face in arbitrating new contract terms—where they must often attempt to use quasi-judicial procedures to achieve quasi-legislative ends—are fascinating and deserve far more study than has been given to them. This is also true of the problems that advocates face in the public sector, where the labor agreements must be related to statutes and government regulations, where the lines of jurisdiction and authority on all three sides of the arbitration table may be indistinct, and where the administrative or judicial review of arbitral awards may sometimes be almost a matter of routine.

The Advocates' Responsibility to Intraplant Relationships

Important and intriguing as these problems are, however, it is on grievance arbitration in the private sector that I want to center my comments. This is the area in which, professionally speaking, I grew up. Further, it is the area in which, in this country at least, labor arbitration itself really grew up. It is the area in which many of the accepted principles governing labor arbitration were tried out, tested, and developed. And it is the area which I think best illustrates a special responsibility that advocates have these days in the labor field: a responsibility for the long-run welfare of the collective bargaining relationship in which they are functioning and for the protection and preservation of the grievance and arbitration procedure which is central to that relationship.

It is about this special responsibility and its practical meaning for advocates that I want to talk this morning. To lay the basis,

let me make some statements about grievance arbitration that to this audience may seem elementary—even banal—but which in day-to-day practice, I suspect, are too often forgotten.

The first is this. Grievance arbitration is part of the grievance procedure, and a sound grievance procedure—with, when necessary, sound arbitration—is absolutely vital to good intraplant relationships. The effectiveness and, if you will, the health of an industrial unit—the level and quality of its production, its resiliency, its ability to withstand bad times and take advantage of good times—depend in part upon the morale of both employees and supervisors. I submit that an effectively operating grievance procedure—a procedure that gives both employee and management the feeling that their agreements have meaning, that wrongs can be righted, errors corrected, and the agreement administered fairly and according to its intent—is essential to morale. And since arbitration is the terminal step in the grievance procedure—the step at which, failing agreement of the parties, the ultimate decisions must be made about the righting of wrongs, the correction of errors, and the interpretation and application of the agreement—it cannot fail to influence employee and supervisory morale and thus the health of the industrial unit.

I am making a point here of mentioning both employee and supervisory morale. All of us know the importance to plant operations of employee morale. We arbitrators spend a substantial portion of our professional lives telling employees in decision after decision that when they feel that a supervisory order is improper or unjust, they must not refuse to obey it, slow down, or use other methods of self-help. They must “obey the order and file a grievance,” the theory being that in the grievance procedure and arbitration they will obtain justice and a fair remedy for any wrongs they may have suffered. And it is obvious that if they are to obey this precept willingly, they must believe what we tell them—must feel that the grievance and arbitration procedure is close to them, responsive to their problems, and, within the framework of the labor agreement, in tune with their basic assumptions about what is right and what is wrong.

I suggest that the health of a plant or other industrial enterprise requires that the supervisory staff have a similar confidence in the grievance and arbitration procedure—a confidence, in other words, that the procedure will also be close to *them*, responsive to *their* problems, and in tune with *their* basic

assumptions about right and wrong. Foremen and supervisors are in the front line of industrial relations; they are the ones who initially apply the labor agreement, make the initial judgments as to its application, and add flesh and blood to the bare bones of its language in constant decisions, shift in and shift out, day in and day out. The grievance and arbitration procedure is essentially a system of challenging and appealing from their decisions. And I submit that their morale, their feelings about their front-line jobs, their willingness to stick their necks out and exercise discretion when good judgment is called for in agreement application, depend on their confidence that they, too, will get understanding and a “fair shake” if their decisions are challenged in the grievance and arbitration procedure.

We are all familiar with the old saying that labor arbitration is an alternative not to court procedures, but to a strike. I suggest that that saying should be carried a good deal further. A sound grievance and arbitration procedure is an alternative not only to a strike, but also to troubled and unhappy intraplant relationships and to the demoralizing effect that such relationships can have on employee and supervisory attitudes, production efficiency, and industrial health.

But what do all these obvious statements have to do with the role of an advocate and the quality of his presentation? Just this. It is my considered judgment, after observing advocates in arbitration for more than 35 years, that it is not enough for an advocate to be an excellent technician, to prepare his cases thoroughly, examine witnesses with skill and penetration, argue effectively, and brief with clarity and persuasiveness. High-quality presentation in grievance arbitration requires that the advocate be continuously aware of the labor relations framework of the case he is presenting, of the potential effect of the case—and *of the way he conducts it*—upon that framework. He should realize, in other words, that the confidence of employees, supervisors, and union and management representatives, in the fairness and effectiveness of the grievance and arbitration process, far transcends in long-run importance the particular case he is presenting. He should realize that it is not enough for an arbitration proceeding to *be* fair and even-handed; the people involved in it—the staff people, witnesses, and observers from both sides—must *feel* that it is fair and even-handed, so that the grapevine which extends from the hearing room to the plant floor will carry that message.

It is not enough that the advocates and the arbitrator know what is going on; insofar as possible, *everyone there* should know what is going on and should be aware of the relationship between the legal technicalities of the argument and the plant-floor problems and disputes for which they seek an answer. There is far too much bewilderment in the back rows of many hearing rooms. An advocate should know that confidence in the arbitration process can only be maintained if a very high percentage of the decisions by arbitrators are informed, sound, understandable, and acceptable to both parties. And he should realize that arbitrators cannot consistently turn out such decisions by themselves. The advocates must give them the evidence and the broad and thorough understanding of the issues that such decisions require. In other words, the advocates, by the nature and "quality of their adversary presentations," set the tone of the procedure and the level of argument and controversy and, in substantial measure, determine the effect that the proceeding will have on future relations on the plant floor.

Let me pause at this point to make a very important statement. I am *not* saying that it is the job of a good advocate in grievance arbitration to lose cases. Obviously, in our adversary system, it is the function of a good advocate to make the very best case for his side that he can. But I *am* saying that winning the case should not be his *only* consideration. He should always realize that he is functioning in a continuing relationship whose welfare must be protected and preserved. After the hearing ends, the witnesses and the foremen are going back to the daily process of working together in the shop. Will the conduct of the case—the nature of the testimony elicited, the manner in which witnesses are examined, the tenor of the argument, and the comments of the advocates—tend to improve relationships back in the shop or harm them?

During the coming weeks an employee and a foreman who have been opposing witnesses at the hearing will be seeing each other every day at the furnace, the machine, the assembly line, or the office. Will one leave the hearing persuaded that the other is a liar? Or a fool? Or an incompetent? Or one who is no longer deserving of trust or respect? An advocate should think about this.

The union and management representatives who have been facing each other at the hearing are going to be meeting each other again in a few days to deal with other grievances and other

problems. What effect will the arbitration proceeding and the manner in which it is conducted have on their coming meeting and on those that succeed it? An advocate should think about this.

Sometime after the hearing, with the transcript, exhibits, and briefs before him, the arbitrator will begin the study of the case and the preparation of his decision. Will he find in the record that the advocates have made only the argument and information needed for a technically correct decision? Or will the advocates have given him the full, all-around understanding of the case needed to make his decision and his explanation of it, not only technically correct, but also acceptable to the losing side? An advocate should think about this.

Why am I saying these things? I am saying them because under the pressures of a busy advocate's life, and particularly under the competitive pressures of the hearing room, these things are very easy to forget. Most advocates I see in grievance arbitration cases are very busy people, with pressing claims on their time. They are union staff representatives who have just come from a contract negotiation, who have to drive 50 miles to a local union meeting that night, and drive another 100 miles and go through a different set of meetings or negotiations the following day. They are management staff counsel who are sandwiching this arbitration hearing in between an NLRB proceeding and an OSHA matter and who have a brief on still another matter due before next Tuesday. Or they are lawyers in general practice who have been called in to the case at hand on an ad hoc basis, as it were, fresh to the grievance and the union-management relationship, and have to learn about them both from scratch, going to the phone every so often to keep in touch with other matters at their offices.

When I suggest that these advocates coming into a grievance arbitration case should try to learn not only about the grievance, but also about the labor relations framework within which it arises, and present their cases with an eye to that framework and to the effect on it which their presentations may have, I know I am suggesting a difficult thing. I do so with confidence because so many of the fine advocates with whom I have worked over the years, in ad hoc as well as permanent relationships, have demonstrated in case after case that it can be done by busy men, and done superbly.

But I do so with urgency because I fear that such advocates

are in a minority. Too many grievances these days are being tried as though they were one-shot litigations whose parties would never see each other again after the hearing is over. In too many cases, the primary objective of the advocate seems to be to outsmart the opponent rather than to enlighten and persuade the arbitrator. Too often grievance arbitration is approached as though it were an adjunct, not of the grievance procedure, but of the courts.

Some Illustrative Specifics

I have been speaking in very general terms. Let me get down to some illustrative specifics. You are a lawyer retained by a company to try a grievance arising in its clerical bargaining unit. One of the female stenographers has asked for a merit wage increase above the top level reached through automatic progression. The issue, under the language of the agreement, is whether her supervisor, in denying the increase, had acted reasonably, "giving proper consideration to all relevant factors." This is your problem:

The grievant has been there a long time, has worked hard and earnestly, has rarely been absent or late for work, and has a clean disciplinary record. The union proves all this. To defeat the grievance, however, you have simply to prove the truth: that she is a pretty bad stenographer, can't spell very well, has difficulty reading her own shorthand, types letters that are not very neat, and often is unaware of the errors she makes. You can prove this very easily—merely put the woman in charge of the stenographic pool in the witness chair, ask her to tell the arbitrator (and everyone else in the hearing room) about the grievant's incompetence as a stenographer, recite endless instances of her mistakes, back up this testimony by introducing copy after copy after copy of the error-filled letters she has typed, and you are home free, with the arbitrator's decision practically in your pocket before you leave the hearing room. It could be like shooting fish in a barrel, and I think I can hear many of the advocates in the audience saying, "Where is the problem? If this is a problem, may all of my problems be like it!"

But I submit that you *do* have a problem. The company obviously isn't going to discharge the grievant. She's been there a long time; she has been willing and loyal; she is well-liked; and the second time she does a letter, it is usually okay. The com-

pany's main interest in the case is in establishing the principle that merit increases are different from automatic increases and should require a showing of real merit before they are granted. And so she and the supervisor are going to be back in the office tomorrow—and many tomorrows after that—along with all the other typists and stenographers who are sitting on the union side of the hearing room, listening to everything the supervisor has to say. How far are you going to go in trying to prove that the grievant is a nincompoop? How many badly typed letters are you going to put in evidence? Are you going to choose the ones that just make her look below average, or are you going to put in the three or four that the supervisor turned up (when you asked her to search the files) that make her look like a real moron?

