CHAPTER 7

THE FINE ART OF ENGINEERING AN ARBITRATION SYSTEM TO FIT THE NEEDS OF THE PARTIES

I. THE DESIGN PROCESS

MYRON L. JOSEPH*

It was originally suggested that I attempt a paper that could serve in the future as a blueprint for parties who want to reassess the merits and demerits of their existing arbitration systems. But that would involve an encyclopedic review of the advantages and disadvantages of each variant of each aspect of arbitration. That seemed not only unreasonable but impossible, since the merits and demerits of any arrangement depend on the goals of the particular parties. Ben Fischer will say, "You can't give generalized advice"—and, as usual, he is right. Too frequently, arbitration has been assessed solely on how well it meets the criteria of speed, economy, and justice. But those are not the only relevant goals, and last year's Presidential Address by Arthur Stark illustrated the variety of forms the parties have invented to meet their respective needs.

I have not come forth with a blueprint, but I am going to suggest a process that might be considered by those who want to engineer an arbitration system to fit their needs. It is not complex. It involves the identification and the assignment of relative weights to the parties' relevant goals, a continuous problem-solving approach to arbitration, the development and maintenance of an information system that will permit them to monitor the system, and the willingness to modify the system in response to changing conditions.

The needs of the parties are not fully described by speed, economy, and justice. Arbitration is part of an industrial rela-

*Member, National Academy of Arbitrators: Professor of Economics and Industrial Administration, Carnegie-Mellon University, Pittsburgh, Pa.

tions system—of a collective bargaining relationship—and as part of that system, it must share the responsibility for achieving its goals.

Management Goals

Management in the private and public sectors has specific goals of profitability and efficiency. Industrial relations executives must be able to show that their activities, including arbitration, contribute to those goals. The following are some of the ways that arbitration can help to further management's objectives:

1. A basic management goal for arbitration is the reduction and elimination of wildcat strikes. In exchange for relinquishing authority to a third party, the employer expects to avoid costly work stoppages. This is a critical management goal, and to the extent that it is not achieved, no matter how speedy, economic, and just the arbitration process, the system is in trouble and needs adjustment.

2. Arbitration furthers management's goals by strengthening the employer's authority to the extent that it has not been limited or restricted through collective bargaining. Arbitration defines and confirms the legitimacy of authority and resolves disputes over the scope of that authority. It helps employees to understand and accept the employer's legitimate role and gives supervisors a clearer framework within which to carry out their responsibilities. If the employer's authority is continuously challenged, either because supervisors are going beyond the limits of their legitimate authority or because employees have not accepted that authority, it would appear that the arbitration process is not fulfilling this function.

3. Arbitration can contribute to productivity and reduce turnover and absenteeism through its impact on employee morale and attitudes toward work. Arbitration can contribute to reduced labor costs by helping employees understand their work environment—giving them a process through which they can influence that environment and sustain their individual dignity. It is only when employees accept and understand the conditions of employment that productive efficiency can be maintained. Arbitration plays an important part in gaining that acceptance, not only by providing an equitable and just process, but by helping employees to perceive that they are being treated fairly.

4. Arbitration can help to improve supervision, by helping to give supervisors a better understanding of their role and of the labor-management context within which they must carry out their responsibilities.
5. Arbitration provides a mechanism for communicating with the union at a number of levels, thus helping to give union officers a better understanding of company problems and management priorities.
6. Arbitration can help maintain managerial effectiveness by providing a mechanism that permits adjustment to new and unanticipated circumstances that were not considered when the collective bargaining agreement was negotiated.

Union Goals

Although labor unions have no clear bottom-line goal to match profitability, it is possible to assess the effectiveness of arbitration from the union point of view in terms of a number of organizational needs and objectives. In addition to protecting and representing the interests of their members, unions may be viewed as having major organizational goals that are related to their strength, stability, and effectiveness. Some of the ways that arbitration can contribute to these goals are the following:

1. Arbitration can reduce the number of or eliminate wildcat strikes, which tend to erode the authority of the union organization and weaken its ability to negotiate effectively with management.
2. Arbitration can define the proper limits on management's authority so as to clarify the line of demarcation. Union resources would be conserved if unnecessary grievances were avoided.
3. Through arbitration, the union can demonstrate to its members that it has helped them understand and control their work environment and preserve their individual dignity. The ability to achieve this goal through arbitration depends on both equitable results and the way the union members perceive the arbitration process.
4. Arbitration can strengthen union-membership ties, by providing a context within which union officials can be responsive to the members and supply them with a valued service. Union officers frequently can achieve this goal by representing grievants, even when a case is very weak.

5. Arbitration can help to develop better union officials and more informed members, by giving them a better understanding of management's problems and priorities and a better appreciation of the context within which the union must function.
6. Arbitration can provide a channel of communication with management officials at various levels so that they can develop a better understanding of the union's problems and priorities.
7. Arbitration can help union officials to be more effective, by providing a means of responding to unanticipated developments.

Balancing Objectives

These union and management goals are just some of those that are relevant for the assessment of an arbitration system. Many of them are parallel and do not involve labor-management conflict. When arbitration is considered in the context of the complex framework of union and management goals that clearly go beyond speed, efficiency, and justice, it is apparent that it is in the interest of the parties to fine-tune their system to try to achieve their own particular balance of objectives.

It is not possible to maximize all of the relevant goals, since some conflict with others. For example, an appeals process may assure consistency and possibly more valid and just decisions, but at the same time it may delay closure on issues that are of pressing concern to employees and managers, leaving critical aspects of their relationship undefined and inviting both parties to push for advantage while awaiting a definitive decision.

A problem-solving approach to the design of an arbitration system requires that the parties recognize and deal explicitly with the *trade-offs* that will be required. For fine-tuning, the parties' goals must be identified and they must be given relative weights. Of course, the parties must agree, and for the process to be most effective, each should be sensitive to the multiple goals of the other so that in areas where there is no inherent conflict, the arbitration process can be designed to carry out its many functions as part of the industrial relations system.

Many dials are available for fine-tuning, and it is not necessary to enumerate them for this audience. They range from a definition of grievances that can be appealed to arbitration, through a multitude of procedural and substantive elements, to the form and status of the arbitrator's award. The ways in which the

process and the actions of all concerned are perceived will affect important interests of labor and management. Perception and reality are not always the same, and some activities are more important as symbols than as significant factors in the decision process. But symbolism as well as the communication and education functions of arbitration should be given careful attention in designing and implementing the process.

There are two design areas that I would like to discuss as examples of the approach to arbitration I am suggesting. The first involves the extent and form of participation by rank-and-file employees and lower-level supervisors in the arbitration process. In the interest of economy and expedition, many parties submit at least some cases to arbitration on the basis of stipulations, affidavits, and written arguments. If the cases are screened properly, there is probably no loss in the "justice" or validity of the decision, and a good deal of time and money is saved, particularly if the arbitrator is asked to give an abbreviated opinion. What is lost is the opportunity to educate employees and train foremen and local union officials. What is relatively unknown is the impact of this impersonal procedure on the perception and long-run acceptability of arbitration. The parties may protect themselves by providing that the awards issued in various curtailed arbitration procedures are without precedent. But no incident is completely unique, and though a grievance may be disposed of expeditiously, the organizations may have learned nothing from the process.

My purpose is not to criticize the various attempts to make arbitration more efficient and less expensive. Rather, it is to urge the parties to be alert to the possible indirect effect of these procedures on their multiple goals. The process should be evaluated realistically in terms of the parties' goals and objectives that are relevant to arbitration, and, where necessary, the parties should devise a monitoring system to develop the information necessary to make such evaluations.

One basis for employee dissatisfaction with arbitration is the frequent perception that the process does not do any good—that it does not provide a satisfactory mechanism for resolving certain types of disputes. To the extent that this feeling becomes widespread, arbitration will be greatly weakened in its ability to satisfy the major union and management goals that I have already discussed.

Acceptance and respect for the process are essential to both

parties, and here is an important area for their fine-tuning. It is well known that in some cases grievants gain little when they win a grievance beyond the satisfaction of being right. When found guilty of improper work assignments or erroneous exercise of authority, employers are normally told that they are wrong and, in some cases, not to repeat the infraction. Violations of rules against foremen performing bargaining-unit work result in very modest penalties, and in many instances supervisors continue to perform bargaining-unit work whenever they consider it appropriate. These are highly emotional issues involving face-to-face relationships of employees and supervisors at the workplace. The inability of arbitration adequately to handle them and similar situations threatens the continuity of the arbitration process and, of course, the ability of arbitration to meet the needs of the parties.

