If I disagree, and you do not comply with the request thereafter, negative conclusions may be drawn from your refusal, or I may reject the submission of any evidence by you relating to the matter involved in the request as appropriate.

II. RIGHTS ARBITRATION AND TECHNOLOGICAL CHANGE

OSCAR A. ORNATI*

This essay represents an inquiry into the impact of contractual restraints, precedents, and arbitrators' values as moderators of the impact of technological change.

I am reporting on a survey of arbitration decisions, published mainly between 1980 and 1984, that deal with contractual disputes consequent to the introduction of technological changes.

The context within which I started my inquiries included the following:

1. The broad national concern with the decline in our comparative advantage—in the "smokestack" sector—frequently negatively associated with unionism.
2. The recent technical literature's preliminary consensus that productivity is higher in the presence of unionism than in its absence.[1]
3. The recent flowering of studies aimed at the development of a general theory of arbitrators' behavior. These studies are mostly the work of economic theorists,[2] whose theorizing about arbitrators' behavior is, so far, limited to interest arbitration.

One of my concerns in choosing this topic was to attempt to extend the model of arbitrator behavior to disputes over "rights."[3] Such econometric studies of interest disputes are consistent with the notion that arbitrators' decisions tend to approach an "appropriate award" with the "appropriate award"

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*Member, National Academy of Arbitrators; Professor of Manpower Management, Graduate School of Business, New York University, New York, N.Y.

[1]Freeman and Medoff, What Do Unions Do? (New York: Basic Books, 1984), 163.

[2]Ashenfelter and Bloom, *Models of Arbitrator Behavior: Theory and Evidence*, 74 Am. Econ. Rev. 111–124 (1984); Farber, *Splitting-the-Difference in Interest Arbitration*, 35 Indus. & Lab. Rel. Rev. 70–77 (1981); Farber and Katz, *Interest Arbitration, Outcomes, and the Incentive to Bargain*, 33 Indus. & Lab. Rel. Rev. 55–63 (1979); Kochan and Baderschneider, *Determinants of Reliance on Impasse Procedures: Police and Firefighters in New York State*, 31 Indus. & Lab. Rel. Rev. 431–440 (1978).

[3]Disputes over "interests" in which arbitrators become involved are those in which the parties are at an impasse over what should be in a collective bargaining agreement, disputes over "rights" are concerned with the interpretation of existing contracts.

being "a function of the unbiased examination of the facts of a given situation, independently of the offers of the parties, of the values of arbitrators or other intervening variables."[4]

I approached my survey with the following presumptions—it would be inappropriate to call these "hypotheses" as my presumptions are, at best embedded in a *gestalt* rather than in a particular theory of arbitral behavior:

1. I had presumed that, guided as arbitrators' rights decisions are by the constraint of the "four corners of the contract," I would find, primarily, decisions reinforcing the *status quo* and had presumed that these decisions would tend to mitigate the negative employment impact of the negotiated or contractually permitted, newly introduced technological change.

2. I had also presumed that the pattern of decisions on the impact of technological change of the 1980s would be observably different from that of the earlier two decades. I expected this to be the case on two subsidiary presumptions:

   a) The contractual language of clauses dealing with the impact of technological change had, through the 1970s, become more specific and narrower;

   b) The intensity of the economic crises of the years 1973 to 1979 had shaken out unionized marginal firms and thereby placed out-of-reach of rights arbitration most situations in which economic conditions and technological change had already run their course in their broad impact on employment.

It is thus appropriate, prior to reporting on and discussing the cases studied, to summarize Elkouri and Elkouri on arbitration decisions involving technological changes as of 1973, and to establish what changes in contractual clauses dealing with layoffs pursuant to technolgical changes have been taking place in more recent years.

The Pattern of Arbitration Decisions up to 1973

It is significant that Elkouri and Elkouri[5] deal with technological change under the management rights rubric. The

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[4]Farber and Bozeman, *The General Basis of Arbitrator Behavior.* NBER Working Paper No. 1488 (Nov. 1984), 3, 4.

[5]Elkouri & Elkouri, How Arbitration Works, 3rd ed. (Washington: BNA Books, 1973).

topic is, in turn, subdivided into five major headings: (1) wage adjustments following changes in operating methods, (2) job and classification control, (3) determination of the size of crews, (4) the right to subcontract and, (5) assigning work out of the bargaining unit.