And what about the supervisor? As you plan your examination, are you thinking about what her testimony is going to do to her standing with the other stenographers in the stenographic pool? And to efficiency and morale in the pool? Would it be better not to put the supervisor on as a witness and, instead, put the sorry collection of letters in evidence while you're cross-examining the grievant? But what would it do to the grievant to have to go through the ordeal of sitting before her fellows and her boss for an hour or so looking at her own mistakes, admitting them, and having to try to explain them? This is only a "simple merit increase case," and if you are only an excellent technician, it might give you no problem. But I submit that if you are not only a good technician, but also a good advocate in grievance arbitration, you will find a good deal to think about and several not too easy judgments to make while you are preparing and trying this case. You do not want to risk losing the case. But do you want to win this one little battle in a way that can lose the war—or, to put it more aptly, jeopardize the chances of peace and good working relations in the stenographic pool?

Let me give you another problem, one that is not quite so simple. This time you are a union advocate. Two members of a local union have been discharged for fighting each other in the plant. It was a real fight. Blows were unquestionably struck, but each man says that the other one started it and hit the main blows and that all he himself did was try to avoid the blows and defend himself. No foremen or supervisors were close enough to see what really happened, but the company judged that both

men had been involved in the fight and discharged them both. Each man has filed a grievance, the two grievances have been set down for hearing at the same time, and you have been retained by the local union to try them.

When you begin your investigation, you find that everyone assumes that the two grievances will be tried together as one combined case. After all, they concern the same events and seem completely interdependent. But you can see that if they are tried together, one grievance at least is sure to be lost. You may be able to save one of the employees by proving that the other provoked the fight and was the aggressor, but you obviously can't save both men that way. But you think about it and realize that if you can have the grievances tried separately, you might possibly be able to save both of them. You know that this company has a long-standing rule, established at the union's request, against calling employees from the bargaining unit to testify as company witnesses in an arbitration hearing. Therefore, if the grievances are heard separately as two independent cases, each with its own record, you can call the grievant in each case as your only witness and *his* version of the facts will be the only one that gets into the record of *his* case. The company will have no witnesses who can deny either grievant's version; and the arbitrator, in each case, may have to uphold the grievant because no evidence in the record of his case contradicts or throws doubt on his testimony. By a technical move—insisting on separating the cases—you will have saved both men rather than saving, at the most, only one.

If you are thinking only of winning these two grievances and getting these two men their jobs back, separating the cases will doubtless seem like a good idea. Ought you to think about anything else? Suppose that you discover that this company has been trying for years, over the union's strenuous objections, to have individual grievances tried separately even though they concern the same events, hoping, on the one hand, to reduce the impact of any pro-union awards that might be issued and, on the other hand, to make arbitration more expensive and more of a burden on the local union's treasury.

What effect should this discovery have on your trial plans? Should you, in these two cases, start playing the company's game and jeopardize the union's long-range position against the needless separation of grievances and multiplication of arbitration hearings? And will the sort of technical dodge you are

contemplating, which obviously involves an effort to prevent the full truth about the fight from coming out, inspire the confidence of employees and supervisors in the fairness and effectiveness of arbitration at the plant? May not the company consider that you are abusing the rule against the calling of bargaining-unit employees as company witnesses and, despite the union's objections, abandon the rule? What are your obligations as a union advocate in these circumstances? And how should you balance all the interests involved—the grievants' interest in getting their jobs back, the union's interest in giving them fair and proper representation, the union's interest in its long-range opposition to the separation of grievances that grow out of the same transaction and involve a common set of facts, the union's interest in maintaining the rule against the calling of bargaining unit employees as company witnesses, and the fundamental interest of everyone in the fairness of the arbitration procedure and in its good reputation?

Now let me give you a third problem. Again, you are a company lawyer, but this time the grievance you have been called in to try involves a challenge to the adequacy of the incentive rates that have recently been installed on a set of stamping machines in one of the producing departments. You inquire and find that they are a new type of machine, faster than the machines they replaced, but fairly complicated to set up and operate; the employees have needed training, and many still lack the "feel" for the machines that they should eventually acquire; and, for these or other reasons, the incentive rates have not been paying off. The foremen and supervisors think that there are indeed "other reasons" for the low incentive earnings. They think that the employees are sabotaging the new rates, deliberately creating trouble, and slowing down their production in the hope of persuading management or the arbitrator that the rates are too tight and should be loosened up—in which case, of course, they would be able to run away with the new rates and increase their earnings far beyond the target levels which the agreement contemplates.

And so you come to the hearing room prepared for a real battle over the adequacy of the incentive rates, leading an array of industrial engineers and technical experts armed with photographs, machine models, charts, and tables, and ready to answer any attack on the rates the union may make. But what happens? The union makes a case which you think proves nothing at all.

It puts on witness after witness who testify that their earnings under the new rates have been low. These witnesses seem angry and frustrated and repeat over and over again that on the old machines they made good money, but with the new machines and new rates they rarely earn more than their guaranteed base rate. But they say nothing about what's wrong with the rates. They know what the time standards are for the various elements of the operation, but they don't challenge the time standards or even assert that the overall time allowed is necessarily inadequate. One after another, they just say bitterly that they haven't made any money since the new rates came in, and the union rests its case.

What do you, as the company's advocate, do at this point? In real life, of course, the first thing you will probably do will be to ask for a recess and consult with your client, in the shape of the plant labor relations director or maybe the plant manager. But suppose that instead of giving you direction, he looks blank and asks for your opinion. What do you tell him? The union has the burden of proof. In your opinion, it has failed absolutely to sustain that burden. It has given the arbitrator no basis for a finding that the rates are inadequate, and you think that the arbitrator—an experienced person on incentive cases—will agree that that is so. Is it your proper course, then, to move for summary judgment by the arbitrator or, if you don't want to sound that legalistic, to inform the arbitrator that the company is resting its case on the record made by the union and ask for a decision in its favor based on the union's failure to sustain its burden of proof?

I have known company attorneys to do this sort of thing. And I do not for a moment suggest that they were necessarily wrong or unwise in doing it, or that you, yourself, shouldn't do it in this hypothetical case. But I do say that before you rush back to the hearing room to rest your case, you should at least pause and reflect. The situation in the department is bad; the company is not getting the production it wants; the employees are not getting the money they want; and everybody has been hoping that the arbitration would aid in ending the stalemate.

What will help most in this situation—an arbitrator's award based solely on the union's failure to present an adequate case? Or will an award be more helpful that is informed by company evidence concerning the rates, the time standards, the bugs and troubles and employee inexperience that have lowered effi-

ciency, in addition to the reasons (which it is hoped your witnesses can suggest) why the rates have sometimes paid off and may be expected, with employee cooperation, to produce proper earnings levels in the future? Might not it help the situation in the department if the employees heard such evidence themselves and, by way of rebuttal, had a chance to reply to it, so that when they went back to those stamping machines they would at least feel that their real problems have been heard and considered?

I am not saying that there is only one right answer to these questions. And I am not suggesting that there are any necessary answers to the questions that will arise if you do go ahead and present your case—the question, for example, of how far you should go in trying to prove that the employees have been deliberately slowing down and controlling their production. Should you use general statistical charts? Or tables showing the comparative production rates of different employees? Or should you go further and put foremen on to testify about the actions and conduct of specific employees, comparing those who seem to be producing fairly well with those who are not? I am not trying to lay down rules as to which course you should follow. I know that as an advocate, you must try to “win your case.” I am only suggesting that the test of whether or not you have won this case is not simply whether the arbitrator’s award says “the grievance is denied.” The real test is what happens to production levels and incentive earnings on those stamping machines after the award comes down.

Let me give you one more problem. This time you are a union lawyer, and you are called in by a local union to handle a temporary-vacancy grievance that some of its members are all steamed up about. You look at the papers and you find that the grievant is a millwright with welding experience who had asked to be assigned to a temporary vacancy on a repair job. The repair job called for a good deal of welding, but he thought he could do it. If he had been assigned, the temporary job would have involved working on the sixth and seventh day of a seven-consecutive-day period and, under that particular agreement, he would have received time-and-a-half for the sixth day and double-time for the seventh. The departmental superintendent had denied his request for the assignment, however, and instead had given it to a welder with less seniority whose schedule was such that he could work those days at straight time.

You look at the agreement and find that it provides that a

temporary vacancy should be given to the senior man in the seniority unit who asks for it if he can do the work efficiently and safely. You look at the grievance records and find that management has merely been arguing that your grievant wasn't as good at welding as the man they put on the job. So you lean back and smile and say, "This may not be too tough after all. Management is making the old mistake of arguing about the grievant's relative ability when, under the agreement, it's simply his ability to do the work safely and efficiently that counts for a temporary vacancy."

But then you interview the grievant, and after you've finished asking him about the nature of the repair job and his prior welding experience, he says to you, "I sure hope we can win this one. Those damn craft welders keep moving in on us millwrights, claiming that all the welding work is theirs and taking away work that we've been doing for years. We've got to fight back, and this is just the start." What do you do at that point? Conceivably, you might ignore it and just go ahead on the basis of the temporary-vacancy issue and the grievant's ability to do the job. I hope that either your experience or your antennae will tell you that you may have a bear by the tail in one of the thorniest thickets in labor relations: a jurisdictional dispute between two groups of skilled tradesmen, complicated by seniority rules and practices and with the possibility that both management and the local union officials are caught in the middle. Obviously, before you start to try that grievance, you had better find out all you can about this thorny thicket and about what booby traps may be hidden in the underbrush.

To assume some not too improbable facts, let's suppose that you find that the company and the international union, in response to a number of such disputes, have recently entered into a memorandum of understanding saying that welding work should generally be assigned to craft welders, but that millwrights may continue to do simple "tack welding." Suppose, however, that at this plant the millwrights had raised a storm over this memorandum agreement and that the superintendent, to quiet them, had told them orally that, within reason, he would interpret "tack welding" as including any welding that was incidental to their main work assignments. You find that the welders have just learned about the superintendent's oral promise to the millwrights and are raising a storm themselves. You find that the millwrights are angry because they think that the superintendent, by denying the grievant the temporary repair assignment,

is going back on his oral promise. And you suspect that the superintendent has acquired a few brand new gray hairs, thinks that he shouldn't have made the oral promise, doubts that it could be enforced in the face of the top-level memorandum of understanding, knows that everyone, including top management, is now mad at him, and is beginning to think that early retirement might be a good idea after all.

