APPENDIX B

REPORTS OF THE RESEARCH COMMITTEE*

I. ACADEMY MEMBERS' EXPERIENCE WITH TRIPARTITE ARBITRATION IN THE EARLY 1980S

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Undoubtedly the overwhelming number of labor arbitration disputes are decided by a single arbitrator. There is, however, an alternative form of decision making in which a tripartite board hears a dispute and renders an award. In addition to the neutral arbitrator, an employer-appointed arbitrator and a union-appointed arbitrator constitute the adjudicating tribunal.

Few arbitrators are enthusiastic about the tripartite mechanism. Writing about thirty years ago, Arbitrator Davey concluded:[1] "I feel reasonably certain that in time the tripartite board will become completely vestigial as far as grievance arbitration is concerned." Participants in sessions at the Academy's 1967 and 1981 meetings were not enthusiastic about the tripartite system.[2]

Nevertheless, tripartitism continues. As part of its continuous research effort, the Academy authorized a survey of its members to ascertain the extent and pattern of tripartitism. A three-page questionnaire was developed and mailed to the membership of over 600 in mid-1983. Over two hundred usable replies were received, about one third of the Academy's membership. Two of

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[1]Davey, *Labor Arbitration: A Critical Appraisal*, 9 Indus. & Lab. Rel. Rev., 87 (Oct. 1955).

[2]*Uses and Misuses of Tripartite Boards in Grievance Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 152–179; *Tripartite Interest and Grievance Arbitration*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, ed. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1982), 273–302.

the three pages focused on grievance arbitration; the remaining page included questions regarding interest arbitration and limited demographic information about the respondent.[3]

The responses represent only one participant's view of the process. The perceptions of the other arbitrators, the advocates, the parties themselves, and the specific grievants have not been obtained. Surely there would be some differences between the neutral arbitrator's view and those of other participants.[4] Studies of the perceptions of these participants may result in different judgments regarding the process.

Tripartite disputes constitute a small proportion of the typical Academy member's caseload. Each member was asked to indicate "in approximately what percentage of the cases you have decided in the past three years were tripartite panels involved?" For grievance disputes, the responses were as follows:

Percentage of Workload	*Number*	*Percentage of Arbitrators*
Total	207	100%
None	35	17%
to 5%	62	30%
5% to 10%	55	27%
10% and over	54	26%

Only 15 members reported that their tripartite cases exceeded a quarter of their workload.

As had been anticipated, Academy members had far less experience with interest tripartite arbitration. Only 74 of the 206 respondents reported handling an interest dispute during the past three years. Fifty arbitrators reported from one to five disputes; 12 reported six to nine; and 12 reported over ten. Clearly, relatively few arbitrators handle tripartite interest disputes, and very few adjudicated more than a handful of such disputes each year.

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[3]A copy of the questionnaire can be obtained from the author at the Department of Economics, University of Kentucky, Lexington, Ky. 40506.

[4]The classic study of the practitioners' views was Jones and Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process*, 62 *Mich. L. Rev.*, 1115–1156 (1964). A more recent study was completed by Davey, *What's Right and Wrong with Grievance Arbitration*, 28 *Arb J.* 209–231 (Dec. 1972). An effort to quantify arbitrator, management, and union attitudes is available in Shore, *Conceptions of the Arbitrator's Role*, 50 J. App. Psy. 172–178 (1966).

Tripartitism in Grievance Disputes

Use of Tripartite Panels

Academy members are the nation's most experienced arbitrators; it would seem logical to assume that the parties are likely to select them to decide disputes. Nevertheless, about one out of five Academy members had no experience with tripartitism during the three years under review. Non-Academy members probably would have had less experience than Academy members with tripartitism. Thus, it seems obvious that relatively few grievance disputes are settled by tripartite panels.

As has been indicated, the responses of arbitrators were grouped by their experience with tripartitism. It was assumed that arbitrators with considerable tripartite experience would differ somewhat from those with little experience. There is some evidence to support this view. Arbitrators with more tripartite experience tended to have more arbitration experience. The mean years of Academy membership by caseload was as follows:

Percentage of Caseload	*Academy Membership (Mean Years)*
0 to 5%	9.1
5 to 10%	11.4
10% and over	14.7

All three groupings reported that the vast majority of their tripartite cases were ad hoc. Some arbitrators reported a significant proportion of their caseload (25 percent or more) from permanent umpireships. These cases were typically reported in the following industries: airlines, public sector, utilities, buses, and railroads.

Arbitrators who reported less than 5 percent of their caseload in tripartite situations typically handled from two to five cases during the three-year period, about one a year. A few handled as many as 10 to 15 disputes. In sharp contrast, arbitrators whose tripartite cases exceeded 10 percent of their workload typically handled over 20 cases during the period—over seven a year. A few reported over 100 cases, about three every month.