Unions have turned to the arbitrators in a vain attempt to resolve the problem. Most arbitrators will not go beyond the traditional "make whole" remedy, and they should not be expected to address an issue that is clearly one the parties must resolve through the bargaining process. If arbitration is going to continue to play its critical role in industrial relations, the parties must consider the "appropriate remedy" issue, particularly in those areas where the traditional norms of arbitration are perceived to be completely inadequate because they do nothing to satisfy the grievant when he is proven to be right. It is as important for management as it is for unions that this basic weakness in the arbitration process be cured through fine-tuning.

Adjusting the Process

Finally, I would like to note that the essence of fine-tuning is the willingness and ability to change the dial-setting when frequencies shift. Arbitration should not only reflect the particular needs of the parties, but the parties should be alert to the need for adjusting the process to meet changing circumstances. If they continuously assess their arbitration activities in terms of their multiple goals, they will be alerted to changes that might require new procedures and techniques. Too often problems are identified in an ex post analysis of why the backlog got out of hand, why there was a rash of wildcat strikes, or why the membership refused to ratify a new agreement.

Of course there are areas of conflict, but I would urge that the parties have such a strong mutual interest in the strength and continuity of arbitration that a problem-solving, rather than an adversary, relationship is appropriate. This would require, as I have indicated above, that the parties analyze how all of their relevant goals can be affected by the arbitration process. These goals must be given relative weights so that the parties can properly assess the trade-offs that will be required in the design process. They must design and maintain an information system that will permit them to monitor how arbitration is perceived by those concerned and to assess how well it is satisfying the multiple union and management goals that the process affects. And, above all, fine-tuning requires a willingness to be flexible and to work together to keep the arbitration process in tune with our rapidly changing world.

II. THE TEAMSTERS AND ANHEUSER-BUSCH

STUART F. MEYER*

When Jack Dunsford called me last September and asked that I appear before this august body, quite frankly I kept asking myself "Why?" I know Anheuser-Busch, in selling over 41 million barrels of beer last year, is the largest brewer in the United States, but I dismissed that as the reason for the invitation when Jack failed to ask me to provide free Budweiser for this entire meeting. (Usually that is the main reason I am invited places.)

I could not accept the postulate that I was invited because Jack Dunsford happens to arbitrate some of the disputes at our St. Louis brewery. A member of the National Academy would certainly be above that sort of thing. And for the very same reason, I knew that it had nothing to do with the fact that Dick Mittenthal, your outgoing president, sits as a permanent neutral on the very committee that is the subject of my address today.

So I came to the conclusion that maybe—just maybe—Jack thought that some of you may find interesting the type of arrangement the International Brotherhood of Teamsters and Anheuser-Busch have developed for the resolution of grievances at six of our ten breweries. It is called the Multi-Plant Grievance Committee (or simply the MPGC). It is unusual. It is, quite frankly, unique.

To properly understand its workings, I have to take you back in time a few years and give you some background. In 1969 we had seven breweries. At two of those, Jacksonville, Florida, and Houston, Texas, contracts were being negotiated. Those negotiations proved unsuccessful, and a strike occurred at each plant. Several weeks later, our entire system of breweries was shut down through the device of cross-picketing.

Bear in mind that, while we have other unions in some of our plants, at that time production workers were predominantly Teamsters under the National Brewery Conference of the IBT. As an aside, presently all production workers and a significant number of our maintenance employees are represented by the Teamsters. The settlement of the 1969 disputes included an

---

*Vice President, Labor Relations, Anheuser-Busch, Inc., St. Louis, Mo.

agreement between the international union and us that in 1970 we would bargain the seven breweries' contracts at one location at one time.

In those 1970 negotiations, our newest four plants sat together and bargained contracts which, while remaining separate for each brewery, nevertheless were remarkably similar in the major areas. In one of those areas, the grievance procedure, the contracts were identical and created for the first time the Multi-Plant Grievance Committee. While the procedure was patterned somewhat after the national-trucking grievance handling, the fact that only one company was involved made it distinctly different.

The MPGC and Its Functions

Let me explain what the MPGC was, how it functioned, and our resultant experience under it. Any grievance at any one of the "New Four" breweries, as they came to be known, which could not be resolved through the normal in-plant steps of the grievance procedure, would be docketed for hearing at the quarterly MPGC meeting.

Assume that a Tampa grievance was called for hearing. What specifically happened? The Tampa business agent and the company's industrial relations manager for the Tampa brewery came into the hearing room and sat opposite the panel. The panel consisted of three representatives of management and three representatives of the union. The company's representatives consisted of one from corporate labor relations, one from corporate operations, and one from one of the "New Four" breweries, that is, a plant manager or an industrial relations manager. The union's representatives consisted of one from the National Brewery Conference and two business agents from plants in the "New Four." Obviously, no company or union representative from the Tampa brewery could sit on the panel for the hearing of a Tampa grievance.

The hearing itself began with the moving party—in cases involving discipline, the company, and in all other cases, the union—giving to the panel members and then reading aloud its written position on the grievance in question. This was followed by the other party doing the same thing. These written positions, and the written decision that I will describe later, formed the minutes of the hearing. There was no transcript. The written

positions varied in length, based normally on the importance of the grievances, but they averaged approximately two to three pages. They could be supported by written affidavits.

While the presence of witnesses was permitted, the holding of the hearings at one central location away from any of the plant cities made it highly restrictive from a cost standpoint. One other point worth noting, especially to this group: Under some very, very unusual circumstances, which I cannot foresee at this time, we would permit attorneys to represent either or both sides; but to date they have been excluded.

Following the presentation of the written positions, each side orally rebutted the other; questions were asked by the panel members; and, finally, each side had an opportunity to sum up. They were then excused.

The six panel members would then go into executive session and collectively attempt to resolve the matter. It took only a majority vote of the panel to render a decision. If that occurred, the decision, which by necessity was normally only one or two sentences in length, was written up but not divulged to the parties at that time. The next case would then be called. The decisions, by the way, were mailed to the parties after the three- or four-day meeting was concluded.

But what happened when the panel could not render a majority decision? What if the final outcome were 3–3? Then the decision form would have been marked "Deadlocked," and the grievance could have proceeded to ad hoc arbitration.

You may have noticed that I have been using the past tense. Why? The reason is that we changed it—not the procedure, but the make-up of the panel. Why did we change it? What happened under the old system? What were the advantages and disadvantages?

Advantages of MPGC

First, the advantages: There was a *timely resolution* of most grievances that were incapable of plant settlement. As an average, it took less than three months, whereas ad hoc arbitration takes anywhere from four or five months on up. The system was *less costly.* A business agent and an industrial relations manager could handle up to 10 or 12 cases for the cost of a four-day trip plus a fee of $20 a case. The latter paid for forms used, meeting rooms, etc. This total cost of approximately $100 a dispute was

far less than that of ad hoc arbitration, involving arbitrator's fees, attorney's fees, and incidentals.

It permitted *expertise* in the operation, an in-depth knowledge of actually running a brewery, to become an integral part of the practical solution to a problem. At the same time, it had available those very people who negotiated the contract—those people who knew not only the bargaining history of the labor contract at hand, but also the labor-relations history of the company and the union over an extended period of time. Therefore, the perspective of responsible international union leadership and responsible corporate management could be brought into play. Additionally, it forced both management and the union to administer identical contract language in the same manner at differing locations. This meant that the employee in Houston, Texas, would be dealt with in a manner consistent with the employee in Columbus, Ohio.

Lastly, and probably most importantly, it gave the corporate representatives of the company and the staff representatives of the union continuing first-hand *knowledge of the problems in the shop.* This enabled the parties to approach the bargaining table at contract time with a real understanding and an almost perfect prediction of the key issues to be discussed.

Disadvantages of MPGC

The small cost that I mentioned as an advantage was sometimes used to continue petty grievances beyond the stage where they normally would be dropped. The abundance of these often impeded the panel's progress and served as irritants to the members of the panel. This, then, resulted in too much friction within the executive sessions. Gains made by either side at a particular plant, oftentimes under unique circumstances, were the subject of attempts to spread them into the remaining plants by the use of this forum.