Well, again I ask: what, at this point, do you do? As a good advocate, you have peeked beneath the apparent surface of the grievance and seen the realities behind it. If I may scramble some metaphors, you have begun to peel the onion and uncovered a can of worms. Do you plan to try your case simply as a temporary-vacancy case dependent on your proving the grievant's ability to do the job? Do you raise the oral agreement and put the superintendent on the spot with either the millwrights or the welders? If you should win the case on the basis of the oral promise, thus bringing it to everyone's attention, may you not create a situation in which either the international union or the company or both will have to crack down and nullify it as contrary to their top-level understanding? If that happens, will not the situation of your grievant and his fellow millwrights be worse off than if the case had been treated simply as a temporary-vacancy case with the oral promise remaining as the possible basis for a practical working solution of the welder-millwright dispute? Should you try to get in touch with the company lawyer and see whether he plans to jump into or to avoid the jurisdictional bramble bush? In other words, how best can you try this simple little temporary-vacancy dispute so as to do justice to your grievant and at the same time not create serious long-run problems for him, for the local union that retained you (which represents both the welders and the millwrights), and for the company with whom that local union has to live and work?

Rejoinders and Responses

I think I can hear some of you saying, a little impatiently, "These aren't really the problems an advocate faces in grievance arbitration. We take our directions from our clients. These are policy problems that management and the union must face, and we should and must govern ourselves by their wishes." To a certain extent, of course, this is true. Obviously, you must check with your clients, and the final policy decisions must be theirs.

But I have observed too many advocates in too many arbitration proceedings not to realize how greatly an advocate, if he chooses, can influence such decisions. I have rarely seen an advocate try a case like a robot, fully programmed by his client with ready-made answers to all the problems that arise at a hearing. Even those unfortunate advocates who have to try their cases with a company or union official sitting right beside them, pulling their sleeve every three minutes, passing them notes, whispering in their ear, or even interrupting and asking questions or giving answers themselves usually seem, nevertheless, to be in charge of their cases and to be giving quite as much advice to their clients as they receive.

In any case, whether an advocate is left free to prepare and try a case as he thinks best or must continually consult with his union or management principals, my point is the same. In grievance arbitration, a good advocate cannot wisely confine his attention to the narrow limits of the case itself. He must have a broader frame of reference. A grievance usually has to do with the past. But its importance always lies in the future, and a good advocate will always have at least one eye on the future effect of what he is doing on the relationships from which the grievance arose.

Some others of you may be saying, "This is all very well, but isn't he talking about the proper concerns of the arbitrator rather than of the advocate? Isn't it the arbitrator who should be concerned about the future of intraplant relationships, because it's his decision that is going to have the most to do with molding and influencing the future?" *Of course*, within the limits of the agreement, these things should be the arbitrator's concern. That is pre-eminently his job: to write decisions that will properly interpret the agreement, clarify the rights and obligations of all parties to it, and thereby, it may be hoped, aid the parties in maintaining sound relationships and a healthy industrial organization. But the arbitrators cannot do it alone. The advocates must do their share, if grievance arbitration is to be an effective and constructive force in industrial life.

The Adversary System and the Common Welfare

The title of my paper refers to the "Quality of Adversary Presentation," and "adversary" is by all odds the most important word in the title. In this country, we are trying to use the

adversary system developed in our courts as a means of interpreting our labor agreements and dealing with the day-to-day issues and problems that arise as those agreements are applied *by* human beings, *to* human beings, and *for* human beings in our industrial establishments.

We have, as a country, a great deal at stake in this venture. In a troubled era, with violence and the habits of violence growing around us, with people across the world seeming to respond more easily to the pressures that tear men apart than to those that bring them together and growing impatient with the long, frustrating processes of reason and persuasion, and turning too frequently to the deceptively inviting methods of force, we are trying—in grievance arbitration at least—to swim against this dangerous current. We are trying to convince people that, at least in this area of their lives, adversaries can deal with each other as adversaries—with conflicting interests and contrary points of view—and still have an eye to their common welfare, to broad areas of common concern, and to the common values they place on reason, honesty, and fair play. If we are to do this in grievance arbitration, the advocates, through the methods and quality of their adversary presentations, must help us do it.

Comment—

EVA ROBINS*

I want to pursue what Ralph Seward began and to give unqualified support to his comments. I speak from the point of view of the ad hoc arbitrator, primarily in the private sector. I do not know if the umpireships show the same problems I discuss here; I do know that colleagues who do a substantial amount of public-sector work complain of the appearance of a trend toward the development of such problems. From what I have been told, it is reasonable to conclude that a trend has developed, in some areas faster and with more intensity than in others. Before I go into a description of the trend, and of its causes, allow me to look back.

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The Way Things Were

At one time, in the grievance and arbitration process and the hearing, parties and advocates seemed sensitive to what they were there for, what the alternatives might be if they (and the process) were not there. In what I now refer to, ruefully, as the “old days,” presenters of cases in arbitration realized full well that the process was not a litigation in which the parties had no responsibility for the quality of the on-going relationship. We knew, as did the parties and the employees, supervisors, and union representatives at the shop, that if morale were to be sustained, production levels maintained, and relationships improved, they had to learn to live together without unresolved problems. Few cases were handled as “one-shot litigations,” to borrow the Seward phrase. Except in some instances where management and the union knowingly opted for a hard-line, arm’s length relationship, there was in the not-so-dim past a concern with the maintenance of relationships at the plant level as well as at the highest union-management levels.

Do you remember? We recognized that arbitration was not a win/lose game—that, in arbitration, nobody “won” and nobody “lost.” The arbitrator interpreted or applied the contract, but also recognized that the judgment he or she made had to be lived with in the plant, in a continuing relationship. We took care; we tried to issue opinions that would not destroy the ability of union and management to continue to function effectively. Where we might have failed in this, the parties themselves, in trying to contribute to or retain a cooperative relationship, have been known to put aside an award as “not workable” and to work out a solution to the problem *after* the arbitrator’s award was issued.

Parenthetically, it might also be noted that the opportunities for developing imaginative solutions often do not rest with the arbitrators, that superb contributions toward dispute resolution and development of lasting relationships are made *by the parties*, either before the arbitration part of the grievance procedure or after the arbitrator’s award when it is recognized that contractual limits prevented the arbitrator’s issuing an award encompassing a sensitive and meaningful solution.

David Feller said to us, in 1976, in his exceptional review of the arbitration process and external law:

"The basic attitude, excluding these aberrations [referring to *Torington* and *Holodnak*], is premised on a sometimes unstated but ever-present recognition that arbitration is not a substitute for judicial adjudication, but a method of resolving disputes over matters which, except for the collective agreements and its grievance machinery, would be subject to *no* governing adjudicative principle at all."¹

Referring to his statement that arbitration is a substitute for the strike, he adds, in explaining the theme of his paper:

"It is plain, once you stop to think about it, that the statement implies that grievance arbitration is not quite the same thing as adjudication. . . .

" . . . To put the matter in other words, the parties to the collective bargaining process have substituted for the strike, as a method of resolving differences between them as to the proper application and interpretation of their agreement, a system of adjudication against the standards set forth in that agreement; but that system of adjudication, since it is not a substitute for litigation, is not the same, in principle, historical background, or effect, as the system of adjudication used by the courts to resolve controversies over the meaning and application of contracts.

" . . . Essential to the Golden Age of Arbitration was the proposition that the rights of employees and employers with respect to the employment relationship are governed by an autonomous, self-contained system of private law. That system consists of a statute, the collective bargaining agreement, and an adjudicatory mechanism, the grievance and arbitration machinery, integral with the statute and providing only the remedial powers granted, expressly or impliedly, in the statute. . . .

" . . . The collective bargaining agreement is not a contract but an instrument of government, and when the Supreme Court says that courts shouldn't review arbitrators' decisions, what it really is saying is that it is improper to judge an arbitrator's performance in adjudicating disputes arising out of this system of government by the standards a court would use in judging a breach-of-contract suit."²

It is suggested that Feller's 1976 paper might well be reread.

Arbitration has provided a different substantive system than is found in adjudication in the courts. It has provided, too, a different procedural system, sometimes tailor-made to the needs of the particular relationship. That system begins in the grievance procedure, without an adjudicator and, generally,

¹Feller, *The Coming End of Arbitration's Golden Age*, in *Arbitration 1976*, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 100.

²*Id.*, at 100-103.

without formality or procedural restraints. It reaches the adjudicator only when the parties to the dispute have failed to resolve the dispute. In using the system in the past, parties had a choice of deciding if they wanted formality or informality at the hearing. Some parties and some arbitrators were uncomfortable with formality and sought to retain a simple, informal process, aimed at giving the arbitrator what he or she needed to make a decision. Others found a desirable orderliness in formal procedures and developed their processes the way they found them most useful, not as the litigation of a single case, but rather as jointly developed settlement machinery. The choice had not been between the procedures of litigation versus the less stringent procedures of arbitration; it had been between variations of the less stringent procedures of arbitration. Even where the parties opted for formality, they were *not* opting for the equivalent of a court enforcing a commercial contract.

There has been and, in many situations, still is talented arbitration advocacy which serves to present a point of view, but still maintains solid relationships.

Discernible Changes and the Current Situation

A change has been occurring in some relationships. Where it occurs, it evidences itself in changed attitudes and practices on the part of the persons engaged in the presentations of cases in arbitration. The differences noted by Feller between arbitration of a labor dispute and litigation of a contractual or a statutory claim become somewhat "fuzzy" in practice, caused, I think, by circumstances that I will describe later. More and more, arbitration cases seem to be taking on some of the attitudes and hostilities of litigation—seem to be in the hands of the technicians. It appears that this change is not yet seen in all parts of the country, or with the same rate of development. But we hear from colleagues and from advocates for parties that there is a clearly discernible trend in that direction—a trend toward treating arbitration as though it were a matter of one-shot litigation, seeking to have applied to it the federal rules of evidence and the trappings of the court trial rather than the dispute-resolution surroundings in which arbitration grew up. The more legalistic, technical process—the process which treats as expendable the grievant, foremen, supervisors, management, union, and the

arbitrator—shows up now as more than an occasional occurrence.