The respondents reported considerable use of "waivers" by the parties of a panel in favor of a single arbitrator. About three

fourths of the arbitrators indicated that they were chosen as the single neutral at least once during the past three years despite the fact that the contract called for a panel. The remaining one fourth reported either that they did not know if the parties had waived a panel or had no experience with waivers. Arbitrators who reported waivers typically indicated knowledge of from "one to five" such cases during the three-year period. Thirty-one arbitrators, however, reported knowledge of ten or more waivers.

By waiving panels, the parties reduced considerably the number of tripartite cases. If the parties had not waived panels, the number of tripartite cases would have increased by about one fourth. Clearly, the parties have chosen to disregard their contracts. If they do so consistently, they should of course consider changing the contract to reflect their preference for a single arbitrator.

Over half of the arbitrators reported little change in the prevalence of tripartite arbitration in "the past three-year period" compared with "the three-year period before that." A third said that the incidence was less than in the earlier three-year period, and the remaining sixth said it was greater. Some of the latter arbitrators volunteered that they had a rise in their tripartite cases because they were now arbitrating in a particular industry. It seems safe therefore to conclude that tripartitism has not spread in the past three years, but remains entrenched in a few industries and companies.

The Executive Session

The use of an executive session is widespread among Academy members. Only one in seven indicated not holding an executive session. Among the remaining, about half reported that they had held executive sessions in over three quarters of their cases. About a fourth reported executive sessions in one half to three quarters of their cases. Arbitrators with more tripartite cases reported more use of the executive session than those with less experience. Half of the arbitrators with a 10 percent or more tripartite caseload reported executive sessions in three quarters of their cases, compared with only a third of those arbitrators with less than five percent of their workload.

The executive session enables the neutral arbitrator to learn the attitudes of the company and union arbitrators. In addition,

many arbitrators do not prepare a draft decision until after the executive session. Of 160 arbitrators who responded to the question, about 40 percent indicated that they prepared their draft decision after the executive session. Only 20 percent indicated that they prepared the decision immediately after the hearing, some of which were presented to the parties for discussion. The remaining 40 percent of the arbitrators reported a varied practice, with some decisions prepared immediately after the hearing and others after the executive session.

Over half of the arbitrators reported that the discussion during an executive session sometimes resulted in a minor change of facts. About 30 percent said that they were informed of a significant error, and had to make an appropriate correction. Rarely, however, did the executive session result in a change in the "outcome of the arbitration." Only nine of the 54 arbitrators who reported a ten percent caseload or more of tripartite cases reported that the outcome of a particular case was altered at the executive session. Some of these nine arbitrators "explained" that the executive session's discussion resulted in an admission of "errors" in the "facts."

Separate Opinions

It is often assumed that the losing party (arbitrator) will file a dissenting opinion. The responses to our question regarding the filing of separate opinions suggest that the practice is widespread but not universal. Over 40 percent of those responding to the question (69 out of 164) indicated that one party had filed a dissenting opinion in one of their cases, and seven arbitrators reported that both parties had dissented in a case![5] These responses suggest that company/union arbitrators dissent and file opinions, but the question may not have been well drafted.[6] Several arbitrators pointed out that some company/union arbitrators simply dissented and did not file opinions; hence, the respondent answered negatively to our question. A rephrasing of the question therefore may have revealed more instances of nonconcurrence in the neutral arbitrator's judgment.

Rarely does a neutral arbitrator respond directly to a dissenting opinion. Only 14 arbitrators said that they "responded in the

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[5]Presumably each party dissented to different portions of the award.

[6]The wording of question 9 was: "In what percentage of your tripartite cases in the past three years have party members filed separate opinions?"

decision or on the record" to a dissenting opinion. Several arbitrators pointed out, however, that the opportunity to respond to a dissent may not present itself. Typically, the dissenting member files his opinion after the neutral arbitrator has issued an award. A response by the neutral would serve no particular purpose and would further alienate the losing party.

Mediation Efforts

The tripartite mechanism seems to offer the neutral arbitrator an unusual opportunity to mediate. During the discussions among the panel members, the neutral arbitrator presumably learns each party's attitudes. The neutral can encourage them to explore possible settlements, and even press them to reach an agreement. Do Academy members attempt to mediate? And with what success?