On wage adjustments, besides noting that management generally has the right to set operating methods, the Elkouris described the employer as "closely restricted in the determination of wage rates for new or changed processes."[6] They note further that wage rate changes should flow only from "*material* increases in the workload."[7] On job and classification control, much weight is given to the general latitude arbitrators give to management in establishing new job classifications and to the modification thereof that flows from the language typical of management rights' clauses. In addition, the Elkouris note that arbitrators tend to give management the right to abolish, merge, and establish classifications. Of major importance is management's freedom as to interjob and interclassification transfers of duties. On this matter Arbitrator Updegraff is cited approvingly as follows:

> There can be no doubt that normally in industry generally, the assignment and reassignment of unskilled and semi-skilled duties such as those here involved would be entirely and exclusively within the discretion of management in the absence of a clear, express agreement otherwise.[8]

The Elkouris note also that:

> In general, management is permitted to exercise much more discretion in assigning individual duties and tasks to workers than it is permitted in assigning workers to regular jobs.[9]

Arbitrator Holly's explanation for permitting interclassification of duties in spite of the presence of contractually detailed job classifications is cited as part of the argument:

> [The] purpose of job evaluation and job descriptions is to provide for equitable wage rates, not to provide a control over job content.[10]

As to size and composition of crews, the Elkouris report arbitrators in general agreement as to managements' right to

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[6]*Id.* at 438.
[7]*Id.* at 440.
[8]*Pure Oil Co.*, 45 LA 558 (1965), quoted in Elkouri & Elkouri, *supra* note 5 at 456.
[9]Elkouri & Elkouri, *supra* note at 458.
[10]*U.S. Steel Corp.*, 26 LA 325 (1956), quoted in Elkouri & Elkouri, *supra* note 5 at 462.

make changes where "substantial changes in technology or manufacturing processes have been made."[11] Thus, provided that the changes in working conditions required to implement the new equipment are major, management is given the right to alter conditions established by the contract.

The Elkouris' 1973 fix on management rights to subcontract and to assign work out-of-the-bargaining unit is much more complex. Indeed, while in arbitration awards through the early 1960s it was generally held that unless the agreement specifically restricted it, management had the right to subcontract, later cases significantly narrowed management's scope. In the view that dominated the 1960s, the appropriateness of subcontracting is tested against the *totality* of the contract, and subcontracting is permitted only if certain standards of reasonableness are met. In particular, as expressed in a McDermott 1969 decision:

> [M]anagement has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contractual language.[12]

In the face of broad management rights clauses, management's right to assign work out of the bargaining unit is permitted *only* when the following circumstances are found to exist:

1. The quantity of work or effect on the bargaining unit is *de minimis*.
2. The work is supervisory or managerial in nature.
3. The work assignment is temporary.
4. The work is not covered by the contract or has not been previously performed exclusively by bargaining unit employees.
5. The work is experimental.
6. An emergency is involved.

Such stringent limitation of the management rights clause is clearly based on the weight to be given to job security which is what the collective bargaining agreement is all about. Indeed Saul Wallen had, already in 1949, presented the underlying view as follows:

> Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job

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[11]Elkouri & Elkouri, *supra* note 5 at 473.

[12]*Shenango Valley Water Co.*, 53 LA 744 (1969), quoted in Elkouri & Elkouri, *supra* note 5 at 503.

security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies.

The transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.[13]

1980–1984 Contractual Changes in Job Security Clauses

The collective bargaining rounds from 1978 to date can be broadly described as periods of union concession on wages and working conditions as trade-offs for job security to the remaining employees. "Conventional wisdom" has it that the contents of collective bargaining contracts grow like coral reefs, layer by layer, with the characteristic of a new layer determined by the previous contract's contours and by the environmental conditions that surrounded it. This led us to inquire into the degree to which contractual language dealing with job security had recently become more specific and narrower.

The detailed tracing of contractual clauses dealing with technological change is a particularly complex task in the midst of structural changes in the economy. The task is even more complicated in the absence of good data. The only available data base is to be found in a series of publications, *Comparative Survey of Major Collective Bargaining Agreements* issued every two years since 1972 by the Industrial Union Department, AFL-CIO.[14] Each of these surveys summarizes, by type of contract clause and benefit, the contents of 100 collective bargaining agreements. Thus, a basis for long term comparisons exists even though, over the years, the agreements that are summarized change.

