Conclusions

The use of interest arbitration has grown dramatically in a 15-year period. Almost half of the states now require such a system, and it is permissible in a number of other states. Interest arbitration has generally been upheld when it has been challenged on constitutional grounds. Aspects of its performance which have been considered include chill and narcotic effects, outcomes, and strikes. As an academic, I am comfortable in grading the compulsory interest arbitration scene with a solid "B." It's fair to say that interest arbitration has assuaged most of the fears we all had at the start, but it still has room for improvement.

We are now past the introductory phase of the use of compulsory interest arbitration on a wide-scale basis. There will be talk, and some action, designed to eliminate or curb the process significantly. However, I expect the next phase will emphasize gradual extension of the use of interest arbitration and improvement of existing systems. To that end, the closing section of this paper was devoted to five suggestions for such improvement.

II. TRANSIT AND OTHER ATTEMPTS TO ARBITRATE CONTRACT TERMS

MARCIA L. GREENBAUM*

Today's session is about "Interest Arbitration: Its Promise and Performance." The promise was simple. A neutral third party, acting singly or as chairperson of a three-member board, would render a decision about the contract terms for a new or renewed collective bargaining agreement, which would resolve a labor dispute and thereby avert or end a strike or use of some other economic weapon, particularly in an industry or service where the strike is intolerable, inconvenient, and/or inadvisable.

Reading the literature, however, leads to the conclusion that this session could just as easily be entitled "The Threat and the Performance" because almost as much has been written about the disadvantages.

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1. The "Split-the-Baby Effect." That is, arbitrators, seeking an award acceptable to the parties, will "split the difference" between their positions and issue a compromise award. This will lead to:

2. The "Chilling Effect." The parties' knowledge that their dispute will eventually be subject to determination by a neutral third party, who may "cut the baby in half," will lead them to bargain as little as possible so they can save as much as possible for the arbitration process, thus undermining the negotiations process.

3. The "Narcotic Effect." Arbitration is a drug, like heroin or hashish, and once the parties have tasted its tantalizing flavor, sniffed its sweet smell, and experienced its heavenly highs, they will be addicted to this alternative and only go through the motions of bargaining as foreplay to the main event.

Interest arbitration has always had its detractors. Among the opponents was Senator Wayne Morse, who said:

> "Mr. President, if you go into arbitration . . . you are taking away from the parties, management and labor, some very precious freedoms. You are substituting a third party and asking that third party, in effect, to tell them how they are going to run their business, and under what conditions they are going to work. That is a dangerous situation. It is a situation that attacks, in my judgment, some basic foundations of economic freedom in this Republic."[1]

Senator Barry Goldwater concurred: "It is not often that the senior Senator from Oregon and junior Senator from Arizona find themselves in agreement, but on this particular subject, compulsory arbitration, I am in complete agreement. . . . [I]f [compulsory arbitration] is forced upon the American people, it can mean price control, wage control, quality control, and even place of employment control."[2] Also in opposition was Secretary of Labor Willard Wirtz, who stated: "[A] statutory requirement that labor disputes be submitted to arbitration has a narcotic effect on private bargainers. . . . They [will] turn to it as an easy—and habit-forming—release from the obligation of hard, responsible bargaining."[3]

Let us look at interest arbitration in several situations—first,

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[1]Congressional Record, February 20, 1963, 2492.

[2]*Ibid.*

[3]Wirtz, *The Challenge to Free Collective Bargaining*, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963), 296, at 303.

in the public sector, in particular, Massachusetts, which has had a seesaw approach to arbitration of police and fire disputes. Second, I'll turn to transit, focusing on the MBTA in Boston, with which I have had first-hand experience. Then I'll consider quasi-public disputes such as those in the airline industry, where I am currently occupied. And last, I'd like to check the count on baseball arbitration. These diverse experiences raise questions about the continued acceptability of the process and the role of the arbitrator in protecting the process from attack.

Massachusetts: An Interest Arbitration Teeter-Totter

When public-sector collective bargaining became law in Massachusetts in 1965, there was no finality unless, of course, the parties themselves agreed on the terms of a new contract. Dissatisfaction on the part of both the municipalities and the public-safety unions led the General Court (which is the legislative body) in 1973 to enact a compulsory last-best-offer binding interest arbitration statute. Following mediation and fact-finding, either party in a police or fire dispute could petition for a tripartite arbitration panel, which was then empowered to hear the matter and select, based on ten statutory criteria, the entire final offer of one party or the other. There could be no modification of the final packages by the arbitration panel. One party won; the other lost.

