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.

"In responding to this question the advocate obviously projects himself into the role of the arbitrator.

"In making the anticipatory decision, the advocate must get a sufficient feel for the case so as to be able to make a valid judgment, often without being able to undertake the detailed investigation and interviewing required in actual preparation for hearing. The client may give what he believes is the full story. A little probing usually reveals some critical feature is held back —either willfully or through ignorance of what is relevant. Often the employer action is so clearly defensible or so obviously wrong that the answer is easy. At times it is apparent that there are subtleties which require further probing before a judgment can be made.

"It may be necessary to interview potential witnesses, have the employer study past practice, or examine notes on prior negotiations before a fair appraisal can be made.

"But, the employer usually wants a quick, even if relatively uninformed, judgment. His inquiry often comes as he is ready to meet or prepare an answer at the last grievance step, and if he is totally off base, this may be the best place to settle. Here, unless the case is a complete disaster, the advice usually is to press on and 'as we get into it further, we can always change our mind.' Sometimes it is easier to settle after the union has decided to go ahead, the arbitrator is selected, and the date set.

"In any event, once the facts are as well in hand as reasonable preparation will permit, the question remains—how will it come out?

"Perhaps the reason so many advocates believe they would make good arbitrators is that they are constantly judging their own cases. Their decisional processes are probably no different from those most arbitrators would articulate—but with one exception. The arbitrator rarely takes himself into account when describing how he decides cases; the advocate anticipating a result almost always takes into account the characteristics of the particular arbitrator.

"The advocate may have a very clouded crystal ball, but he does indulge in the notion that some arbitrators are better for his side than others on difficult contract interpretations; that some are poor employer risks on discharge cases, while others are reputed to be so employer-oriented that when their names are suggested by the union, one may reasonably be suspicious of the desire to prevail. This notion of what particular arbitra-

tors are likely to do in particular situations is a factor both in selection of the arbitrator and evaluating the probable outcome once selected.

"In any event, given a fair grasp of the facts, including such relevancies as past practice, bargaining history, and degree of even-handed application by the employer, most advocates, union and management, are rarely surprised by the arbitrator's decision. There are, of course, close ones that you hoped to win, but lost. But there are the close ones you win when the odds you quoted were against you.

"All in all, the system is fair and works well, even if an unsophisticated employer may believe you can never win an arbitration, and even if there are some occasional decisions that are beyond rational explanation. This exception does not prove the rule—it proves there are either some poor arbitrators or some poor advocates.

"But winning in arbitration is not everything. Rarely in a lawsuit will the parties have a continuing relationship, but always in the arbitration setting. A sure winner may be dropped and a sure loser carried through to arbitration because of the continuing and complex relationship of the work environment.

"A winner may be dropped or a loser taken on because the employer has won too many—all justifiable—and the union or employees are losing confidence in the process.

"There are some issues which could be won in arbitration but which should be kept in doubt. Sure winners of this type usually mean sure trouble in the next negotiations. Many out-of-classification transfers and out-of-seniority layoffs fall into this category. It may be preferable to settle these on an ad hoc basis than push to victory.

"Conversely, losers may be taken on to back a supervisor's decision or to teach a lesson to a supervisor who may believe the employer always gives in. Both employer and union may be in the position where an adverse decision of the arbitrator is more acceptable than a settlement of the parties.

"The advocate tries to give an answer broader than the question, what are my chances, before advising whether or not to arbitrate."

Mr. Friedman summarized his views as a union attorney as follows:

"The union attorney often enters the grievance procedure after the union has already decided to arbitrate the grievance.

His function begins with an analysis of the case; he evaluates past practice in the particular plant, general arbitration precedents, and the available evidence. If the arbitrator has already been chosen, the lawyer will engage in one of the favorite games of all advocates—trying to predict what this arbitrator will do in this kind of case. If the arbitrator has not been selected, the lawyer has the harder task of being totally objective—he attempts to predict how the ideal arbitrator will decide, and, in this process, becomes the arbitrator himself, attempting to decide the case on the merits and on the evidence as it is then available to him.

"At this point, if the union's case appears weak, the lawyer will probe in his client's discussions to discover why the union has brought the case so far. The lawyer may find that the union has misunderstood a contract provision, or that it has not taken into account unfavorable past practice or unreliable evidence. In such cases, the lawyer has obviously made an arbitral decision, and he will counsel that the case be settled or withdrawn. The union may agree, and that is the end of the case. If the union disagrees, the lawyer with some additional probing, may recognize that the union is under a political necessity to arbitrate. Perhaps the issue is one that the membership insists must be arbitrated. The grievant may be a long-service employee to whom the officers or members want to give the fullest protection; or the issue may be one which the union firmly intends to win in arbitration or, if it loses, take to the next contract negotiation.