There is evidence of the growth of a more intense advocacy that some of us believe will very adversely affect the process unless it is somehow checked. Some employer-union relationships remain as they were, treating arbitration as a part of the established and accepted internal method of resolving disputes. But others, and recently an increasing number, appear either to have opted for or have fallen into a practice of handling an arbitration hearing as though it were a trial—as though dealing with statutory law.

There is some support, in the stories I hear, for a conjecture that this also has infected the grievance procedures at lower levels than arbitration—that grievance procedures have become hidden processes of discovery, to find out what the other side's position will be in the arbitration hearing, but not truly a dispute-resolution effort. From what I am told by some union and management people and from the grievance papers I am offered at some hearings, in many situations the grievance procedures have become simply the rubber-stamping of lower-level decisions and positions, with very little contribution toward resolution at each step.

I come from New York, and you may believe I speak of a New York City syndrome. But it is not. I have noted the same change in many places in this country, and many of my colleagues also see it as countrywide, and growing.

One aspect of the change is the competitive urge to win in arbitration, the sense that nothing should be barred that would help to produce a "win" settlement in the grievance procedure or an arbitration award in favor of the position being pursued. This overwhelming need to win produces all manner of competitive practices not heretofore thought of as appropriate to arbitration. It may be that these practices account for the discomfort many people (employers, unions, employees, arbitrators) seem to be beginning to feel with the arbitration process. The treatment of arbitration in the same manner as a statutory judicial process, often with less sensitivity than is displayed in courtrooms, does not make the arbitration process especially appealing to employees or first levels of management. This is especially so when the advocate's apparent need to win is not necessarily because it is considered *right* that the dispute be so resolved, but rather because the individual's career needs, or

consideration of election or appointment, or promotional opportunity, or simply retention of position, seem to him to justify it. Or—and truly this is the worst motive—there sometimes is a personal vendetta between the two advocates, and they ignore what is good for the process or for the resolution of a particular dispute.

Curiously enough, this heavy emphasis on the treatment of grievances or arbitration in the same manner as a litigation would be treated in the courts comes at a time when there has been a great increase in the number and assortment of arbitration systems and cases, in the number of advocates engaged in the process, and in the number of arbitrators hearing and deciding cases. The American Arbitration Association and the Federal Mediation and Conciliation Service report strong increases in the utilization of arbitration as the preferred means of deciding labor contract disputes. In his presidential address at the 1978 Annual Meeting of the Academy, Arthur Stark described various adaptations of the basic arbitration procedures, some expedited procedures, appellate procedures, and other areas of branching out and healthy growth. Mr. Stark said, commenting on the vitality of the process, that “the future is bright and challenging.”³ And, of course, it is. Yet there *are* cautions we should not ignore. For at the same time as we see clear and incontrovertible evidence of growth and utilization of various forms of arbitration as meeting the needs of employers and unions, there also is evidence of overuse, of some disillusionment with the process, and of a growing dismay within union and employer organizations and among arbitrators with the effort to make grievance arbitration a process akin to the judicial interpretation and application of contracts, of which delay is only one unhappy result. Some of us think arbitration is better when it is not cluttered by objection and legal roadblocks, or muddled by hostility and a disregard of the effect of actions taken or attitudes shown at the hearing on the parties involved. A showing of a highly developed killer instinct in one or both advocates does not make the process great.

Every ruling from an arbitrator on an objection does not need

³Stark, *The Presidential Address: Theme and Adaptations*, in *Truth, Lie Detectors, and Other Problems in Labor Arbitration*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1978), 29.

to be met by a diatribe. We do not need to receive, in so many cases, prehearing briefs, posthearing briefs, motions made before, during, and after the hearings, in writing, accompanied by affidavits, for a variety of remedies or actions having no real value to the arbitrator's evaluation of the case and ability to reach an appropriate decision. Nor does long and fierce cross-examination pay off. However much advocates believe the client wants to hear a slashing cross-examination, it must be apparent to counsels that all too often cross-examination merely serves to cement what was testified to on direct examination.

It may well be that some arbitrators themselves have participated in or contributed to the perceived changes. Some, coming out of a litigation background, perhaps find greater professional ease with the use of courtroom procedures and either ignore or do not know the special nature of arbitration. Arbitrators sometimes think it is their duty to go along with whatever kind of presentation the parties choose. We have, perhaps, taken too seriously the comments which used to be made that the arbitrator was the creation (some said "creature") of the parties. It may be that some new arbitrators with no labor relations experience also believe that this is the proper way to conduct a hearing and merely accept the extraordinarily legalistic presentations as the way things are. Where we have parties before us who are attempting to apply to arbitration strict compliance with the rules of evidence of the federal courts, each arbitrator must decide if he or she is receiving the information, in quality or quantity, that will allow a proper *arbitration* decision to be reached.

We hear of technical game-playing before and during arbitration hearings, the purposes of which seem to be to prevent a case from ever getting to the arbitrator, or to push into arbitration a case that has no business being there. We hear so much argument on the relevancy of the proffered testimony or evidence. But the opposite side of the coin is that employees and supervisory forces who attend hearings frequently do not believe the arbitrator has been given the real facts of the disputes. And they say so.

Some hearings are so beclouded with objections, exchanges between the presenters, and arguments against the arbitrator's rulings that indeed it *is* difficult at times to get a clear hold on the issues and positions of the parties. Too, I think employer and union representatives should think of the effect on the rela-

tionship among stewards, employees, and supervisors if a representative of one of the parties at the hearing willfully misstates direct testimony in an effort to trap a witness on cross-examination. Perhaps it is allowable cross-examination, but the cost may be very high. Another practice seen more often now is the clearly willful misstatement in a brief of a cited passage in a published case, a misstatement in a brief of a witness's testimony, or quoting a passage from testimony or a cited case omitting a most significant statement that changes the meaning given in the brief to that testimony or case.

As arbitrators, a growing number of us complain of experiences that we evaluate as hurting the process or the relationship of the parties to each other and to the arbitrators. We want you to know what troubles us, what we believe impedes our hearing a case properly or writing an opinion that is at once correct, to the point, and within contractual limitations. We want you to know the effect of some actions that we believe will influence the future use and quality of arbitration. If, indeed, there is a trend, or even only an increase in occurrence, some of us would like to see it reversed because we see much potential damage to the process if the practices continue and grow.

Generally stated, then, I and others are concerned that arbitration has become, in too many cases, a legalistic exercise engaged in by lawyers and nonlawyers alike, by some employer advocates and some union advocates, and, in a number of relationships, treated by some arbitrators as though that kind of presentation were a proper and inevitable part of the process. Arbitration's roots, purposes, and history seem to be ignored. The lessons of the past—the early recognition that in-plant relationships were important—seem to have been forgotten in far too many instances.

The Causes

I have not yet talked of what appear to be some of the causes for the changes I have been discussing. I would like to mention a few as I and my colleagues perceive them. There may be others.

1. *The growth of arbitration in the public sector* has resulted in the substitution of arbitration for lawsuits based on civil service and other laws. In the public sector, employees and employers have for years been litigation-prone. They continue to be. Many see

arbitration not as a different process, but simply as a different courtroom. And so do their counsels. They do not recognize the difference between arbitration under a labor contract and litigation.

2. *The fear of EEO, OSHA, duty of fair representation, and other external law liabilities* certainly has had an impact on the kind of presentations we now have in arbitration. In an effort to avoid criticism or far more extensive liabilities, parties present cases in arbitration which they hope will pass muster in the courts if the matter reaches the courts. This produces a more formal, more technical presentation. The quality and behavior of the parties at the hearing frequently show the result of external-law considerations. Some cases are presented by a grievant's own attorney, authorized by the union to so function. In many instances, such attorneys representing individual grievants are untrained in labor relations and see an arbitration hearing as exactly the same as any trial. So there is presented a case that shows no sensitivity to relationships and which is, too often, simply an attack on employer, union, and arbitrator.

3. *The growth of arbitration in the public and private sectors* has caused more people to be engaged in the field, but with less or different training and experience. Most of the time the persons with knowledge of labor-contract negotiations, contract administration, and labor relations and with experience in establishing and nourishing the relationship between the parties are the persons who know the arbitration process and its proper uses. Not enough people with heavy skills in those areas are available to serve as presenters of the cases in arbitration. The reliance of employers and unions has had to be on the new and untrained, or the differently trained.

But these are not the *sole* causes. More and more we are hearing cases with a very substantial increase in the attempt to impose legal restraints by one or both parties or by their representatives serving as advocates. More and more, for whatever purpose, hearings that are being turned into trials are prolonged beyond warrant. In utilizing services of new or old presenters of cases—lawyers or nonlawyers—some employers and unions are entrusting their labor relations practices to persons who either do not know how to contribute to good labor-management relationships or do not believe that to be the presenter's function. They offer hostility, but make no real contribution to the relationship between the parties or to the

arbitrator's understanding of the problem before him or her. I suggest that this is as much a cause of difficulties in relationships as are external law considerations.

Before I go on to a few examples, I would like to leave some questions with you, for your consideration. Twenty or 30 years ago we would have known, in hearing a case or in presenting one, that the philosophy of labor relations reflected in the positions and presentations of management and the union was based on the employer's (or the industry's) and the union's philosophy—whether or not articulated. By our own measure it was “good” or “bad,” but it was not unknown and not subject to modification for the aggrandizement of the individual presenting the case. Now we do not know this. Whose philosophy of labor relations do you believe is presented to us in arbitration now? *For the union*—is it that of the international union? The local union? The shop steward? The membership? The lawyer for that law firm who prepares and presents the case? And, *for the company*—is it that of the head of the company? Its labor relations people? A line supervisor or an operations manager? The company-employed law firm? The lawyer for that law firm who prepares and presents the case? Do you know? Indeed, have you—union and management people—recognized that someone is speaking in your name? *Who* speaks for you? What image does he or she present? What values, what principles, are held out by your spokesmen as the company's or the union's values and principles?⁴

The process could do without a grievant concluding, after bitter exchanges between counsel and questions half-answered or lost in the argument, that no one wants him to tell his story, after his waiting sometimes as long as five years to tell it. I submit that the word getting back to the plants is not supportive of arbitration as a dispute-resolution process in a growing number of bargaining relationships. A colleague who does a consid-

⁴At the Annual Meeting, when I asked these questions, one person in the audience pointed toward the ceiling, implying that top management sets the tone of philosophy or policy. I suggest here that this view is too simple. If labor-management policy really is developed, articulated, and communicated by employer or union brass to labor-relations, employee, and union personnel down the line, is there effort on the part of those people to influence top management in the selection of a philosophy of labor relations? If not, why not? Is there at least a possibility that industrial and labor-relations management or supervision, local union personnel, or advocates for either or both, are developing their own antagonistic, arm's-length philosophy and actions to suit that philosophy because it is believed that this is what top management and the international unions want? Is it not dreadful to assume that nothing can be done about it?

erable amount of labor contract mediation as a private mediator tells me of a recent mediation in a fairly large operation in the private sector, in which the employees insisted, against the union's advice, on the removal of arbitration from the contract as the sole dispute-resolution mechanism, and on the substitution of an elective procedure of arbitration *or* the right to strike over unresolved grievances. The demand was withdrawn with great reluctance at the end of the negotiations. The mediator tells me that the strong support for the demand was based on anger at what the employees thought the arbitration process had become.

