CHAPTER 4

THE ART OF OPINION WRITING

I.

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This program offers the usual Academy format—one labor and one management representative and one arbitrator, presumably the neutral between the two. In this instance, however, no inference should be drawn that there are three or even two sides to the subject of this meeting. There is not a good, or artful, opinion for management and another for labor. Hence, I do not intend to offer a management view on this, but rather some comments on what I consider to be the requirements for or characteristics of a good opinion—for all sides.

At the outset, I offer a definition of a good opinion: it is where I expect to win, but I lose, and when I read the opinion I am satisfied that justice has been done.

The first inquiry might well be, why an opinion at all?

A lawyer friend who plows the same turf I do received the announcement of the Academy program. He told me he didn't find this topic particularly interesting because he never read arbitrators' opinions—only the bottom line. "All I want to know," he said, "is did I win, or did I lose."

I must confess that I, too, read the bottom line first. I am an advocate and winning is better than losing. But I do go back and read the opinion—with pleasure when I win and very carefully when I lose.

What purpose does the opinion serve?

There is, of course, no requirement that an arbitrator explain his award absent a contractual requirement to do so. This issue was recently considered by the Third Circuit Court of Appeals where the losing party to an award challenged the failure of the arbitrator to issue an opinion. Both the trial and reviewing court

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found the arbitrator was under no legal or contractual obligation to provide an explanation.[1] The Court of Appeals cited the familiar passage from *United Steelworkers* v. *Enterprise Wheel and Car Corp.*[2] that "arbitrators have no obligation to the court to give their reasons for an award."

What is significant about the appellate court's decision for our purposes was its discussion of the utility of opinions. It observed that the losing party "makes an attractive argument in favor of the desirability of requiring arbitrators to write opinions." The court outlined these arguments:

> "[O]pinions would establish a general body of precedent to guide management in administering the contract, to guide unions in deciding which cases to bring to arbitration and to guide arbitrators in making further decisions; the requirement of arbitral opinions will help insure that an arbitrator will consider the opposing contentions and formulate a coherent resolution; . . . the need to articulate reasons may influence the arbitrator to consider the matter carefully; . . . the opinion would meet the salutary purpose served by all written opinions—explanation to the losing party why it lost and evidence that its arguments were considered."

As authority for these arguments, the court referred to Jules Getman's article, "Labor Arbitration and Dispute Resolution."[3] Similar reasons are found in Sylvester Garrett's presidential address to the Academy at its 1964 meeting.

Syl Garrett included a few more, less altruistic reasons, primarily concerned with increasing the arbitrator's study time and, hence, remuneration. He, of course, was not advancing this as a valid reason, but rather was describing the argument of those who favored no opinions.

To the general reasons favoring opinions—precedent for the parties and arbitrator, acceptability to the losing party, and discipline for the arbitrator—may be added another. That is, the impact of the arbitration in NLRB proceedings—the *Spielberg* and *Collyer* doctrine,[4] in Title VII litigation—the *Gardner-Denver* footnote,[5] and in fair representation cases—*Vaca* v. *Sipes.*[6]

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[1] *Virgin Islands Nursing Ass'n Bargaining Unit* v. *Schneider,* 668 F.2d 221, 109 LRRM 2323 (3d Cir. 1981).
[2] 363 U.S. 593, 598, 46 LRRM 2423 (1960).
[3] *Labor Arbitration and Dispute Resolution,* 88 Yale L.J. 916, 920–21 (1979). *See also* Syme, *Opinion and Awards,* 15 LA 953 (1950).
[4] *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955); *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971).
[5] *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 7 FEP Cases 81 (1974).
[6] 386 U.S. 171, 64 LRRM 2369 (1967).

There may be some differences of view among us as to the desirability of indirectly shifting to the arbitration process the resolution of questions of violations of statutory rights. My own bias is that one good bite is enough, and whether it has been a good bite cannot be determined from the award alone.[7]

In any event, I suppose it is a condition of this assignment and the premise of your attendance that opinions are clearly desirable or are so ingrained in the process that further speculation on whether the award should be explained is pointless. However, the reasons for opinions articulated by Garrett, Getman, and the court of appeals might be kept in mind as a benchmark against which to test quality.

As one more warm-up pitch, let me confess to a certain reluctance in holding myself out as an authority on arbitral opinion-writing, qualified to tell you how they should be written or what they should contain. I have written a few myself as the sole neutral—three to be exact—and compared to that task brief-writing is a snap.

Apart from its result, the opinion analytically has four parts: the issue in contention, the facts, the arguments of the parties, and the discussion or analysis. This is not to suggest that a particular format or sequencing is preferable. The statement of the issue usually comes first, but in many instances the issue cannot be adequately explained apart from the factual background, including relevant contract provisions.

Also, it is not necessary that in all instances the result be saved for the last paragraph. An opinion is not a who-done-it. Some read as though the arbitrator felt he would lose his reader if he gave any hint as to how it was all going to come out before the very end. Supreme Court opinions are usually more merciful. They tell you right at the beginning—judgment affirmed, judgment denied—and the reasons then follow.

I have nothing to contribute on the question of "style." Some

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[7]Another argument favoring the writing of opinions is the issue of reviewability—a reason that arbitrators may not find very attractive. Unless the arbitrator is required to articulate reasons for the award, it may be impossible for a party to challenge or a court to determine whether the arbitrator has in fact gone beyond the limits of his contractual authority. The question of judicial review was discussed by the court of appeals in the *Nursing Association* case, but was found to be an insufficient reason to impose a legal obligation to issue arbitral opinions. The court distinguished the arbitral process from administrative proceedings where articulation of the decision is required. The court was unwilling to impose this formality upon the arbitration process, citing with approval commentators who argue that "the unique and continuing relationship between management and labor may at times be better served by maintaining the informality and flexibility that characterizes many arbitrations." *Supra* note 1, at 224.

people write well, some do not. Some write lyrically, others with cold prose. Nothing said here today will make good writers of poor writers, or discourage those who are now first-rate stylists. All I would suggest is that opinions be written so they can be understood. Sometimes one gets the impression that the arbitrator has dictated the opinion into a machine and never again looked at the product. They ramble, have no coherent organization, and are just bad writing. "Dictated but not read" is not acceptable.

To button this down—I don't believe arbitrators should get hung up on a particular format. Let that be determined by the case itself, not by a habit of form. Opinions should be at least intelligible even if not great literature.

A word on the issue: This is usually not much of a problem. The grievance papers make it clear or the parties stipulate. Occasionally there is a hang-up on this, particularly in contract-interpretation cases. There may be disagreement on which provision is to be interpreted, or each side may try to load the question in its favor. The arbitrator's responsibility where the parties do disagree on the issue, or where they leave it to him to formulate, is to set out clearly his understanding of the dispute. This sounds pretty fundamental, but sometimes it gets lost in the shuffle.

Incidentally, in preparation of this paper I sought the views of two of my favorite opponents, Lee Burkey and Gil Feldman. Both mentioned the problem of the lack of a clear statement by the arbitrator of the issue he is deciding.

The statement of the facts is, to my mind, the most critical part of the opinion. I put aside the interesting but mostly useless philosophical inquiry as to what is a fact—the distinction between subsidiary and ultimate facts, evidentiary facts, and conclusory facts with which law students are tortured.[8]

The difficulty about writing facts is not that we don't know what facts are, but the temptation to write the facts to support the conclusion. The brief writer faces this all the time and he does this quite deliberately. But the advocate cannot be faulted because that is his function. His job is to convince the arbitrator or the court, and if he does so by highlighting the facts favorable to his side or minimizing those that are unfavorable, that is

[8]This still goes on. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 28 FEP Cases 1073 (1982), where the Court discusses the kind of "facts" found by a trial court which can be reviewed by an appellate court.

acceptable. There is a limit, of course; he has an obligation not to dissemble, and he ought not be so obvious that his ploy becomes transparent.

But what is acceptable conduct for the advocate is not for the arbitrator. The arbitrator has an obligation to state the facts accurately and as fully as the case demands. He cannot avoid facts that do not fit his conclusion. Nobody would disagree that the arbitrator has this responsibility. The problem is, how does he fulfill it?

This raises the interesting question as to when the arbitrator reaches a decision. At what stage of the process does he know how the case is going to come out? Does he decide while taking evidence, or listening to oral argument, or reading the briefs, or reviewing the transcript, or writing the opinion?

Well, the answer you would undoubtedly give is that it all depends. Some cases are easy and the answer is apparent as soon as you hear the opening statements of each side—sometimes I think after hearing only one side. Others are complex and you have to reflect—the study-time syndrome.

I would hope that to the extent it is possible for any human to be objective and not influenced by little imps we hesitate to talk about—things like what my batting average is with these parties—that in a case of any complexity the arbitrator not make up his mind until after he has written the facts.

