goat for their own political failures, the mischief becomes a reality. No matter where the fault lies—and I would spread it rather broadly, even including some of us—the result does no credit to arbitration, either as a profession or as an institution.

Comment—

I. J. GROMFINE*

I received and read Arnold Zack's paper around Easter time, and as I went through his catalogue of actual and potential misconduct by partisan arbitrators in tripartite grievance arbitrations, my mind kept returning to my favorite Easter story. It is a very old one, dealing with the American priest whose origins were in that part of Ireland where a pronounced distaste for the British is a way of life. Every time this priest delivered a sermon, no matter what the subject, he found some occasion to blast England. Finally the Bishop called him in, lectured him on the fact that Catholicism is a religion and not a political institution, and ordered that henceforth his sermons be confined strictly to theological matters and not involve any castigation of England or the British people. For a full year the priest complied with the injunction, though his heart was not in it at all. Finally, after a year of suppressing the only subject he had any interest in, he could stand it no longer. It was Easter, and he rose in the pulpit and said: "My friends, the gospels tell us that at the Last Supper the Lord Jesus rose, and he said to his disciples, 'Before the cock crows in the morn, one of you will deny me thrice.' And there was one amongst the disciples whose name was Judas, and he rose and said, "I sy gov'ner; you aynt lookin' at me ar yu?' "

To all of the high crimes and misdemeanors that Arnold has listed, I plead not guilty.

A very large proportion of the grievance arbitrations, and almost all of the interest arbitrations, handled by my office involve cases in which we act as counsel and partisan arbitrators representing, in tripartite arbitrations, the Amalgamated Transit Union, which is the dominant union in America in the local and over-the-road passenger industry. From its inception in 1892, the Amalgamated has been wedded to the process of

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arbitration both in grievance and interest disputes. So far as I know, it is the only union in America which, from its beginning, has had a provision in its constitution denying sanction to any strike over any issue (including the terms of a new agreement) unless the employer has been offered and has refused the opportunity to arbitrate the dispute, whether or not the contract or any law requires such arbitration.

What is more, from the beginning tripartite arbitration has been the dominant method followed by this union, and provided for in its labor agreements both for grievances and interest disputes. When Arnold Zack suggests, as he does, that tripartite grievance arbitration had its inception with the Adjustment Board provisions of the Railway Labor Act in 1926, he overlooks the transit industry. Transit agreements in Boston, Washington, Pittsburgh, Memphis, St. Louis, and many other cities provided for tripartite arbitration of all disputes many years prior to 1926.

So far as interest disputes are concerned, there never was any question as to the preferred form. I know of no local of the Amalgamated that has ever willingly submitted a dispute over the terms of its contract to a single arbitrator or a board of neutrals. I will have more to say on that in a moment. But even as to grievances, the clear preference has been for the tripartite form, and that preference originally developed not alone—or even primarily—in the need to provide guidance to the early corps of nonprofessional arbitrators on the conduct of hearings or the preparation of decisions, or to provide assistance in the understanding of technical matters peculiar to the industry, as Arnold suggests was the case in the railroad industry. Those were factors that influenced the original decision to opt for tripartite arbitration in transit, but there was an even more fundamental consideration, at least from the union's point of view. And that is the simple notion that collective bargaining, which is the underpinning of any form of arbitration, implies that the union will have a meaningful voice in the grievance process from the moment the grievance is filed to the time when a decision on the dispute is issued. Win, lose, or draw—the union feels more secure, and is better able to live with the result (even when the result is a loss), if it knows that its representative has had an opportunity not only to present the facts and argue the merits, but to participate in the process by which a decision was reached.

That opportunity to participate in the decision-making pro-

cess need not take any specific form, and techniques can be, and have been, developed which avoid many of the problems, particularly the problems during the hearing, that Arnold referred to. In the transit industry, for example, we typically employ in grievance arbitrations one person who serves both as the counsel for his party at the hearing and as the arbitrator for that party. On matters of procedure and evidence at the hearing, the neutral rules as if he were the sole arbitrator. After the hearing, the neutral studies the record and briefs (if any) and submits a proposed award to the two partisans. Either partisan then has 10 days in which to request an executive session of the board, failing which the proposed award becomes final.

In many of the cases no executive session is requested. The winner is happy with the result and the reasoning by which that result was reached. The loser is unhappy with the result, but is satisfied that the neutral chairman has given full consideration to all of his evidence and argument. But even when no executive session is held, I believe the tripartite system serves an important function. I recognize that, in cases where there is a single arbitrator with no executive session available, *most* professional arbitrators will still try their best to come up with a result that does justice to all of the evidence and arguments presented. Yet I must say that in my experience with tripartite arbitration, the fact that the neutral knows that his proposed award may have to be fully defended and explained in a face-to-face meeting of the board provides an added incentive that often makes the difference between a fair, well-reasoned decision and one that is not.