Examples

I would like to present a few examples of what some of us believe to be a deterioration of the arbitration process. Many come to mind, but in the interest of brevity only a few will be cited.

1. An arbitrator who dates back, as I do, to the mid-1940s for his knowledge of and relationship to the arbitration process told me of an arbitration case that resulted in his removing his name from a panel of arbitrators on which he had served for many years. In the past, the cases of the employer and union in that relationship had been fairly clearly presented in a straightforward manner, without burdensome, litigation-type argument. But the union had had a frightening experience with a charge of failure to provide fair representation to a grievant and was gun-shy. It responded by abandoning judgment and taking just about everything to arbitration, without real effort to resolve in the grievance procedure. This resulted, of course, in a very substantial increase in the number of cases, and both the union and the company retained counsel to present cases in arbitration. Neither attorney had had much experience in collective bargaining or contract administration, although each had had substantial trial experience. Hearings in arbitration, according to my friend, became extraordinarily long and formal, with transcripts in all cases, prehearing briefs in some, posthearing briefs in all cases—however simple—and at times reply briefs. In one instance, motion papers were filed with the arbitrator asking him to permit the filing of midhearing briefs on the claimed inadmissibility of a piece of evidence offered and accepted by the arbitrator.

In the case that caused my colleague to resign, he had held seven days of hearing on what he considered to be a relatively simple case—a case, he believes, that might have taken one day to present in the earlier period. When he began to consider the material before him, preparatory to reaching a decision and to writing his opinion, he found it difficult to make sense of the transcript. He then crossed out of the transcript all unwarranted objections; arguments on those objections; comments on the arbitrator's rulings; repetitions of objections; attacks on the arbitrator's impartiality, knowledge, and ability; motions; arguments in support of or opposed to motions; and similar matter that had added heat, but no light, to the hearings. He allowed to remain in the transcript the opening statements, the testimony of all witnesses on direct and cross-examination (even unto the fifth repetition), and the relevant comments of counsel made during the hearing including, wherever it could be discerned, both counsels' descriptions of their theories on which the case was brought and defended. Out of a total of more than 2000 pages of transcript, he was left with 340 pages. He had (as I recall it) well over 100 exhibits, a few being really meaningful to the issue.

To the parties, the cost of this case in dollars was extremely high; the cost in the frustrations experienced by the grievants, employees, and lower-level union and supervisory people and the cost in the loss of respect for the process and damage to the relationship between the parties was prohibitive.

2. In another situation, an arbitrator sent a letter to the designating agency and to the parties, withdrawing from a case on which he had held two days of hearing. The parties had completed, in that time, the phrasing of an agreed-upon issue and little more. As a result of the technical nonsense of the second day of hearing, he wrote the following letter to the designating agency:

“Counsel for the Company—significantly, the party which initiated the grievance in this case—stated repeatedly and strongly that the informal manner in which the hearing was being conducted was prejudicial to the Company's position. I certainly do not agree with that assertion. But it would be to no worthwhile purpose to debate the merits of that contention at this juncture. The consideration of overriding importance at this point is that the persistence and forcefulness with which that statement was made convinces me that no reasonable prospect exists under which an award rendered by me in this case would be accepted as an impartial and fair disposition of

the matter at issue. As such, my effectiveness in serving as an arbitrator in this case has been destroyed, and I have no alternative but to withdraw from that office. Please accept my resignation, and I request that you proceed to secure a replacement.

"By a separate mailing, I am returning to the parties the exhibits which were introduced into the record. Obviously, they owe me nothing for my services to date. My files on the matter are closed."

The arbitrator in that case authorized my use of his letter, without identification of the parties.

Some arbitrators, faced with substantial attack by one or both parties at hearings, have served notice on designating agencies that they will not take future designations with certain companies, unions, lawyers, law firms, consultants, or other presenters of cases because they do not believe they can function effectively with that individual or organization. They believe themselves to have been intentionally abused by a presenter, perhaps without the principal's knowledge and authorization. The arbitrator who wrote the letter quoted above believes that the behavior of company counsel at that hearing was a disservice to the process, to both parties, and to the collective bargaining relationship. More important, he thinks that the company and union people who were at the hearing have had an example of arbitration at its worst and that this has a spillover effect on plant morale and cooperation.

3. In another matter, involving a disciplinary suspension of ten working days for violation of a rule, a company witness was called to testify to the method of enforcement of the rule at other plants of the company subject to the same contract. The union objected, claiming that the administration of the same labor contract but at another location, with different managerial and union personnel, was not relevant to the issue at this plant. The arbitrator was about to rule on the objection, but the union's attorney insisted that the issue was so important that he wanted to brief it—that he would not continue with the hearing until his brief and the company's brief had been reviewed by the arbitrator and a written ruling made. The company stated that it had no objection to this procedure, and the arbitrator allowed it (he says, to his "shame"). Hearings were suspended, company and union attorneys filed briefs on the question, and the arbitrator issued his ruling, as required. He found the testimony admissible. The hearings resumed. Time lost?—about two months. Lots of additional dollar cost.

4. All of us have heard of a party's recourse to the courts because an award was not postmarked precisely within the period required by contract or designating-agency regulation and an extension had not been obtained by the arbitrator. I never have heard of such recourse, or failure to abide by an award, by or on behalf of the party whose position was *sustained* by the award. Yet the agreement that an arbitrator's award is final and binding is made in anticipation that positions sometimes will be sustained and sometimes denied. Can there be justification for an advocate's using the accident of a one-day late award, for example, to avoid the contractual commitment to be bound by the award? What is more to the point, does this kind of action seem proper to the employees and supervisors?

5. The incidence of dispute over the arbitrability of a grievance shows substantial growth. This growth does not result from procedural arbitrability questions so much as it does from matters of substantive arbitrability. The tendency of the past had been to leave such matters to the arbitrator, although there had been, in some areas, acceptance of the belief that procedural arbitrability questions were for the arbitrators and substantive arbitrability questions were for the courts. Here, too, there are signs of change. More and more, questions of arbitrability are being given to the arbitrators to decide, but are presented as though to a court. There was a long period when arbitrability was presented to the arbitrator as a threshold question, but the entire case (on arbitrability and on the merits) was presented to the arbitrator so that, if arbitrability were found, the arbitrator then could make a decision on the merits. Recently, the writer heard of a labor contract that provided for the hearing on arbitrability to be held by one arbitrator who issued the decision. If the dispute were found to be arbitrable, the parties then would proceed to the selection of an arbitrator to hear the case on the merits. This has served to more than double the time required for obtaining a final and binding award on the merits of a dispute. It has more than doubled costs.

These are not isolated instances or occasional occurrences not constituting a perceivable trend. The kind of problem I talk of here may have occurred in the past, but if our assessment is correct, not nearly as often as now. The misuse of the process and sometimes of the arbitrator are seen by some of us to be trouble for the future of arbitration, not for

specific arbitrators. These occurrences have a cumulative effect and contribute to persuading employees, unions, employers, supervisory forces, and grievants that arbitration is not the only solution to labor problems and labor contract grievances. If the lower levels of supervision and of union representation at the plant become persuaded that arbitration, as it has come to be practiced by employer, union, or their designees, is not serving to get before the arbitrator what is believed to be important, if they become convinced that what is occurring is sort of game-playing, the intent of which is to win at whatever cost, then there will be pressure for change. Industrial peace may require that the time-tested method of dispute resolution not be so destroyed.

Some Results of the Changes

It is not too soon to identify a few of the results that some of us have perceived. Since I have expressed some dislike of the growing technical approach to the presentation of cases in arbitration, I would be remiss if I did not make it clear that a well-prepared, well-reasoned brief can be a joy to an arbitrator attempting to decide a complex matter. What seems to have occurred, however, is that the use of both pre-hearing and posthearing briefs has grown to proportions that are totally unnecessary. Sometimes the inescapable conclusion appears to be that the purpose of the brief is something known only to the advocate; it is not for the enlightenment of the arbitrator.

The perceivable disaffection some parties appear to be having with the arbitration process has been translated into action. In one situation in which I am one of five contract arbitrators, an employer announced that the union's counsel had become increasingly technical and difficult in his approach to arbitration of their labor disputes and was making it impossible for the employer to continue to treat arbitration as part of what he described as a "problem-solving" function. As to the grievance procedure short of arbitration, the employer expressed his willingness to have his supervisory people work with union people to resolve grievances at the lowest possible level, without raising questions as to contractual time limitations or restraints or questions of substantive arbitrability.

He also served notice that in the future, if the matter were not settled in the grievance process, he would raise arbitrability as a threshold question and resist submitting to arbitration any grievance that he thought was not arbitrable, either procedurally or substantively. *That* was a new posture in the relationship. Whatever the wisdom of the employer's new stand, the change has occurred and has begun to produce antagonism between employees and supervision at the lower plant levels. In a group of plants that had averaged 100 arbitration cases per year, it is plain that antagonisms are increasing even at the lower plant levels, and it is reasonable to conclude from the new case figures that the annual case level will double.

Another result of the increased litigation and treatment of arbitration in the same manner as lawsuits has been the effect on the arbitrators. Where they have been in some way involved in lawsuits brought by employers, unions, or individual grievants, or where a party has sought to vacate an award because of alleged procedural deficiencies at the hearing, or where the extraordinarily technical hearing presages a court action by whichever side "loses" when the award is issued, these arbitrators seem to have begun to write "defensively." Where many arbitrators in the past have felt it their obligation to write for the understanding of the grievant, the employees, the stewards, and the foreman, now there seems to be an interest in making a showing that there has been a full and fair hearing and that the arbitrator's rulings have been technically correct. It may be that some arbitrators are writing for the eye of the court—just in case.