Effective July 1, 1974, this three-year experimental process met with immediate criticism, including a suit by the municipalities. The statute was upheld by the Supreme Judicial Court, but this did not quell the criticism. The municipalities, which were required to appropriate funding for the offer selected, objected on the ground that it constituted an intrusion into local autonomy by an outsider, the arbitrator, who was not accountable for the end result. There were complaints that the process favored the unions, whose offers were allegedly selected more frequently, and that awards were more costly than settlements. And there was criticism that the process insulated the respective parties from their constituencies, removed accountability, and deprived them of self-determination.

Said Arbitrator Lawrence Holden, formerly chairman of the Massachusetts Board of Conciliation and Arbitration: "There is no question that the removal of local autonomy over salary and fringe benefit determination for police and fire groups has gone

down hard in certain quarters. Local autonomy, particularly in the form of town meeting ratification of spending decisions, is a principle that is imbibed with mother's milk in many New England jurisdictions."[4]

In the three-year period from fiscal year 1975 to fiscal year 1977, 97 cases went to last-best-offer arbitration. However, one-third of the awards were litigated. The unions won most suits, but only after court costs, legal fees, and two years during which employees went without pay raises. In some cases the judges did vacate the awards or parts thereof.

It was against this background that the legislature considered renewal of the statute in 1977. The municipalities sought an end to the experiment and almost succeeded in obtaining it. But the legislature renewed the process with some modification, overriding the governor's veto. Among the modifications was making the fact-finder's report an alternative to the parties' final offers in interest arbitration.

A 1978 study[5] compared the pre-final-offer period with the post-final-offer period and found that: (1) There was some increase in the proportion of police and fire *impasses* attributable to the availability of arbitration. (The key word is impasses, not arbitrations.) (2) Over the first two years of the law, 93 percent of those who negotiated new public-safety contracts did so without resort to arbitration. (3) Thus, while there was greater reliance on impasse procedures, this did not lead to a large number going the full route to an arbitration award. (4) Even where an arbitration award was the end result, the arbitrator most frequently selected the fact-finder's report as an option or the final-offer package that came closest to (or was identical to) the recommendations of the fact-finder. Thus, final-offer awards were mostly determined during the fact-finding procedure.

The 7 percent going to final-offer arbitration by package in Massachusetts compared favorably with the approximately 30 percent of police and fire negotiations ending with an award in states with conventional interest arbitration, such as Pennsylvania and New York, and with the more than 16 percent submitted to issue-by-issue final-offer arbitration in Michigan.

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[4]Holden, *Final-Offer Arbitration in Massachusetts,* 31 Arb. J. 35 (March 1976).

[5]Lipsky and Barocci, *Final-Offer Arbitration and Public Safety Employees: The Massachusetts Experience,* in Proceedings of the 30th Annual Meeting, Industrial Relations Research Association, ed. Barbara D. Dennis (Madison, Wis.: IRRA, 1978), 65–76.

The municipalities, however, were not satisfied and mounted a campaign to take the issue to a public vote. Responding to the threat of a referendum, the unions, and in particular the Firefighters, entered into negotiations with the League of Cities and Towns, and these parties sought the assistance of Academy member John T. Dunlop, who had considerable experience with joint labor-management committees. He proposed such machinery for the commonwealth's municipalities and the various police and fire unions. The parties embraced this compromise, the legislature passed it, the governor signed it, and thus the Joint Labor-Management Committee was born (Chapter 730 of the Acts of 1977, which became Section 4A of Chapter 150E).[6]

The new law gave the Committee the power to: (1) specify the issue or issues to be arbitrated; (2) nominate the panel of neutral arbitrators from which the arbitrator is to be selected by the parties, and if they can't agree, appoint a neutral arbitrator or arbitrators or the chairman, the vice-chairman, or a panel of the committee, including the chairman or vice-chairman, to arbitrate the dispute; (3) determine the form of arbitration, whether conventional arbitration, issue-by-issue, last best offer, or such other form as the Committee deems appropriate; and (4) determine the procedures to be followed in the arbitration proceeding. The Committee handled some 101 cases in its first 18 months. The majority were settled informally and only 39, or about 39 percent, went to award. A similar figure for the prior process administered by the Board of Conciliation and Arbitration was 15 percent. The higher figure may be accounted for by the parties wanting awards for public consumption even where there were agreed-upon results.