Sometimes when the decision is not clear, or where the neutral arbitrator may have ventured into areas not necessary to his decision that may cause more problems in the future, an executive session is requested, and such executive sessions are most frequently handled by a conference telephone call.

Sometimes, however, the problem with the proposed award is more serious. The losing party in the proposed award feels that the neutral has ignored or misconstrued some critical evidence or has overlooked or misunderstood an important argument. In those cases a meeting of the board is convened, and it is there that the tripartite form and the opportunity it provides for participation in the decision-making process takes on real meaning. In his listing of the elements of what he calls an "idealized tripartite arbitration," Arnold Zack mentions the fact that only in the confines of an executive session of a tripartite board are

the partisans free to ask, and insist on an acceptable answer to, the question put to the neutral: "Do you understand?" In my judgment, that simple element, in and of itself, justifies the use of tripartite arbitration. Even when performed by the same individual who acted as counsel at the hearing, the advocacy in an executive session is a different kind of advocacy than is possible or appropriate at the hearing. When properly performed, it is no mere reargument of the case. It is a probing into the stated and unstated thought processes by which the neutral reached his proposed decision, in an effort to understand the decision even if it is not possible to change it. Even when I have not succeeded in changing the result, I have almost always come away from an executive session with a better understanding of why the neutral reached the result he did, and I have been in a better position to explain it to my client.

There have been times when the entire proposed decision was reversed. I remember a case in which a very eminent past president of this Academy reversed his proposed decision to sustain a discharge when, as a result of the discussion in the executive session, he discovered that he had totally ignored a very critical piece of evidence. There have been many other times in my experience when, even though the ultimate result was not changed, the neutral was able to strengthen the reasoning by which that result was reached on the basis of discussion by the partisan supporting that result in the executive session. There have been other times in appropriate cases when the executive session provided a forum for a mediated award that may have differed from what the neutral would have done on his own, but which provided a greater measure of acceptability to what would otherwise have been the losing party. Arnold suggests that it takes a George Taylor to pull that off and there are not many of his mold around, and that, in any event, it involves a kind of compromising of his judgment that many arbitrators may find distasteful. I believe that there are many arbitrators today who are equal to the task of achieving a mediated result in an appropriate case (and not all are), and if doing so compromises the neutral, so be it. It is the parties who have to live with each other long after the arbitrator has left the scene.

I recognize that there are many arbitrators who have no feel for the tripartite process, let alone participation in mediated awards. I remember one case in which I had requested an executive session after the neutral had issued a proposed award in

which his decision turned entirely upon a finding of fact for which I could find not a scintilla of support in the record. When I arrived at the executive session, I was greeted with these words from the neutral: "Mr. Gromfine, you are of course free to make any statements or comments about my proposed award you may deem appropriate, but I am duty bound to tell you that once I have written a decision, I never change it."

Fortunately for those of us in the business of *interest* arbitration, such neutrals rarely make their way into interest cases, and it is about tripartite arbitration in interest cases that I want to direct my remaining comments.

The subject matter assigned to this panel does not, of course, go to the question of the merits of interest arbitration as an alternative to the strike or other means of resolving disputes over the terms of a contract. For the purposes of this discussion we assume that, for one reason or another, the terms of the contract are to be determined in arbitration, and we consider only the limited question of whether tripartite arbitration or arbitration before a single arbitrator or a multineutral panel is the most appropriate. On that question I do not believe there is any contest. Indeed, in my opinion, anyone who does not accept the compelling necessity for tripartite arbitration in interest cases does not really understand what interest arbitration is all about.

In such cases, typically, the stakes are very high—much higher by far than is true in the normal grievance case—and both sides have a vital interest in participating to the fullest degree in every aspect of the process by which a decision is made as to the terms of the contract under which they both must live in the year or years ahead. It is not enough to describe the difference between grievance and interest arbitration, as it commonly is by the scholars, in terms of the difference between the judicial and the legislative process. The executive session in an interest case is, in a very real sense, an extension, at a sophisticated level, of the process of collective bargaining. The union's capacity at the bargaining table to threaten a strike, and the employer's capacity at the bargaining table to fold its arms, say "no," and take its chances on a strike, are both removed. Left only is the opportunity, on both sides, to persuade the neutral, on the basis of evidence in the record before him or her.

Persuade the neutral to do what? If winning the day was all that counted, the persuading could be done by counsel at the

hearing and the matter left to the neutral. Winning is *not* all that counts. Interest arbitration in the transit industry has survived for almost a century because, while there have been occasional catastrophies for one side or the other, over the long run it has produced results, fashioned in the give and take of tripartite executive sessions, which have achieved a reasonable measure of *acceptability* by both parties.

