

CHAPTER 6

CAN THE LABOR ARBITRATION PROCESS BE SIMPLIFIED? IF SO, IN WHAT MANNER AND AT WHAT EXPENSE?

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Early in 1985, I was asked to speak at the New York University National Labor Conference on the topic "Effective Advocacy in Arbitration."¹ That paper, delivered about a year ago, was in many respects a lament. It deplored advocacy by those who didn't understand the genesis and purpose of labor arbitration or, having once understood, had forgotten or chosen not to remember. It also mourned the rise of the gladiator, the proponent in arbitration of the Vince Lombardi credo of combat, the single-minded warrior, whose sole concern was victory over what was inevitably characterized as the "opponent," victory regardless of tomorrow's cost in the plant or on the shop floor. It mourned, too, the often-seen lack of effective grievance handling by both union and management, the failure to take a hard look at what was slouching toward the hearing room door waiting to be heard, the lack of openness in the steps below, the withheld information, the surprise witness, the game of cat and mouse, and similar tactics antithetical to the nature of the grievance and arbitration process.

Obviously, those comments were not meant to apply to everyone or even to the vast majority of advocates. As Syl Garrett, quoting Walter H. Davis, reminded us many years ago, "No generalization ever is completely true—not even this one."² The

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¹In Proceedings of New York University 37th Annual Conference on Labor, ed. Richard Adelman (1985), 12-1.

²*The Role of Lawyers in Arbitration*, in *Arbitration and Public Policy*, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Spencer D. Pollard (Washington: BNA Books 1961), 102, 108.

comments were meant to bring us back to what I consider the true nature and original intent of the grievance and arbitration process and to highlight those practices which, in my judgment, were in conflict with it.

The paper was also a plea—a plea to those who had abandoned “formal informality” to return to it, and a plea to those who had never experienced that method to try it:

so that the hearing room is a place where the emphasis is on the merits of the claim, rather than technical objections to its consideration. A place that recognizes that the story should be told. A place where motions are minimized; one where advocates understand, as they think of making objections, that they are before an arbitrator, not a jury; a place where argument does not overreach, where briefs are concise and reflective of the record or, in those cases where it's apparent the arbitrator doesn't need them, non-existent. A place, in short, where grievance arbitration can perform the function for which it was designed—that of a fair forum worthy of respect from which just results emerge.³

Well, as it turned out, some members of this year's Program Committee must have read that paper, for they said to me—enough lamentations; talk about simplifying the procedure, how it can be done, if it can, and at what costs. So, here I am.

I suspect the short answer to the question posed, “Can the Arbitration Process be Simplified?” is “Yes. But you may not like it.” Before plunging into that topic, let me tell you very briefly what I'm not going to talk about, followed by a short preface to what I am going to talk about.

What I'm not going to talk about because I've made the point before, may at first blush seem off the topic and “off the wall,” but I think not. Besides, I can't resist repeating it to a wider audience. One of the greatest costs I've seen in arbitration, and one of our topics is cost, is the cost to all concerned of the delayed discharge case, the case that is heard three months, six months, two years after the discharge is effectuated. It is a cost to the grievant, who is off the premises and unemployed, a cost to the employer if its decision is found wanting, and a cost to the process, both in finding the “truth of the matter” after a long passage of time and in the distortion that lengthy interval creates for decision making when the arbitrator, if he or she finds the offense punishable but not dischargable, must wrestle with the proper burden of a back-pay award.

³*Supra* note 1 at 12–13 to 12–14.

You all know the point—none of these costs necessarily have to be borne. Long before the Steelworkers and the can manufacturers adopted their “justice and dignity” provisions, two networks and the broadcast union representing their technicians fashioned their own deferred discharge provision some 36 years ago. Ben Roberts was the first impartial umpire under that procedure and I have been very much involved in it for 10 years. Designed to be swift (three to four weeks, and in some cases, less), with the employee remaining on the payroll and, except in extreme cases, still working, the procedure has avoided all the cost factors I have outlined. Since I’m not talking about this, I won’t dwell on the subject. However, I’ll be happy to send to anyone who might be interested my 1984 paper describing the process and the arguments for and against it. Let me just say, that as we move from an era of confrontation to one of cooperation, as I think we are despite bumps and scrapes along the way, many observers believe that a reasonable *quid pro quo* for union and worker involvement in the health and well being of an enterprise, a reasonable *quid pro quo* for worker cooperation and trust is fair treatment of employees in the disciplinary process through a deferred discharge—innocent until proven guilty—procedure.