There the matter stood until 1980, when the citizenry passed Proposition 2½ and thereby repealed the interest arbitration provision. The Joint Labor-Management Committee continues to engage in dispute resolution up to, but short of, imposing arbitration. Arbitration continues to exist for state troopers, metropolitan district police, and Massachusetts Turnpike employees, as they are not municipal employees covered by Proposition 2½.

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[6]Greenbaum, *The Joint Labor-Management Committee for the Resolution of Municipal Police and Fire Disputes in Massachusetts*, in Proceedings, Annual Meeting of Association of Labor Relations Agencies, Seattle, Wash., Anchorage, Alaska, July 1980.

Final-offer arbitration, particularly if package selection is the only choice, can be hard on the arbitrator, especially where the proposals of one party or both contain a "clinker."

I have served as arbitrator in a number of cases, including one town where the parties, both police and fire, had resorted to mediation and fact-finding for every contract negotiation. The police appeared before me in a final-offer interest arbitration, proposing a one-year contract term, while the employer pressed for three years. At the time, negotiations and impasse procedures had dragged on for so long that even an award for a three-year contract would expire within a month. I used the power of the appointment to do two things.

First, I told the union, in the presence of the employer, that if it continued to propose a one-year contract as its final offer, its chance of selection was less than zero. This forced it to rethink its position in terms of three years, which final offer was very close to that of the employer. Second, the parties were told that they had had enough hand-holding by third-party neutrals over the years and it was time they let go and negotiated on their own. Within a week or two of my award, they signed a contract retroactive for the prior three years, and they immediately negotiated a successor agreement all by themselves to cover the next several years. Thus, the narcotic effect was neutralized and what was a chilly relationship defrosted.

Interest Arbitration: A Rose by Any Other Name

Much of the literature on the subject from the 1940s to the mid-1960s used the term "compulsory arbitration." For example, there was "Is Compulsory Arbitration Inevitable?",[7] "Compulsory Arbitration: Panacea or Millstone?",[8] "Is Compulsory Arbitration Compatible with Bargaining?",[9] and "Thumbs Down on Compulsory Arbitration."[10] Some pieces postulated that in such a process, labor and management would be dragged

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[7]Taylor, *Is Compulsory Arbitration Inevitable?* in Proceedings, First Annual Meeting, Industrial Relations Research Association, December 29–30, 1948, 64–77.

[8]Roberts, ed., Compulsory Arbitration: Panacea or Millstone? (Honolulu: Industrial Relations Center, University of Hawaii, 1965).

[9]Stevens, *Is Compulsory Arbitration Compatible with Bargaining?* 5 Ind. Rels. 38–52 (February 1966); Bruno Contini, *Is Compulsory Arbitration Compatible with Bargaining?* 5 Ind. Rels. 111–16 (October 1966).

[10]Berrodin, *Thumbs Down on Compulsory Arbitration,* 2 LMRS Newsletter 4 (August 1971).

kicking and screaming to the arbitration table and then forced to swallow the meal, however unpalatable, prepared and dished out by a third party—the arbitrator—who could walk away from the table without so much as a particle in his teeth, while the meal fed the parties would poison, if not kill, collective bargaining.

This period was followed by one in which there was an interest in "Advisory Arbitration of New Contract Terms,"[11] and then the newly coined *legislated interest arbitration,* as in "Legislated Arbitration May Work—When Born of Consensus."[12] Then people began to ask, "What's So Terrible About Compulsory Arbitration?"[13] Perhaps it was the term, for shortly thereafter there was a move toward "binding arbitration," as in "Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector."[14] This, however, confused the process with grievance arbitration and the term "interest arbitration" began to predominate, frequently in tandem with "final offer."

This was the name of the process in Massachusetts until Proposition 2½, when its name was frequently shortened to four letters. Since then, there has been a change in political administration. The police and fire unions are again lobbying the legislature for enactment of a new law, but interest arbitration is not mentioned. Rather, what they now seek is "closure mechanism."

Transit: Riding VIA (Voluntary Interest Arbitration)

While arbitration of interest disputes has long been the practice in the newspaper and printing trades, as well as in public utilities, glass, and other industries, the oldest and most fre-

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[11]Bryan, *Advisory Arbitration of New Contracts: A Case Study, I. Avoiding Confrontation by Advisory Arbitration,* and Groner, *Advisory Arbitration of New Contracts: A Case Study, II. Why Advisory Arbitration of New Contracts?* in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), at 55–60 and 61–70.

[12]Straus, *Legislated Arbitration May Work—When Born of Consensus,* Proceedings, Conference on Arbitration of New Contract Terms for the Protective Services, March 9, 1971, 73–82.