David Wolff used to do that with the United Pilots System Board of Adjustment. He would bring in a statement of the facts and ask the board members whether the statement was fair—was there anything omitted that any member thought should be included, or anything included that ought not be there? He would then adjourn the session and reflect on the decision. There was more to it, of course: listening to arguments, determining whether there was a consensus, discussing a tentative award. Also the environment of a tripartite board is not the same as that of a neutral acting alone. But the sole arbitrator should be able to discipline himself not to jump too fast.

One of the three famous cases I decided as a neutral involved a two-day suspension of an employee for insubordination in walking off the job. There were many little details—who was standing where, was the door open so that the corroborating witness really could have heard what was going on, was the supervisor's statement to the grievant a direction or only a hope? The supervisor was new on the job and, I felt, a bit too

quick to assert his authority. I had been having trouble getting appointments because of my identity as a management advocate, and this was my chance to show how impartial I was. Here I could decide for the union and establish my credentials as a good guy.

When I wrote the opinion, it just would not come out right. I tried three different approaches to the facts, convinced it was my style and not my preconceived conclusion that was at fault. I finally realized what I had done to myself and then upheld the discipline.

Since that experience, I am sensitive to any symptom of premature mind-making-up by the arbitrator when I am presenting a case. If a completely objective person such as I could get caught in his own wishful thinking, what must this alleged neutral be doing to me right now when he furrows his brow, or when he asks my witness a tough question during the hearing?

Illustrations of fact-fudging to fit the conclusion are hard to come by unless based on first-hand knowledge. Reading a reported case doesn't reveal much; there is no way you can know whether the statement of facts is other than accurate and fair.

One of my colleagues recently ran into a beauty. An employee was terminated for performing manual labor for a third party while on sick leave and after having turned down light duty offered by his employer. There was dispute as to the fact of the outside work having been done, when it was done, and the nature of the work. Each side had support from witnesses who might be considered less than objective. However, the company succeeded in getting the supervisor of the other employer to testify that the terminated employee had in fact performed manual labor during the time he was on sick leave. The arbitrator nonetheless found for the grievant, describing the company case as being founded on surmise, suspicion, and conjecture. The problem of the testimony of the third-party supervisor was handled very simply. It was ignored. However, the opinion reads well, but it hardly inspired confidence and certainly failed to meet the test of acceptability.

There is another side to the coin. If an arbitrator does fairly state the facts, he has a correlative obligation to account for them somewhere in his opinion. A company closed shop in March 1980 after more than 30 years of dealing with the same union. The contract provided a June 1 vacation-eligibility date. The employer refused pro rata vacation pay on the ground that

since the claimants were not employees as of June 1, they were not entitled to vacation pay for the preceding year. The employees made out a good equitable claim, and there was some ambiguity in the contract—so a not unreasonable interpretation could support the claim. However, in a prior negotiation the union had proposed, and the employer had successfully resisted, an amendment to the vacation article to provide that in the event the employer went out of business, pro rata vacation would be paid to the terminated employees. The union agreed that such a proposal had been made and had been rejected. This history clearly had some relevance to the dispute at hand.

The arbitrator included this bargaining history in his statement of the case, mentioned it in his discussion, but never disposed of it. What he said, in effect, was that but for his misgivings about the union's failure to persuade the employer to agree to pro rata vacation pay for employees terminated as a result of the employer going out of business, he would have no doubt as to the merits of the union's claim. He then concluded as a matter of general arbitral authority that vacation is deferred compensation and accrues with time, and he awarded pro rata vacation pay. There was no further discussion of his misgivings or any explanation as to why the particular bargaining history did not make this case somewhat different from those cited in support of the award.

I raise this example not because I felt the decision was wrong. In fact, I thought the result was right, but the opinion left me hanging. The arbitrator had an obligation to do something with the bargaining history. One footnote to this case might be that since the employer is gone, there is no problem of the future relationship between the parties or the acceptability of the arbitrator.

Neither of the arbitrators in these two examples is a newcomer. They both enjoy excellent reputations, and I would not hesitate to select either of them again. But they, like all of us, must be alert to the trap of the opinion being a rationalization of a preconception, not an explanation. It is in the handling of the facts that this issue is most sensitive.

That part of the opinion describing the respective contentions should be easier to handle. An occasional problem is the copout of an advocate who is on shaky ground and tells you and the opponent that his position is obvious and he won't belabor the point. The arbitrator should insist that the arguments be clearly

stated, either by oral summation or by brief. Although somewhat tangential to the subject at hand, the advocate who is required to file a concurrent brief is entitled to know the arguments of the other side and, in the case of the employer, the relief being sought. Once the arbitrator has the contentions in hand, he should set them out in the opinion and should respond to them, particularly to the arguments advanced by the losing party.

Many of us believe that cases are overbriefed, but a recent experience has changed my view on this. The case was fairly straightforward; there was a transcript and oral argument, and I was satisfied that a brief would have been superfluous. When the opinion came down, it was clear that the arbitrator had forgotten what the argument was all about. He is a busy fellow, overloaded, and way behind in getting decisions out. I finally bugged him about the delay and got a quick answer thereafter. I am sure he didn't have time to reread the record before getting at the job, forgot what the argument was about, and let fly. The result was not a disaster, but the situation was awkward. I am not sure whether the lesson is that arbitrators should not take on too much work or that parties should not nag when the decision is long overdue.

I realize that the suggestion that briefs always be filed so that the arbitrator is clear on the arguments appears to disadvantage the nonlawyer advocate. But a brief need be no more than a statement of the party's perception of the issue and facts and why he believes he should win. The briefer the better, to which all the arbitrators here would, I am sure, say "Amen."

The guts of the opinion is obviously that part usually called the discussion, sometimes analysis, decision, or opinion. How much should be said? If one purpose of the opinion is to guide the parties in the future, is there not a responsibility to spell out clearly the guidance being offered? How do you convince the parties—particularly the losing party—that you understood his arguments and that you knew what you were doing? You know there is no possible road map on this. The danger lies more in saying too much rather than not enough.

I have tested my own views on this with my union friends whom I have mentioned earlier, and we are in substantial agreement. A good opinion answers the questions put—all of them and no others. It allows its lesson for the future to come from its result, not its pontification. It does not lecture; it does not

offer gratuitous advice. It does not denigrate or embarrass. It does not say—in an attempt to mollify or to apologize—if you had only done this, or relied on a different contract provision, it might have come out differently. If you have reserved judgment on evidentiary objections, or said you "would take it for what it is worth," then give us the ruling on the objections and tell us what it was worth.

The opinion should not be a vehicle for the arbitrator's philosophy. It is primarily for the grievant, not the advocates. Write so the principals understand why you have found as you have. There is a difference between the sophistication and knowledge of the process that can be assumed of a college-teacher grievant and a punch-press operator. It is to them that you owe the explanation, not to me or my counterpart. And, lest this litany be taken as somewhat condescending, let me assure you of what you must know: There is usually far less sophistication sitting on the employer side than on the union side of the table.

Well, easily said—but how do you know when to quit writing, or when you are inadvertently salting an old wound? You don't. When you are sitting alone and deciding alone or writing alone, there is no way you can know. This is why the job is so tough and why it is amazing that there are so many of you who do it so well.

Here is a fellow who didn't do it well. This is an old but memorable decision. I read verbatim:

> "Therefore it is the finding of the Umpire that, according to the existing agreement, the adjusted base rate and the special day rate are not to increase five cents effective this August 1 and five cents August 1 next year. The Company is within the terms of the Contract not to grant this increase in pay.
>
> "However, to promote better employer-employee relationship and co-operation, the Umpire strongly urges the Company to grant these increases. . . ."

There are some devices for testing the opinion for inadvertent flaws before its release. The tripartite panel is one obvious vehicle. Too often the parties waive contractually provided boards in the interest of expedience. But when the arbitrator has some concern about the opinion, he might well request that the board convene solely for the purpose of advising him whether his words have created more problems than his award has settled.

One tripartite-board case in which I was involved concerned an interpretation of the agreement defining competing seniority

rights arising out of a merger. The arbitrator got the award okay, but simply could not understand the terminology of the trade. His opinion was incomprehensible. The partisan representatives finally took over, rewrote the offending paragraphs, and had the arbitrator sign the award.

Other ways of getting at the problem were proposed by Syl Garrett in his presidential address to the Academy in 1964, reported in the Proceedings of its Seventeenth Annual Meeting. I have already referred to this in another context.

One was a variant of the tripartite board—informal consultation between the arbitrator and the parties. For success, this procedure would require, he said, "a rare combination of character, sophistication and insight in the parties' representatives who consult with the arbitrator." Apparently, this is a combination all too rare since I have not heard of any use of this procedure.[9]

Another of his suggestions was to follow the practice of some equity courts of issuing proposed findings, conclusions, and an order to which the parties could file exceptions. An alternate proposal would be for the parties to submit proposed findings to the arbitrator from which he would draw his findings and conclusions. These latter proposals are probably far too formalistic. They might be explored, however, in a case of sufficient complexity where the arbitrator has some concern over the content of the opinion, and of course, only with the concurrence of all hands.