One arbitrator, in a recent opinion, explained why he ruled as he had, at a hearing, on the admissibility of a few small pieces of evidence. His explanation was that one of the advocates had stated that if the award went against his client, he intended to dispute confirmation of the award. And when the arbitrator awarded in favor of the opposition's position and interpretation, he took care to explain in his opinion the basis of his rulings on the admissibility of the offered exhibits.

Other arbitrators note in their opinions such matters as the date hearings were deemed closed and what extensions in time were granted to the parties for issuance of briefs and by the parties for issuance of the award. If they have found it necessary to reject evidence sent to them after the hearing was closed, they

carefully note that in their opinions. At one time many of us were aghast at a suggestion of a law professor-arbitrator—that we make certain to state in the opinion that we had considered every bit of evidence offered, even though some of it was not specifically mentioned in the opinion. Many arbitrators have now begun to do this.

It is acknowledged that some of the effort toward protection has to do with questions of external law. Thus, in cases involving EEO-type claims, some arbitrators make an effort to meet the “criteria” of footnote 21 of *Alexander v. Gardner-Denver*,⁵ even though a claim of statutory discrimination is not involved in their arbitration case. One provides in his opinion a description of his background and experience with EEO and contractual discrimination matters. Apparently there is a belief that, should the employer or union seek to have the arbitrator’s award recognized as having some effect in an EEO-based lawsuit, the opinion itself should provide information to the courts as to the “special competence” of the arbitrator.

But not all protective measures come from external-law problems. The results some of us see developing from the increasingly technical approach to arbitration should not be minimized. We know arbitration for what it has been—for the quality it has brought to the relationship between employer and union, shop steward or employee and first-level supervision. The substitution of antagonism for that relationship cannot possibly do any good to either party or to the process.

What might reasonably be asked, for the survival of the arbitration process and its continuing contribution to industrial peace, is this: before employers and unions give the authority to speak in their names to the presenters of their positions in grievance disputes and arbitration, in the presence of employees, supervisors, union officials, and management personnel, they must decide and make known to those presenters—nonlawyers or lawyers—the philosophy of labor relations they want to adopt and the results they want to achieve. It is a decision they cannot make lightly.

⁵415 U.S. 36, 7 FEP Cases 81 (1974). In part, footnote 21 reads: “We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court’s discretion with regard to the facts and circumstances of each case. Relevant factors include . . . the degree of procedural fairness in the arbitral forum . . . and the competence of particular arbitrators” (emphasis supplied).

Comment—

BERNARD W. RUBENSTEIN*

Although the thrust of this session is a critical view of the advocate, I propose to make some defense of the much-maligned union advocate who has been criticized over the years at these sessions as unprepared, or at least inartful.

In the labor relations seminar that I give at the University of Maryland School of Law, I have tried, in a much less eloquent way than Ralph Seward has done, to make students aware that advocacy in labor relations is somehow different because, as Mr. Seward has said, the advocate must have an awareness of the labor relations framework. I have tried to explain that advocacy in arbitration is unique indeed, and that we are not “hired guns,” as perhaps are the criminal and tort lawyers. In short, there is really nothing in Mr. Seward’s paper with which I would disagree, except for one thing. I am afraid the world about which he writes may no longer be today’s world.

Speaking solely as a union attorney who has been handling arbitration cases for more than 25 years, the role of the union attorney may well have changed substantially and irrevocably. When I started to practice, the law of the duty of fair representation had been formulated only in cases like *Steele v. Louisville & Nashville Railroad*,¹ clear-cut cases of racial discrimination, or of other obviously hostile and discriminatory conduct by a union toward certain members of the bargaining unit.

From that point, however, over the years court and Board cases have left us with something less than perfect guidance. The hostile, discriminatory aspects of these cases give me no problem. That has been with us since 1944. However, there are other aspects that do bother me. First, as every practitioner knows, there has been a tremendous increase in the volume of litigation before the National Labor Relations Board and the courts. Second, the Board itself is a Johnny-come-lately in this area, but seems to be making up for lost time. After all, the Board decision in *Miranda Fuel*² was issued only in 1962, 18 years after *Steele*; thus, it is only in recent years that Board law

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¹323 U.S. 192, 15 LRRM 708 (1944).

²*Miranda Fuel Co., Inc.*, 140 NLRB No. 181, 51 LRRM 1584 (1962).

has become a major factor in this area. Moreover, in Board law, the alleged violations run against the union alone.

It is not my intent to duplicate the vast body of literature that has appeared in recent years on the duty of fair representation. Rather, I wish to discuss the practical implications of this growing body of litigation for the union advocate, specifically in relation to the thrust of Ralph Seward's paper.

The first area of impact is on the process of screening cases before they ever reach the arbitration stage. In many on-going relationships between the advocate and his union client, despite the fiction that the union attorney walks into the room unprepared, the attorney can and does play an important role in the screening process. Many clients run cases by me for my opinion as to the worthiness of arbitration. With some unions, I hold regular meetings where we review outstanding grievances. Other clients discuss cases with me on a less formal, regular basis.

More and more, however, decisions are made based not upon the merits, but upon the likelihood that the grievants will sue or file a charge with the Labor Board. The result is that the attorney has less input, and more cases go to arbitration. Indeed, some clients, as a matter of routine, take everything to arbitration. It is obvious that this subverts the whole purpose of grievance procedures. If every case is to go to the adversary process of arbitration, the give-and-take at an earlier stage has vanished and the process has been subverted. A company has no incentive to settle its "bad" cases if the union cannot settle those cases that should be settled. The advocate then must argue poor cases, but must put on a show because, after all, the case may have gone to arbitration to prevent a lawsuit. The arbitrator may well feel justified in criticizing the advocate's performance, but the criticism may not in fact be so justified. The failure was in the screening process. And, in that case, the advocate's role is to protect his client, the union, against the lawsuit or the NLRB charge.

The second area of major impact is upon advocacy at the hearing. One is the accelerated introduction of lawyers into the hearings. In the last couple of years, several international representatives who have handled arbitration cases for many years have called me in on an ad hoc basis to handle cases which in the past they would have handled themselves. The introduction of a "strange" lawyer is not necessarily good for the process. The lawyer may have no awareness of the labor relations frame-

work and treat this as any other case. Indeed, he may feel that he must seek a win at all costs in order to impress a potentially new client.

Another impact with which we are all familiar is the increasing formalization of hearings to protect against future lack-of-due-process claims, transcripts to protect against possible Board or court action, more insistence upon rules of evidence, objections to documents, insistence upon briefs, and the like—all designed to protect the advocate.

Finally, and perhaps here I reach Ralph Seward's major point, since *Hines v. Anchor Motor Freight*,³ advocates have become aware of the standards of conduct that the court and Board may impose upon union advocates. Certainly employees who obtain union representation are entitled to the best they can get. But best by whose standards? The female employee who complains that her discharge was the climax of sexual harassment by a supervisor wants that issue raised. The lawyer may feel that it is unnecessary to the successful resolution of the case, and certainly destructive of relationships in the plant, particularly if there is doubt in his mind as to the accuracy of the allegation. Does he risk losing the case and buying a resultant lawsuit?

I could give many examples. Almost every dischargee claims some form of discrimination or harassment by some supervisor. "He was out to get me" is a claim union advocates hear in their sleep. What should the advocate do? Do you call a grievant to testify? We all know many cases lost because of the grievant's own testimony. Does the arbitrator say to himself or out loud, "Why did that stupid lawyer try it that way?" In the subsequent lawsuit, the grievant may testify that he couldn't even tell his side of the story.

The lawyer may well recognize what is right and best for stable and intelligent labor relations in the long run. But is it best for my client if I subject him to potential lawsuits and Board actions that may involve liability and, in any case, will involve the expenses of defending an action? Yet even these questions may be easier than those issues involving competing interests within the bargaining unit.

Mr. Seward gives as an example a temporary-vacancy, seniority-ability question. But consider this case. The company and

³424 U.S. 554, 91 LRRM 2481 (1976).

union have negotiated a not-uncommon provision providing that in the matter of promotions, seniority should govern when ability and skill are substantially equal. The agreement covered 1500 production and maintenance employees. The company posted two openings for pipefitters for which 64 employees bid. The two successful applicants were selected by the company on the basis of superior skill and ability after interviews with all bidders. Twenty-six unsuccessful bidders filed grievances; all of them were senior to the two selected. The union chose the four most senior and processed them through the grievance procedure. The matter went to arbitration. At the hearing, each of the four grievants testified as to their skill and ability. The successful bidders were not present at the hearing and hence did not testify. The company presented its evidence as to how it made the choice. It was also agreed that there was no past practice. Of the four, the arbitrator denied two on the grounds of lack of substantial equality and granted two. Two persons were then knocked out of their jobs by the successful grievants.

Some of you may recognize this set of facts. Every arbitrator in this room has had a similar case, similarly tried. Those of you up on recent developments, and especially the Steelworkers, may recognize *Smith v. Hussman Refrigerator Co.*,⁴ decided January 3, 1979, by the Eighth Circuit Court of Appeals. The court held that the union acted unreasonably and arbitrarily because a seniority system is not a "neutral" principle; that a union's choice to process all grievances based on seniority unfairly discriminates against employees receiving promotions on the basis of merit; and that the seniority clause in the agreement specifically required the union to balance merit and seniority. The union, having made no independent inquiry as to the relative merits of the competing employees, violated its duty to the two junior employees. The two received a total of \$9000 damages. However, to complete the picture, the court denied the plaintiffs equitable relief and refused to set aside the arbitrator's award. The plaintiffs, therefore, did not get their jobs. A union narrowly escaped a similar fate before the NLRB in *Washington-Baltimore Newspaper Guild Local 35*,⁵ decided January 16, 1979.

What is the effect of all this on advocacy? Well, here is a court telling a union not only which member it must represent, but

⁴100 LRRM 2239 (8th Cir. 1979).

⁵239 NLRB No. 175, 100 LRRM 1179 (1979).

what evidence it may be necessary to present to an arbitrator—and this is in a case where there is no hostility alleged. What is the poor advocate to do? Can it be imagined that if the union decided that the junior employees were, indeed, superior to the senior people, it could have avoided legal action? Is the answer that each group gets its own advocate at the hearing?

