One of the chief advantages of arbitration has been the finality of awards. This factor is essential to expeditious resolution of disputes. If, despite an award, a grievant may relitigate his grievance in another forum, the parties' system of private law is frustrated. The arbitrator probably best serves the parties if he confines his award to an interpretation of the agreement, but conducts the hearing in a manner that will meet the criteria of the NLRB and the Supreme Court.

The need to comply with these criteria has influenced the decisional process. The parties as well as the arbitrator must keep these criteria constantly to the fore especially where the collective agreement contains provisions similar to statutory provisions such as clauses barring discrimination because of union activity, or because of race, ethnic origin, sex, or age. To achieve finality, an adequate record is necessary. This may require a stenographic record. Special care must be taken to observe procedures safeguarding the grievant's right, and the complaint which parallels the statute must be referred to in the evidence and in the award. The award is not likely to be the final word if the parties and the arbitrator fail to observe these criteria. The decisional process may suffer in increasing formality—but there may be no other choice.

II. The Judges' Perception of the Arbitration Process

We turn next to the judges' perception of the arbitration process. There are important similarities in the judicial and arbitral processes. Both arbitrators and judges operate within constraints of an institutional character. Both are engaged in adjudication. As stated by Lon Fuller, "adjudication is a process of decision in which the affected party ["the litigant" or "the grievant"] is afforded an institutionally guaranteed participation

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Board. *Gardner-Denver* has also had its impact on the courts as well. In a recent decision of the Ninth Circuit, the Board was barred from honoring an arbitration award absent evidence that the issue of a discharge of a discriminatory character under the Taft-Hartley Act was submitted to or considered by the arbitrator. *Stephenson* v. *NLRB*, 550 F.2d 535, 94 LRRM 3234 (9th Cir. 1977). *Cf. Servair, Inc.* v. *NLRB*, 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979). *See also Suburban Motor Freight, Inc.*, 247 NLRB No. 2, 103 LRRM 1113 (1980) where the NLRB refused to defer to arbitration awards if unfair labor practice issues were not raised by the arbitrator, and *Sea Land Services, Inc.*, 240 NLRB No. 147 (1978) where it was held no deference is to be given grievance settlements short of arbitration.

which consists in the opportunity to present proofs and arguments for a decision in his favor. Whatever protects and enhances the effectiveness of that participation enhances the integrity of adjudication itself. Whatever impairs that participation detracts from its integrity."[11]

Courts are limited in their discretion by statutes and by stare decisis. Arbitrators are limited by the collective agreement which not only sets forth substantive limits, but by its very terms defines and limits the role of the arbitrator. Published awards provide a body of precedent from which certain arbitral principles are distilled, but, because of the infinite variety of collective bargaining agreements, do not provide a basis for decision comparable to the common law. In interpretive cases, when a prior award has interpreted the identical contract clause in a similar factual context, most arbitrators would give the prior award stare decisis effect.

The court's power in the interpretation and enforcement of contracts is far greater than that of arbitrators. This brings to the fore the cliché that has done some harm—that judges construe contracts strictly, while arbitrators play fast and loose with them. Lon Fuller concluded that the cliché was untrue and that the generalization should be reversed. He cited cases that demonstrated, in his words, "a willingness by courts to add to or subtract from the language of contracts that would seem strange indeed in labor arbitration." He went on to say, "The reason for this difference is not far to seek. . . . It [the contract] is the charter, not only of the parties' rights but of his powers as well. The courts, on the other hand, have a commission broader than the enforcement of contracts. They have, accordingly, claimed the power to interpret contracts broadly in terms of their evident purpose and to disregard certain kinds of provisions deemed unduly harsh."[12]

The judges on our panel have little difficulty in accepting the narrow scope of review prescribed by the *Steelworkers Trilogy*. They acknowledge the basic thesis of the Supreme Court that the parties have bargained for the expertise of the arbitrator and that awards should accordingly be enforced so long as the arbitrator based his conclusion on the collective agreement. Differ-

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[11]Fuller, *Collective Bargaining and the Arbitrator,* in Proceedings of the Fifteenth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1962), at 25.
[12]*Id.*, at 14–15.

ences in perspective have been disclosed in the discussion of specific cases in the discussion outline. A case which gave rise to extensive discussion is stated in the outline as follows:

> "In the course of a reduction of work force due to a recession-caused loss of business, an employer reduced six foremen to bargaining-unit classifications, thereby continuing them at work without interruption in their employment. As part of the same personnel actions, the six most junior employees in the bargaining unit were laid off for lack of work and have grieved. At the outset of the hearing, the Union contests the right of the employer which, in turn, insists upon its contractual propriety. The employer's proffer of proof makes it clear that its finances dictate that if the Union prevails, an arbitral order to reinstate the six laid off bargaining-unit employees will cause six foremen in turn to be laid off. The six supervisors are not present at the outset of the hearing, and the arbitrator is informed that neither party intends to call them as witnesses."