A related issue, and one on which comment has been suggested, is that of the role of precedent in the process. Precedent in this context is an ambiguous concept. It may imply the extent to which an arbitrator should be bound by decisions of other arbitrators, or it may relate to the device of bolstering a decision by reference to what others have done in an effort to bestow respectability on the decision at hand. Or precedent may refer to the impact on the future relations of the parties themselves —a reason in favor of opinion-writing advanced by the court of appeals in the case referred to earlier.

A number of considerations are raised. The arbitrator is not bound by precedent as a lower court is bound by decisions of a superior reviewing court. Nonetheless there is obvious merit

[9]During the course of his presentation at this meeting, Sam Camens of the United Steelworkers of America advised this writer in particular and the audience in general that, in fact, this procedure is frequently used in the steel industry.

to the notion that like cases should be decided in like manner —the element of predictability in helping to guide the conduct of both parties to a collective agreement.

Precedent is not a straitjacket. The metaphor used by the Supreme Court was "a new common law," the "common law of the shop."[10] However, the common law is not static. The greatest common law judges are those who have gradually moved and shaped the law through due regard to the past and recognition of changing social needs and public acceptance. Allan Dash's contribution to the common law of subcontracting is an example of this development. The changing attitudes of society toward hair and dress styles are reflected in movements in arbitral awards. The gradual change in decisions on the acceptability of polygraph evidence is another. The common law arbitrator, like the common law judge, follows a little and leads a little.

The arbitrator who uses precedent to decide must be mindful of the limitations. Predictability may be a key element in any system of justice. But new ground must be broken occasionally —one spadeful at a time.

Little purpose is served in citing precedent in opinions, however much it may have influenced the arbitrator in reaching his decision. It too easily becomes a substitute for reason and is too glib a way out of a tough situation. The arbitrator in my accrued-vacation-pay case was, I believe, guilty of that. He had a tough case—the equity was clearly with the employees, but the bargaining history went the other way. He ignored the tough part and justified his actions on precedent not really applicable to the case before him. But, as we say, bad cases make bad law.

One last comment on precedent, both as a decision-making and opinion-citing device: Precedent implies that there is a body of reported case law that reliably reflects the state of the common law. Given the current haphazard method of publication, there cannot be a great deal of confidence that this is so with arbitral decisions. As I read the reports, I have the uncomfortable feeling that publication is to a considerable extent a device for gaining recognition for the arbitrator or the victorious lawyer, or the judgment of some editor as to what is significant. Although there has been some easing of the problem recently, there is still the subtle pressure from the arbitrator to get per-

[10] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579, 582, 46 LRRM 2416 (1960).

mission from the parties to publish before the case has been heard.

Perhaps the Academy might undertake to collect decisions of its members and establish a committee which could recommend for publication those decisions it considered significant. If permission were sought from the parties by such a committee, I am sure it would be readily forthcoming. And if the established services were not cooperative, you might start your own publishing venture.

Another thought: In the course of worrying about this presentation, it occurred to me that arbitrators generally do not know how tough it is to be an advocate, and advocates do not know how tough it is to be an arbitrator. The arbitrator's attitude is —you guys have it easy, you throw everything at us and hope some will stick, and then we are left with the problem of sorting it all out. The advocates' attitude is that the arbitrator has the easiest job in the world—just sit there and listen, then go home and write a decision. No fuss, no muss, no overhead.

An exchange of roles might be illuminating. At some time during his apprenticeship, the arbitrator should be required to try a few cases as advocate. He should interview and prepare witnesses, anticipate cross-examination, decide what exhibits he needs and how to present them, enjoy the pleasure of hearing something new and damaging the first time his witness is asked a question on cross, make an oral summation, and then write a brief. When he reads the opinion resulting from his efforts, he will have gained some new insights.

The advocate, in turn, should hear and decide at least one case. He will learn at first hand the loneliness of the long-distance runner. What does he do with this case, what is the approach, who overstated, are there any signals I am not getting, how much do I say in the opinion, how little can I say and still appear intelligent? And then, when the opinion is out, he can sit back and wait for the reaction.

It may not be possible to implement this in actual cases, but a well-constructed moot court model could serve as well. This is another project for the Academy. I think you would get better presentations by advocates, and arbitrators might be a bit more sensitive of the art of opinion-writing.

And now the last word: Lest you go away from this meeting with the notion that only arbitrators have problems with opinion-writing, let me read what Justice Powell had to say about an

opinion Justice Blackmun wrote recently. The case concerned the constitutionality of a provision of the Illinois Fair Employment Practices Act that effectively foreclosed a remedy because of a slip-up by the Commission and through no fault of the complaining party. Justice Blackmun wrote two opinions: One, the Court's opinion, joined by four justices, held the provision to be a due-process violation; his other opinion, joined by four other justices, held it to be an equal-protection violation. Justice Powell, who joined the second opinion, filed a separate concurring opinion. He wrote, in part:

> "It is necessary for this Court to decide cases during almost every Term on due process and equal protection grounds. Our opinions in these areas often are criticized, with justice, as lacking consistency and clarity. Because these issues arise in varied settings, and opinions are written by each of nine Justices, consistency of language is an ideal unlikely to be achieved. Yet I suppose we would all agree —at least in theory—that unnecessarily broad statements of doctrine frequently do more to confuse than to clarify our jurisprudence. I have not always adhered to this counsel of restraint in my own opinion writing, and therefore imply no criticism of others. But it does seem to me that this is a case that requires a minimum of exposition."[11]

This is sound counsel for all opinion-writers—avoid unnecessarily broad statements, exercise restraint, and engage in a minimum of exposition. This is also good advice for writers of speeches as well as writers of opinions.

II.

SAM CAMENS*

The title of today's panel discussion, "The Art of Opinion Writing," is a nice noncontroversial topic and one that the Academy has discussed in prior sessions. In fact, 17 years ago in this very city, a most illustrious panel composed of Syl Garrett, Ben Aaron, Gerald Barrett, Tom Kennedy, and Herb Sherman devoted a half-day to the "Problems of Opinion Writing," expressing views that were alternately critical, constructive, and self-applauding.

As one reads those Proceedings of the 18th Annual Meeting

[11] *Logan* v. *Zimmerman Brush Co.*, 455 U.S.422, 28 FEP Cases 9 (1982).

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of the Academy, it becomes evident that the problems of opinion-writing have not changed significantly. Thus, one of the participants in those discussions made the profound observation that "opinions should be precise, direct and models of clarity."

Hear, hear, I fully agree! And, if I had any good judgment I would sit down while we are all in agreement.

I have to say in all honesty that there is little concern in labor circles about the "Art of Opinion Writing" to the extent that the word "art" refers to matters of form, style, literary value, or format. What we are looking for is a decision that is factually and contractually sound, supported by an opinion that is understandable, that supports the decision, and that hopefully improves—but definitely does not worsen—the existing company-union, employer-employee relationships. If the opinion does not satisfy these simple requirements, it is of no value to the parties and may well be counterproductive, no matter how well written it may be.

In my view, which reflects long experience in steel arbitration, it is impossible to discuss the "Art of Opinion Writing" in a meaningful fashion unless it is done in the context of union-management relations. The success or failure of the arbitrator is dependent on his capacity to write an opinion that is in keeping with the relationship between the parties.

This, then, brings us to the types of cases in which the arbitration opinion is important and can have a significant impact on the parties. Collective bargaining is a very delicate and precise process. In many cases the parties are not willing or able to reach agreement on every aspect of a subject, and yet the pressures or realities of the situation make it imperative that some accommodation be reached. What do they do? They write language that is vague, imprecise, and subject to interpretation. The lack of precision and clarity may be intentional, or it may be the result of ineptitude. Whatever the reason, the arbitrator's task is to write an opinion that will rationalize the language and, in the process, stabilize the parties' relationship. This is where opinion-writing becomes an art form.

George Taylor described this aspect of arbitration at the Second Annual Academy Meeting: "Grievance arbitration is an extension of the collective bargaining process. . . . Arbitration should produce results consistent with the parties' agreements in respect to detailed unanticipated problems which simply can-

not be treated specifically in negotiations." Harry Shulman provided a similar description when he said that a labor agreement ". . . is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."

If there is any doubt that companies and unions do, indeed, accord such latitude to arbitrators, consider the following list of generalities that arbitrators are traditionally expected to apply to a multitude of different situations under agreements negotiated by the United Steelworkers of America:

> relative (ability), orderly (procedures), highest level (employee performance), earliest practicable date, consistent (with safety and health), sustained effort, just cause, incidental, detailed (application), necessary (guideposts), existing rights and obligations, under similar circumstances, reasonable course, sufficient, significant, equitable earnings, the integrity of earnings.

In hundreds of carefully conceived opinions, arbitrators have perfected the meaning of words in various factual settings. The result is an artistic and brilliant patchwork of opinions which in context have given meaning and stability to our collective bargaining agreements.