To trace the outcome of negotiations in matters of job security the *Comparative Surveys of Major Collective Bargaining Agreements* of 1980, 1982, and 1984 were analyzed.[15] Clearly, by 1980 such contractual change provided only a kind of "future protection." The impact of the new clauses is limited to future layoffs traceable to "technological changes," regardless of whether the tech-

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[13]*New Britain Mach. Co.*, 8 LA 720, 722.

[14]Prosten, Comparative Survey of Major Collective Bargaining Agreements: Manufacturing and Non-Manufacturing. Industrial Union Department, AFL-CIO, Washington, D.C. Nov. 1984 and 1974, 1976, 1978, 1980, and 1982.

[15]*See also* for a similar discussion Ornati, "The Wage/Job Security/Benefits Tradeoff: Collective Bargaining Considerations 1984–85" in The Employee Benefit Handbook—1985 Update, Warren, Gorham & Lamont (1985).

nological change is introduced to stave off a reduction in business or to improve the future of the business. The data are silent as to those who have lost their job in the past.

To the extent that these data describe patterns, they help understand how widespread a practice is in terms of the number of companies with clauses protecting employee job security and in terms of the frequency of increases or decreases of particular forms of job security. The resulting Table describes changes in contractual guarantees available to union employees as a consequence of major technological change in their company.

The table suggests that at least some union employees have gained job security in the language of contracts as negotiated over the last four years. The requirement of advanced notification to the union appears more frequently (+7), there is an increase in the number of contracts with an outright prohibition of layoffs(+3). Along with expanded employment protection there is a diminution in preferential rehiring by seniority (−5) and an increase in the number of companies with no specific job security clause (+4). The major development is in the expansion of workers' rights to have training for new jobs (an increase over 1980 of 10 covered companies) coupled with a major rise in severance pay (+8). The changes traced in Table 1 seem to indicate a trend in which unions and managements have expanded the job security of workers presumed capable of acquiring new skills and knowledge, while older workers presumed not as able to adapt to the new technologies are being "phased out" with various types of severance pay.

Survey Report

A careful cull of the texts of BNA and CCH arbitation reports from 1976 to date yielded 29 cases dealing with grievances clearly arising from manning changes pursuant to the introduction of new technology. I do not claim that the survey that I conducted is representative of the universe of rights-decisions in the cases of technological change. Indeed, the membership of the National Academy is fully aware that published decisions are, at best, a small part of the total. In a *pro domo* argument all that is claimed is data availability and the argument that published awards cannot significantly differ from those not published.[16]

[16]Prof. Martin Wagner has called my attention to the probability that significant and possibly different decisions on technological change have been issued by arbitrators with a long history as permanent umpires in mature collective bargaining relationships.

Table of Contractual Arrangements Dealing With Job Security

Changes in clauses in the number of companies reporting job security provisions

	1980	1984	1984 1980
1. No Special Provisions, Seniority Rules Apply	4	0	−4
2. Special Provisions in Local Agreement	2	1	−1
3. Contract Provides Advance Notice to Union	24	31	+7
4. Contract Sets Up Special Co./Union Committee	7	9	+2
5. Contract Provides for Negotiation of Rights	7	9	+1
6. Attrition Clause for Greater Job Security	2	3	+1
7. Contract Prohibits Layoff	6	9	+3
Workers Have Right To:			
a. Training for new job	11	21	+10
b. Bumps into another job/same plant	8	8	0
c. Transfer to replacement facility	5	5	0
d. Preferential hiring, same plant	9	8	−1
e. Preferential hiring, other plant	8	6	−2
f. Retain prior seniority when hired at other plant	5	3	−2
8. Layoff W/Recall Rights	10	11	+1
9. Severance Pay	14	22	−2
10. Moving Expenses	7	5	−2

Source: Prosten, *Comparative Survey of Major Collective Bargaining Agreements.* I.U.D./AFL-CIO, Washington, D.C. The 1980, 1982, 1984 issues.