Also, political problems developed. Business agents were sitting on other business agents' cases. An industrial relations manager was judging grievances of those who would judge his within the next few days. Intracompany and intra-union pressures emerged.

Finally, the biggest problem that developed and formed the Achilles heel was the subject of deadlocks. While the panel was able to settle approximately 80 percent of all cases brought

before it, it was unable to handle the big ones successfully—that is, the discharges, the other disciplines, the subcontracting cases, and disputes concerning the performance of bargaining-unit work. This 20 percent, over a period of years, became quite substantial in number. Deadlocks only lengthened the time for resolution since ad hoc arbitration was still then the only answer.

Deadlocks of important grievances fostered distrust of each other among panel members. Instead of assisting the parties in coming into negotiations knowing the issues and mutually working toward solutions, deadlocks heightened the animosity and frustration which all too often affect the field of labor relations. In 1976, we experienced a 98-day national strike, and one of the main reasons for it was our history at the MPGC and our mutual inability to settle quickly and amicably major differences which appeared in the form of grievances. Hence, the change to the system that we have today.

Changes in the System

What changes were made? First, we increased the per-case fee to fifty dollars. Secondly, we decided to meet every month. More importantly, we restructured the panel. Now we have a panel of five instead of six—two from the National Brewery Conference, two from the corporate staff, and a permanent neutral.

The increased fee per case was an economic necessity. While it takes care of the incidental costs and some of the permanent neutral's fee, it has not been of such an economic burden as to reduce the number of petty grievances brought before the panel. In addition, both the company and the Brewery Conference must periodically supplement this in order to compensate the neutral.

Monthly meetings are held to further expedite resolution of grievances since certain matters are now kept in status quo until resolution by the panel. These meetings compel resolution of any grievance within an average of five to six weeks. The speed is truly amazing; I know of no grievance procedure which, if taken to its ultimate, resolves all grievances within a month to month-and-a-half from the date the grievance arose.

It is the restructuring of the panel, however, that is most important. It is in this area that we have been able to maintain the advantages and do away with the critical disadvantages, for

now deadlocks cannot occur. Under the current system, the grievance is heard as it was under the old, but the executive session is quite different. The union and the company representatives enter it with an entirely different attitude. Let me explain why. Whereas we used to be able to throw up our hands and deadlock the case, leaving it for some unknown and, as far as we were concerned, unseen arbitrator to render an opinion months later with pages and pages of sworn testimony together with pounds of legal briefs, we no longer have that luxury.

A permanent neutral, Dick Mittenthal, sitting right in the room with us, hearing exactly what we have heard, listening to us arguing and expounding to each other, knowing how cases have been decided a month ago, six months ago, two years ago —that permanent neutral *will* decide the case right there on the spot. The presence of the neutral and the concern we all have as to the content of his decision tends to bring both the company and the union panel members down from the clouds. It quite often brings us from the ethereal to the practical. We know that if we fail to come to an agreement, we have done just that—failed. And a third party will impose a decision upon us, a decision which oftentimes neither of us cares for.

As an aside, I would be remiss if I did not say that the neutral is also placed in interesting and unique—and, I daresay, sometimes distasteful—positions. He plays different roles. He has been a sounding-board, a counsellor, a mediator. Sometimes he has joined the parties in their search for common-sense answers. He is also put into the position, however, of having to render an on-the-spot decision without the aid of the presence of witnesses, the hours of contemplative thought, and the review of legal briefs and prior arbitration decisions. But it is this very aspect of speedy decision, of informality and uniformity, that breeds the mutuality of purpose, the joint objective of harmonious relations, that so often is found lacking.

Experience with MPGC

Is the Multi-Plant Grievance Committee totally successful? No. Are all the parties happy with it at all times? No. Dick Mittenthal has rendered some decisions with which I strongly disagree. I am sure I can say the same for my counterpart, John Hoh. I can also say that John and I have agreed upon decisions not looked upon with great favor by Dick. This would be true

regardless of who sat as the neutral. But we make it a practice that once the matter is referred to the neutral, his decision is accepted and stands as the decision of the committee.

I have done my best to outline to you the evolution and workings of the MPGC. I do not give it a wholesale recommendation to others. I have learned long ago that peculiar circumstances, unique relationships, and a distinct history between the parties all come together to form a base—a foundation—for different solutions. On the whole, the MPGC has served a useful purpose for Anheuser-Busch and, I believe, for the Brewery Conference of the Teamsters.

III. THE UNITED MINE WORKERS AND BITUMINOUS COAL OPERATORS' ASSOCIATION

PAUL L. SELBY, JR.*

In accordance with the theme of this session on "Engineering an Arbitration System to Fit the Needs of the Parties," my presentation is of the bituminous coal system as an illustration. A couple of opening comments seem to me to be in order.

One of those, if it hasn't already been made, is a reminder that arbitration is a creature of the particular collective bargaining agreement that the particular parties have negotiated, bargained, and concluded, for a term, between themselves. While it is true that such parties may adopt a substantial body of system and principles from arbitration as a form of dispute settlement, and it is also true that every arbitrator who serves any such system contributes to the design of that system, the *parties* make their own agreements and devise their own systems. And they do so in response to their needs as they identify and conceive them to be at the particular time in the development of labor-management relations between them. The parties' response in engineering their own system is in accord with their own goals and purposes to the extent that they can come to mutual agreement on them through collective bargaining.

A second comment of some importance, it seems to me, is that we are dealing with a system of procedure that has as its purpose and function the administration and enforcement of a contract. It is elementary but seems necessary to say as background for this presentation that the procedure involves interpretation, construction, and application of contract rights and obligations to the settlement of disputes about those rights and obligations as they arise in the myriad vagaries of a dynamic, on-going human relationship—a particular employer-employee relationship. Under the circumstances, it is altogether proper that we recognize that the parties to that relationship have contracted, as they see important to them, to control the manner and method of the procedure for the interpretation, construction, and application of their expressed and implied rights and obligations, as well as to control the limitations on that enforcement

*Chief Umpire, Arbitration Review Board, United Mine Workers of America and Bituminous Coal Operators' Association, Washington, D. C.

—a form of limitation on enforcement remedies and damages, if you will.

Thus, I believe that no system of arbitration in labor-management relations can be examined without accounting for the dynamics of bargaining history of the particular agreement cast upon what one knows of the industry and the parties to the agreement over a substantial period of time. Each system is unique to the parties who have bargained the system, although, of course, it is likely that basic principles and practice of arbitration are applied more or less generally in all systems. This may be a substantial factor in the hesitation of parties in selecting arbitrators and may also contribute considerably to the oft-discussed difficulty in gaining acceptance for the arbitrators themselves. The point is that, while we might examine a particular system in relation to an ideal system, if there is one, or in light of our own standards or notions of what is proper, overly restrictive, or too loose, etc., the structure and detail of any system is set in response to what the experience and goals of the parties to the governing documents dictate for those parties at any particular period in their relationship. The dynamics and conditions of relations between the parties and in their industry shape the dispute-settlement system designed by the parties more often than do any scholarly patterns.

Another opening comment follows along the line of the second. I am working in a system which I think is still in the process of development. I am the third chief umpire of the Arbitration Review Board, UMWA-BCOA, and I would not hope to try to perform the expected job had it not been for the genius and hard work of the first chief umpires who contributed and fulfilled their time and purpose in developing the system. Just as I am indebted to Rolf Valtin, a past president of this Academy and the first chief umpire of the Arbitration Review Board, for a functioning system, in place and operating with remarkable efficiency, and for a substantial body of precedent for interpretation and application of our agreement, I am also indebted to Mr. Valtin for basic analysis and description of our system on which this paper is founded. As I try to isolate some significant aspects of our system as illustrations of the theme of engineering the system, even if I don't mention it as points are made, be assured that I acknowledge that Mr. Valtin was there first, did

it or said it first, and, even though I am working in a system that is modified from that which he pioneered, even many of those modifications were probably made as a result of his identifying them and suggesting the need for adjustment.

More specifically to the point of background material for this paper, Mr. Valtin wrote an article entitled "The Bituminous Coal Experiment," published in the August 1978 issue of Labor Law Journal, to which reference will be made for base points for this discussion. Part of that article deals with opinions on subjects which some might consider controversial, and, while I may not fully agree with those opinions, those disagreements are not relevant to the subject at hand. What is relevant is that his description of the system as it was operated under the 1974 National Bituminous Coal Wage Agreement is presented more succinctly and better than I could.

