APPENDIX E

# THE FUTURE OF GRIEVANCE ARBITRATION*

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The American system of voluntary grievance arbitration is unique among industrialized nations. More importantly, it works. Indeed, it is perhaps the only aspect of our industrial relations system that is widely accepted by labor, management, and the public. Economists, labor lawyers, and industrial relations scholars and practitioners often disagree over the impact of unions on wages, productivity, and inflation; amendments to the National Labor Relations Act; worker representation on management boards; and many other issues in the field of labor-management relations. But there is virtual unanimity over the advisability of including grievance arbitration in collective bargaining agreements. It is significant that during the widespread concession bargaining of the last few years, resulting in wage reductions, wage freezes, elimination or adjustments in cost-of-living clauses, and substantial modification of many other contract provisions, there was not a single reported case of the elimination of grievance arbitration from a major contract. Indeed, there is no reported instance of any employer demanding this in negotiations.

Given this high degree of success with grievance arbitration, it is amazing that there has never been a serious effort to quantify the extent of grievance arbitration in the United States. The Labor Department has compiled statistics on the proportion of agreements containing arbitration provisions, but there are no

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figures on the number of arbitration cases decided each year. While the voluntary nature of our system of arbitration makes it extremely difficult, perhaps impossible, to obtain complete and accurate information on arbitration awards, a cooperative effort among appointing agencies, unions, employers, and arbitrators could lead to a reasonably good approximation of the extent of grievance arbitration in the United States.

Why do we need this information? While I do not necessarily agree with Patrick Henry that the only way to judge the future is by the past, it helps to know what happened in previous years before predicting what may be expected in years to come. If we knew more about the extent and geographic incidence of grievance arbitration, the factors influencing the number of cases, the number of active arbitrators, and the distribution of cases among them, such organizations as the American Arbitration Association, the Federal Mediation and Conciliation Service, and the National Academy of Arbitrators would be in a better position to judge the need for new arbitrators and to identify areas in which arbitrator development programs should be conducted.

## Influential Factors

Arbitration is an adversarial procedure. Therefore, the system as it has developed in the United States depends on the existence of unions to process grievances and to represent employees in arbitration. The increase in union membership during the 1930s and after World War II was the most important factor leading to the growth of arbitration. This suggests that a decline in unionization should have the reverse effect.

Government played an important role in promoting arbitration. The first permanent grievance arbitration system was established by the Anthracite Coal Board, which was set up in 1903 by the Anthracite Coal Commission. While there had been instances of interest arbitration in the late 19th century, this was the real beginning of arbitration over the interpretation and application of agreements. Arbitration made considerable progress during World War I when the War Labor Board functioned as an arbitration tribunal and the parties stipulated in advance that they would abide by the Board's rulings. In the 1930s, the Federal Conciliation Service encouraged inclusion of arbitration clauses in agreements and maintained a staff of full-

time arbitrators and designated ad hoc arbitrators upon request of the parties. The enactment of the National Labor Relations Act in 1935 provided for the recognition of unions and promoted collective bargaining, both of which are conditions necessary to the development of grievance arbitration.[1]

Of course, the greatest impetus to both the institution of arbitration and the development of arbitrators was provided by the War Labor Board during World War II. The WLB handled over 2000 cases and inserted arbitration as the final step in the grievance procedure in every case in which the issue arose. Many of the founders of the National Academy of Arbitrators handled their first arbitration case on referral from the War Labor Board. There is little doubt that the availability of an experienced group of arbitrators encouraged the parties to include arbitration provisions in their agreements after the war.

Grievance arbitration, though resisted by employers before World War II, caught on rapidly after the war, at least among large employers. By 1948, 70 percent of all contracts covering 1000 or more workers contained provisions for arbitration. Coverage increased to 89 percent in 1952, to 94 percent in 1966, and since 1972 over 97 percent of all major contracts provide for arbitration of grievances. About 30 percent of these agreements exclude certain issues from arbitration; and this figure has not changed much since 1972.[2]

Another factor that has undoubtedly influenced the growth of arbitration has been the increased complexity of agreements. As more and more subjects of negotiation were incorporated into contracts, disputes over the interpretation and application of contract language increased. However, discipline and discharge have always accounted for about one-third to 40 percent of all grievance arbitrations.[3]

Finally, though there have always been complaints about cost, delays, increasing formality, and other perceived shortcomings of arbitration, the system would not have endured as long as it has, if the parties were not generally satisfied that it was serving

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[1]Stieber, *Grievance Arbitration in the United States: An Analysis of Its Functions and Effects*, Research Papers 8, Royal Commission on Trade Unions and Employers' Associations (London: HMSO, 1968), 4–6.