About a fourth of the Academy members reported that they attempted to mediate. Arbitrators with more experience attempted to mediate more often than those with less experience. The pattern is apparent in the table:

Extent of Caseload	*Attempted Mediation*	*Number of Arbitrators*	*Percentage*
Total	46	171	22
to 5%	7	62	11
5–10%	13	55	24
10% and over	26	54	48

Most arbitrators reported that they attempted to mediate as often in single arbitrator cases as they did in tripartite cases. The more experienced arbitrators, however, reported that they attempted to mediate in tripartite cases more often than did less experienced arbitrators. About half of the more experienced arbitrators reported mediation efforts in tripartite cases, as compared with only one fourth of the least experienced arbitrators.

How successful are these mediation efforts? Eleven Academy members reported no successes, but some of these arbitrators reported only a few cases. Thus, they failed in only one or two cases. About half of the arbitrators (26) reported success rates of "below 50 percent." The remainder (9) reported success rates of more than 50 percent. One arbitrator reported a success rate of 100 percent, but added that "he never attempted to mediate unless he is sure that he can obtain a settlement."

Most arbitrators indicated that their success rate in mediating tripartite grievance disputes was about the same as in single arbitration efforts. The most experienced arbitrators reported greater success in mediating tripartite grievance disputes than single arbitrator cases. Nine reported that their success rate was greater in tripartite disputes; seven the same; and four reported a lower success rate in single arbitrator cases.

Impact on Arbitration Process

Most respondents indicated that tripartitism had little effect on: (1) "the quality of the opinion and award"; (2) "the acceptability of the award"; and (3) "the orderliness and expedition of the hearing." Approximately 150 arbitrators responded to this question. Over three fourths reported no impact on the quality of the awards; and 60 percent reported no impact on acceptability; and over 60 percent reported no impact on the "orderliness or expedition" of the hearing.

A minority of the respondents presented a different view. About a fifth believe that tripartitism improves the quality of the awards, and about a third asserted that tripartitism improves the likelihood that the award will be accepted. Quite a few arbitrators expressed reservations as to whether tripartitism had any impact on award's acceptability, and some responded that it was very difficult for an arbitrator to know what the parties thought of an award. Finally, a third were convinced that tripartitism interfered with the orderliness and expedition of the hearing.

The survey's final inquiry enabled the respondent to reach an overall assessment. The respondent was asked "on the whole, do you believe tripartite arbitration is worth the expense and delay it may cause?" Almost two thirds of the 166 respondents answered in the negative, some rather violently so! Here are a few quotations:

1. No. Very little is gained by this procedure.
2. No. Leads to excessive formality with no apparent good results.
3. I doubt that it is worth the extra expense.
4. No. I write a "proposed" award and one of the other parties signs affirming. No executive session if I can avoid it. Basically and generally that is what the parties desire.

5. In every case, participation by the Union and the company appointed members has been perfunctory.

6. No. In 90 percent of cases it is waived or ignored by the parties because partisan members vote for their constituency.

About a third saw some positive aspects, but this judgment must be qualified somewhat. Of the 60 responses which indicated positive attitudes, only 18 were unqualified "yes" answers. The remaining 42 were positive but qualified responses as to whether tripartitism was worth the cost. Some of these responses were:

1. Occasionally but not regularly.

2. Generally not. In a few cases where special knowledge is important, a tripartite panel can be very helpful.

3. To some degree. The losing party may be more inclined to accept the award and feel they had a fair day in court.

4. Yes, if for no other reason that it assures parties that their views will be accorded consideration both at the hearing and in executive session.

5. Depends on the nature of the problem being arbitrated, history of parties' relationship, and sophistication of parties' representatives on board.

6. Yes, *provided* the parties appoint capable partisan members who acquire experience in arbitration through long terms of office and who have the independence to function effectively within the board.

Clearly, the Academy's overwhelming judgment is critical of tripartitism, although a minority report some advantages.

The attitudes of Academy members are consistent with those of other arbitrators. Sixty-five percent of the Mediation Service's panel arbitrators who responded to a 1981 survey also expressed negative attitudes toward tripartite arbitration.[7] Nevertheless, there may be some bias in these responses; two reasons come to mind. As has been indicated, the overwhelming number of arbitrations are decided by a single arbitrator. The Academy member has therefore been accustomed to a certain routine. Clearly, the introduction of the two new "co-equals" creates a new environment. More importantly, the tripartite board necessitates the sharing of power with two other individuals. Even

[7]Herrick, *Labor Arbitration as Viewed by Labor Arbitrators*, 38 *Arb. J.* 39–48 (March 1983).

arbitrators are not always receptive to sharing authority, and the prospect may create some anxiety.

Interest Disputes[8]

Relatively few Academy members served in a tripartite interest dispute. Of those who reported having grievance tripartite cases, about 40 percent reported an interest dispute. That percentage prevailed for each grouping of arbitrators, contrary to my expectation that the more experienced arbitrators would have more interest cases. Surprisingly, two arbitrators who had no tripartite grievance arbitration experience each reported one interest arbitration case.