Fifteen cases covering 1980 to 1984 were surveyed in detail.[17] Management was sustained in fourteen of the sixteen cases; the union's grievance was upheld entirely only in two and in part in two others. In several awards several sub-issues were remanded to the parties for further negotiation. Thus, first, the tally: 88 percent in favor of management.

Four types of issues dominated the surveyed cases. Out-of-bargaining unit was cited the most, in seven cases; job elimination in four cases; a change in wages in three; and job classification change in two. I found no case dealing with crew-size or group layoff.

We note second, that all 1980-84 cases follow well established criteria as to the centrality of the contract viewed in its totality, the importance of the wording of the management rights clause, the parties' duty to negotiate and the binding nature of precedent. In fact, there are suggestions in the texts of the cases studied that even though most cases were resolved in favor of management, arbitrators believed that the economic and social conditions of the last five years required attention to both the letter and the spirit of the agreement as more, rather than less, cooperation between labor and management was needed. Gray, in an article in the *Arbitration Journal,* well expressed this idea:

> In the past, as well as the present, the major impetus to labor-management cooperation has been the perception of a common enemy. During the two World Wars, the enemies were foreign powers and cooperation was spurred by patriotism. The current period also features foreign powers as the enemies but the battleground has shifted to international trade.[18]

As to the fundamental issue underlying disputes on the impact of technological change—the contrasting economic interests of management and labor—arbitrators, at least indirectly, have first asked about the parties' attempts to negotiate and then have asked "Is there an economic justification to the employer's decision?" If the facts presented by management at the hearing suggest an affirmative answer to both questions, the awards broadly support consequent management actions.

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[17]The cases in question were: *Minnesota Gas Co. Energy Center,* 84–1 ARB ¶8118; *Pennsylvania House,* 84–1 ARB 8177; *Pacific Motor Trucking Co.* 75 LA 941 (1980); *Bethlehem Steel Corp.* 77 LA 372 (1981); *Glenmore Distilleries,* 80 LA 1043 (1983); *Williams Pipeline Co.,* 80 LA 338 (1983); *Peoria Water Co.,* 80 LA 478 (1983); *Dravo Corp.,* 79 LA 427 (1982); *Holly Farms Poultry Indus.,* 83–1 ARB 8006; *Interstate Brands Corp.,* 84–1 ARB 8084; *Tennessee Am. Water,* 77–2 ARB 8477; *Special Metals Corp.,* 78–2 ARB 8549; *Allegheny Ludlum Steel Corp.,* 80 LA 937 (1983); *National Steel Corp.,* 77 LA 1042 (1981); *Dravo Corp.,* 75 LA 1042 (1980).

[18]Gray, *Labor-Management Cooperation,* 38 ARB J. 17 (June, 1983).

Precedent is given much *explicit* weight. Indeed, our survey suggests that citation of several cases supporting the arbitrators' decisions is much more the norm in disputes dealing with the consequences of technological change than in other types of contractual interpretations. The explicit following of precedent is most notable in decisions that hold "that the enumeration of classifications and wage rates in the contract does not implicitly limit management's jurisdiction. . ."[19] and in decisions that "permit management to eliminate jobs and/or transfer all or part of duties of a position where technological developments are produced to perform the work of the employee."[20]

We found many awards granting management freedom in job reclassification, wage changes, and job assignments pursuant to different types of technological change. In these precedent was traced back to the same four or five seminal decisions such as Feinberg's *National Sugar Refining Co.* of 1949. Later, in *Omaha Cold Storage Co.,* James Doyle followed Feinberg and argued that where the production function was changed:

> [I]n the absence of an express limitation in the contract, management may change job content of a negotiated classification, or transfer some or all of the duties of one classification to those of another classified occupation *provided* it does not act arbitrarily or for the purposes of discrimination.[21] (Emphasis added.)