[2]*Ibid.*; Bureau of Labor Statistics Bulletins 1784, 1888, 1957, 2013, 2065, 2095, U.S. Department of Labor.

[3]Annual Reports, Federal Mediation and Conciliation Service; *Study Time*, American Arbitration Association, various issues.

them well or, at least, that it was the least bad way of resolving grievance disputes. For this, arbitrators can take some credit.

It is reasonable to expect a positive relationship between the number of workers covered by collective bargaining agreements and the number of grievances appealed to arbitration, i.e., all other things being equal, the more workers eligible to file grievances the greater the number of grievances appealed to arbitration. Of course, we know that conditions affecting labor-management relations are constantly changing. Still, I believe that the extent of unionization is a reasonable starting point in considering the future of grievance arbitration. While the number of workers represented by unions generally exceeds union membership by some 15 percent,[4] I shall use membership figures because they are more comparable over time and more readily available than collective bargaining coverage.

We are all aware of the decrease in unionization as a proportion of the labor force: from a peak of 35 percent of the non-agricultural labor force in 1954 to about 19 percent in 1984.[5] But these figures do not tell the whole story. If private sector and public sector membership are considered separately, the decline has been from 35 percent to about 16 percent in private employment, while unionization in public employment has increased from only 13 percent in 1960 to 36 percent in 1984.[6] A good part of the public sector increase is explained by the inclusion of associations since 1968. Still, the diverse trends in private and public sector unionization are significant and, as we shall see later, important for the trend in grievance arbitration.

## Trends in Arbitration

While percentage figures are significant as a measure of union power and influence, absolute membership figures are more important as an indicator of arbitration trends. After all, it is the number of potential grievants, not their proportion of the labor force, that might be expected to affect how many grievances are filed and appealed to arbitration.

Looking at union membership, we find that there were about the same number in 1984 as in 1960, 17 million. During this 24-

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[4]*Daily Labor Report* No. 31, Section B (Washington, D.C.: BNA, Feb. 14, 1985).
[5]U.S. Bureau of Labor Statistics, Bulletin 2079 (1980) and *Daily Labor Report* No. 31.
[6]*Ibid.*

year period, membership peaked at 23 million in 1974 and declined by 6 million in the next decade. Again, a substantial proportion of total membership after 1968 is accounted for by the inclusion of associations.

Separating private and public sector figures, we get a better picture of what has been happening. Private sector membership went from 16 million in 1960 to 11½ million in 1984. The last previous year in which private sector unionization was at this low level was 1942, when practically no public employees were organized. Public sector membership during this period increased from one million in 1960 to 5½ million in 1984.[7] To summarize, since 1968, unions have lost 5.2 million private sector members and gained about 1.8 million public employee members, a net loss of about 3,400,000 members. Given these figures on union membership, what has happened to grievance arbitration?

In considering the trend in grievance arbitration cases, we are greatly hindered by incomplete and inadequate data. Grievances are processed to arbitration in a variety of ways: ad hoc cases handled through the American Arbitration Association, the Federal Mediation and Conciliation Service, state agencies, and direct selection by the parties without an intermediary; cases decided by permanent arbitrators or by rotating panels of arbitrators; and cases processed under the Railway Labor Act. Of these various paths to arbitration, we have data from the AAA, the FMCS, two steel permanent arbitration systems, and the Railroad Adjustment Board.

Award figures by calendar year have been made available by the National AAA Office for the period 1969–1984.[8] Figures for 1957 and 1966 were published in earlier AAA newsletters. These figures show an increase from 1350 awards in 1957 to a peak of 7713 in 1978, followed by a decline to 6832 in 1983. (Figures for 1984 are incomplete but will probably be somewhat lower than those for 1983.) A breakdown between public and private sector cases is available only for 1984 when the distribution was 60 percent private and 40 percent public. In 1985, AAA had 3150 arbitrators on its active list.[9]

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[7]Represented workers in Government were 23 percent higher than union membership compared to only 11 percent higher in the private sector. *Daily Labor Report* No. 31.