The best example of this is the classic "2B" dispute in the steel industry. U.S. Steel and the United Steelworkers of America had agreed in 1947 to a provision which protected local working conditions and plant practices, and which is now known as the "2B" clause. The ink had barely dried on the agreement when the parties found themselves unable to reconcile major disagreements regarding the meaning and scope of the clause. It was Syl Garrett who undertook the truly difficult and unenviable task of reconciling the differences by setting the guideposts for such questions as what local working conditions are, what they may encompass, how they may evolve, and how new practices are created.[1]

This same 1947 U.S. Steel agreement with our union contained a new provision dealing with incentives. Again, it took a series of Syl Garrett's opinions to give guidance to the parties in order for them to be able to cope with the hundreds of newly created disputes dealing with "equitable incentive compensation" and "maintenance of required incentive changes." These most urgent opinions guided the parties through the stormy sea of industrial turmoil to a calmer bay of manageable waters.

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[1]N-146:1953; USC-846:1959—Sylvester Garrett (U.S. Steel).

There are many other situations in which arbitrators have guided our union and companies to safe harbor. For example, Herbert Blumer, who probably is not remembered by many in this assemblage, wrote a historic opinion on February 19, 1946, in a U.S. Steel case, defining and shaping the parameters of the term "relative ability" as applied to seniority disputes. Another example arose following our most recent (1980) steel negotiations when Jim Jones (Approved by Al Dybeck)[2] and Bert Luskin[3] resolved disputes relating to a newly negotiated provision limiting the use of temporary foremen as witnesses in disciplinary cases, and thereby repaired a problem that was seriously eroding the relationship of the parties.

As we review the great impact that arbitration opinions have had on our relations, we cannot overlook the important opinions that filled the voids where specific language, in many areas, was not at the time included in the basic labor agreement. The most notable of these situations were the contracting-out disputes.

Every student of arbitration should be aware of the great legacy of court cases—that is, the *Steelworkers Trilogy*[4]—and arbitration opinions written by (to name the most notable, but not all) Seward, Garrett, Alexander, McDermott, Stashower, Cole, Platt, Valtin, and Shipman.[5] It was these timely, forceful, well-reasoned opinions that provided the great crutch that carried us over the critical days of conflict and total impasse to a mature and stable labor relations atmosphere resulting in contract language specifically dealing with contracting out.[6]

In the types of situations discussed above, the arbitrator's opinion is the critical element in providing guidance to the parties or in settling a contractual dispute on the basis of a rationale that helps to eliminate rancor and often contributes positively to the development of the relationship. A mere decision that one party is right and the other is wrong would not serve these larger purposes. Hence, the true "Art of Opinion Writing" is the ability of the arbitrator to write an opinion which is understandable and convincing and which manifests tolerance

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[2]USS-17315:1981—James E. Jones, Jr. (Approved by Al Dybeck) (U.S. Steel).
[3]702:1981—Bert L. Luskin (Inland Steel).
[4]*United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).
[5]Report of the Joint Steel Industry-Union Contracting Out Review Commission, November 7, 1979, Exhibit 1—Human Relations Committee Paper dated 10/24/62.
[6]1963 Experimental Agreement on Contracting Out between United Steelworkers of America and Basic Steel Industry.

and sensitivity for the position of each party. This, indeed, is the true test of a great arbitrator, and the ability of many arbitrators to do this is the reason that the arbitration profession has prospered and attained its current high status.

How do arbitrators attain that level of performance? Do the great arbitrators possess magical powers? No. In my opinion the great arbitrators are great because they work at the task of obtaining a total understanding of the industry, its plants, the workforce, the practices and the common law of the industry and plant, the economic situation of the industry and its changing technology. They also become totally aware of the sociological aspects of the relationship, including the personal and political factors at all levels of the company and the union. Finally, and most essential, is an intimate knowledge of the agreement and the history of collective bargaining.

It is amazing how fully the great arbitrators master these subjects. There are some who have become so knowledgeable that I sense they know more about us than we know about ourselves.

If you are saying to yourselves that only a permanent arbitrator can become this knowledgeable and informed, I am sure that is true. What about the vast majority of situations that involve ad hoc relationships? I believe that the ad hoc arbitrator should at least aim for a similar level of understanding. This can be done, I think, by addressing a few fundamental questions, the following being only my feeble attempt to provide illustrative examples: What do the parties want of me? What is the nature of the dispute and what effect will it have on their continuing relationship? How careful must I be about such matters? Can I write an opinion that contemplates such questions based on the record that has so far been made? Are there some missing facts? Do the tensions before me represent something deeper than I comprehend? Is there some other section of the agreement involved that has not been discussed?

Ask! Ask! No one can make the best decision or write the most appropriate opinion if he has doubts or some gnawing concerns. The arbitration process must be a problem-solving institution, not a "win at all costs" contest. The arbitrator must literally dig out the facts if the parties do not adequately present them.

Recognizing this need, my union and the steel companies have provided as follows in the Expedited Arbitration Procedure: "The Arbitrator shall have the obligation of assuring that

all necessary facts and considerations are brought before him by the representatives of the parties."

Furthermore, the Academy's Code of Professional Responsibility states as one of the general principles of hearing conduct:

> "An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing."

I realize that there may be a few labor agreements that seek to limit independent inquiry by the arbitrator. But let me reemphasize that I, for one, feel it is your obligation to the parties to pursue the facts. The future viability of the collective bargaining relationship is, to a degree, involved in each arbitration case, and this is no less true with respect to ad hoc relationships.

The basic labor agreement is not a static document. It is a code of conduct, not unlike the Constitution of the United States, that is affected and modified by changing social movements, mores, culture, economics, national politics, legislative and judicial developments, governmental decrees and regulations, and many other social and economic factors. The arbitration opinion must also reflect those changes. One of the clearest examples of how and why arbitration is influenced by factors outside the collective bargaining agreement is in the area of employee discipline where an elaborate common law of due process and procedural rights has developed by reason of arbitration opinions that have reflected the civil libertarian movement of the past four decades and incorporated many of the concepts enunciated by the Supreme Court during that era.

On the other hand, I have a feeling that many opinions issued during the last decade have not kept pace with sociological developments. I sense a serious cultural lag, and perhaps even an unconscious "new generation" bias. This is particularly evident when the ominous subject of marijuana and drugs is involved. The problem does not arise in the clear-cut cases, such as the employee who is selling grass on the job or is under the influence while at work. But I have seen too many arbitration opinions in which the parties seem to have lost all perspective in their zeal to prove that an employee is in possession of mari-

juana, where an individual's rights of privacy and due process have been trampled and justice has been denied based on insubstantial evidence and the uncorroborated accounts of paid informants.

The discipline and discharge procedures of American industry are unjust. This is so despite the fact that discipline is subject to severe restraints by reason of collective bargaining agreements and procedural and substantive protections accorded by arbitrators. While existing constraints are quite significant, the disciplinary system is nonetheless terribly unfair because it conflicts with the principles of justice in a democratic society under which a person is presumed innocent until adjudged guilty by a jury of his peers.

While there are a few exceptions, such as in the container industry where the USWA and several major can companies have negotiated provisions that enable most disciplined employees to remain on the job pending adjudication of their offenses, in most cases employees suffer the pain and indignity of a penalty before their guilt or innocence is determined. This undemocratic procedure is resulting in much resentment among our members, causing the entire process to be suspect —and this includes the final step, namely, arbitration.

There is a further element of unfairness in the system. This is the fact that, in order to find that a suspended or discharged employee was not disciplined for just cause, an arbitrator must not only make a finding of "not guilty," but must also take the difficult step of revoking a penalty already imposed. In many cases this involves thousands of dollars of lost time, thus creating at least the appearance of an added element of pressure motivating the arbitrator not to overturn management's action.

No arbitrator should make the mistake of treating a discharge as a "run of the mill" case. A discharge is the most important event in an employee's life, perhaps barring death or a similar catastrophe. Hence, the opinion in a discharge case must reflect much more than simply a finding of guilt or innocence; the opinion must be highly sensitive to the necessity that all concerned feel they have received their "day in court."

A major proportion of discipline cases involve conflicting testimony, which necessitates credibility findings. It does not help the arbitration process to see opinions (fortunately, they are few in number) in which the grievant's testimony is characterized as

self-serving while reliance is placed on a foreman's testimony on the theory that the foreman had no reasonable motive to lie. In the mind of the worker this is tantamount to an arbitrator's finding that supervision or management is honorable and the worker is not.

Similarly, I occasionally see a close case that seems to turn on the time-worn issue of whether guilt beyond a reasonable doubt or preponderance of the evidence is to be the standard of proof. This sort of theorizing in an arbitration opinion does little to advance either a specific case or the arbitration process. More important, however, is the fact that when an arbitrator adopts a lesser standard of proof in his opinion, this necessarily reinforces the workers' feeling that he is being viewed as a lower-class individual.