[13]Seinsheimer, *What's So Terrible About Compulsory Arbitration?* 26 Arb. J. 219–25 (September 1971).

[14]McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector,* 72 Col. L. Rev. 1192–1213 (1972).

quent users of the process have been in transit. Since 1891, when arbitration was first incorporated in the bylaws of the Amalgamated Transit Union, to date, it has arbitrated more than 700 cases,[15] most before tripartite boards on a voluntary basis.

A recent study indicates that of 184 transit contracts concluded between 1960 and 1976, 72 percent resulted from negotiated settlements without strikes or arbitration, 17 percent occurred after strikes ranging from one to 270 days,[16] and 10 percent were resolved by arbitration.[17] This 10 percent figure is comprised of 19 arbitrations on 10 properties.[18] A number of awards have been unanimous.[19] Not every pair of transit negotiators has used the process; those who have used it have not repeated in each and every possible year.[20]

The Boston Carmen's Union, Division 589 of the ATU, has had a bargaining relationship with the Massachusetts Bay Transportation Authority (MBTA) or its predecessor since 1912, when the employer was a private-sector corporation known as the Boston Elevated Street Railway. The contracts have long provided for tripartite interest arbitration to resolve impasses, and the parties have freely invoked the process, which calls for selection of a neutral who is knowledgeable about transportation matters.

Since the end of World War II, ten Boston transit contracts have been settled by arbitration and six by direct negotiations.[21] Traditionally, the awards have been issued without an opinion, and the parties themselves appeared to be content with this process. The legislature, however, was not. Crises (including several shutdowns), frustration (including late or cancelled service), and disillusionment[22] led to the enactment of two laws

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[15]Stern et al., Labor Relations in Urban Transit (Madison: Industrial Relations Research Institute, University of Wisconsin, 1977), 168.

[16]*Id.* at 175.

[17]*Id.* at 165.

[18]*Ibid.*

[19]Sternstein, *Arbitration of New Contract Terms in Local Transit: The Union View,* in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1974), 10, at 11.

[20]*Ibid.*

[21]Years in which contracts were settled by arbitration were 1949, 1951, 1953, 1957, 1958, 1960, 1973, 1976, 1979, and 1981. Contracts were negotiated directly in 1946, 1955, 1963, 1966, 1969, and 1972.

[22]*Massachusetts Bay Transportation Authority* and *Local Division 589, Amalgamated Transit Union, AFL-CIO,* Award of James J. Healy, January 15, 1983, 2.

which substantially changed the process and threw the parties into a bitter dispute.

The first of these statutes, M.G.L. Chapter 405 of the Acts of 1978, replaced the contractual tripartite arbitration board with a single neutral who had to be a legal resident of the commonwealth and experienced in state and local finance. This conflicted with the collective bargaining agreement. It also dictated a new set of criteria on which the arbitrator was to rely primarily, including:

> "1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:
>
> "a. the statutory requirement of advisory board approval of the authority's fiscal budget;
> "b. the financial ability of the individual communities and the commonwealth to meet additional costs;
> "c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effects of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.
>
> "2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked, but also for wages for time not worked, including vacations, holidays and other excused time.
>
> "3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.
>
> "4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.
>
> "5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
>
> "6. The average consumer price for goods and services, commonly known as the cost of living.
>
> "7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> "8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.
>
> "9. The stipulation of the parties."[23]

[23]M.G.L. Chapter 161A, §19F.

In December 1980, when a funding crisis threatened operation of service, the legislature passed M.G.L. Chapter 581 of the Acts of 1980. (The two together became M.G.L. Chapter 161A.) This law excluded from bargaining a host of named "inherent management rights," including levels of staffing, contracting out, assigning and apportioning overtime, and hiring part-time employees. It also prohibited bargaining on or inclusion in a contract of "automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law." These provisions, too, conflicted with the contract then in place, which contained a COLA clause and overtime provisions.