Structure of the System

I deal here with the arbitration system as it is constructed in the National Bituminous Coal Wage Agreement of 1978. One analysis is that the present system is the third step in what appears to be a continuous development process. The base points in such an analysis would be: (1) a historical development process for the system, culminating at its latest expression in the 1968 and 1971 national agreements; (2) the introduction, identified as an "experiment" by Mr. Valtin, of the foundations—the "first draft," if you will—of the 1974 agreement; (3) the present system, modified from the "first draft," as set up by the 1978 national agreement.

The present structure of the system, from the point of view of meeting the felt needs of the parties and for proper understanding of its design to meet those needs, has to be viewed in the context of its development. The basic structure itself does not expose the reasons for its elements and characteristics. Thus, I cannot avoid, from time to time, the important, though probably tedious, historical development.

Of primary interest here, of course, is our system of arbitration under the agreement, which involves two levels of arbitration. One of those is the usual and customary form, if there is such, of what might be called the trial level of arbitration—the general-jurisdiction arbitration. The other is an appellate review

level of arbitration. However, it seems to me that the arbitration system alone does not meet the purpose of our examination of engineering criteria; at least I can't talk about it without some further description of the surrounding structures and the nature and characteristics of the governing agreement. So you'll have to bear with some of that material in addition to a description of the arbitration system.

The core of the system is Article XXIII of the agreement, entitled "Settlement of Disputes." This article specifies the machinery for what is known in our industry as the "regular grievance procedure," including therein regulations of personnel who participate, the specification of and regulations for the steps in the procedure, and procedural requirements. There are three specified steps to be taken prior to arbitration.

Article XXIII also provides for arbitration and, significantly for our purposes here, specifies certain regulations of the arbitrations themselves, as well as for the establishment and operation of panels of arbitrators who have terms of office.

Finally, the article supplies the authorization for the creation and operation of the Arbitration Review Board in its present form by means of incorporating into the agreement a Memorandum of Understanding Continuance of Arbitration Review Board, which was negotiated and executed at the same time as the national agreement itself.

The memorandum, in turn, provides for the personnel of the board, its jurisdiction in reviewing arbitration decisions, and its responsibilities in administering the arbitration generally. Then, as authorized and directed by the memorandum, the parties have promulgated administrative and procedural rules governing details of the operation of the system.

A brief sketch of the structures and functions of the whole grievance-arbitration procedure is presented as a setting for pointing up the engineering design features and purposes of the arbitration system that is the center of our attention. Many of the procedural requirements of the grievance procedures have direct impact on the arbitration system and upon the subject matter of arbitrations. They also provide subject matter for review cases, as claims respecting "due process rights" have been presented as requiring interpretation and application since, in our agreement, a number of commonly understood concepts are specific contractual provisions.

The Base and the Procedures

On the principle that a party is bound to arbitrate only those disputes he has contracted to arbitrate, the subject matter of grievance arbitration under any agreement is an essential base of a system. Under our agreement, the general arbitrability base is as broad as can be devised, covering "differences . . . between Mine Workers and an Employer as to the meaning and application of provisions of this Agreement, or . . . differences . . . about matters not specifically mentioned in this Agreement or . . . any local trouble of any kind arising at the mine or operation. . . ."

Procedurally, however, the kinds of disputes are roughly categorized into four areas for grievance handling. Mr. Valtin identified three areas: health and safety under Article III, Section (p); discharges under Article XXIV; and "regular grievances"—"all other" in Mr. Valtin's terminology. However, there is a fourth area of grievance handling which, when necessary to be pursued, has important impact in arbitration and generally causes serious disputes in the local setting.

In our industry, local union employee participation in administering the agreement is through contractually recognized committees, as it is in most industries, I suspect. In addition to the usual grievance-handling committee (the mine committee), in coal we have a mine health and safety committee with contractually recognized powers of inspection, recommendation for correction and abatement of safety hazards and violations, and, under specified conditions, closure of a mine or part of an operation for "imminent danger." The agreement specifies the committee powers of both committees. It also expressly protects committee members from discipline for actions while acting in their official committee capacity. In return, however, the agreement also specifies procedures for removal of committeemen or the whole committee for improper exercise of the powers of the committee. Thus, there is a fourth procedure I call, for want of a better name, "committee removal."

All those procedures feed into arbitration for final and binding decision. The arbitration system and procedures, as previously mentioned, are specified in Article XXIII. Arbitration is intended to apply the agreement on a uniform, national, industry-wide basis, but, because of the volume of arbitration without any real form of or circulation of awards, as well as the litigious attitudes of the parties, there has been a substantial number of

conflicts in contract interpretation and construction as the arbitrators, in performing their particular assignments to decide particular disputes, have come out with divergent views of interpretation and construction of general provisions. Accordingly, the parties have provided an appellate level of arbitration with the purpose of developing a means for authoritative rules of decision on contract interpretation and application. Presently, our appellate review system is based upon a procedure akin to certiorari, designed to leave the trial-level, general-jurisdiction arbitration final and binding except where the case is accepted for review on one or both of two limited grounds for review. Both grounds deal with contractual interpretation and do not deal with fact resolution.

A significant engineering factor clearly applied in response to the felt needs of the parties and which is a pervasive characteristic of the whole system is the expressed specification for speedy determination at all levels. Mr. Valtin discusses this important factor at some length, analyzing its effect on and in the system as he experienced it under the 1974 agreement, and he explains some of the reasoning and needs of the parties for such specifications. In light of some of the current discussions about expedited procedures, it is of some interest to pause and note the express time limitations our parties have placed on all procedures from grievance steps through arbitration and through review.

For descriptive purposes, if the contract grievance and arbitration procedures all took place within the time limits expressed, the process on a "regular grievance," from discovery of a claim, through the steps of the grievance procedure, and through arbitration and final award, would take some 90 days. (If some of my colleagues in the coal industry are "counting contract" on me, note that the time limits in the early steps are expressed in terms of working days, while only the later steps—applicable primarily to arbitration—are expressed in terms of calendar days. It could be that arbitrators are not considered to have "working days" different from calendar days; however, no one offers premium-rate fees that I know of. Our current hassle is over cancellation fees.) If a case is pressed for review and it happens to get accepted for review, an additional 180 days is added to the procedure, making a total of 270 days from grievance occurrence to final appellate decision. For cases subject to the special procedures, there are fewer steps and shorter time

limits and, thus, even less time to decision is contemplated.

Some detail of the grievance procedures is noted for its effect on the arbitration system:

1. In the "regular grievance procedure," there are three steps prior to arbitration. (a) At step 2, the grievance and the positions of the mine committee and mine management are reduced to writing on a standardized form. There is seldom any further statement or clarification of the issue to be submitted to the arbitrator. (b) At step 3, former practices in many of the districts involved taking testimony "for the record." This testimony was then reduced to writing in a transcript before a discussion of settlement ensued. These transcripts, accompanied by briefs of the parties, were then submitted to arbitrators and constituted the submission to them. In the 1974 agreement, the provision was that no such transcripts were to be made unless the parties mutually agreed to such procedures. In the 1978 agreement, the provision states flatly that no such verbatim transcript will be made at step 3. Technically, the only record of this step is made on the standard grievance form. (c) There is also a new provision which requires that both parties disclose fully the facts and the provisions of the contract upon which each relies "at all steps of the procedure." Obviously aimed at facilitating settlement, the provision is also aimed at preventing a formerly prevalent practice of "sand-bagging" in preparation for springing the key witness or fact or contractual argument in arbitration in order to win. Under the 1974 agreement, a number of problems of "surprise evidence" had to be dealt with by the board. With the introduction of the new "full disclosure provision," there are already pending a number of review cases requiring the board eventually to make decisions construing the provision, as the parties now seek to use the provision, for tactical purposes as a new device for "winning," to exclude evidence and testimony on essential issues.

2. In the procedures on health and safety disputes, there are now only two steps prior to arbitration. The issues in these disputes often involve complicated fact-finding for the arbitrator, since the standards are expressed as either reasonable good-faith belief or as an arbitrary or capricious action; there are no clearly expressed standards relating to regulatory law.