It is these kinds of problems that contribute to the workers' suspicion that arbitrators possess a middle-class bias and suffer from a cultural lag and a generation gap. Add this to the existing antagonism which flows from the failure of the system to apply the common principles of democratic justice and one can readily see why discipline opinions are threatening the viability of the arbitration process.

Great social and cultural changes are taking place in America, and most certainly in the workplace. There is a new, younger workforce, made up of tens of millions of well-educated Americans—zealous in defense of their freedoms, demanding of their rights, motivated by new values, searching for self-identity, wanting to have personal pride in their own achievements, capable of becoming deeply involved in their work, and ready and able to expend a far greater effort if given the proper encouragement and opportunity.

This new generation, seeking a more enjoyable and purposeful life, is placing demands on all of us to democratize the workplace, improve the work environment, and open up the system so that they can become involved in all facets of their working life. In view of the stern realities of declining American industrial competitiveness, we can no longer avoid the obvious conclusion that outmoded management methods—autocratic rule enforced by harsh disciplinary practices—result in an alienated workforce, inefficient production, poor quality, and a restricted union-company relationship.

There are some encouraging joint union-company programs to forge new styles of participative management with employee

involvement in decision-making. In basic steel, these cooperative efforts arise under the 1980 Experimental Agreement which provided for Labor-Management Participation Teams, more commonly known as LMPTs. That agreement states in part:

> "Collective bargaining has proven to be a successful instrument in achieving common goals and objectives in the employment relationship between steel labor and steel management. However, there are problems of a continuing nature at the level of the work site which significantly impact that relationship. Solutions to these problems are vital if the quality of work for employees is to be enhanced and if the proficiency of the business enterprise is to be improved.
>
> "The parties recognize that a cooperative approach between employees and supervision at the work site in a department or similar unit is essential to the solution of problems affecting them. Many problems at this level are not readily subject to resolution under existing contractual programs and practices, but affect the ongoing relationships between labor and management at that level. Joint participation in solving these problems at the departmental level is an essential ingredient in any effort to improve the effectiveness of the company's performance and to provide employees with a measure of involvement adding dignity and worth to their work life.
>
> "In pursuit of these objectives, the parties believe that local union and plant management at the plant can best implement this cooperative approach through the establishment of Participation Teams of employees and supervision in departments or similar units at the plant."

In view of the demonstrated success of our LMPT programs, I am tempted to bend your ears about the great potential of this concept. Suffice it to say that I am convinced there will be profound changes in disciplinary systems and rules, work attitudes, managerial prerogatives, union concern for quality and production, grievance priority vs. LMPT responsibilities, and the status of management and workers. Moreover, these changes may well take place without any significant change in the contract language.

As these new concepts unfold, many disputes will undoubtedly arise. Once again, arbitration opinions may be necessary to help bridge the gap. This, in turn, will require that the arbitrator understand what is happening in the workplace.

Let me conclude by observing that I assume that all who are trying to break into the ranks of the arbitration profession can write with clarity and logic. If not, they don't belong in this league. As I have tried to demonstrate in various ways in this paper, the key to writing a good opinion is being fully informed

as to the entire case, including the parties, the related problems, the underlying tensions, and of course, the facts and issues of the case at hand. Then all of this knowledge must be encompassed in an opinion, written so that the losing party can accept the decision and not feel that the system has let him down, and so that, in the process, the parties' abilities to improve their relationships are enhanced. This is the "Art of Opinion Writing."

III.

RICHARD MITTENTHAL*

The arbitrator's job is divided into three fairly distinct tasks: hearing the case, making a decision, and writing the opinion.[1] The hearing demands some rulings, perhaps clarification of the issue or the evidence, but our choices tend to be limited. Decision-making offers us more discretion, although here too we are limited to a considerable extent by the parties' arguments, by the way the issues have been framed. Opinion-writing, however, provides us with an almost limitless number of choices. Which arguments should we use? Which should we discard? What facts should we stress? Where is the ultimate reality in the dispute? The possibilities in drafting the opinion—from the standpoint of organization, content, style, language, overall tone, and so on —involve a feast of discretion.

Arbitrators spend more time writing opinions than doing any other part of their job. Yet the Academy has devoted practically no time at all to this subject. That may be because opinion-writing has always been regarded as a highly individualistic affair which does not lend itself to generalization. Or perhaps we simply do not wish to divulge trade secrets. Whatever the reason, I believe there are generalizations which can be drawn about *good* opinion-writing. That is the purpose of this paper.

Let me begin with a few basic propositions. How we prepare an opinion is influenced to some degree by the audience for whom we write. I think the primary audience should be those in the employment community out of which the grievance arose.

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[1]In the more difficult cases, decision-making and opinion-writing may merge and become a single exercise.

That would include the aggrieved employee, his union representative, supervision within his department, and labor relations personnel. These are the people who experienced the problem; these are the people who need to be persuaded that the arbitrator's solution is sound and sensible. Such an audience suggests that the opinion be written simply without resort to Latin phrases, legal maxims, arbitration precedents, and other useless baggage. Such an audience is more likely to be convinced by a straightforward analysis of the facts and of the contract. Should we write for a larger audience, for publication in BNA reports, or for gratification of our egos, we run the risk of saying far more than is necessary. The temptation then is to elaborate, to go beyond the instant case to hypothetical situations and general principles and thus raise new questions. This kind of mischief should be avoided.

How we write the opinion is influenced to an even greater degree by our view of the purpose of the opinion. Surely all of us would agree that our essential purpose is to make a clear, concise, and compelling statement of why we decided the case the way we did. But there is, I believe, a deeper purpose. That is to attempt to convince the losing party that it had to lose and thus set the underlying dispute to rest.

Certain opinion-writing behavior flows from acceptance of these purposes. Convincing the loser demands a strong argument. The opinion must focus on justifying a given result. It must persuade. It must have a point of view. It must be muscular, linear, and single-minded. It must carry the reader forward, point by point, through the puzzle so that he can see by the final sentence that the arbitrator had no choice but to rule as he did.

An example would be useful. Suppose the arbitrator is confronted by a dispute in which the merits seem evenly divided—the dreaded 50-50 case. A common approach is to prepare an opinion that expresses the closeness of the issue and the difficulties in reaching a decision. Such baring of the soul, however, is not conducive to persuasion. The more committed the arbitrator is to the 50-50 scenario, the more likely his decision will appear to have turned on some relatively inconsequential factor. The arbitrator will have needlessly placed in the parties' minds the image of a coin being flipped in the air. The loser is likely to feel that if another arbitrator heard the case, or if the arbitrator who actually heard it had gotten out of bed on the other side the morning he made his decision, the result would have been different.

The better approach is that the arbitrator, once having arrived at a decision, should forcefully argue for his position. He should not dwell upon how troublesome the issue was. It may have been a 50-50 case when he began to study it, but by the time he makes his decision, he has transformed it into a 55-45 proposition at the very least.[2] There is no need to detail in the opinion the struggle the arbitrator experienced in moving from his initial 50-50 impression to his final 55-45 view. That would serve no useful purpose. The opinion should simply make clear that one party does have the better argument and the reasons why. Perhaps this requires some dissembling—that is, making it appear as if the case were easier to decide than it actually was. But I believe that such dissembling does the parties a service by increasing the arbitrator's chances of persuading the loser and thus increasing the possibility of setting the dispute to rest.

I recognize that the parties are not always concerned with winning and losing. They sometimes care less about the result than they do about the arbitrator's analysis. They simply seek direction. Here, too, the arbitrator's ability to persuade is vital. His views are far more likely to be heeded if his opinion is compelling, if he can show that his solution to the problem is sensible. There is no substitute for a tightly reasoned and well crafted opinion.

Obviously, what the arbitrator says is critical, but what he avoids saying may be more critical. Opinion-writing demands self-restraint. One must constantly be on guard, in reviewing a draft opinion, for the sentences and phrases that have a potential for trouble-making. The danger is not that the arbitrator will say too little but rather that he will say too much. Some arguments should not be made in an opinion because they are certain to invite new controversies. Some should be omitted because they raise matters that have not been mentioned by the parties.[3] Some should be ignored because they constitute dicta —that is, authoritative pronouncements on questions not before the arbitrator for decision. The arbitrator must apply his red

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[2]From the arbitrator's perspective, there is no such thing as a 50-50 case. We are obligated by our job to convince ourselves that one party or the other has more than 50 percent of the merit on any issue before us. That exercise, in occasional cases, probably involves an element of self-deception.

[3]This restraint can and should be ignored on occasion. For example, where the parties fail to argue the case properly and ignore crucial points, the arbitrator may have no choice but to explore matters not covered by the parties in an attempt to provide a sensible answer to the dispute. I explore this problem further later in this paper.

pencil to more than argument. He must also ferret out irrelevancy, redundancy, unsupported statements, gratuitous advice, and idle philosophizing. A good motto for this kind of pruning is: If in doubt, leave it out.