Discussion centered on the issues of due process and fair representation.

It was recognized that, since the foremen became members of the bargaining unit, the union had a duty to represent them as well as the junior employees they displaced. It was also assumed that the employer could be depended upon to advance the strongest case for the supervisors. Apart from the fact that the employer would be interested in defending its decision and avoiding a back-pay award, presumably the employer would strongly desire to retain the more experienced supervisors.

The judges concluded that the arbitrator should give notice of the arbitration hearing to the supervisors and presumably should permit them to participate fully in the hearing with independent counsel if they so chose. A number of reasons were advanced. First, there was a due-process consideration: that the rights of the supervisors would be determined in a hearing in which they would not be present. Second, there was a concern relating to fair representation: whether the union fairly considered the rights of supervisors in filing and supporting the grievance. Third, there was an apparent conviction that notwithstanding the basic principle established by the NLRB that the union is the exclusive bargaining agent, the union cannot be the final judge of what constitutes fair representation. Finally, there were considerations of judicial economy. It was the judges' position that if the case came before them on an action to enforce an award in favor of the junior employees and the employer and

former supervisors opposed it, they might refer the case back to the arbitrator with direction to give notice to the supervisors, if under all the circumstances there was a question whether the interests of the absent employees had not been adequately represented.

The governing issue here is how to balance the statutorily mandated right of exclusive representation given to the union against the due process rights and the statutorily mandated obligation of the union to provide fair representation for all members of the bargaining unit. Here we suspect the difference in the balancing process as between judges and arbitrators arises out of a fundamental difference in their respective perceptions of the arbitration process.

Arbitrators have had the experience over many years in handling grievances challenging company decisions to choose one employee over another in promotions, layoff, recall, overtime, and in a variety of cases involving the interpretation and application of the seniority system. Almost without exception, notice is not given to the successful, nongrieving employee, although in many cases the employee may be present. Under the judges' approach, notice would be required to the nongrieving employee in all of the situations listed. Such a requirement would result in a vast change in the arbitration process. The only parties to the collective agreement are the company and the union. If notice is given, what is the status of the employees to whom notice is given? Are they additional parties? Do they have the right of independent representation? Who should give notice? Does the standard arbitration clause which gives the arbitrator jurisdiction to hear and determine grievances and limits the arbitrator to the interpretation and application of the agreement carry with it the authority to give notice to employees to appear at the hearing presumably with the right to be heard? Manifestly, arbitrators would agree that due-process considerations make it desirable to have all persons affected present at the hearing. The experience of most arbitrators is that the employer does an effective job of representing absent successful employees. One of the primary advantages of arbitration is that it is a relatively simple and expeditious procedure. The arbitrator's primary concern is to avoid complicating the process and burdening the parties with a tripartite dispute, and diminishing the role of the union as the party to the agreement.

The advocates on the panel divided on the issue. Stuart Bern-

stein, a management attorney, endorsed the judges' position. Irving Friedman, a union attorney, dissented. He is not prepared to concede that the union as an exclusive bargaining representative may not make decisions as to the competing interests of the members of the bargaining unit. He recognizes that there is a possibility that political or other irrelevant considerations may play a part, but that the court-implemented fair-representation principles take care of such considerations. He is greatly concerned that the judges' position would seriously undermine, if not erode, the basic exclusive bargaining right of the union and that there must be at least a presumption that the union in deciding between members of the bargaining unit is acting in good faith. He believes that an effective remedy exists within the union's procedure for election of officers as regulated by the Landrum-Griffin Act.[13] His position is more fully set forth in a paper attached to this report (Appendix II).

Another issue arises out of an area of increasing conflict between arbitral and judicial decisional authority resulting in an increasing tempo and sometimes anomalous disposition of fair-representation claims in the courts. Mr. Bernstein has explicated this problem in a paper also attached to this report (Appendix I). His thesis is "that the appropriate judicial disposition of these cases—once the determination of breach of duty of fair representation has been made by the court—is to refer the dispute back to the contractual arbitration procedure for further processing. If the basis of the finding of unfair representation is that the union failed to process the grievance to arbitration, then the union should be ordered to proceed to arbitrate. If the claim is inadequate representation during an arbitration already held—as in *Anchor Motor*—then another arbitration can be ordered, and where appropriate (depending on the nature of the union's breach), the employee to be represented by a lawyer of his own choice, fees to be paid by the union. Since the predicate for the order directing arbitration is that the union has breached its duty, the imposition of the obligation to pay lawyer's fees seems reasonable."