Academy member William J. Fallon, who has often served as an arbitrator for the MBTA and 589, described the new legislation as an "unprecedented interference in the bargaining process" which ". . . will necessitate an acrobatic interest arbitrator to perform the required balancing act."[24]

In 1981 the authority refused to arbitrate unless the procedure conformed to the new laws. The union deemed the laws unconstitutional and invalid, and sought arbitration under the tripartite procedure provided for in the contract. Both parties litigated and the union won the first round before Federal District Court Judge Walter J. Skinner, who ordered bargaining and arbitration to proceed on all subjects in a hybrid process of the contract and the law before a tripartite panel, provided the neutral met the statutory qualifications as well.[25]

The parties selected me, and I proceeded to hold some 36 hearings, which is far in excess of the usual 9 to 12 hearing days in transit.[26] During that time the employer called many public officials to testify to the financial inability of the commonwealth and its municipalities to pay. The lawyers representing the authority insisted upon a question-and-answer type presentation with all documents attested to by witnesses. The union, on the other hand, sought to use its traditional approach of having an economist serve as advocate and witness, as he was the preparer of most of the documents and evidence. The thrust of the

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[24]Fallon, *Interest Arbitration: Can the Public Sector Afford It? Developing Limitations on the Process, III. An Arbitrator's Viewpoint,* in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 259, at 270.

[25]*Local Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts,* 511 F.Supp. 312 (D. Mass. 1981).

[26]Sternstein, *supra* note 19 at 14.

MBTA's case was the financial status of the 79 cities and towns in Massachusetts and comparability of their public employees. The union, in turn, concentrated on Boston's place at the top of the transit industry nationally and relied on comparable transit employment. The atmosphere was adversarial and the 100-plus issues in dispute remained unresolved. Amongst the key issues, in addition to wages, were COLA and its elimination as proposed by the employer, the use of part-time employees, scheduling and staffing of the spare list, distribution of overtime, and the past-practice provision.

It should be noted that in reality the bargaining process was not confined to the two parties, but also included, in a sense, "the M.B.T.A. Advisory Board, each of the 79 cities and towns which comprise the Board, the State Legislature and Executive Branch, the courts, the M.B.T.A. patrons, and the plebiscite at large."[27] There were many cooks often following different recipes. The press seemed to be able to keep the pot boiling on the front burner. In the interim, the general manager of the MBTA was accused and later convicted of accepting payoffs, and was jailed.

Just prior to concluding the rebuttal cases, and prior to the time the tripartite arbitration panel entered its executive session, the First Circuit Court of Appeals came down with its decision, reversing the district court and halting the arbitration process on the basis that the state law prevailed over the contract, notwithstanding Section 13(c) of the Urban Mass Transportation Act.[28]

In an effort to salvage what had been done in 36 days, the union proposed that I act as sole arbitrator. This was rejected by the authority. The union then proposed a waiver of the 45-day mediation requirement. This too was rejected and, as a result, the parties spent from February to May 1982 in mediation. Finally, another arbitrator, James Healy, was selected and hearings began anew in the summer of 1982. This time there were 22 hearing days between August and November, with briefs filed in December of 1982 for an agreement that was to have been effective January 1, 1981. He rendered an award on January 15, 1983. The procedure was lengthy,

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[27]Healy, *supra* note 22 at 1.

[28]*Local Division 589, Amalgamated Transit Union* v. *Commonwealth of Massachusetts*, 666 F.2d 618, 109 LRRM 2014 (1st Cir. 1981), *rehearing den.*, 666 F.2d 645, 109 LRRM 2034 (1st Cir. 1981), *cert. den.*, 457 U.S. 1117, 110 LRRM 2608 (1982).

time-consuming, and costly, but did avert a possibly lengthy strike.

Transit: New York Gets On for the Ride

People in suits and jogging shoes or roller skates were a common sight in New York City during the Transit Workers' strike. Camaraderie seemed to spring from the inconvenience caused by the absence of buses and subway trains. The legislature, however, saw it somewhat differently and enacted a new law requiring interest arbitration of New York City transit stalemates. Under this new compulsory arbitration statute, the New York State Public Employment Relations Board is authorized to appoint a three-member panel (and, more specifically, the three impartial members of the New York City Office of Collective Bargaining). The standards stated in the statute are the traditional ones, including "take into consideration and accord substantial weight to the financial ability of the public employer to pay the cost of such increase in wages or benefits,"[29] and comparison of wages of transit employees with other employees performing similar work and other employees generally in public and private employment in New York City or comparable communities. This covered New York City transit, but excluded commuter lines.

For six weeks this spring, New Yorkers were again inconvenienced, this time by a strike of the trainmen, represented by the United Transportation Union, against the Metropolitan Transportation Authority. Service on Metro-North was restored when the trainmen voted 159 to 28 to submit their dispute to binding arbitration before a three-person panel.