Assignment of Work Out of the Bargaining Unit

The most complicated and challenging of all surveyed cases are those dealing with technological innovations that lead to work assignment in either different or out of the bargaining units. It is in these situations that the arbitrator is brought face-to-face with the central characteristics of the newer technologies; still a substitution of capital for labor, the machine now is a substitute for brain rather than brawn. We see here the compressing of quality control functions (as in the *Drano Co.* Case,[22] where all timekeepers were displaced, or in the *Eaton Corporation* Case,[23] where the quality control function was removed from the jurisdiction of layout craftsmen) or the enlargement of the

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[19]*Freeport Kaolin Co.,* 72 LA 738, 741 (Vodakin, 1979).
[20]*Peoria Water Co.,* 80 LA 478, 482 (FitzSimmons, 1983).
[21]48 LA 24, 27 (1967).
[22]79 LA 427 (Sherman, Jr., 1982).
[23]61 LA 410 (Ellman, 1973).

information requirements for the control of subsidiary activities (as in the case of the *Bon Secours Hospital, Inc.*,[24] where the coding process of what was earlier an essentially clerical process was enlarged, requiring the operator to have knowledge of biology, physiology, and medical terminology).

In these cases we frequently run into an overlap of managerial and technical functions with those of operatives involved in highly specialized crafts, maintenance, and quality control. Further complicating matters, the new processes often involve the use of confidential business or financial data that become known to employees. Such situations provide employers with claims of a statutory—extra contractual—right for assigning work outside the bargaining unit.

In cases dealing with out-of-bargaining-unit work assignments, the reviewed awards are more varied and the rationale of the arbitrator is more complicated and detailed. While the grievances were invariably denied, in every denial the arbitrator made it a point to circumscribe the management rights clause. Thus, in situations involving automation or technological change, *absent language specifically constraining it*, management is generally given the right to assign bargaining unit work to employees outside the unit (usually more skilled and salaried personnel). Management does *not* win, however, when transferred work is very similar in nature to that done before and if the work does not involve changes in procedure, level of training required, and so on.[25]

A very important variation on the standard acceptability of transferring work out of the bargaining unit and thus eliminating a position is the recognition that the duties of the eliminated person cannot be replaced overnight. In certain instances, for example, in the installation of a computer system, the length of time required before operations are as smooth as they were when the grievant performed them often exceeds a year. Arbitrator Leach in the *Ohio Brass Co.* case determined that the company should not have terminated an employee as soon as automation occurred because a major part of his functions were

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[24]73 LA 751 (Matthews, 1979).

[25]While *Freeport Kaolin Co.*, 72 LA 738 (Arb: J. Vadakin) is the immediate source of the arbitrational tendency described above, *Williams Pipeline Co.*, 80 LA 338 (Arb: R. Ross) and *Special Metals Corp.*, 78–2 ARB: (8549) (Arb: D. Williams) have been handled in a remarkably similar manner. It should not go unnoticed, however, that although somewhat outdated, Arbitrator James Doyle's similar decision in *Omaha Cold Storage*, 48 LA 24, appears to be the authoritative precedent in cases of this nature.

still needed (and, indeed, parceled out to others in the interim before the computer began to "pay off") for some time afterward. Thus, it is very important for company and union to establish exactly how much of a job is still left after automation and when most of this residual will effectively diminish.[26]

The fact that new equipment or automation does the work of a bargaining unit member more efficiently, is a more sophisticated machine, and requires some training to use *does not mean management can unilaterally assign the bargaining unit member's work to a salaried employee* if the cost of training the bargaining employee (if necessary) to operate the equipment is not too formidable. If the work performed by operator of the new machine is similar to that done previously, it must be returned to the bargaining unit.[27]

> The fact that the machine is used in part to perform strictly managerial [nonbargaining unit] functions does not license the Company to disregard the Union's legitimate claim to preserve that part of its work jurisdiction which has been taken away without so much as prior consultation.[28]

What Have We Learned From This Survey?

In spite of the more drastic changes in production methods reported in the 1980–1984 cases, we find that arbitrators are almost entirely guided by the principles that the Elkouris summarized as the dominant practice and view existing prior to 1973.

We note only two suggestive, if not significant, differences: (1) a greater awareness of time as a variable traceable in the actual introduction of technological change; and (2) an arbitral expansion in the right to employer-paid training as a job right.