[8]AAA compiles awards on the basis of the year in which the cases were filed with AAA. Thus, 1980 awards include cases filed in 1980 and decided in 1980 or any subsequent year.

[9]AAA *Arbitration News,* No. 3, 1967; AAA Labor Management Institute letter dated Apr. 14, 1967; AAA statistics provided by Earl Baderschneider, Vice-President-Publications, letter dated Sept. 26, 1985.

The Detroit Region of AAA, one of the four largest, reported a fairly steady level of total awards ranging between 800 to 932 during the period 1978–1983. There was a sharp drop to 628 in 1984. More significant is the distribution between private and public sector cases in the Detroit office. In every one of the last seven years public sector awards outnumbered awards in the private sector, reaching over 70 percent of the total in 1981 and 1982. Private sector cases in Michigan decreased, while public sector cases increased in every year since 1978 except for 1984, when the public sector awards dropped by almost 50 percent, while private sector awards held steady.[10]

The FMCS picture is very similar to that of AAA. Awards reported on a fiscal year basis increased from 917 in 1957 to a peak of 7539 in 1980 and then declined to 5824 in 1984. The breakdown between private and public sector awards, available only for the period 1981–84, shows an increase in public sector cases from 12 percent to 17 percent of the total. In addition to having a much smaller proportion of public sector cases than AAA, federal cases outnumber state and local cases 3 to 1 in FMCS. In AAA, public sector cases are heavily weighted towards non-federal cases. FMCS has about 1600 arbitrators on its active panel list, about half the number reported by AAA.[11]

## Permanent Arbitration Systems

There is no single source of information on the number of cases decided by permanent arbitrators or by rotating panels appointed by the parties. Through the cooperation of Al Dybeck, Chairman of the Board of Arbitration for U.S. Steel and the Steelworkers' Union, and Rolf Valtin, permanent umpire under the Bethlehem Steel-Steelworker Agreement, I have secured figures on cases closed annually. Employment data for these two companies were furnished by the Research Department of the union.

Steel industry employment has been declining for many years, primarily as a result of increasing imports resulting in plant closures and major reductions in force. Employment in U.S.

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[10]Detroit AAA statistics provided by Mary A. Bedikian, Regional Director, letter dated Oct. 7, 1985. Detroit regional data reflect awards actually rendered each calendar year.

[11]FMCS award figures are as of the year in which the award is issued, regardless of when the case was filed. FMCS Annual Reports and letter from Jewell Myers, Director of Arbitration Services, Sept. 6, 1985.

Steel and Bethlehem has also declined precipitously. U.S. Steel employment has decreased from 126,500 in 1969 to 34,400 in 1985. Bethlehem employment dropped from 78,000 in 1969 to 24,000 in 1985. For both companies, this represents a decrease of at least 70 percent over a period of 15 years. What has happened to arbitration case loads in these two companies?

In U.S. Steel, the average number of cases decided showed practically no change in the first six years of the 1980s as compared with the decade of the 1970s, despite a sharp decrease in employment in almost every year. The Arbitration Board has decided an average of 423 cases per year in the current decade as compared with 427 per year in the previous ten years. In the 1950s the Board decided an average of 107 cases per year, and in the 1960s it issued 241 awards per year.

The experience has been quite different in Bethlehem, where average arbitration decisions per year have reflected the decline in employment: 1965–69—130 cases, 1970–74—116 cases, 1975–79—93 cases, 1980–85—74 cases. Thus, the number of Bethlehem decisions dropped by 43 percent in the face of an employment decrease of 70 percent.

Why the difference in experience between these two companies? Al Dybeck suggests that the down sizing in U.S. Steel and competitive pressures in the industry have generated more grievances over such issues as subcontracting, crew size, lay-offs, and working conditions. During these difficult economic times for the steel industry, both sides are being much more inflexible in interpreting the contract, and grievances that might have been settled in the earlier steps of the grievance procedure in better times are now being processed to arbitration.

I did not press Rolf Valtin for an explanation of the trend in arbitration decisions in Bethlehem because it is pretty much in line with what one might expect during a period of declining employment. Still, one wonders why the same factors that were operating to keep U.S. Steel decisions up were not also working in the case of Bethlehem.