3. In the discharge procedure, there is provision for "immediate arbitration," which involves assignment to an arbitrator within five days of a suspension with intent to discharge and a

requirement that the arbitrator hear the case within five days after the assignment to him. After hearing the evidence and testimony, the arbitrator is expected to render a bench decision to be followed by his written award within ten days of the hearing. Obviously, this procedure causes substantial difficulty in obtaining arbitrators who can hear the matter in the short period, and many arbitrators have difficulty, in the complicated cases, with the bench decision made without the usual mature reflection and consideration of the award.

The Administration

Administering the arbitration system is a matter dealt with in the agreement for the purpose of seeking uniformity of administration and assuring even-handed applications of the rules and regulations. There are 18 United Mine Worker districts over the broad, generally nationwide, geographical area in which the organized industry operates under the national agreement. The arbitration system is organized so that there are panels of arbitrators appointed in each district; they are called district arbitrators. Assignments to the district arbitrators are made on the basis of rotation. The panel system was developed and organized under the 1974 agreement and marked a substantial change over arbitration practices under prior agreements. Prior to the 1974 agreement, selection of arbitrators, as well as practices and procedures in arbitration, varied greatly from district to district. Generally, selection was on an ad hoc basis, marked by delay in selection. Submission and practice defied categorization, ranging from full-scale hearing to submission by brief only.

Under the 1974 agreement system, specific panels of arbitrators were appointed in each district. Selection as well as removal of panel arbitrators was by action of the president of UMWA and the president of BCOA, jointly. Selection was by a striking system. Removal was by unilateral action of either party on ten days' notice to the affected arbitrator. Administration of the panel-assignment rotation system was given exclusively to the Arbitration Review Board to achieve the uniformity in administration sought.

As reported by Mr. Valtin, substantial supplementation and changes in composition of the panels were frequent. He assigns two reasons for the changes. Casualty due to removal of arbitrators by one or the other of the parties led to his estimate that

nearly half of the "starters" were not around at the end of the term of the agreement. But most significant was the need for repeated supplementation because of the heavy load of arbitrations. Instead of the originally estimated 500 to 700 arbitrations per year, the actual count ran about 2500 arbitrations per year. In the last year of the 1974 agreement, Mr. Valtin estimates that there were some 150 posts on the panels, or an average of about eight per district. Because of service on more than one panel, there were, in all, some 75 arbitrators in the corps.

The present system has been modified in a number of respects. The arbitrators are now on two types of panels in the districts. One is called the regular district panel, akin to those under the 1974 agreement. The other type of panel is a panel selected by an employer and a particular UMWA district. The arbitrators are all called district arbitrators, apparently to signify that their awards have the same final and binding effect in district arbitration even though their appointments and assignments come through different administration, and to signify that all their awards may be subject to review in the same fashion and in accordance with the same procedure and for the same reasons.

The regular panels are selected by the presidents of the national parties as in the past, but now those selected on these regular panels serve a term of 18 months and may be removed prior to the end of their term only by mutual action of the national parties. These panels continue to be subject to the administration of the Arbitration Review Board.

The special employer-district panel arbitrators are selected and serve in accordance with the terms of the special district agreement between the employer and the UMWA district. Such agreements may have some modification as to the term to be served by the arbitrators and may have some special procedural arrangements with respect to assignment and submission of the cases to the arbitrators, but the agreements are required to be in writing, to be effective for the term of the 1978 agreement, and to conform to outlined basic standards.

One of the specific provisions in Article XXIII is that, regardless of the source of their appointment, district arbitrators shall render their decisions in an expeditious manner, and failure to do so may be grounds for removal by mutual consent of the appointing parties. This continues to underline the parties' desire for expeditious disposal of their disputes, but it also tends

to produce some of the same work-load problems that plagued the system in the 1974 term.

In response to a number of problems and needs of the parties identified to be accounted for in their system, the 1978 agreement specifies a number of regulations of arbitration procedure for the coal industry that may appear different from others and may also appear to restrict unduly the exercise of professional function and decision making.

For one such regulation, one must understand some history. Prior to the 1974 agreement, as noted, a substantial submission practice was taking testimony at step 3 of the grievance procedure. This testimony, often without a chairman or hearing officer, was taken for the record. Objections and the like were made for record and sometimes argued, but, similar to the taking of formal depositions in formal litigation procedures, the commissioners continued to propound their questions and the witnesses continued to answer, even though one or both were the subject of objection. Transcripts were prepared. Then the positions of the parties were briefed, and the whole package was submitted to the arbitrator. However, this practice was seen to be a cause of unreasonable delay, for one thing, and, for another, to contribute to an atmosphere and attitude of record-making looking to arbitration as the source of settlement rather than seeing the step as a means of achieving settlement. The contemplation of the 1974 agreement provisions was to state a preferred method—avoiding transcripts, specifying that, after reviewing the facts together, the representatives would jointly prepare a "concise statement" setting out those facts and the positions of the parties. When the case was referred to the arbitrator, if there was such a statement backed by a transcript of step 3 proceedings, then, only if he needed it would an arbitrator hold a hearing within 15 days at the mine site. If there was no transcript, then the mine-site hearing was specified unless the parties agreed that there was no question of fact.

The 1978 agreement specifies that no verbatim transcript shall be made at step 3, and a hearing shall be conducted unless the parties can agree that no issue of fact remains controverted between them. Hearings are the rule for the regular panels. For the special panels, however, the agreement specifically allows agreement on retention of the older transcript and brief-submission practice, reflecting a compromise allowing a slower changeover to newer procedures and also reflecting a reluctance on the

part of some of the local parties to give up the older practices they found to be satisfactory.

A further modification of the 1974 procedures is a requirement that the district arbitrator record the proceedings and close the record upon completion of the testimony and arguments. This is backed by a further provision that no transcript of the record of the proceedings shall be made unless for purposes of review before the Arbitration Review Board, obviously designed to seek to avoid delays awaiting preparation of transcripts prior to decision or writing briefs. Posthearing briefs are not permitted except in cases where the arbitrator determines that briefs are necessary for his full understanding of the case presented. The provision further states that the arbitrator shall render his decision as soon after the close of the hearing as may be practicable, and if he can't make his decision within 30 days of the close of the hearing, he is to advise the parties promptly of the reasons for the delay and the date when the decision will be submitted to them!

Engineering concerns here are both obvious and subtle. The obvious is that expeditious hearing and decision still remain a paramount concern, with the contractual provisions seeking to eliminate conceived causes for delay. Another is the growing recognition of "live" arbitration as providing advantages of "day in court," participation by an arbitrator with his questions and clarifications, and encouraging settlement efforts by placing the parties "under the gun" of presentation before an arbitrator. There remains, however, the dilemma of speed versus quality of decision, with the accompanying need for a substantial number of arbitrators.

The requirement that arbitrators keep the record has some purposes not readily apparent. It is obvious that the recording of arbitration proceedings is not to be allowed to cause delay in decision, and, manifestly, transcripts are not to be provided unless the record is needed for review. However, a practical reality is that a record of proceedings may be necessary—essential—for purposes of review. Experience under the 1974 procedures was that there usually were no "official transcript" records. Provision was made in the appeals rules for objections or corrections to be made in order to make the record comport with what had been presented to the arbitrator. Disputes about what was a proper record arose far more often than thought necessary. The answer now specified is to require the arbitrator

to keep the official record and to certify it as containing what was submitted to him, if needed for review. Thus, a prima facie accurate record can be assured.

Appellate Reviews

The review process in our system is a mechanism—an engineering technique, to follow the theme—to assure that the national agreement is interpreted, construed, and applied as a national, industry-wide agreement. Our national agreement is an industry-wide agreement bargained in a multi-employer unit. It has existed and has developed as such a national agreement over a bargaining history going back to 1945 when it was first denominated the national agreement, and beyond that to a basic 1941 agreement between the United Mine Workers of America and a number of coal-operator associations situated in a number of geographical locations. One of the characteristics of the agreement contributing to the arbitration system now operating under its 1978 version is that, while there is practical recognition that there is some need for (and there has always been) some local agreements, customs, and practices that still have substantial force in interpretation and application of contractual provisions, the agreement does not contemplate local bargaining of "local agreements" in the form, and certainly not with the substance, as in many master agreements, whether company-wide, regional, or the like. Instead, it is expressly made applicable industry-wide as the paramount governing document of labor-management relations between covered employees and signatory employers.