Arbitrators are now more aware that the introduction of new equipment does not have immediate impact on employment level and working conditions. Inasmuch as the process is gradual, arbitrators tend to order training to protect grievants' employment in interim periods. In several cases arbitrators, while reaffirming management rights to change assignments,

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[26]68 LA 492 (1977).
[27]*Leavenworth Times*, 71 LA 396 (Bothwell, 1978).
[28]*Eaton Corp.*, 61 LA 410, 414 (Ellmann, 1973).

upheld grievants' training claims "if the cost of training . . . is not too formidable." Even here the cases that I reviewed appear to follow a way of reasoning first suggested earlier in *Ohio Brass Co.* by Strasshofer who argued that in the installation of a monitor and computer system it was perfectly legitimate to transfer this work *on a temporary basis* as part of the logistics of training unit employees to operate the yet unsettled, nonroutine operator tasks.[29] In this case, after a period of 90 days of retraining the company was ordered to replace grieving employees to their previous positions as the work was basically still of the same nature.

Aware that the spread of new operations is a gradual phenomenon, in space as well as in time, arbitrators have, in a number of cases, supported management's right to reclassify some employees while denying that right to others according to the employee's precise position in the changing production chain. Thus, in the *East Ohio Gas Co.* case, the arbitrator noted that the position of one employee who experiences job reclassification as a result of automation does not necessarily imply that all workers in that same position and classification face reclassification. If they are not as directly affected by the new equipment, their jobs, titles, functions, and wage rates need not change.[30]

In all these cases, when each case is read in its totality—that is when the reviewer reads the facts of the case and the contentions of the parties as well as the arbitrator's decision—one palpably feels the efforts involved in balancing the interests of the employer and the employee in line with the contract, precedent, and intent of the parties. In addition, in reading the words arbitrators choose, one has a clear feeling of concern for the broader social turmoil and for carefully weighting the larger societal consequences of technological change.

Contributions to a General Theory of Arbitral Behavior

What have we learned about arbitral behavior? Ben Fischer, in the 1961 Proceedings of the National Academy,[31] first raised

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[29]62 LA 913 (Strasshoffer, 1974).
[30]67 LA 698 (Letson, 1976).
[31]Fischer, *Discussion* in Arbitration and Public Policy, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books, 1961), 160–167.

the question of why two parties would agree to abide by a third party's decision, when between them they possess both the information and the legal right to make their own decisions. Harry Shulman[32] and Theodore St. Antoine,[33] among arbitrators, and Oliver Williamson,[34] among academics, have called our attention to the inability of the parties to write fully contingent contracts. From that it follows that the parties' benefit is in retaining capable outsiders to prescribe an appropriate sharing of costs and rents originating in the unpredicted changes in the environment.

Recent econometric studies have demonstrated that arbitrators contribute to the reaching of a pseudo-market equilibrium in the allocation of costs and benefits not considered in the original contracting processes. We find that this doctrinal explanation, usually applied only to arbitration over interests, is also applicable to rights arbitration over grievances stemming from the introduction of new techniques where management has contractually retained the right to do so.

The agreement to introduce new equipment is itself contingent. Indeed, were the employer not to implement the agreement, he is not liable to do so. The timing and precise consequences are never completely specifiable even where the union is most cooperative. Agreements involving new technologies are, at best, agreements to agree within broad sets of predictable outcomes or to be bound by third-party decisions. When new and unexpected conditions trigger grievances, the arbitrator's role is the same as that of the arbitrator dealing with entirely new issues. The only difference is the presence of a contract that typically does not specify the new "states of nature" even though the parties' opportunism leads them to claim that the events are exactly what was specified and that the contract has all the answers.

Thus, arbitration of disputes on the impact of technological change differs from the majority of contractual disputes in which the case turns on issues of fact: who did what? It is this part of the arbitral practice that led Russell Smith in "the search for

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[32]Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).
[33]St. Antoine, *Judicial Review of Labor Arbitration Awards*, 75 Mich. L. Rev. 1137 (1977).
[34]Williamson, et al., *Understanding the Employment Relation*, Vol. 6, No. 1 Bell J. Econ. 250 (Spring, 1975).

truth: the whole truth" to refer to arbitrators as lie detectors.[35] In the cases I reviewed, finding the facts was rarely central and matters of credibility did not arise. These cases involved the search for the appropriate award with an implied attempt to minimize the costs for both labor and management.

How does strict adherence to precedent and the "search for the appropriate award" square with 88 percent of the cases going to management? Clearly the movement toward some type of equilibrium does *not* imply a tendency for union and management to split the outcome of the awards! What needs explaining is the large number of cases going to management when precedent narrows management freedom.