Dicta pose a special problem. Most arbitrators agree that dicta should be avoided to the maximum extent possible, but there are cases where the use of dicta is almost unavoidable. Sometimes, for instance, it may be difficult to explain what a contract clause means without first stating what it does not mean. Or it may be difficult to explain what a contract clause means without first stating what some other related clause means. Sometimes the issue is presented in such broad terms that it cannot be discussed sensibly without first drawing some firm conclusions about matters not before the arbitrator for decision. In these and similar situations, dicta may have an irresistible appeal. Caution is nevertheless appropriate. The arbitrator should employ dicta only when his opinion would not otherwise be sufficiently strong. If he can write a persuasive opinion without resort to dicta, he should do so.[4]

One of the worst examples of lack of self-restraint can be found in opinions that seek to curry favor with the parties. The benign form of this disease is the act of applauding the rhetorical skill of the parties' spokesmen. The malignancy occurs when, as the saying goes, the arbitrator "throws a bone to the loser."[5] I refer to the arbitrator who goes out of his way to express agreement with one or more points made by the loser even though such agreement has absolutely no bearing on the rationale for the decision. This kind of opinion-writing is deplorable.

Another fundamental problem, closely related to self-restraint, arises from the parties' own shortcomings. Both employers and unions often fail to prepare their cases as well as they should. Typically, they cover 80 or 90 percent of the matter. They overlook a crucial contract clause, they fail to see a significant line of argument, or they disregard an important fact which has been introduced in evidence. The arbitrator studies the record and discovers the missing 10 to 20 percent. To what extent, if at all, should his opinion rely on these missing points?

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[4]The discussion in this paragraph assumes that the arbitrator is reasonably confident that his dicta are correct.

[5]Sometimes the parties describe this disease in terms of the arbitrator "giving the language to one side and the decision to the other."

No simple answer is possible. *Ignored facts,* where relevant, should be used in the opinion. That is what happens in practice. No one seems to be troubled by such arbitral behavior because the ignored fact is indeed part of the record of the proceeding.

Ignored arguments are troublesome. I have no problem placing such an argument in the opinion so long as it is closely related to what the parties have asserted, so long as it is consistent with the parties' theory of the case. The arbitrator, in these circumstances, is merely recasting the ideas before him in an attempt to provide a more realistic or more rational view of the dispute. His argument may be new, but it is a reasonable outgrowth of the materials the parties themselves have placed before him. The danger is that he will go further and develop an argument that has absolutely nothing to do with the parties' theory of the case.[6] Then he will be on questionable ground, for he cannot know what the parties' views would be on the new argument he is raising. He cannot know whether his argument could withstand the parties' probing. He acts without the benefit of the parties' guidance and, hence, substantially enlarges the possibility of making an error.

Ignored contract clauses pose a similar difficulty. My view is that such a clause ordinarily should not be used in opinions.[7] The arbitrator has no idea what the parties' interpretations of that clause might be. He knows nothing of the bargaining history. He knows nothing of the past practice with respect to the clause. All of us are familiar with contract language which seems clear on its face, but has been given strange and unexpected meaning by the parties. Should the arbitrator enter this thicket and rely on the ignored clause in writing his opinion, he increases the possibility of error, and this kind of error could turn out to be a serious and costly matter for the parties. The fact is that arbitrators are not omniscient. We do not know enough to make a definitive statement about an ignored clause. That could be

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[6]The more sophisticated the parties and the more comprehensive their presentations, the less likely an arbitrator will attempt such a new argument. The less sophisticated the parties and the less comprehensive their presentations, the more likely an arbitrator will attempt such an argument.

I confess I have not followed the above admonition where the parties are so unsophisticated or poorly represented that their arguments fail to address the real issue in the dispute.

[7]The exceptions would, I suspect, depend on such considerations as the contract's restrictions on the arbitrator's authority, the submission agreement's reference to a specific contract clause, the adequacy (or inadequacy) of the parties' presentations, and the arbitrator's familiarity with the parties.

remedied, of course, by the arbitrator asking the parties for their views on the applicability of the ignored clause before he makes his decision in the case. But that approach also raises troublesome questions.

If the arbitrator can write a convincing opinion without these ignored materials, he should do so. The questions I have raised come into play only where the arbitrator believes his opinion will not be strong enough without the ignored argument or the ignored contract clause.

My comments on self-restraint can be translated into a simple message. Opinions should, to the greatest extent possible, attempt to honor the reasonable expectations of the parties. Those expectations can usually be gleaned from the evidence and arguments presented at the hearing and in the posthearing briefs. The theories we concoct in our opinions should flow from such evidence and arguments. They should not come as a total surprise to the parties. An opinion is far more likely to be accepted if we keep these expectations in mind as we write.

Acceptability is influenced by other factors as well. Behind many disputes there is a core reality unstated by the parties. Consider, for instance, the struggle in work-assignment problems between the union's interest in stability and management's need for flexibility. That reality may not be helpful in deciding the case, but its description in the opinion may serve to place the issue in sharper focus or provide the kind of background which will help to make the opinion more compelling.

Acceptability can be enhanced by the arbitrator's descriptive powers. Many disputes involve complex machinery or complex work processes or complex organizational relationships. To the extent the arbitrator can master this complexity and demonstrate his mastery in the opinion, he increases his chances of persuading the parties that he fully understood the problem. The better the description, the more credible his opinion is likely to be.

Acceptability is no doubt the reason why some arbitrators cite published awards extensively in their opinions. They seek to demonstrate through precedent that their views are consistent with what other arbitrators have said. Such behavior assumes, mistakenly I think, that published awards somehow represent a common law of arbitration. The fact is, however, that these awards arise from a bewildering variety of contracts, and each contract has its own distinct bargaining history and past prac-

tice. To say that a ruling in a farm equipment-UAW plant should be given weight in a basic steel-Steelworkers mill is nonsense, no matter how similar the cases may be. Moreover, the parties presumably hire an arbitrator for his judgment on the dispute before him. They are not getting what they contracted for if his opinion in the case is based largely on what other arbitrators have said in other relationships. Such an opinion, in Ben Aaron's words, "creates the impression that the writer did not trust his own judgment" and "is . . . [thus] self-demeaning and odious."[8]

None of this is meant to lessen the importance of precedent within a given relationship. Obviously, an arbitrator should honor previous awards for the same parties so long as those awards are in point and are not clearly in error.[9]

I turn now to matters of organization and style. To start with, far too many opinions begin with a statement of facts without any hint as to what the dispute is all about. Not until the middle of the opinion is the issue explained. This serves to frustrate the reader. The remedy is clear. Every opinion should begin with a brief introductory paragraph that sets forth the nature of the dispute.[10] One can then read the facts with some understanding of their significance.

As for the statement of facts, it can best be written after the decision in the case is fixed in the arbitrator's mind. The facts should nevertheless be couched in a neutral tone. But the choice of facts and the order of their presentation should relate in some way to how the arbitrator is going to decide the dispute. They should be shaped by what is to come. There is no point in reciting facts that have no bearing whatever on the parties' arguments or the arbitrator's ruling. There is no point in describing the facts at great length in this initial statement if the arbitrator intends to explore them in detail later in support of his decision.

As for the parties' arguments, they should be integrated into the arbitrator's discussion wherever possible.[11] Many opinions

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[8]Aaron, *Arbitration Decisions and the Law of the Shop*, 29 Labor L.J. 536, 542 (1978).

[9]Where industry-wide bargaining exists and much the same language appears in every contract, an arbitrator may properly rely on previous awards within the industry.

[10]For example, the opening paragraph in a discharge case might be: John Doe was discharged on January 1, 1982, for insubordination. The Union insists that he was not insubordinate and that, even if he had been, the penalty imposed was excessive. It believes, accordingly, that his discharge was unjustified. It seeks prompt reinstatement with back pay.

[11]In the more important cases, it may be advisable to have the parties' positions fully described before the arbitrator's discussion.

contain a recitation of each side's argument and then a discussion, which often is little more than a rehash of the winner's argument. The reader is forced to cover the same ground twice. That is not a formula for capturing the reader's attention and admiration. A better approach, I believe, is to express the loser's argument and then discuss its flaws and weaknesses. No doubt that discussion will sometimes be a simple restatement of the winner's argument, but the opinion will read much better and the winner is not likely to complain about the failure to give equal space to its argument.

As for the arbitrator's discussion, the format will vary from case to case. His answer to a grievance can be constructed in many ways. He can mix fact, contract, and equity in a great variety of combinations. There is no one correct method. The materials themselves tend to dictate the arbitrator's choice of format. Whatever the choice, it is likely to be validated by an argument that flows smoothly and has an inner consistency.