Its "supremacy clause" establishing a rule of decision expresses a major factor in the design of the arbitration system. Article XXVI, Section (b), provides in pertinent part:

> "This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished. . . . Whenever a conflict arises between this Agreement and any District or local agreement, this Agreement shall prevail. . . ."

This expressed intent that the national agreement is to be applied as a national, industry-wide agreement has been the basis for the development of the newer structures of the appellate arbitration system created in the 1974 agreement and modified under the 1978 agreement.

Among the various techniques that could have been utilized for this purpose, the one selected was a right of appeal from a district arbitrator's decision to an appeal panel whose function and purpose is to render decisions that establish precedent interpretations and constructions of the agreement which are binding and are to be applied uniformly and universally in the industry. Under the 1974 agreement, the appeal mechanism was selected and the procedural device that a right of appeal resided in the parties to the district arbitration was utilized. The Arbitration Review Board was created as the panel of appellate decision. The grounds for appeal were three: two dealt with contractual interpretation and the third with corrections of decisions clearly wrong or unjust.

The board construed the right of appeal to be one of right, requiring the examination of each appeal both for grounds for appeal and on its merits. There were no screening mechanisms in the hands of the national parties, and appeals were prosecuted directly by the district parties. In defense of this approach, it must be pointed out that the agreement provided such an appeal right, and the composition of the board as a tripartite panel with a member representing each of the national parties as a part of the decision-making panel was conceived as answering the needs for screening out unworthy appeals and as a means of presenting the position of the national parties on the questions to be decided.

As noted by Mr. Valtin, the board was inundated with appeals, a great many of them arguing for the "arbitrary and capricious" third ground for correction of decisions that were merely adverse. In short, the appeal process came very close to being considered by the parties in the field as being simply a fifth step in the grievance process rather than as fulfilling the highly meritorious purpose of establishing a rule of decision to be utilized in settlement of future disputes. In spite of those problems—insurmountable in the hands of others than those who made up the board—the board produced a remarkable record of precedents to be applied as governing interpretations and application of the agreement. I quote from Mr. Valtin's paper to make the point:

> "Consider some of the areas which the Board dealt with: contracting-out of various types of work, eligibility for personal or sick leave, bargaining-unit or nonbargaining-unit status of certain jobs (existing in practically all mines), eligibility for holiday pay under various

circumstances, the proper calculation of vacation pay, the permissibility of the introduction of new classifications, the required presence of helpers on various pieces of equipment under various circumstances, the authority of panel arbitrators to modify the discharge penalty, the effect of a violation of an employee's predischarge procedural rights, the difference between a voluntary quit and a discharge, the burden-of-proof rule in discipline cases, the seriousness of the offense of picketing and whether or not an employee of Employer A is subject to discipline if he pickets a mine of Employer B.

"The importance of forging uniformity from multiplicity in areas such as these need hardly be elaborated upon. Stating it otherwise, if the Coal Agreement is indeed to stay as a national industry-wide Agreement, the day must come—if there are ever to be stable labor relations in coal—when there will be sameness in rights and obligations under the Agreement."[1]

The changes instituted in the 1978 agreement were, I submit, in direct response to the needs exposed by experience while retaining the overall goal of seeking a rule of decision to provide the "sameness in rights and obligations under the Agreement." Briefly sketched, some of the changes pertinent to our concern for engineering criteria were:

1. While retaining the parties in the district arbitration as the direct parties in interest in the review proceedings, the right of appeal was changed to an application for acceptance for review.

2. The grounds for accepting review were reduced to the two dealing with contractual interpretation, dispensing with the "arbitrary and capricious" grounds and its invitation to trial *de novo* attempts to correct faulty fact-finding or to avoid "loss" at the district level. Thus, the deliberate choice was made to limit the function of the board to contractual interpretation.

3. To implement this choice, the board is given discretion, on the basis of a form of certiorari practice, whether to grant review so as to limit it only to those decisions where decision must be made in the interest of industry-wide uniform application.

4. As noted, the parties to the district arbitration are the prime movers in the process to seek review, and they are provided the opportunity to be heard on their positions as petitioner and respondent in both the petition for certiorari and on the merits if the case is accepted for review. However, screening control asserted by the national parties is achieved in a manner other

---

[1]Valtin, *The Bituminous Coal Experiment*, 29 Lab. L.J. 469, 476 (1978).

than by representation on the decision panel. Instead, in the initial procedure of seeking review, after both the petitioner and respondent, the parties to the district arbitration, have presented their positions on the question whether the case should be reviewed, the president of the UMWA may withdraw union petitions, and the president of the BCOA may withdraw employer petitions whether such employer-petitioner is a member of BCOA or not. After review is accepted and the board has taken on the issue or issues presented in the case, either the UMWA or BCOA, again at a time after both petitioner and respondent have presented their positions on the merits by brief, may intervene to present the international or industry position. This seeks to assure presentation of such positions and viewpoints and provides opportunity for whatever screening techniques the parties wish to devise to implement exercising such options.

5. Another engineering technique to meet the needs of the system and to assure a reasonable basis for the success of the system devised for the 1978 agreement was the device of appointing an Interim Arbitration Review Board with an interim chief umpire to decide the backlog of appeal cases left at the termination of the 1974 agreement. The jurisdiction of the interim board was limited to deciding the remaining appeal cases on their merits, affirming or correcting the panel awards as briefly and succinctly as possible. Such decisions were expressly specified to have no precedent effect in the interpretation of the 1978 agreement. Thus, the new board was given the opportunity to set to work under the new rules and concepts without being hampered by the backlog of the 1974-agreement cases.

The effect of such care is evident, I think, in what has transpired with the 1978 cases. The board began receiving petitions for review under the new system in November 1978, after the rules the parties promulgated became effective on November 22, 1978. As of May 4, 1979, 151 review petitions have been filed. Of these:

- 31 were withdrawn at the petition stage.
- In 50 cases, review was denied.
- In 39 cases, review was accepted, and one case was withdrawn after review was accepted.
- The remaining 31 are pending decision whether to review. I hasten to say that their pending status is because the time has not yet run for decision whether to review.

- Of those accepted for review, the files are just now maturing for decision on the merits of the issues presented. The first such decision was issued the day I left to come here. Seven more are due before the end of May, and the rest follow in regular order thereafter.
- We continue to receive an average of four new petitions per week, judging from the recent activity.

We do not yet have a basis for making judgment on the question whether we are achieving the precedent effect expected from our decisions. We can say that we note that the district arbitrators are following the precedent established by the first 126 "official decisions" made by the 1974 board. Whether there is any empirical evidence that the parties in the field are utilizing the board decisions in their regular grievance handling, I don't know. I can say that our feeling is that we are having some of the desired effect, judging from the questions posed and the advice being sought both by the parties and by the district arbitrators.

There is one other engineering factor utilized which is so important to the effective working of our system that it is noted outside of the listing of changes above. It is not really a change. The agreement specifies that the district award is final and binding between the parties to the district arbitration except as provided for review in the procedures for review. In addition, the rules provide that any petition for review must be filed within 35 days from the award date. We have ruled that the 35-day limitation is jurisdictional and that no untimely filed petitions will be granted. Also, any order denying review specifically provides that the award on which review is sought and denied remains and is final and binding between the parties to the district arbitration, as provided in the agreement. We all have been almost evangelistic in our insistence that this concept of finality be understood and accepted, given the history and litigious practices in our industry, as they are well described by Mr. Valtin in his paper.

Goals of the System

I close in the same vein as I started. The primary goal of our system is to seek to obtain a national, industry-wide uniformity in interpretation, construction, and application of the agreement through the arbitration system. While the parties in other

industries have utilized other forms of systems for such a purpose, the parties in the bituminous coal industry have selected a limited appellate review system. They have done so, in part, because the huge volume of arbitration in the coal industry makes well-nigh impossible, under extant systems of permanent umpires, any reasonable handling of the volume, and the parties have not yet developed an acceptance, given their traditions, of expedited forms short of full-scale hearing in arbitration.

Having opted for an appellate review system, experience has dictated some need to limit the right of review and to develop screening of issues presented by representatives of the parties at the national level. This has been achieved by the procedures for certiorari decisions and the rights of withdrawal and intervention by the national parties.