The study panel agrees generally with the thesis advanced by Mr. Bernstein, although, as indicated below, the judges had some difficulty with its implementation. The parties have bar-

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[13]Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401-531.

gained for resolution of disputes involving the interpretation and application of the collective agreement by an arbitrator chosen by them. The employer and members of the union rely on this adjudicatory institutional framework. They have a guaranteed right to participate in this forum. To shunt them from a determination of their chosen arbitrator to a judge or a jury is to deprive them of a collectively bargained right. It is our opinion that action of this character is unwise, unsound, and contrary to federal labor policy which places a high premium on effectuating the collective agreement.

The disagreement over implementation is bottomed, perhaps, on differing views of the determination of the unfair-representation question. The Bernstein position is that the unfair-representation and contract-breach issues are separate. As to implementation, during the course of our discussion the judges observed that an unfair-representation claim against an employer under *Vaca* v. *Sipes*[14] cannot be maintained if the underlying grievance is without merit. Thus the court in such a case considers and decides whether the grievance is meritorious in the course of deciding the unfair-representation case. What the effect of this determination is or should be if the matter is referred back to arbitration was not fully explored in our discussions, but it is likely that the determination would have a preclusive effect. Perhaps implementation of Mr. Bernstein's proposal would require a reformulation of the standard of liability in an unfair-representation action.

Another approach is, that in referring a case back to arbitration, the court would reserve jurisdiction of the lawsuit pending the arbitrator's award. At that point, if the grievant is upheld, the court would apportion damages against the union and employer in accordance with the *Vaca* v. *Sipes* formula. The court might even direct the arbitrator to make a recommendation as to damages (see Appendix I).

Mr. Friedman disagrees with Mr. Bernstein's suggestion that, under certain circumstances, the union should be required to provide an attorney chosen by the employee at the union's expense. His position, elaborated in his paper (Appendix II), is that unions which seldom use attorneys for themselves should not be required to pay for attorneys for employees. Instead, an

[14] *Vaca* v. *Sipes*, 386 U.S. 171, 186, 64 LRRM 2369 (1967).

employee could be represented by a self-chosen union member or official more likely to understand the institutional concerns. The employee should not be given an advantage unavailable to other employees, particularly where the interests of the grievant are in conflict with those of other employees.

Although this issue of providing an attorney was not fully explored in our discussions, we would expect that the judges on our panel would support the Bernstein view. The arbitrator members are somewhat more sympathetic with the Friedman view, at least with reference to the small unions with limited funds and with a tradition of using lawyers only on a limited basis. The differences in the viewpoints expressed may be largely explained by the difference in perspective and experience and an understandable tendency on the part of the judges to place a high premium on due-process considerations, including a concern that if the union has breached its duty of fair representation, the employee should not be required for a second time to rely on the union and leave open the possibility of a second fair-representation suit.

The study panel considered many cases included in the discussion outline. Our primary interest was to determine whether there were fundamental differences in approach between judges and arbitrators to the procedural and substantive issues presented. For the most part we found few differences. Some of them reflected differences in experience arising out of operating within very different institutional settings. We list some of the other issues discussed, not necessarily in the order of their importance.

1. The judges, involved daily in extensive pretrial discovery, were of the opinion that more use could be made of discovery in complicated fact cases. The arbitrators and the advocates took the position that discovery was burdensome and unnecessary in most arbitration cases. The grievance procedure leading to arbitration provides an opportunity for the parties to learn about the case. The advocates also pointed out that frequently they were not retained until shortly before the arbitration was scheduled for hearing.

2. There was considerable discussion about the extent to which judges and arbitrators should play an active role during a hearing or trial. As one of our judge members put it: "When I was selected to serve as a judge, I felt that I was to preside over as objective a search for the truth as possible." There was gen-

eral agreement that a completely impassive posture was inconsistent with the search for truth. It is difficult to generalize on the degree of participation. Much depends on the quality of the advocates and the extent of preparation. Assuming competent advocates, interrogation by judge or arbitrator should be deferred until after a witness is fully examined. When the parties appear to be fully prepared and have made complete presentations, extreme caution must be exercised in determining whether it is necessary to open up issues that may have been deliberately avoided for reasons best known to the parties. In this respect, because of the continuing character of labor-management relations, arbitrators in particular must exercise restraint. However, an active role by the arbitrator in a disciplinary case does not pose the same potential for mischief as in a sharply contested contract-interpretation case. Even the most competent advocates may overlook a fact or circumstance that may be crucial to an understanding of the case. Eliciting facts, as such, under such circumstances may be fundamental to the search for truth.[15]

Another aspect of participation relates to appearances. A judge or arbitrator who actively intervenes because of the inadequacy of representation of one side may unwittingly create the impression that he has prejudged the case in its favor. There is also a danger that overintervention may unconsciously carry over into the decisional process.