The logical question is, where is all this taking us? Last week, while we were discussing the duty of fair representation, one of my students asked why should not a discharged grievant have open access to judicial process. This would give him the same right as anyone else who has allegedly suffered the loss of a property right—that is, open access to the judicial process, which in labor agreements is the arbitration process. In addition, as in any other legal proceeding, he would be represented by a lawyer of his choice. It may be that we are fast approaching that legal position. In that case, the advocate in labor relations will be no different from his criminal-law brother.

Comment—

ANTHONY T. OLIVER, JR.*

Although many of you may not have noticed, there was a substantial amount of head-nodding and other visible expressions of concurrence as the speaker, Mr. Seward, delivered his paper. If you were watching, I am sure you noticed the same reaction from the discussants on this panel, including myself. It is interesting because that was precisely my reaction when I first read Mr. Seward's address prior to this meeting, an opportunity available only to the discussants.

After reading the paper for the first time, I was hard pressed to think of any appropriate response except an enthusiastic "yes." My reaction did not change after the second and third reading. It was at that point in time I concluded that my only possible response was to give this audience the compressed course in good trial practice which Mr. Seward chose not to do, or to compare and discuss the quality of the presentation of individual advocates whom I have observed over a number of years in representing management in arbitration cases. It oc-

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curred to me that to give a course in good trial practice would entail substantially more time than has been allotted. It also occurred to me that if I chose the latter course, I would be comparing and discussing only the quality of *labor* advocates in arbitration because as a management advocate, unlike most of you who are arbitrators, my opportunities to observe other management advocates in action are obviously very limited. Besides, I do have to return to southern California and face most of those labor advocates again and again, and I am not sure that after such a discussion I would be entirely welcome.

Still, as noted by the speaker, the quality of adversary presentation is a broad subject. I thought that perhaps, as he did, I could block out certain areas and aspects of it and try to reduce it to manageable size. It did not take long to discover that even that approach was fraught with difficulty. After another reading, I thought it best to analyze the special responsibility of advocates which Mr. Seward discussed, and determine how well management advocates meet that responsibility. Mr. Seward suggested that in most cases only a minority of advocates do so.

Changes in the Process

Judging by the background of the other discussants, my role here is to defend management advocates and their role in the adversary process of arbitration. All of us have observed a change in that process over the last few years. Some of this change is reflected by the number of cases reaching arbitration today which, in the past, would have been settled short of arbitration. There has also been an increase in the number of cases in which both parties are represented by attorneys, as well as those cases where the individual grievant is represented by his own attorney. The reasons for these changes are, for the most part, external to the grievance and arbitration system itself.

Bernard Rubenstein has covered in detail a number of the reasons for these changes, such as the increase in civil actions based on employment discrimination, the ever-present specter of actions against unions for breach of the duty of fair representation, and the vast increase in legislation—both federal and state—regulating the fields of collective bargaining and labor-management relations, to mention only a few. To a large extent, the advocate in the arbitration process, particularly the ad hoc attorney-advocate, is not in a position to control these external

factors. However, if the grievance and arbitration procedure really works and the grievant is made to feel that he truly has had his day in court, then, even where the grievant's claim is denied by the arbitrator, he may not seek further redress of his claim by way of another tribunal or forum. This is one way in which the impact of some of these external factors can be lessened.

The increase in the use of attorneys in the arbitration process over the years frequently has given rise to the hue and cry that arbitration proceedings have become too legalistic or technical. In an address before this Academy in 1961, Sylvester Garrett discussed at length the role of lawyers in arbitration.¹ He pointed out that as late as 1947, many held the view that lawyers had no legitimate place in collective bargaining or arbitration. At the 1957 meeting of the Academy, John Sembower spoke of the necessity of halting the trend toward technicalities in arbitration.² These and other similar comments engendered vigorous reaction, such as the comment by Benjamin Aaron in 1959 in which he analyzed the use of the term "creeping legalism" as follows:

"Use of that rhetorical device is regrettable because it suggests something stealthy and unwholesome—a condition to be resisted as strongly as 'creeping subversion.' We would be better advised, I submit, initially to concentrate on the particular practices or attitudes under attack; after they are identified and evaluated, there will be time enough to determine whether they are creeping, toddling, or galloping."³

Despite the dire warnings of some, and for many of the reasons cited by Bernard Rubenstein, it would appear that the use of attorneys as advocates in arbitration proceedings is here to stay and likely will increase. This is not necessarily destructive of the system, as noted by Sylvester Garrett in his 1961 address when he stated: "There are few greater privileges in arbitration than to preside where the parties are represented by seasoned, intelligent, and cooperative attorneys who understand the facts, the real problems involved, and the medium in which they operate."⁴

¹*The Role of Lawyers in Arbitration*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 102.

²*Halting the Trend Toward Technicalities in Arbitration*, in *Critical Issues in Labor Arbitration*, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1957), 109.

³*Labor Arbitration and Its Critics*, 10 Lab. L. J. 605, 606 (1959).

⁴Garrett, *supra* note 1, at 105.

However, the increased use of attorneys who have not grown up with the arbitration process has not been without frustration. Attorneys frequently have been injected into the process without the seasoning and complete understanding of the medium in which arbitration works. Coupled with the natural instinct for victory, they have brought with them some of the tactics that tend to impede effective arbitration. There are those whose utter disregard for the system and insatiable thirst for victory has brought to the arbitration hearing conduct and tactics that are totally indefensible. It is not my purpose here to defend such advocates. I believe that such conduct can be handled by most arbitrators on a one-for-one basis, and it has been my experience that not only are most arbitrators capable of doing so, but they do so rather forcefully. It is also not my purpose to add to Sylvester Garrett's eloquent presentation on the role of attorneys in arbitration. Instead, I would rather return to the central theme of Mr. Seward's address and concentrate on the particular responsibility of an advocate which he discussed.

The Responsibility of the Attorney-Advocate

No one can quarrel with the proposition that *all* parties to an arbitration proceeding have a responsibility for the long-term welfare of the collective bargaining relationship in which they are functioning and to protect and preserve the grievance and arbitration procedure which is central to that relationship. However, the nature and extent of that responsibility obviously will vary depending on the position of the management advocate. If the management advocate is the company's industrial relations director or has some other full-time executive position with the company, he is more apt to be intimately involved with the labor relations climate in the plant than is the attorney-advocate who, like most arbitrators, is usually called in on an ad hoc basis to represent the company in arbitration proceedings. I am not saying that the former has this special responsibility and the latter does not, simply that the nature and extent of this responsibility will differ.

One elemental difference is that the attorney-advocate generally does not decide which cases will and which cases will not go to arbitration. Generally speaking, the attorney-advocate is called in *after* the decision to arbitrate is made, whereas the full-time management advocate more than likely participated in

the decision itself. For the moment I would like to concentrate on the responsibility of the attorney-advocate since that is the role with which I am most familiar.

In most cases, notice of a pending arbitration hearing is first received from a client when he calls for assistance in selecting an arbitrator. Since most advocates believe that some arbitrators are better able to hear certain types of cases than others, there is usually a brief discussion of the facts of the matter in dispute in this initial conversation. However, this conversation does not usually delve into the merits of the case, merely the nature of the dispute. In some cases, the arbitrator is selected without consultation, so the first indication of a pending arbitration hearing is the telephone call to confirm the attorney-advocate's availability for a particular date or dates. With the crowded calendars of most arbitrators today, the interval between the telephone call and the actual hearing date usually provides sufficient time for advance preparation of the case for hearing, a luxury that some of my brethren on the other side of the table do not always enjoy.

It is primarily during the preparation for hearing that the attorney-advocate must exercise the special responsibility to which Mr. Seward referred. At the time the advocate commences his preparation, generally the dispute has been through the required three or four steps of the grievance procedure and a decision has been made to arbitrate. How well this grievance procedure works, as well as how sound the decision is, varies from employer to employer. Perhaps one of the better descriptions of how the grievance procedure frequently operates and how the decision to arbitrate frequently is made was contained in a paper presented by C. W. Ahner at the 11th Annual Meeting of this Academy in 1958.⁵ Mr. Ahner stated:

"To be realistic about the prearbitration process let us lift the corporate veil and take a behind-the-scenes look at that unanimity which management presents to the outside and ask how the decision is made that a case shall be arbitrated. Who, on management's side, makes the final decision to go to arbitration? Upon his knowledge, experience, objectivity, and independence depends whether the decision to arbitrate is intelligent and realistic. You are all familiar with the typical four-step grievance procedure which would insure a thorough screening of cases advancing towards arbitration. But those of

⁵*Arbitration: A Management Viewpoint*, in *The Arbitrator and the Parties*, Proceedings of the 11th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1958), 76.

you who have seen the mechanism in operation must have observed the squirrel-cage effect that is sometimes achieved. The man who made the decision which gave rise to the grievance may also make the final decision to arbitrate. And this may happen for any number of reasons: The department-head making the original decision may be a valued production man whom no one in the organization cares to reverse. Or the lower-level supervisor may have made the original decision on the advice of the executive. At any rate the ultimate decision may be the original decision, progressively reinforced but not reconsidered as it proceeds through the grievance process.”⁶

If the attorney-advocate arrives upon the scene depicted by Mr. Ahner, he has his work cut out for him. He must review the proposed documentary evidence and interview the potential witnesses. He must determine the impact of the entire proceeding as well as any decision that may be issued by the arbitrator on the labor relations framework existing between the parties. He must find out what occurred at each step of the grievance procedure and determine to what extent the available evidence supporting the company’s position was disclosed to the union during the various steps of the grievance procedure. Finally, he must determine whether or not the decision to arbitrate was sound. Was it based on facts? Was it based on emotion? By the time the advocate has accomplished all of this, he should have made up his own mind about how best to present the case, the potential effect of how he presents it, and the overall effect of all possible results of the arbitration. The advocate may even conclude that, for any number of reasons, the decision to arbitrate was not realistically conceived.

The advocate should advise the client of his conclusions, and generally he should accompany them with his recommendations. It may be that the advocate will recommend against arbitration, but the fact which must be borne in mind is that it is the client, not the advocate, who makes the ultimate decision to arbitrate or not.

What I am suggesting, at least from the viewpoint of an attorney-advocate, is that the preparation of the case is but another step in the grievance and arbitration procedure, and it is at this step that the special responsibility of an advocate, as discussed by Mr. Seward, is most effectively exercised. For this reason, the exercise of that responsibility may not be readily apparent to an

⁶*Id.*, at 79.

arbitrator at the hearing, and he may well conclude in any given case that the advocate has failed either to recognize or to exercise that responsibility. I believe, however, that most seasoned attorney-advocates not only recognize this responsibility, but exercise it with some frequency.