I repeat—this system is engineered by the parties to meet their conceived and felt needs; it imposes upon and borrows from conventional principles and practice of arbitration. While one might examine the system against some ideal system and find it wanting, it is presently constructed by the parties to meet their needs and traditions as they see them. And, as I further noted, we have just now moved into the heavy-going for decision making where the real and ultimate validity of the system as meeting the needs of the parties is to be tested. A report a year from now or, more practically, at the time of the negotiations for a new agreement at the end of the term of the 1978 agreement, will better note whether our hopes for the system have, in any real measure, been met. As with all human institutions, and especially labor-management relations institutions, luck, hard work, and sincere good-will efforts by persons dedicated to their expressed intentions to make things work between them are more essential than all the design and problem solving we mere mortals can devise.

IV. THE STEELWORKERS UNION AND THE STEEL COMPANIES

BEN FISCHER*

When we build a house, our plans are based on our needs, our perceived tastes, and our means. We do not consult an architect to learn how many children we should have, what functions we wish to perform in the house, and what we can afford to pay.

When the parties want to develop their system for settling grievances through arbitration, it is they who must make their own decisions. How much traffic will there be? What kind of hearings are wanted? Should the decisions be short or long, written in Latin or in English, addressed to the pros or to the grievant and the supervisor? How do the parties want to select the arbitrator, and what type of person is being sought?

These are obvious questions that the parties ought to resolve. There are many others. The answers depend on the parties and how they perceive their needs and desires. They would do well to think through their relationship and come up with answers that make sense to them.

Collective bargaining is not a neat process. Fashioning the arrangements for arbitration is one of many decisions that are made in bargaining, made under difficult conditions, often under great pressure to achieve accommodations of many conflicting interests and judgments, not only between the parties, but within each of the institutions. Therefore, the decisions actually arrived at are pragmatic, perhaps imposed by one side or a compromise that entirely pleases neither side.

The Board of Arbitration

Even when great care is taken, what one plans for and what actually happens are not quite the same. When Phil Murray, president of the Steelworkers, and Jack Stephens, vice president of U.S. Steel, set up the Board of Arbitration back in 1945, they saw need for a three-man board (later abandoned), for a mediation role (never used), and for decisions that put the issue at hand to rest in all of U.S. Steel and even the industry—but that

*United Steelworkers of America (retired), Pittsburgh, Pa.

did not happen. Issues once decided keep cropping up, sometimes as allegedly different, sometimes by a party seeking a new result, and most often with little reference to what went on before. The result is a continuing heavy load of cases in U.S. Steel and in other companies. This is not to imply that the Board of Arbitration has been a flop. It has been very successful and has had a tremendous impact on the relationships in the steel industry. But it has not followed the course originally contemplated by its founders.

Viewed in perspective, the Board of Arbitration has helped to provide a frame of reference for management and union contract administration that is so extensive and pervasive that it is taken for granted. People at all levels have come to assume that certain things can be done and others not done. That assumption flows largely from what the board has decided and what it would likely decide. The thousands of board decisions and the attitudes reflected have become an integral part of the contractual relationship between the parties.

Even though other companies in steel or in other industries in which the Steelworkers bargain do not accept the U.S. Steel board as having authority beyond U.S. Steel, its influence is very potent. Not many arbitrators choose to pursue policies in Steelworkers' cases in conflict with the Board of Arbitration. There are several reasons for this, not the least of which is the realization that unnecessary inconsistency can only cause disruption when patterns of bargaining are closely interrelated.

The U.S. Steel Board of Arbitration is a relatively unique institution, responding to the special circumstances of the important relationship between the company and the United Steelworkers.

First, the board is no longer a board, but is made up only of arbitrators—its chairman, the associates, and a panel of ad hoc arbitrators who are used when the traffic so requires or when a very urgent matter arises that needs someone on the spot pronto.

Second, while the parties have relinquished their board status, they continue to carry on close supervision of all phases of the operation, including scheduling of cases and review of draft decisions before they are issued. The parties and the arbitrators have found the review process useful. The key position of these

parties in the bargaining spectrum makes their caution especially appropriate. It should be noted that the review procedure is useful and workable in large measure because both parties bring to it a degree of objectivity and respect for the process that avoids what could be intolerable pitfalls.

Other Arbitration Arrangements

While the major steel companies bargain as a group with the union, each of them and the union fashion separate arbitration arrangements with wide variations in structure, procedures, resort to review (if at all), and types of participation by headquarters personnel. Even though the union has a single arbitration department, it addresses each relationship separately and does not seek to duplicate the U.S. Steel arrangements elsewhere except to the extent that seems appropriate.

The wide variety of arbitration arrangements is apparent not only in steel but also in the other USW industries, such as aluminum, can manufacturing, copper, etc. In no case, in fact, is a single pattern discernible even within a given industry.

Among these company setups, one can find review systems that resemble the one in U.S. Steel, but there are others where (1) the parties get involved in posthearing review only when the arbitrator seeks them out for advice; (2) drafts are sometimes shown; and (3) either party, through its designated representative, may require a posthearing review. The arrangements not only vary greatly but also undergo changes with a surprising degree of frequency and usually not much fanfare.

Most of the major steel arrangements involve use of associate arbitrators, a practice that has grown in response to heavier traffic and more insistence on prompt disposition of cases. The days when companies did not care about speed and, in fact, saw advantage in delay are gone so far as most of steel is concerned. The companies seem to see an effective procedure as a useful part of the effort to achieve employee morale and constructive labor relations. Of course, what the parties want to achieve and what proves to be attainable are not always the same thing. Making arbitration work as the parties want it to requires more than a wish. Steel has its share of grievance and arbitration problems, and while constant attention is given to correcting breakdowns, problems keep cropping up.

Expedited Arbitration

The widespread use of expedited arbitration in steel, aluminum, can, and some copper and fabricating plants seems to reflect two somewhat contradictory trends. Expedited arbitration, first started in steel in 1972, is designed to get prompt disposition of grievances and sharply reduce delay. It would not have been accepted if the regular procedures had not been plagued by too much delay and the resulting dissatisfaction with arbitration.

However, expedited arbitration as used in steel and other industries by the steel union would not be acceptable if it were not for the basically successful experience with regular arbitration. That experience has helped give arbitration a good name. Despite constant carping by management and union people at various levels, on balance, the institution of arbitration, as they know it, enjoys a reputation for integrity, competence, and usefulness.

As a result, expedited arbitration is viewed as a quicker, less expensive method of getting the same kinds of results. The qualms that do exist over the use of relatively untried, untested arbitrators with a waiver of many procedural safeguards tend to be quieted by the knowledge that the expedited arbitrators operate within the parameters already established by regular arbitration. While expedited arbitration does not establish precedents, the panelists are committed to accept the precedents already established by the regular process. On the few occasions I know of when an expedited arbitrator strayed from the clearly established precedent, the parties dealt with the situation in some appropriate manner.

To reinforce the no-precedent nature of expedited arbitration, the parties do not distribute the awards beyond the plant and cannot cite them in any further proceeding.

Expedited arbitration as used by the United Steelworkers has worked. Some 86 panels have been established, covering 406 plants, 508 local unions, and 414,000 employees. Three hundred thirty men and women serve on these 86 panels. The system has accounted for a large number of settlements measured both by the decisions made (about 5500 in all) and by the many settlements arrived at in the face of immediate, impending hearings. Cases scheduled for arbitration traditionally are often settled, but when assigned to the expedited procedure, the di-

rect settlement tends to take place much earlier and through the action of lower level grievance participants.

The use of a single panel in each area by all the coordinating steel companies is a unique feature, especially since each company contract is different and each uses its own regular arbitration procedures and arbitrators for the nonexpedited cases. There is a single administrator for each steel panel who arranges automatic rotation of the panel-member assignments regardless of which company is involved. The administration is handled variously, by an employee of the U.S. Steel board in the Pittsburgh area, by the regional American Arbitration Association office in some, and in others by a single company employee of the plant personnel office in the major facility in the area. The union inspects the records and has residual joint administrative rights.

The overall steel expedited program is directed by an industry-wide joint group which monitors all phases of the activity. The overall record-keeping is handled by the union since it has access to the traffic involving all the programs and is in sole possession of the complete set of awards issued.

In the other industries, there are comparable approaches, but they are carried on by a company-by-company system, not intercompany. Individual plants of the companies other than the aluminum, can, and the nine basic steel companies do latch on to existing panels, usually with clearance from the parties who set up the panel in the first place.