3. An interesting discussion arose concerning the issuance of an award that may be mandated by the collective agreement but frustrated by the operation of external law. A case that presented this issue was set forth as follows:

> "The employer and the union have had a collective bargaining agreement for years in which seniority is accumulated and administered in layoffs and recalls by departments. The plant has a majority of female workers overall. But the warehouse department is all male and one or two other departments are predominantly male. The employer sells some of its products in Department of Defense post exchanges and commissaries, and is thus subject to affirmative action contract compliance procedures. Upon a complaint by a group of women about the inaccessibility of the warehouse for them, the

[15]Special problems arise when advocates place a higher priority on winning a case than on the impact on the continuing management-labor relationship. See Chapter 3, *The Quality of Adversary Presentation in Arbitration: A Critical View*, in Proceedings of the Thirty-Second Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1979).

Department of Labor orally suggests that the company adopt plantwide seniority; no formal order has issued to that effect, but explicit references have been made to the possibility of cutting off the DoD outlets for failure to engage in affirmative action. The employer applied plantwide seniority to allow a woman to bump a departmentally senior male in the warehouse; it also laid off several women who were departmentally senior but junior to women retained on a plantwide basis. The laid off women have threatened to sue the union for lack of fair representation in not pressing their grievances in reliance on their departmental seniority. The union has brought those grievances before the arbitrator on their behalf, and the employer pleads its necessity to comply with the Department of Labor 'suggestions.' "

The arbitrator's role is to interpret and apply the collective agreement. Under the seniority provisions of the agreement, it is clear that the arbitrator is required to sustain the grievances. If such an award is entered, there is a strong possibility that in a Title VII proceeding or in a suit for lack of fair representation, the award would be set aside in favor of employees discriminated against because of departmental seniority. The arbitrator may better serve the interest of all concerned by deferring decision until a formal order or opinion is issued by the Department of Labor. If the parties are thereafter unable to reach a resolution of the problem, this may be one of the rare occasions in which the arbitrator should attempt mediation. At any rate, if an award is issued, the arbitrator should make clear the existence and importance of the relevant external law and defer the effect of the award for a period of time or remand the case to them so that the parties may cope with the problem.

4. Another area of slight difference involved the attorney-advocate acting as a witness in an arbitration case. The advocates and the arbitrators were of the opinion that such testimony should be received and weighed along with the rest of the record. Their experience was that such testimony was not uncommon. Attorneys of the parties are not infrequently involved in the negotiation of the collective agreement at issue and therefore are in a position to present relevant collective bargaining history. The judges' initial reaction was negative in light of the experience of the courts with respect to attorney-witnesses.

5. Another area of discussion concerned the issue of procedural arbitrability particularly if it relates to the implementation of time limits in the grievance procedure. Time limits are essential to assure that a prime objective of the grievance procedure,

expeditious resolution of the dispute, is achieved. In the close cases where deadlines are missed by days, arbitrators tend to avoid literal application of time limits. They do so in the belief that the labor-management relationship will thereby be enhanced and that substantive due process for the grievant will not be frustrated.

The judges prefer that awards be disposed of on their merits unless it is patently clear that the arbitrator will exceed his jurisdiction in doing so. This attitude is consonant with the direction of the Supreme Court that "Doubts should be resolved in favor of coverage."[16]

The attitude of the advocates is in the process of change. If an aggrieved employee is deprived of a hearing because of the failure of the union to process his grievance within the time limits of the agreement, the end result may be litigation to vindicate his right to fair representation.[17]

Such an outcome may in the end be more costly to the parties than a hearing on the merits, regardless of how the arbitrator decides the case on the merits.

III. The Decision to Arbitrate: The Advocates' View

One of the most important functions an advocate performs for a client is sizing up a case, attempting to predict the outcome in arbitration. The advocate, accordingly, plays a crucial role in the decisional process. What factors does he consider, and how successful is he in making predictions? What factors, extraneous to the merits of the case, play a role in his decisional process?[18]

Mr. Bernstein summarized his views as a management attorney as follows:

"The primary consideration in advising an employer whether to defend or settle a grievance headed for arbitration is the advocate's estimate of the probable outcome. In this respect, arbitration is no different than a lawsuit.

"There are other considerations unique to arbitration, but the starting point is the perennial question—what are my chances?

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[16]*Steelworkers* v. *Warrior & Gulf Navigation Co., supra* note 2, at 583.

[17]*See Ruzicka* v. *General Motors Corp.*, 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975).

[18]See *Comments* by Bernard W. Rubenstein, union attorney, and Anthony T. Oliver, Jr., management attorney, on *The Quality of Adversary Presentation, supra* note 15, at 47–62, in which there is a discussion of the advocates' role in the decisional process.