Some other points are worth mentioning. The arbitrator's discussion should express his view of the dispute in his own words. He should not quote the winner's brief in responding to the loser's argument.[12] That kind of opinion-writing suggests that the arbitrator is incapable of independent analysis and can do little more than parrot the views of others. Moreover, he should respond to all of the loser's arguments. There is nothing more frustrating to the loser than having an argument ignored and thus rejected without reason. I realize that some arguments are so absurd that they cannot be answered without the arbitrator appearing to be equally absurd. In such situations, it should suffice to note briefly in the opinion that this argument lacks merit.

As for the award, the actual disposition of the grievance, there is no point in repeating what has already been said in the discussion. Ordinarily, it is enough to state simply that the grievance is granted, denied, or granted in part and denied in part. And, if granted, it is appropriate to describe what exactly the employer should do to correct the violation. Of course, in those cases which are submitted through a stipulated issue, it is enough to say that this issue is answered in the negative or the affirmative.

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[12]However, there is nothing wrong with quoting from the parties' briefs at an earlier stage of the opinion in describing the parties' arguments. That is often useful when their arguments are difficult to paraphrase.

Our opinions tend to make dreary reading. A disinterested person would have to possess a strong will to wade through many of the opinions that cross my desk. I have sometimes wondered whether interested persons—the parties immediately involved in the dispute—take the trouble to read the entire opinion. And I admit I occasionally have trouble rereading my own decisions.

The drabness is, I suspect, attributable to several factors. First, the subject matter often does not lend itself to graceful exposition. Try preparing an opinion in a job-evaluation case which turns on the question of whether a widget-builder's responsibility for tools and equipment demands "*moderate* attention and care" or "*close* attention and care." Second, the arbitrator is not free to write as he wishes. He is given a set of facts, competing arguments, and contract language. He must ordinarily work with these materials, nothing more. Such limitations can stifle the writer's imagination. Third, an arbitrator who writes more than 100 opinions a year "usually lacks sufficient time to develop or to nourish an acceptable writing style. When opinion-writing becomes a dreary chore, grace and elegance of style cannot survive."[13] Finally, many arbitrators seem to believe that the parties view the quality of the opinion as a secondary matter. They feel the parties are concerned with the "bottom line," the result, and little else. This kind of cynicism, whether justified or not, serves to undermine the quest for excellence.

Drabness is not inevitable. Opinions ideally should have the balance and grace of a Mozart piano concerto, the strength and directness of a Rodin sculpture. But this is not an ideal world. Such perfection cannot be achieved with a mere two days of study time. Nevertheless, opinion-writing can be improved if we pay more attention to matters of style. My emphasis on style is not just a personal idiosyncrasy or an aesthetic interest. It is a conviction as to how arbitrators can best be understood. It is an appeal for simplicity, directness, and lucidity.

I recognize that each arbitrator develops his own unique style. I recognize, too, that there is no one best method of expression. Hence, my remarks are aimed more to what should be avoided than to what should be done. Let me point to some common failings.

It is not enough to write sentences that are grammatically

[13]Aaron, *supra* note 8, at 539.

correct. As Aaron has noted, ". . . one can ingest just so many pages filled with simple declarative sentences, unvaried by an occasional venturesome independent clause or a single felicitous phrase, before giving up and turning to what the writer of the opinion might well refer to as the 'bottom line,' that is, the award."[14]

It is not enough to paste together pieces of the transcript, the briefs, and the contract along with a few short personal observations and then leap to a conclusion. The arbitrator's presence should be felt. His opinion is supposed to involve the kind of careful analysis and reasoned argument that will convince the parties that he fully understood the problem.

It is not enough to list, briefly and numerically, the factors which led to a given decision. Such opinions have a sense of incompleteness. The arbitrator should consider the weight of these factors, and his opinion should reflect their relative importance. He should bind his ideas together through suitable transition phrases. His explanation should thus carry the reader forward, step by step, to the conclusion.

It is not enough to prepare an opinion which is merely contractually correct. The arbitrator must go further. He should be sensitive to the parties' needs and the practical impact of his words. For example, if he is deciding a credibility question, he may be accurate in stating that the foreman's testimony was a "pack of lies," but that statement might well destroy the relationship between the foreman and the employees he supervises. By muting his words, the arbitrator can make the same ruling without damaging the foreman's ability to function.[15]

An even better example is the arbitrator's choice between broad and narrow rationales for a given result. Both may appear to be perfectly sound, but because there is always the possibility of error, a decent self-restraint suggests the use of the narrow rationale.

Style demands an appreciation of shadings and subtleties. Arbitrators properly devote time to such questions as to whether an act should be described as "reasonable" or "not unreasonable." Style demands an appreciation of the uses of ambiguity. Arbitrators sometimes should not be explicit. We may be doing the parties and ourselves a favor by deliberately

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[14]*Ibid.*

[15]Arbitrators' concern for their own acceptability results in their writing opinions in such a way as to avoid making the parties look bad.

placing an ambiguous phrase or argument into an opinion. Style demands an appreciation of those aspects of a case that are better left unmentioned. Arbitrators correctly ignore materials which have a potential for causing unnecessary trouble. The list is endless.[16]

Nothing I have said is meant to suggest that "art" is more important than substance. I am certain that the parties are more interested in a sound decision than an artful opinion. Arbitrators, faced with such a choice, would also opt for the right answer to the dispute. However, there is no reason why we cannot be both sound and artful. Opinions need not be dreary reading. We have the skills and experience to make our opinions more clear, more concise, and more compelling. What we have to do is to spend more time with the kinds of questions I have raised in this paper. Speed is not compatible with the high degree of selectivity necessary for good opinion-writing. Only those who are willing to spend extra hours at their drafting tables are likely to prepare *a quality product.* And that should always be our objective. We owe it to ourselves, no less than to the parties.

Discussion—

MARK KAHN: I was very pleased to hear from some of the speakers, particularly the two partisan speakers on the essentially neutral subject, indications of the value of an opinion being reviewed by and with the parties through the medium of a tripartite board, or perhaps a discussion of the case by a tripartite board even before the opinion is written. I bring this up because I think most arbitrators prefer to operate as sole arbitrators. Because of the industries in which some of us arbitrate, we have had more exposure to tripartite boards, and in spite of the fact that the procedure is somewhat cumbersome, may cause additional delays, and so forth, I think it greatly enhances the quality of the product. I wonder if any of the speakers would think it appropriate to urge the parties who have not experimented with tripartite grievance arbitration boards to consider investing in that kind of procedure.

[16]One of my pet peeves is the impersonal reference to ourselves as "the arbitrator" or "the undersigned" instead of "I." It seems to me the arbitrator is a flesh-and-blood "I," not some disembodied presence.

MR. BERNSTEIN: I have worked with tripartite boards, and I have the view that they have been eminently successful. The problem, I suppose, with a tripartite board—and I've heard it expressed by others many times—is that all it does is drive you back to extend the arguments and the hearing to the executive session. The partisans find it very difficult to discipline themselves to the point where they can approach an executive session with the kind of objectivity that's implied in the concept of an award of a tripartite board. I'm not sure how you develop that discipline in new areas. Some parties have a long history of using tripartite boards and do not have to develop the discipline. Perhaps an alternative approach suggested by Syl Garrett might have some merit: not setting up a formal tripartite board, but simply testing on the parties an opinion which you suspect has some trouble with it, or may create some problems for them. That doesn't go the full way, but I think that would help solve some of the problems that Dick talked about and avoid what Sam described as the opinion's simply going too far because of the arbitrator's ignorance of what he is doing.

MR. CAMENS: I think the parties would all agree that we have had great success over the years with the U.S. Steel Board and now with the Iron Ore Range Board. We do not have a tripartite board arrangement, and I don't believe in it because it involves all kinds of rehashing of the case, minority opinions, and all the rest. What we have is an arrangement where a union member and a management member are liaison to the boards; they get draft opinions and they review them. In 50 to 75 percent of the cases, they telephone the arbitrator and say, "Fine. No comment." In, say, 15 percent there are a few generalizations that we think ought to be eliminated because they will get us into trouble later on, or we think a little tightening up or a little more explanation is needed. We find we're in dispute in maybe 5 percent of the cases where we think that either the determination of the facts or the application of the contract is not accurate. Then we might get into an executive-type discussion of these points—but with the understanding, of course, that the arbitrator is ultimately responsible for the opinion. The two people—the union member and the management member—are there in kind of an advisory capacity.

I want to mention here something we haven't discussed. Our system is the greatest training ground in the world for young new arbitrators because they're involved if there is more than

one arbitrator on the board. They are associate arbitrators, and their opinions might be up for discussion and careful analysis; and then they hear why somebody thinks there ought to be some changes, for whatever reasons. I think that this exposure enhances the development of an arbitrator. One of the great problems is that an arbitrator can put out opinion after opinion and nobody ever says a word about whether they are good or bad—and he may be doing an awful job. Then suddenly he's not on the list anymore, and he doesn't know why. I think that the discussion process, with the collaboration of the parties, is most important in an arbitrator's development.