About two thirds of the 74 arbitrators with interest arbitration experience responded as to whether there were more "advantages to the use of tripartite panels in interest arbitration than in grievance arbitration." Thirty-one indicated that there were advantages; two responded that there were advantages in some situations; and eight indicated no advantages. When asked to explain, Academy members cited several advantages; three predominated. Interest arbitration was an extension of negotiations, and Academy members therefore advocated the presence of company/union arbitrators to present each side's view. Because of the complexities of interest arbitration, the responding arbitrators favored an advocate for each side to fully "explain" the facts. Thirdly, interest arbitration afforded more opportunities for mediation, and the presence of company/union representatives facilitated mediation.

The respondents were asked whether tripartite interest arbitration was different from tripartite grievance arbitration. Thirty-three responded positively to the inquiry, while only six asserted that the two processes were the same. Two reasons dominated the explanations of those who asserted there was a difference. First, the arbitrators reported that the company/union arbitrators were much more active and helpful in interest cases, especially at executive sessions. Secondly, many respondents reported that there were so many issues in the typical interest case that the neutral arbitrator had many opportunities to guide the parties toward an acceptable solution.

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[8]The ILO has recently released a brief handbook on interest disputes. *See* Gladstone, Voluntary Arbitration of Interest Disputes, (Geneva: ILO, 1984).

One member summed up the difference rather succinctly:

> There is simply no comparison between tripartite grievance arbitration and tripartite interest arbitration. They are completely different "animals." In grievance arbitration, the arbitrator applies a contract. In interest arbitration, the arbitrator (with the help of his tripartite colleagues) creates a contract.[9]

Conclusion

Tripartite cases constituted less than one tenth of the typical Academy member's workload; rarely would these cases exceed 25 percent of a member's workload. Grievance disputes predominate, but there was a small number of interest disputes. The number of tripartite disputes would increase if the parties did not waive their contract's express language and substitute a single arbitrator. The practice is widespread. When the parties waive panels in unusual cases, the practice seems to be a reasonable method of introducing some flexibility. If the parties waive panels and substitute a single neutral in almost all disputes, they should consider altering the contract to reflect their practice.

More experienced arbitrators seem to have more tripartite cases. Some of these arbitrators work almost exclusively in industries which have historically practiced tripartitism, e.g., railroads, airlines, and utilities. Nevertheless, these arbitrators and all others tend to serve in ad hoc situations; there are apparently few permanent tripartite umpireships.

Academy members saw little change in the number of tripartite cases in the past three years. Certainly there is little evidence to suggest any growth in the use of tripartitism despite the fact the newly organized public sector has frequently adopted the mechanism.

Tripartitism permits the neutral arbitrator to obtain more information. The use of the executive session enables the neutral to learn each party's perception of the case and reaction to the neutral's assessment. Most arbitrators call for an executive session in some cases. The parties typically inform the neutral of their attitudes and of the facts. In those instances in which the

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[9]An employer and union panelist at an Academy session on interest arbitration asserted that arbitrators were poor mediators. *See Interest Arbitration*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1984), 223, 234.

arbitrator presents a draft opinion, the parties comment on the draft.

Tripartitism enhances the opportunity for mediation, but relatively few arbitrators take advantage of these opportunities. Those who do report modest success, which may account for the reluctance of arbitrators to attempt to mediate only in unusual situations.

Most Academy members are not enthusiastic about tripartite grievance arbitration. There may be an element of bias behind this judgment, but the majority were concerned about the additional expense, the prospect of the delay of the award, and the possibility of a disorderly hearing. The minority who expressed positive attitudes regarding tripartite arbitration believed that the process improved the quality of opinions and awards and the acceptability of the award.

There is, however, more general enthusiasm for interest tripartite arbitration. Of course, only a few arbitrators have had any direct and sustained experience with tripartite interest disputes. Judgments regarding the mechanism must therefore be viewed with caution.

II. REPORT ON A SURVEY OF ACADEMY MEMBERS ON EXPEDITED ARBITRATION

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In June 1983, the 600 members of the National Academy of Arbitrators were requested to respond to a questionnaire on the subject of expedited arbitration. The questionnaire had been prepared by the Subcommittee on Research, of which Professor Howard C. Foster of the School of Management, State University of New York at Buffalo was chair. By October, 1983, 206 responses had been received. This report presents a summary and brief analysis of the information developed from the responses, which appears in a tabulated form as an addendum to the report.

An expedited arbitration was defined to include any system of arbitration containing explicit features designed to reduce cost,

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