If you are surprised, as I was, by the failure of arbitration decisions to follow employment trends, consider what has been happening in the railroad industry.[12] Average rail employment in 1980–1984 was 61 percent lower than in 1955–1959: 432,000

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[12]Annual Reports, National Mediation Board, supplemented by information provided by Roy Cavartta, Railroad Adjustment Board.

compared to 1,108,000. Yet, the average number of refereed cases closed by the Railroad Adjustment Board in fiscal years 1980–1984 was 21 percent *higher* than in 1955–1959: 1001 cases compared to 825 cases. A major difference between these two periods was the number of cases withdrawn or decided without a referee. In the 1980s, an average of 113 cases were withdrawn and only 5 cases per year were decided without a referee as compared to an annual average of 583 cases withdrawn and 262 decided without the aid of a referee in the years 1955 to 1959. Thus, it appears that the parties were relying much more on outside referees in the 1980s than in the 1950s.

In 1966, Congress passed Public Law 89–456, which authorized the establishment of special boards of adjustment on individual railroads, at the request of either party, to resolve disputes otherwise referable to the National Railroad Adjustment Board and disputes pending before the Board for 12 months. Since 1971–1975, the average number of Public Law Board cases closed each year has increased from 4479 per year to 4992 in the 1980s, despite a 26 percent decrease in average employment. The total number of cases closed by the three types of tribunals used in the railroad industry (Adjustment Boards, Special Boards, and Public Law Boards) averaged 6989 per year during the 1980s, which was about the same as during the first five years of the 1970s.

## Conclusion

What conclusions can we draw from this patchwork pattern of experience with grievance arbitration? Certainly, it is clear that there is no direct correlation between organized employment and grievance arbitration decisions. In other words, the ceteris paribus condition does not hold because other things are never or almost never equal. Thus, new contracts may spawn more arbitrations than mature relationships, decreases in private sector unionization may be more than compensated for by newly-organized public employees, workers in some industries and some unions are more litigious than those in other industries and unions, and, above all, grievance arbitration, both in terms of number of cases and issues, will reflect changing economic conditions.

Notwithstanding these non-employment-related factors, I would maintain that there is an underlying and fundamental

relationship between the number of organized employees (i.e. the potential grievants) and the number of cases going to arbitration. It may take time for this relationship to become apparent as indicated by the delayed downturn in AAA and FMCS cases. In some situations, decreases in employment may even result in more cases going to arbitration while the parties are adjusting to changed conditions as in U.S. Steel. But after the "shake-out" period is over, it is reasonable to anticipate a reduction in arbitration to a level that is related to the number of potential grievants. In some companies, this happens more rapidly than in others, for example, Bethlehem Steel.

The railroad experience defies rational explanation. I would venture only this observation: that the pattern of arbitration in railroads is not unrelated to the fact that the government picks up the tab for arbitrators' fees and expenses, making arbitration virtually cost-free for the parties.

Coupled with the decrease in unionization, there has been a substantial increase in the number of arbitrators as indicated in lists maintained by AAA and FMCS as well as in Academy membership. At some point, this must result in a decrease in average case loads for arbitrators. This may already have happened to some arbitrators, it may take a while for others, for some it may never happen. Nonetheless, I believe it is inevitable, barring certain developments that could change the scenario dramatically.

First and foremost, of course, an increase in unionization would have a significant impact on arbitration. Not only would there be more potential grievants, but new agreements would probably generate more grievances and arbitration cases than long-standing contracts.

A similar result might be expected from a change in the composition of unionized workers. Just as the increase in public sector organization helped to compensate for the decline in private sector unionization, so also might other newly-organized industry or occupational groups contribute disproportionately to the number of cases going to arbitration.

Finally, enactment of a federal law or state laws giving all employees the right to appeal a discharge to an impartial tribunal would obviously give an upward thrust to arbitration. Such bills have been introduced in several states, but none have been passed.

As I indicated at the outset of my conclusions regarding the future of grievance arbitration, they are based on very skimpy data plus some seat-of-the pants theorizing. If organizations concerned with arbitration believe that it is important for arbitrators, current as well as future, to know more about career opportunities for both full-time and part-time arbitrators, then they should cooperate in developing more complete statistics on arbitration.