Some distinction must be made with respect to the management advocate who occupies a full-time position with the company. If he is a specialist in arbitration hearings, assigned from the corporate headquarters to handle a particular arbitration at one of the company's divisions or plants, and did not participate either in the action that gave rise to the dispute or in the initial decision to arbitrate, he would exercise this special responsibility we have been discussing in much the same manner as the ad hoc attorney-advocate. He may have one additional advantage, however, and that is, he may have the authority to countermand the initial decision of the company to arbitrate.

On the other hand, it is much more difficult for the management advocate who may have participated in the initial decision to arbitrate, as well as in some or all of the steps of the grievance procedure, to recognize this special responsibility as such. Granted, he does have the advantage of intimate knowledge of the framework of the collective bargaining relationship between the parties. He also knows the players and should be able to recognize the impact of an arbitration hearing on the individuals involved and on their present and future relations. However, often this knowledge is clouded by the emotions that have built up as the grievance progressed from step to step and by the desire to vindicate the decisions that he has made or in which he participated along the way. In order to exercise his responsibility as an advocate, he must have the ability to separate the two. Although my exposure to management advocates in these two categories is somewhat limited, I have the distinct feeling from my limited exposure that most of them work hard at making the system work, which is another way of saying they effectively exercise the special responsibility we have been discussing even though they may not recognize it as such.

Strategy Questions

Most of the facts that Mr. Seward has outlined as proper considerations for the advocate in arbitration proceedings are, to my mind, more appropriately reserved to the strategy deci-

sion of whether to settle or arbitrate. In a paper presented to the 20th Annual Meeting of this Academy, my partner, John O'Hara, evolved certain criteria to be applied, or factors to be considered in deciding whether to arbitrate or settle a specific case.⁷ Among some of the more obvious questions to be answered in making that decision, John listed the following: "What is the effect of winning or losing?" In discussing that aspect of the decisional process, he said:

"Although winning may be everything in football, this is not necessarily true in collective bargaining. In the words of a well-worn maxim, I tend to think that how you play the game is often more important. Triumph achieved in a single skirmish may well prove a Pyrrhic victory in the long run. Since a particular arbitration case occupies but a few hours in a continuing relationship which may extend for years, the effect of the decision in that case on the long-range relationship must be considered. I think the parties should ask themselves two questions:

"(a) Is there anything to lose by winning?

"(b) How much is to be lost by losing? . . .

"Arbitrators with authority to decide an issue have as much power to make a bad decision as a good one. For this and . . . other reasons . . . the impact of victory or defeat must be measured not just in terms of present conditions, but rather in the light of its effect tomorrow and thereafter."⁸

I think all will agree that the protection of the continuing relationship between the parties must be paramount in all decisions involved in the arbitral process. I am simply suggesting that many of the considerations raised by Mr. Seward which affect this relationship are more appropriately considered in reaching the prearbitral decision to settle or arbitrate.

Since arbitration is not a one-way street, it is important to keep in mind that *both* parties have the same obligation to be aware of the impact of any arbitration on their long-term relationship. The union advocate should engage in the same basic soul-searching as I have suggested above for the management advocate. In other words, once the decision to arbitrate is made, both parties should come to the hearing with their eyes wide open. Albeit, there are many different reasons why some disputes are arbitrated rather than settled, as Mr. Rubenstein in-

⁷*Strategy: To Settle or to Arbitrate*, in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 341.

⁸*Id.* at 349.

dicated. Generally, however, the decision is made by both parties with full knowledge of the ultimate impact not only of the arbitrator's decision but also of the testimony that may be elicited at the hearing.

Injecting several assumptions, and in light of some of my comments, I would like to reexamine Mr. Seward's example of the female stenographer seeking a merit wage increase over and above the maximum permissible by automatic progression. One basic assumption that I would like to add is that the parties do have a viable grievance procedure and that at each step of the grievance procedure there has been *full and complete disclosure* of the facts upon which the grievant was denied a merit increase. From the company's point of view, its primary concern is to convince employees that merit increases are different from automatic increases and should require a showing of real merit before they are granted. Since the parties negotiated the language upon which the grievance is based, presumably both parties intended that merit promotions be based on true merit.

Although the grievant is a senior employee, a hard worker, conscientious, and has not created any disciplinary problems, the truth of the matter is that she is a pretty bad stenographer, can't spell very well, has difficulty reading her own shorthand, types letters that are not very neat, and is often unaware of the errors she makes. If the grievance procedure is working, this is precisely what her supervisor told her when she asked for a merit increase and no doubt reviewed it again with the grievant when she lodged her grievance at the first step. When the grievance was reduced to writing and processed to the second step, a company representative other than the grievant's immediate supervisor no doubt got into the act. Not having first-hand knowledge of all the facts, he or she probably requested the grievant's supervisor to produce tangible evidence of the grievant's work. Hence, the copies of error-filled letters the grievant had written were extracted from the files. At the second-step meeting these letters were produced by the company representative and examined by the union representative. A similar presentation, involving perhaps the company's director of industrial relations and a union business agent, was made at the third step. At this point, the union representatives were aware that if the grievance was pursued to arbitration, there was not only a possibility, but a probability, that at the hearing the company would call the supervisor to repeat her verbal description

of the grievant's shortcomings and would produce the error-filled products of the grievant's work.

The long-range impact of such a presentation on the relationship between the grievant and her supervisor as well as the other stenographers in the pool certainly must have been in the mind of the union advocate as he prepared the case for hearing and, at some stage of the procedure, the grievant should have been fully apprised of the potentially devastating experience which the hearing might present. If, after taking all of these factors into consideration, the grievant elected to proceed with the hearing, what is the responsibility of the company's advocate toward the grievant? In my opinion, it is the responsibility of the advocate to present all relevant evidence to ensure that the arbitrator is convinced of the merits of the company's position.

I am not suggesting that at the hearing the company advocate should deliberately embarrass the grievant or engage in any conduct that might disrupt the efficiency or morale in the stenographic pool or otherwise impair the labor relations framework between the parties. However, the issue is important to the company, and once the decision to arbitrate has been made and the issue is joined, the advocate has the responsibility to the company to establish before the arbitrator that the grievant was not entitled to the merit increase she was seeking. Both sides are aware that this may entail some embarrassment to the grievant, but this is a risk the grievant assumed by pressing the grievance.

It seems to me that the case of the stenographer should never have been processed to arbitration. If the grievance procedure adopted by the company and the union was effective, and if the parties engaged in full and complete disclosure of all relevant evidence during the course of that procedure, the stenographer and the union should have withdrawn the case long prior to arbitration. If there is one criticism that can be leveled at the process today, it is the instinct to withhold critical evidence for use at the arbitration hearing which, if presented earlier, might well have resulted in a settlement.

The speaker today placed much emphasis on the responsibility of advocates to determine the effect that the arbitration proceeding will have on future relations on the plant floor and the morale of supervisors as well as employees. He reminded us that we are functioning in a continuing relationship whose welfare must be protected and preserved. I doubt that there is anyone present who does not acknowledge that responsibility and its

importance. However, it is also important that the grievance and arbitration procedure which the parties have selected is effective in resolving disputes. This can only be achieved if both parties are satisfied that they had their day in court, that the decision is technically correct, and that it is based upon the evidence presented.

To accomplish all of these results is no small task and it does take a bit of juggling. Sometimes in order to achieve a satisfactory award in the technical sense, it is necessary to put a dent in some future relations on the plant floor. I do not believe that this is necessarily bad as long as both sides are aware of this possibility at the time the decision to arbitrate is made. Individual grievants, as in the case of the female stenographer, should be made aware that an arbitration is not just a pleasant interlude from their normal day-to-day routine. After all, arbitration is an adversary proceeding in which both parties attempt to convince the arbitrator of the merits of their respective positions, and one of the primary vehicles for doing so is the examination and cross-examination of witnesses. From my experience, although there are some advocates who complicate, obstruct, and delay proceedings and attempt to intimidate and harass witnesses, thankfully they are in a minority.

In preparing cases for arbitration, one of the elements that should always be discussed and considered is the selection of witnesses for the hearing. It is at this stage that the decision should be made as to who will and who will not be called. The discussion and the decision should always involve such considerations as the impact of an individual's testimony on his future relations with the union and other employees. I believe that it is just such considerations that result in the fact that most management advocates infrequently call bargaining-unit employees as witnesses in arbitration proceedings *if* the case can be won without such testimony.

The Parties' Responsibility

There is one other aspect of Mr. Seward's address that requires comment. I agree completely that advocates in the labor field have a responsibility for the long-run welfare of the collective bargaining relationship and for the protection and preservation of the grievance and arbitration procedure. As advocates, however, they are shouldering that responsibility for the parties

they represent. After all, it is primarily the parties who should be concerned with the well-being of the system in which they operate, and it is primarily the parties who make the ultimate decisions to arbitrate or settle grievances. Granted, the responsibility assumed by the advocates requires many on-the-spot decisions during the course of a particular hearing, and no one will quarrel with Mr. Seward's observation that these decisions should be made with an eye to meeting that responsibility.

Where I do part company with Mr. Seward to some degree is the extent to which the arbitrator should be concerned with these considerations. I am speaking primarily about the ad hoc arbitrator rather than the permanent umpire whose value to the parties is his accumulation of knowledge of their relationship and how it functions. The ad hoc arbitrator, on the other hand, is called upon to render a technically correct, informed, sound, and understandable decision resolving the issue submitted to him and *based on the evidence presented to him*. If the advocates, after duly considering all of the factors we have been discussing today, elect to present to the arbitrator only the information and argument needed for a technically correct decision, that is all they want. If, on the other hand, one or both of the advocates want the arbitrator to consider elements that have an impact on the long-range relationship of the parties, they will provide him with the necessary information to do so.

The arbitrator should take his cue from the presentation made by the advocates. Although all of us who utilize the services of the members of this Academy, as well as others who serve as labor arbitrators, expect the arbitrator to bring to the hearing his or her special expertise in the field of industrial relations, there are times when we do not want the arbitrator to indulge in speculation as to the long-range impact of a particular decision. If the quality of adversary presentation in arbitration meets the standards outlined for us today by Mr. Seward, the arbitrator's lot should be an easier one, the decision he reaches will not require speculation, and the parties will accept it.