The text of the cases suggests a modifier of arbitrator behavior that points to a societal variable: the country's faith in the benevolent aspects of the new technologies. I was struck by the general tendency of arbitrators to include in their rationale the view that, because of competition, management had almost no choice about the introduction of new equipment. Our society is described as driven by technological progress with the future well-being of management and of their employees entirely dependent on it.

Summary

The time has come for me to pull together this somewhat meandering paper and assess what has been learned by a careful scrutinizing of a limited but indicative number of cases dealing with grievances stemming from technological change.

These cases suggest:

1. While the cases surveyed clearly point to more basic and, so to speak, discontinual, changes in operating processes in the 1980s, the principles that guide arbitrators have *not* changed.

2. While arbitrators are clearly aware of environmental changes and their impact on our industries, these have not visibly influenced arbitrators' decisions. The data deny my hunch that arbitrators in their case-by-case examination of the

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[35]Smith, *The Search for Truth: The Whole Truth,* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1979), 40–60. *See also* for a more detailed econometric formulation card, *Arbitrators as Lie Detectors,* Princeton Working Paper No. 172 (Dec. 1983).

interaction of facts and contractual texts would have softened the employment impact of the new technologies. "It all depends on the circumstances" and "the contract is what we are guided by" are still at the core of what we do, and precedent is what we follow—with care.

3. While surveys of available contracts show that new clauses increasing job security are being introduced, these do not appear to have limited management's freedom to implement new techniques.

4. The cases reviewed suggest that in the 1980s we will see an expansion of arbitral jurisprudence as to employee training rights.

5. When confronted with managerial clauses that are imprecise, and when the totality of the contract does not explicitly deny it, management is viewed as fundamentally free to assign work and pay as business need seems to require it. Indeed, recent arbitrators *obiter dicta,* like in those of the past, show a broad internalization of the importance of technological change and of its related constructive/destructive influence.

From the vantage point of a reasonably deep immersion in cases dealing with what is undoubtedly a major area of contemporary social conflicts this relatively new member of the Academy can only conclude that much, if not all, is well. We are doing what we are hired to do and we do it with care.

There is only one small demurrer: Why is it that arbitrators never seem to probe employer judgments about their own business need; why is it that we seem to take for granted that the employer needs to do that which the employer does; is it true that employers are always guided in their actions by competitive pressures and that their decisions are for the good of their own institutions?

I am conscious that in the very raising of these questions, I am pushing way beyond "the four corners of the contract" and as an arbitrator, meddling in what is not my business. I do so because in other areas of grievance arbitration we have learned not to take the expertise of other professionals for granted. In these proceedings, for instance, much has been said in the past about the reliability of medical evidence. Is it unfair to view employer statements about their decisions as to the rationale for introducing employment-displacing technologies as expert statements?

If so, do not such statements deserve careful examination and at least counter argument?

The issue is a large and murky one. I raise it only as an envoy in the hope that the subject might be picked up in the future in this or in some other forum.

III. MY USE OF THE FINAL-OFFER PRINCIPLE

DALLAS M YOUNG*

Preface

The March, 1985 issue of *The Chronicle* (Journal of The National Academy of Arbitrators) stated in its masthead: "No reproduction of any of the comments of this newspaper is authorized without the express written consent of the Editor. . . ." Having strictly complied with that admonition—whatever my thoughts may have been about such a requirement—I quote from a paragraph in the "Milestones" column: "Young is hard at work on a book on the use of 'Final-Offer Principle in Non-Wage Disputes' and would welcome the submission of cases in the area."

With apologies to the Author and/or the Editor, may I offer an important correction. At best, my practice and research on the topic for today have been done with the hope that some of the ideas would be shared with the best arbitration practitioners and scholars in the world—namely with the members of The National Academy of Arbitrators. To be sure, there may be a place for a book about the theory and practice of the final-offer principle, but someone else will have to do it. My schedule is far too busy with other projects.

Having shared some of my findings and thoughts with members of the NAA's Ohio Region in February, 1979, I am now privileged and honored with the opportunity to present this updated report to you as one of the papers in the Academy's first volunteered-papers-for-members-only program.

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*Member, National Academy of Arbitrators; Professor Emeritus of Labor Relations, Case Western Reserve University, Cleveland, Ohio.