Thus, although its use is diminishing, in the face of labor unrest, interest arbitration in the transit industry continues to be viewed as a viable process, either when negotiated in a collective bargaining agreement, when agreed to on an ad hoc basis to end or avert a strike, or when compelled by the legislature.

Airlines: Disputes Over New Contract Terms

Airlines have also used interest arbitration to resolve thorny problems. In part, these agreements arose because of a govern-

[29]Chapter 19 of the Acts of 1982.

ment requirement that those carriers bidding for and flying under military contracts continue to operate these flights even if there is a strike of employees servicing commercial flights. In 1963, for example, Pan American entered into such interest arbitration agreements with the Flight Engineers and the Brotherhood of Railway and Steamship Clerks for resolution of "all issues relative to the manner of transition of three-man jet crews, and for rates of pay, rules and working conditions," through mediation and, if that failed, by tripartite arbitration. They have arbitrated twice under this agreement since 1963—once in 1970 over the issue of pay rates and again in 1975 on a variety of issues. More recently, the pilots and flight engineers arbitrated the foreign station allowances for Berlin. Neither chill nor addiction has set in.

Airlines: Mergers and Seniority Integration

The merger of two or more airlines has occurred with some frequency in the past. This has given rise to disputes over integration of seniority rosters. The parties have settled many of these by direct negotiation and/or with the aid of a third-party mediator as set forth in the Air Line Pilots Association merger policy. Nevertheless, a fair number have also gone to interest arbitration.

Three factors encourage the use of this process. First, there are the labor protection provisions, often contained in orders of the Civil Aeronautics Board as a condition of merger. Second, there is ALPA merger policy, which provides for arbitration between the two pilot groups if they are unable to merge the lists on their own. Finally, there are the agreements of the disputing parties themselves, often including the carrier or carriers, who consent in a so-called "fence agreement" to be bound by whatever award is issued by the usually three-member arbitration panel. By my count, there have been 25 such pilot and/or flight-engineer awards in the 30 years from 1952 to 1982, many by distinguished members of this Academy, starting with David Cole, in the Pan Am/AOA case in 1952, and including Ben Aaron, Harry Abrahams, Lewis Gill, Harry Platt, Russell Smith, David Feller, Laurence Seibel, and most recently, Richard Bloch in Republic/Hughes Airwest. The integration of pilots on Continental and Texas International Airlines, where I have had 22 hearing days so far, is the 26th pilot case.

In addition, I know of five such flight attendant arbitration awards issued between 1961 and 1982, and I am working on one to integrate the seniority lists of flight attendants on Flying Tigers and Seaboard World Airlines, both of which are essentially cargo carriers. Syl Garrett follows with the flight attendants on Texas International and Continental.

The pilot cases, and to a lesser extent the flight attendant cases, are amongst the most difficult arbitration cases one can do. As one of our colleagues described his experience, "I poured blood from every pore."

A variety of methods have been used to integrate lists, including on a date-of-hire or length-of-service basis; on an adjusted length-of-service basis where furlough time adjusts date of hire; on a ratio basis where the two groups are of unequal size and/or one group brings more to the merger than the other in the way of position entitlements, jobs, promotional opportunities and earning capacity; and/or some combination of these methods, depending on a host of considerations, including the financial health and competitive position of the carriers involved. The evidence presented tests not only the neutral's ability to produce a "fair and equitable" list, the standard for integration, but also his or her knowledge of accounting, economics, statistics, and corporate finance. It is a battle of the balance sheets and expert aviation consultants, who assess how each carrier has fared in this deregulated, PATCO-impacted environment, and project its future. The arbitrator must then try to decide whose crystal ball is the clearer one. This is a specialized kind of arbitration that is regularly relied upon despite its length, cost, and litigious nature.

Baseball: What's the Score on Interest Arbitration?

Lucy comes in from the outfield wearing baseball cap and glove, walks up to the pitcher's mound, and announces, "I've decided that I should be paid a million dollars a year." Charlie Brown sticks out his tongue and says, "BRRATRR!!" Lucy turns and walks off muttering, "So much for arbitration. . . ." I don't think the baseball players would agree.

It seems only natural that an industry which utilizes umpires to rule on what is fair and foul would employ arbitrators to decide the great interests at stake in player salary disputes. Howev-

er, it took a strike and delay of the 1972 baseball season for the major league club owners and the Major League Baseball Players' Association to incorporate in their January 1, 1973 agreement a provision for arbitration. This clause can be invoked by either party, and once invoked becomes mandatory on the other side. The arbitrator, who is selected from a mutually agreed-upon list and who sits as a single neutral, is required to select either the last best offer of the club or the final figure proposed by the player. There are no written awards.