Only in an executive session do the partisans have an opportunity to do the kind of probing of the neutral I mentioned earlier (except that here it is so much more important than in grievance cases) to ascertain to what extent the neutral really understands the message in the typically voluminous economic evidence that will have been placed before him, and to correct him when he appears to be going astray. Only in an executive session (meeting jointly and individually with the partisan members of the board) can the neutral ascertain the depth of commitment each party has with respect to particular issues, and the real priorities each side assigns to the various issues before the board. Only in an executive session is there an opportunity for the neutral to fashion a mediated award (which is the ideal in an interest case), or, if not that, then at least an award that comes closer than the parties were able to do at the bargaining table to meeting the legitimate claims, justified by the evidence, of both parties.

The deep concern that the Amalgamated, at least, has in assuring that the tripartite process be maintained in interest cases evidences itself in some recent, and still pending, litigation in Massachusetts. The Amalgamated contract covering the employees of the MBTA (the transit system serving Boston and many other communities in the Boston area) has, since at least 1913, provided for tripartite interest arbitration, the only requirement as to the neutral being that he be experienced in transportation. In 1978 the state legislature enacted a law requiring among other things, that any future interest arbitrations involving the MBTA must be conducted before a single neutral who is a resident of the state and is experienced in state and local finance. With all due respect to the many fine arbitrators who are legal residents of Massachusetts, the union was offended at the insidious implications involved in restricting the selection of a neutral to local talent who the legislature obviously considered might be more susceptible to the less than impartial newspaper publicity that typically attends an arbitration involving the cost

of providing a public service. But, while the union might be able to live with that burden and rest in the hope that a professional Massachusetts arbitrator will tune out the *Boston Globe,* it could not live with the concept of interest arbitration before a single neutral, for that, the union believed, would emasculate the process.

So far the union's position has been sustained. A federal district court has very recently adjudicated that the enactment by the Massachusetts legislature of the requirement that the MBTA interest cases be heard and determined by a single neutral arbitrator represented an unconstitutional impairment of the obligation of contract. The case is now on appeal to the First Circuit. The basic case and the appeal by both sides involve many other issues with a great deal of "lex appeal," but they are not germane to the question we are discussing this morning. I mention the case really to underscore the fact that, for the Amalgamated, the notion that interest arbitrations must be conducted before a tripartite board, with a full opportunity for both sides to participate in the decision-making process, is a fighting issue.

The techniques by which neutral arbitrators in transit interest cases have made the executive session perform the kinds of essential functions I have described are enormously varied. I could not possibly begin to describe the variations in the time allotted to me. Most neutrals do a lot of listening until they have reached at least some tentative conclusions on the major economic issues, leaving most of the debate initially to the partisans who must, if the process is to work, know what they are doing, have integrity, and be clothed with the authority to do something more than parrot arguments already made at the hearing. After a lot of listening, the neutral may then announce his tentative conclusions, usually to the great dismay of one or both partisans, modifying them in some respects on the basis of continuing discussions, or he may suggest alternative possible conclusions he would be willing to reach either on specific issues or on a total package, in the expectation that one or the other partisans will draw closer to one or the other alternatives.

I am obviously oversimplifying the matter, and as a very partisan partisan, it is not fitting for me to run a class in how neutrals do, or should, make tripartite interest arbitration work. This much, however, I can say—it is not a job for every arbitrator, regardless of how skilled and experienced he may be in grievance matters. In his discussion of interest arbitration in transit

during the 1973 meetings of this Academy, my associate, Herman Sternstein, outlined what we regard as the essential qualifications of a neutral in a tripartite interest case: open-mindedness (that is, a willingness to plow new ground); experience and basic competence in the handling of economic and statistical material; diligence in reviewing the record and the arguments of the parties; and a combination of the kind of flexibility that will enable him to move from a position he may have been inclined to before the sessions began and the kind of toughness that will enable him to do battle for his position once he has reached a position he is satisfied is justified in the light of all he has heard in the hearings and in the executive session.

It is not by accident that 22 of the 31 past presidents of the National Academy of Arbitrators have served (several of them on a number of occasions) as neutral arbitrators in tripartite transit interest cases, and you may be interested in knowing that we now have several agreements in the industry that require that the panel of arbitrators from which the neutral is selected be members of this Academy.

Let me close these comments with this summary observation. Given my background and how I make my living, I would prefer *two-man* arbitrations—a neutral and a union representative. But until I can convince some management to go along with that notion, I will opt for tripartite arbitration for both grievance and interest cases every time.

Comment—

ROGER H. SCHNAPP*

My comments today will be limited to tripartite *grievance* arbitration. I have no personal experience with tripartite interest arbitration and will, therefore, leave that subject to those members of this panel who do have such experience.

I am an enthusiastic proponent of tripartite grievance arbitration. My experience with it has been in the airline industry. At American Airlines, I frequently functioned both as a member of system boards of adjustment and as an advocate before those system boards. At Trans World Airlines, my role has been lim-

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