MR. MITTENTHAL: I think one can inject the parties into the opinion-writing process without a formal tripartite board. On rare occasions, for instance, I've had difficult cases in ad hoc situations where I have gone to the parties and suggested, in view of the seriousness of the issues involved, that I was not only willing, but would appreciate their reviewing the opinion with me prior to its formal issuance. And that offer has almost always been accepted, and the results of the discussions that I've had have been very fruitful and sometimes have resulted in the modification of the rationale or changes in important language. I think that the tripartite concept in terms of its influence upon opinion-writing is extremely important, and I don't think it has been fully explored by the parties.

ROBERT COULSON: Let me make the kind of radical proposal that one can make if one is not an arbitrator. I've read a number of arbitration awards, and I think it would be a great convenience to the parties and to others of us who are interested in your work product if you would get away from the traditional court-decision format—the mystery-novel format—of having to go to the very end to find out what the result is. You might summarize the decision early on in the first page. Then some of us wouldn't go on and read any more, but others of us would then be more interested in what your rationale was and how the facts looked to you. I know that's terribly radical, but even the court publishing companies do summarize the decision up front, and that saves a lot of time for many scholars and people interested in the common law. I think the same thing might be true in the labor arbitration field, and I say that with great diffidence and recognition that it's a radical idea.

PETER SEITZ: In the discussion of the art of opinion-writing, should we not include the art of no opinion-writing? There are

certain cases—and I am not saying that there are very many of them—where no matter how much one writes, and no matter how carefully one writes, you're not going to persuade anyone because the decision comes out of the viscera. I know there are cases of that sort, and perhaps these 49/51 percent cases fall to some extent in that category. There is also a certain percentage of cases in which the parties are interested only in the result and not in an opinion. Now how did all of this opinion-writing happen to come about—simply because unthinkingly a number of arbitrators followed the course of common law judges and wrote opinions? I'm not saying that we shouldn't have opinions. Of course we need opinions to express the rationale of the decision. But it occurs to me that in a certain number of cases, at the end of the case the arbitrator could bring the advocates to the front of the table and say, "Do you really want an opinion in this case? How about just getting a decision—an award?" I have tried that in several cases. If delay and expense are two of the problems of arbitration, why shouldn't we try cutting down on opinions in cases where they can be dispensed with?

ELLIOT BEITNER: Mr. Mittenthal has expressed his judgment that quoting authority and citations is probably counterproductive and reflects someone else's thinking rather than the arbitrator's own decision-making process. Although I am over 50 years of age, I am referred to by many as "the kid," and being a "kid" without the national reputation of our speakers, I think perhaps that many parties require more than my own persuasiveness. While I agree, stylistically, that the purest approach may be to reason out an opinion and have your arguments support it, I also believe that the citation of authority or even of other cases that have similar facts can be of considerable persuasiveness for the parties.

DAVID FELLER: When I listened to Dick Mittenthal's description of the process of decision-writing, it sounded, almost word-for-word, like what I say to my students in appellate advocacy when I tell them how to write a brief. That raises a serious question, and I don't know the answer. What the argument seems to be is whether opinion-writing is advocacy-writing. You want to persuade the loser that he ought to have lost, which is very much the same as trying to persuade a court when you are writing a brief, and I'm not sure whether that really does serve the parties' interest. Now this gets back to the 51/49 percent kind of question. I have written opinions where I've said, "This

is a very close question—a question of contractual interpretation." After having set out fully my doubts about the question and the reasons for the doubts, I say, "Although it is a very close question, I find that this little bit of word here is the thing that persuades me." This may not be very persuasive for the parties who would prefer an argument which sets out the conclusion I have reached in the strongest possible way. It seems to me that that is really not the question where I think you and I differ, and it's not the question which we ought to decide. I would like to hear from the parties as to which kind of opinion best serves their purposes because, after all, that's the reason we're in business.

MR. CAMENS: I think we're talking about instances where arbitrators, considering a given set of facts under the same contract provisions, come out with different answers. What's important in that type of decision is for the arbitrator to make clear that under this particular set of facts, he is making this particular decision, but under the same contract with another set of facts, he might come out with a different decision. You have to be careful in these cases to make it very clear that this one fact was the basis for this decision, whereas if the facts were different, your decision might be different. The important thing is to state clearly the fact or facts that support the decision you make.

MR. BERNSTEIN: I would prefer that the arbitrator tell me precisely what he had to go through, and if it was a tough decision, I'd like him to tell me so. And I have a very pragmatic reason. If I win, what's the difference, but if I lose, I want to tell my client how close a case we had and that we really almost made it.

THOMAS RINALDO: I have a more elementary question. In a recent lengthy case, I asked the two attorneys to submit detailed posthearing briefs, since I planned to eliminate citing or typing out the contract clauses and the positions of the parties in my opinion. When the final product came out of the typewriter, it just seemed a little too skimpy, and I decided to reinsert the contract clauses and the positions of the parties. I somehow had this feeling that the quality of my opinion is directly related to the quantity of pages. I would like to hear from the parties what their views would be if they received a decision without all the contract clauses and their positions recited.

MR. CAMENS: I have an aversion to all that recitation. Why did we pay $500 or $1000 to have repeated what we already know

about our contract clauses? What we want from the arbitrator is for him to tell us precisely why he used this clause or that one. The worst opinions I've seen are those in which the arbitrator not only repeats and types out four pages of contract clauses, but he also types out three pages of verbatim evidence from the third-step minutes that are already attached to the record. Great costs are being incurred when, in a very short paragraph, you could have summed up the reasons why you relied on some fact in your award. You don't have to repeat what the foreman said. I've seen this create great problems because when the decision gets down to the grievant and he sees three pages of what the foreman said—what he didn't agree with in the first place—he begins to wonder about the fairness of the arbitration process. You've got to think about the grievant's reaction. For the process to work, he has to feel that he has had an honest day in court. Arbitrators are hired to dig out what they believe are the facts and to put in very concise and understandable language why they are relying on these facts and what sections of the contract are involved. I hope that along the way the arbitrator establishes his credibility so that everyone accepts his decision and the dispute is disposed of.

MR. BERNSTEIN: The problem you raise, I think, depends on the bargaining history. If my client is newly organized and is having his first arbitration, I would like very much for you to go into as much detail as you sometimes do—contract clauses, the arguments, the whole business—so that he understands that he has had his day in court. If I have a sophisticated client who has been through this over and over again, you can make the award one paragraph long and it's perfectly alright. And again, there's nothing wrong with your asking the parties themselves: What do you fellows want? Do you want a 20-page job, or do you want a half-page job? I have a situation right now where I hope I get a nice long one. I don't care how it goes, but I want that client to know that this is a very fair process. The fellow is in his first arbitration. He has the notion that arbitrators are all liberals, they're all crooked, and they never find for the employer, and if he's going to lose this one, I want him to know why he lost.

DALLAS JONES: I have been hearing in this discussion that we should explain our positions, and one position which always seems to me to be unexplainable is on what basis you decide a credibility issue. I must confess that I've given up trying to

explain to the parties why I do it. I simply write that I accept one position. The testimony was credible or it was not. I wonder how you feel about that, Dick.

MR. MITTENTHAL: I think that there are cases in which one can explain in some detail why the credibility finding is going in one direction rather than another, and to the extent that you can do that, I think you should. But I agree that there are some cases in which it really is inexplicable. It's simply a reaction to everything that took place at the hearing and in your review of the testimony, and there's nothing wrong with simply concluding that A or B is not a credible witness.

MR. JONES: It seems to me that some of the strangest decisions I have read are those in which the arbitrator tries to explain why he decided that credibility issue. I am sure it must have been right; all arbitrators obviously are right. But if I were a party reading one of those, I would have real difficulty with it. I'd like to hear from the parties on that. When you have a real credibility issue, are you satisfied with our saying, "This is the decision"?

MR. CAMENS: I would have a real problem with it because, as I said, the whole discharge process is suspect because of its very nature. The great problem we have is to maintain the credibility of this process that is so important to us. All discharge cases are based on credibility, and when you are considering contradictory evidence and, without any explanation, you say that you have accepted one person's version rather than another's, I don't see how anyone can accept that as credible. In a discharge case there's got to be some basis for finding an employee guilty. There has to be, at least, a preponderance of the evidence or guilt beyond a reasonable doubt. We're talking about capital punishment in an industrial setting. If your decision is based on only a "gut feeling," then the grievant is not guilty. That's a principle of democracy that we don't take lightly. Arbitration is supposed to be a worker's forum that he accepts, and unless it is acceptable as democratic, it will be doomed and we will go back to the chaos that we used to have in these plants. If I leave no other message here today, it is this: We must begin to understand the great uneasiness over democratic principles that is rampant in these plants. We must begin to understand the feelings of this new generation of workers about this problem—their desires and their zealousness for freedom and the protection of their

rights. Industrial plants are no different from all of society. And you who are involved in the arbitration process have got to understand, if you understand nothing more, that if arbitration is going to be a viable process, it has to be a viable process for the workers.