Out of 1000 salary negotiations eligible for arbitration in 1974 and 1975, an average of 9 percent invoked the process—11 percent the first year and 8 percent the second. Of these, 5 percent were settled before the award issued. In only 4 percent, or 43 cases, were awards rendered. Of these, 18 were for the players and 25 for the clubs. Said one researcher: "The most noteworthy aspects of baseball's arbitration experience is that over half of the cases taken to arbitration were settled prior to the award and the arbitration usage rate declined significantly from the first year to the second."[30] And another concluded that these figures suggest that final-offer arbitration is being used, that it has not had a serious "narcotic effect," that meaningful negotiations continued after the disputes were appealed to arbitration, and that many were settled.[31]

Salary arbitration was not available in 1976 or 1977, and 1978 showed a marked decline with only nine arbitration awards issued—two for the players and seven for the clubs.[32] While one researcher found that one of the effects of salary arbitration was to increase the players' bargaining power, he concluded, ". . . that the final offer procedure is stimulating negotiations, and that the chilling effect associated with conventional arbitration has not been a problem."[33] Use of the process has continued to have fairly low incidence.

Of 88 cases filed for arbitration in February 1983, 58 were settled. The score for the remaining 30 that went to arbitration:

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[30]Feuille, *Final-Offer Arbitration,* 32 Arb. J. 203, 209 (September 1977).

[31]Dworkin, *The Impact of Final-Offer Arbitration on Bargaining: The Case of Major League Baseball,* Proceedings of the 29th Annual Meeting, Industrial Relations Research Association (Madison, Wis.: IRRA 1977), 161 at 164.

[32]Staudohar, *Player Salary Issues in Major League Baseball,* 33 Arb. J. 17, 20 (December 1978).

[33]*Ibid.*

Owners 17, Players 13. Fernando Valenzuela, who was 19 and 13 in 1982, when he earned $350,000, was awarded the $1,000,000 he put in a pitch for. At current exchange rates, that's plenty of pesos. The club's reported offer of $750,000 and the resultant spread of $250,000 is a long way from the average spread of approximately $10,000 in 1974–1975, when the pitchers were demanding an average final salary of $69,500 and the owners were offering $59,500.[34]

Said Ken Moffett, the former baseball mediator and now executive director of the Players' Association:

> "The arbitration system helps players in several ways. First, it makes the clubs make more realistic offers. Second, the uncertainties of the final offer system encourage settlement. It makes the players feel like they are able to get a fair deal from the club. The function of the arbitration system is to enable the players to obtain the fair market value for their services, even before they're eligible for free agency."[35]

Players' Association General Counsel Don Fehr, speaking to a large Arbitration Day audience in New York City on May 18, 1983, said, "The system works very, very well." The only fear he had was that the parties might not want to continue to use the process if they lost faith in the arbitrators' ability to render sufficiently fair decisions. On that same day, the national newspaper, USA Today, reported arbitration was "under intense attack" from the owners, who "would dearly love to scrap the entire process. . . ."[36] Management complaints are the traditional, although not necessarily true or valid, ones. Said Baltimore Orioles General Manager Hank Peters: "There seems to be no rhyme or reason to the awards, and they then become precedent-setting awards which affect every club in baseball. People with no real understanding of the game are making decisions that affect it profoundly."[37] This criticism is below the belt since it is the parties to the process who have opted for no written opinion—that is, "no rhyme or reason." It would be ironic if the next negotiations led to a strike over the final-offer arbitration article.

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[34]Dworkin, *supra* note 38 at 165.
[35]Arbitration Times, American Arbitration Association (Spring 1983), 2.
[36]*Baseball's Arbitration Under Attack,* USA Today, May 18, 1983, C-1.
[37]*Id.* at C-2.

Conclusion

A number of conclusions can be drawn from these experiences:

1. In the face of a lengthy strike, particularly in an industry dependent on public monies and support, such as transit, the parties themselves are likely to opt for interest arbitration to resolve impasses. Such was the case with Metro-North.

2. In the face of a lengthy strike, absent the parties voluntarily agreeing to interest arbitration, the legislature itself is likely to impose interest arbitration to avoid future inconvenience as well as threats to health and safety. This is the New York City transit experience.