Setting Up the Panels

The method for setting up the panels may be of interest. The parties did borrow from existing sources, such as the AAA lists, but in the main relied on nominees from the office of the dean of one or more of the local law schools. These nominations are very helpful. They include persons with no connection with that school and nonlawyers as well as lawyers, though the great majority of nominees and of the ultimate panel members are lawyers. Each interested nominee is interviewed by a joint committee made up of designees of the industry-wide joint group. No difficulty was, or is, encountered in agreeing on the panels through this procedure.

A fairly standardized procedure has developed for orientation of panel members. A day is spent with them, including one or

two sessions with the top committee representatives, a luncheon which usually includes local union and plant representatives, and a brief tour of a local operating facility. The parties explain the program's background, their objectives, the procedures that govern, and what they expect from the panel members. Extensive discussion of questions from the panel members takes place.

What has not happened has been an in-depth evaluation of the experience by nonparticipants. It is very much in order to have such an evaluation, not only for the information of the parties, but to present the story to the remainder of the labor-management community for whatever help it could provide. Considering all the money being spent in this country on other studies of far less important matters, it seems ironical that this much-needed project remains neglected.

Some Pro and Con Observations

Expedited arbitration has invited and still invites an almost standard objection. Some claim that it makes it too easy and too inexpensive to arbitrate; therefore the parties may choose to arbitrate instead of going all out for a direct settlement. This fear is usually expressed by management, but is sometimes heard from union sources.

The fact is that expedited arbitration is not always a substitute for regular arbitration; often it is a substitute for what otherwise would have been some kind of eventual direct settlement. To the extent that expedited arbitration avoids delay caused by the full use of the grievance procedure, it is preferable. The elaborate and time-consuming resort to the full grievance procedure is just as objectionable as delay attributable to the full-scale arbitration procedure. Even if the union were to fare better as a result of expedited arbitration use, there is much to be said for that being better for all concerned than long delays, frustrations, and the consequences, especially when the type of case is objectively evaluated. Since access to expedited arbitration is carefully controlled and circumscribed, merely tracing box scores does not tell the whole story.

These observations are based on my assumption that employee hostility is bad for the company—worse than an outcome that offends the sensibilities of a supervisor. An enterprise is designed to make a product, provide a service, and net a profit

—not to reinforce the judgments of supervisors on grievances. A simplistic view of winning and losing can obscure the more fundamental consideration of the basic interests of the enterprise and the parties.

Adapting the Basic System

Despite the extensive use of arbitration in the steel industry and in other USW industries, no provision for appeal of decisions has ever been utilized, with one single exception. In the relatively early years of the U.S. Steel Board of Arbitration, a pile-up of cases led to the first effort to use arbitrators in addition to the chairman of the board. Those arbitrators made decisions, but either party could appeal to the chairman.

That appeal procedure was used extensively; in fact, it was overused, then abandoned, and never heard from again. When the industry and the union were setting up the expedited procedure, brief consideration was given to an appeals procedure; it was quickly rejected. The parties clearly have opted for speed and finality, even if that means that some error may go unremedied.

When assistants or associates are used in regular arbitration, the general practice is to have the chief arbitrator actually issue the award, with the name of the hearing officer included. But the award, once issued, is final.

The impact of differing history and varying opinions is readily seen in the steel union's arbitration arrangements. Almost every phase of the process is approached with variables. Transcripts are used, not used, and, in some companies, used for some types of cases and not others. Briefs are approached the same way, but there is an overwhelming trend in the permanent setups away from posthearing briefs. Even the conduct of hearings varies widely. Indeed, in some companies hearings are conducted differently at different plants, reflecting variations in tradition.

Arbitrators quickly learn about these differences. After a while an arbitrator knows that if he is scheduled to hear ten cases at a given plant, he will probably need three or four days, while at another he may need only two days. He learns to expect most of the scheduled cases to be actually tried at one plant, and to expect most of the agenda to be washed out prior to the hearing at another.

The Need for Trained Arbitrators

No discussion of variables or of an arbitration system that includes the steel-type expedited concept can avoid the issue of quality. Quality is not a simple matter; it must bear some relationship to the parties' needs. Different parties need varying degrees of quality. Where the major issues that get to arbitration involve minor discipline, fact disputes, and some occasional misunderstanding, the parties may perceive of their required standards of quality or competence accordingly. But if an arbitrator is going to be called on to deal with difficult technical subjects, complex language-construction issues, and important precedent making, then the parties may become and should become very demanding.

If one goes further and deals with large multiplant firms with layers of bureaucracies, then arbitration can have far-flung implications, and the stakes become very high indeed. In these kinds of situations, contracts are necessarily written in terms general enough to apply to a wide variety of conditions, and the prospect that arbitration will become the means of implementing general provisions is quite real.

Thus, it is clear that different types of relationships and different issues require a different degree of skill, experience, and competence. The parties need not only enough arbitrators to match the amount of traffic, but also the kinds of persons who can fit the nature of their cases.

Achieving an appropriate match between arbitration needs and available arbitrators is being made more difficult because of the rapidly expanding demands for arbitration. The organization of new fields is adding new dimensions to the problem. The rapid growth of public-employee unions and of the health-industry organizations is especially significant. In these fields, for the present at least, there is great reliance on arbitrators not only for grievance disputes, but for fact-finding and even settlement of contract terms. The new Civil Service Reform Act guarantees that there will be great expansion of arbitration in the huge federal sector. And changes in work force characteristics as well as management structure seem to be leading to more resort to arbitration in the more traditional private-sector relationships.

The inability of parties to get arbitrators they want with timely availability is threatening the health of the labor-management

relationship. Parties hesitate to select persons without a track record, which they can use as a means of evaluating acceptability. But the track record suitable for such evaluation requires acceptability—our own Catch-22 dilemma. This dilemma has long been with us, but it is getting more acute and promises to take on crisis proportions.

The power to solve this problem rests squarely with the parties and is probably beyond the capacity of any one company or union. In fact, not even an industry and a strong union can do enough to assure that future needs will be met satisfactorily.

While many institutions and organizations express concern and do constructive things to recruit, train, and promote arbitrators, these efforts necessarily fall far short of what is required. Nowhere is there a labor or management center, to say nothing of a joint operation, which serves as the instrument through which the parties can tackle the problem of recruiting and training arbitrators on a scale that would begin to fill the needs. Our society spends more money and effort on training plumbers than on recruiting and training arbitrators.

The notion that some form of certification would help misses the point. The parties do their own certifying by choosing a person as arbitrator; that is a good and practical way for the parties to make their judgment, and it is the parties, and the parties alone, who should make the judgment. Some people want a system of certification because they are properly concerned with standards of competence. The answer is not an imposition on the parties of someone else's certification, but a strategy that enables the parties to recruit persons they are satisfied will do the job they want done.

Just as the parties are the ones who can best identify what they want from arbitrators, it can only be the parties, appropriately positioned, who can take steps necessary to assure that their wants are satisfied.

Of course, people disagree on how they want their arbitrations to be structured and who should be their arbitrator. But the whole range of labor relations is typified by disagreements that are resolved somehow, at some time. Matters involving arbitration are issues like others. Hopefully, over a period of time, most companies and unions will learn to find the common ground which best represents that combination of diverse interests and common interests which uniquely marks the success of a constructive labor-management relationship.

Two Final Observations

There is much presumptuousness about what constitutes quality in arbitration. The Steelworkers' program with expedited arbitration has been criticized because new, untried persons are recruited as the arbitrators.

It is fair to say that the experience with expedited arbitration should allay such fears. The parties seem to like it well enough and, in some cases, even compare it favorably with regular arbitration. The program's directors have sought out competent people. Reports indicate that such efforts have succeeded, judging by the conduct of the hearings and the awards. Experience is useful, but it does not produce talent if the talent is absent in the first place.

The other observation concerns the common assumption that advocates reflect the interests of the parties. This is not necessarily so. Advocates seem to concentrate on winning, but both parties have a stake in arbitration that goes much beyond winning or losing any particular case. The real interests of the parties are more likely to be represented by policymakers than by advocates.

It is time that the policymakers of the companies and unions get involved in the problems of arbitration, especially the supply of arbitrators and the ability to get proper, prompt decisions. These are matters that cannot be adequately handled by advocates, by appointing agencies, by the government, by universities, or by the arbitrators' own organizations. The decision makers of the parties have the power and the resources to best solve the problems that beset arbitration. Only they can take the steps necessary to assure the future health of the process.