"The union attorney is less often consulted about cases that the union does not want to arbitrate. He will usually first hear about these cases in the form of unfair representation proceedings, before the NLRB or in a §301 suit. In the situations where the attorney is consulted before the union's final decision, he must evaluate the merits of the case from the viewpoint of a potential arbitrator. Since he must also be alert for any indications of unfair or arbitrary action, he places himself in the position of a judge or NLRB representative, and in such a role decides whether the grievance has been handled properly. If he feels that the grievance does have merit, or that there may have been some irregularity in the handling of the grievance, the lawyer will in effect become the grievant's advocate, to urge that the case be arbitrated, or perhaps that it be returned to an earlier step of the grievance procedure for further investigation

and processing. A weighty factor in many decisions to arbitrate is the desire on the part of the union and its attorney to avoid a suit for denial of fair representation.

"The lawyer preparing a case for arbitration makes a further series of decisions. He directs the marshaling of evidence; he guides in the selection or rejection of witnesses; he makes decisions as to the inclusion or exclusion of arguments and evidence. Along with the union representatives, he must make decisions about using or rejecting approaches that may endanger the basic union-management relationship. He draws on the experience of his union officials for applicable history, for the evaluation of union witnesses, for instruction as to likely company witnesses and their strengths and weaknesses. Often he will even learn from the union officials useful information about opposing counsel and the arbitrator. In this entire process, the attorney and the union have been making a series of decisions. In the ultimate presentation, the arbitrator hears a case that has already been shaped by the collective skill and experience of the union lawyer and his clients, who are usually knowledgeable, articulate, and shrewd. Even while the arbitrator patiently observes the apparently rough battle between the union and the company, his experience will teach him that what he is seeing is the product of two well-prepared adversaries. When he overrides angry objections, when he admits evidence that one party or the other earnestly argues will threaten the very structure of the plant, the arbitrator is aware that he is presiding over an exuberant play in which the cast are the classic villain and hero, and in which the setting is industrial democracy. And the arbitrator will also sense that many lesser decisions, at every stage of the grievance procedure and the preparation by the respective advocates, have preceded and have prepared the way for his ultimate decision in the case.

"The union attorney and the company attorney of course usually have a major part in selecting the arbitrator. It goes without saying that both attorneys are out to win; they screen the lists of AAA or FMCS, each lawyer hoping to find an arbitrator whose inclinations are favorable to his side of the case; and in this somewhat unseemly process, each hopes that as a last resort the selected arbitrator will be fair-minded. Selection of the arbitrator is a part of the decisional process, in my view, the worst part because the potential for economic pressure upon arbitrators, or the appearance of it, inevitably detracts from the credi-

bility of the entire process. The systems that exist today for selection of arbitrators lend themselves to abuse; the existence of arbitrary, sleazy private rating services that purport to evaluate arbitrators would not otherwise be possible. Labor, management, and the many outstanding professional arbitrators deserve a better, more objective system of selection to eliminate partisan control over selection. Thus, I disagree with the position expressed by the majority of my panel that the 'expendability' or the 'acceptability' of the arbitrator acts as an effective restraint on arbitrators. I believe that 'expendability' tends to stunt the exercise of independent judgment and imagination."

IV. Reaching a Decision

At the heart of the decisional process is the question—why and how does a judge or an arbitrator reach a particular result?

This question does not often arise in cases controlled by facts. The fact-finding process is relatively clean-cut and not difficult, except for issues of credibility which can be exceptionally challenging. We found that judges and arbitrators applied the same criteria in determining the credibility of witnesses. Nor is there any difficulty in understanding the decision process when judge or arbitrator is applying clear and unambiguous terms of the agreement. Here, however, the area of discretion may vary as between judge and arbitrator. The judge has both legal and equitable jurisdiction. If the decision which would result from literal application of the agreement is unjust, there is an array of doctrinal approaches that may be used to temper the result. The arbitrator, in contrast, is limited to interpretation and application of the agreement. The end result is that his award may be harsh, but there is not much he can do about it. The example which follows is based on an award of one of the arbitrators.

The case involved a utility located outside of Chicago. The grievant had been employed for 23 years, all of his working career, in various positions, principally in operating and maintaining the electrical relay systems of the company. He grieved the refusal of the company to process his promotion to Senior Test Relay Engineer because he had no degree in electrical engineering. The grievant was acknowledged to be highly competent. He had satisfactorily performed most of the duties of Senior Test Relay Engineer—and had trained and assisted other employees who held degrees in electrical engineering.