3. If getting the parties to bargain is the objective, final-offer arbitration is preferable for it results in fewer cases going the full route to an arbitration award, or so Massachusetts and other states have demonstrated. It was Carl Stevens, the father of final-offer arbitration, who suggested that compulsory arbitration is akin to the strike in that it is ". . . a technique for imposing a cost of disagreement . . . to invoke the processes of concession and compromise which are an essential part of collective bargaining negotiations."[38]

4. None of these processes has produced the chilling or the narcotic effect threatened by many.

5. In difficult economic times, people are less willing to give an outsider carte blanche to dictate the terms of a collective bargaining agreement, and in turn, how much they have to open their pocketbooks. They are more likely to circumscribe the arbitrator's authority or eliminate interest arbitration as an alternative. Such is the lesson from Massachusetts.

6. If the process of interest arbitration is to be viable, it must continue to be acceptable. It must be acceptable to those directly involved. This means that the arbitrator needs to persuade the parties of the reasonableness of the result. Acceptability is built into the process of tripartite arbitration, which presumes there will be some mediation to reach an award, so it represents a majority view.

Where arbitration is by a single neutral, the parties are more

[38]Stevens, *supra* note 9 at 40.

apt to be skeptical of the end result and to assail the arbitrator as an "outsider," who knows little about the matter and whose award seemingly has "no rhyme or reason." This was the charge by some about baseball awards. Perhaps the process was open to this criticism because there are no written opinions to set forth the rationale of the award. One must ask if the absence of stated reasons will lead to lack of acceptance of the process by the parties.

It is noteworthy that arbitration awards under the MBTA/ATU procedure have also been bare-boned, usually without reasons, discussion, or opinion. At the 34th Annual Meeting, I. J. Gromfine, who has represented the ATU in many transit arbitrations, including Boston, said:

> "Interest arbitration in the transit industry has survived for almost a century because, while there have been occasional catastrophies for one side or the other, over the long run it has produced results, fashioned in the give and take of tripartite executive sessions, which have achieved a reasonable measure of *acceptability* by both parties."[39]

7. This is not enough, as it also has to be acceptable to the governmental body with appropriate legislative authority, lest the process agreeable to the parties be overridden by the legislature. This is what happened to the MBTA and the ATU when the legislature passed two statutes directly in conflict with the negotiated provisions of the contract. This leads to my final conclusion:

8. If the process of interest arbitration is to endure, the arbitrator needs to persuade not only the parties directly involved of the reasonableness of his or her award to enhance its acceptability to them in that particular dispute, but also to convince them and larger constituencies of the legitimacy of the interest arbitration process itself so as to ensure its continued acceptability in the future. To paraphrase Walter Reuther, the power of persuasion may be as potent or more so than the persuasion of power.

The paradox is that what is beneficial to the parties as an acceptable solution may not be so for outside parties and their

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[39]Gromfine, *Tripartite Interest and Grievance Arbitration: Comment,* Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 288 at 293.

constituencies—that is, the governor, the legislature, and so on. And this is the dilemma for the interest arbitrator, who must legislate the terms of the contract in a political environment.

III. AN EMPLOYER VIEW

ROBERT M. VERCRUYSSE*

In Colorado Springs almost 15 years ago, my senior partner, Bill Saxton, was asked to present the employer's view on fact-finding after Jerry Wurf of AFSCME presented the union view.[1] Today in Quebec, in 1983, we have 15 years' additional experience to address the question of the promise and performance of interest arbitration. Vic Gotbaum of AFSCME presents the union's view. I will present the employer's perspective on behalf of myself and our firm. And who among you would dare say that history never repeats itself? Bill Saxton is alive, busy as ever, and has asked me to convey his greetings.

Labor arbitration falls into two separate and distinct categories, (1) "rights" arbitration and (2) "interest" arbitration. "Rights" or grievance arbitration typically involves a dispute during the term of a collective bargaining agreement as to whether the agreement has been violated. For the arbitrators involved in arbitration of the question of "rights," there is usually a grievance and an arbitration procedure which spells out his or her obligation as the arbiter of the agreement. In addition, there are also specific clauses of the collective bargaining agreement that define the rights with respect to wages, vacations, benefits, and working conditions which the parties themselves have negotiated. Moreover, as all arbitrators are aware, there is the admonition that the arbitrator is the interpreter of the parties' agreement and is not empowered to add to, delete from, or modify the express terms of the collective bargaining agreement. The arbitrator acts as judge to see if the parties' conduct has violated the agreement.

"Interest" arbitration is the antithesis of "rights" arbitration. When an arbitrator serves the parties as an interest arbitrator,

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[1]Saxton, *The Employer View,* in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 127–33.