Let me move to the preface of this paper’s main theme.

Within that seemingly simple title, “Can the Labor Arbitration Process be Simplified? If So, in What Manner and at What Expense?”, lie some complex questions. Simplified for whom—the arbitrator, the parties, the grievant, those on the shop floor or in the managerial ranks, all of them, or the world at large? Is “expense” limited to monetary expense or should we consider costs in morale, understanding, and acceptance? Surely the latter, for simplification carried to extremes, can strike at the very purpose of arbitration and be at the expense of justice—one of its stated aims.

A colleague tells me of a major company and union who employ a two-faced chess clock, with the arbitrator hearing seven to eight cases a day, but with one hour for each case, 30 minutes, no more, for each side, and the clock inexorably governing and sometimes cutting off exposition of the facts and arguments in midstream, all of which is followed by a bench decision—not only in fact-bound suspension cases, but rather complex contract interpretation matters as well. That’s simplification, but it is surely at the cost of the appearance of justice,

if not of justice itself. My colleague, not incidentally, resigned, believing that what he was called upon to do was in some way in conflict with his professional obligations.

On the other hand, we all know of cases, which, for one reason or another, most avoidable, went on for four to five days or more, when one or even less would have sufficed. We also know of cases where the parties, as an accepted ingrained procedure, insisted on transcripts and briefs when neither was necessary, and where that transcript and those briefs delayed the decision to a point many would consider intolerable.

In contrast, Walter Gellhorn, one of my mentors for whom I have great affection, participated in an expedited discharge arbitration some 10 years ago, expedited not in the "time-dominated" sense previously described, but expedited in the sense that the hearing, without transcripts or briefs, took place within three weeks of the discharge, with the Award rendered within three days of the hearing. When it was over, and Walter had rendered his decision, he was asked to comment on the process. He said:

What is called "expedited arbitration" . . . should instead be identified as "normal arbitration," in my opinion. The cumbersome kind, with a transcript, briefs, and all the trimmings, should be denominated "protracted arbitration" or, even more cuttingly, simply as "the lawyer's friend." Few grievances generate evidential problems of such complexity as to becloud the arbitrator's mind. Few arguments about the meaning of contract terms are so subtle that they cannot be grasped unless what was said orally is repeated in writing. Few controversies are comfortable for the parties to continue living with while the arbitrator's decision is postponed because he must await the delivery of a transcript and post-hearing briefs. Few matters worth taking to hearing deserve to be so imperfectly prepared that the parties' representatives cannot speedily and succinctly state their case, present factual data, and make closing argument. So I am all for expedited procedure. It serves the basic purpose of grievance arbitration because it encourages an economical, quick and understandable decision.⁴

Some of us not as quick as Walter would not forgo briefs and transcripts in all cases. In some matters, they are not only useful, but essential. Essential, not in the due process sense, as Sam Kagel, whom I later commend for other views, considers transcripts, but essential to a full understanding of the evidence in a

⁴Hoellering, *Expedited Arbitration*, in Proceedings of New York University 28th Annual Conference on Labor, (1976), 319, 325.

long and complex case.⁵ Yet, briefs and transcripts, in my view, are markedly overused, with little judgment exercised in particular cases as to their necessity or worth.⁶

Be that as it may, if we are to strike a balance between extremes and sensibly simplify arbitration, we must, to paraphrase my colleague, John Kagel, find ways to process cases as speedily and as economically as possible without diminishing either the quality or integrity of the results. As we search for those ways, I trust we will keep in mind that the purpose of the grievance and arbitration procedure is not to win cases at all costs, but to resolve and settle disputes; that parties need a conflict resolution system as much as they need a "correct" result in any particular case; that arbitration, and this many forget, is only a last resort after all other reasonable efforts fail; and that a settlement by the parties, a mutual recognition of rights and responsibilities or of error, is most often worth more than an arbitrator's award.

In exploring ideas with you, I'm well aware that the process belongs to the parties. But arbitrators also have a large stake in that process. Its continued acceptability and success, and hence our acceptability and success, rest on how well its objectives are achieved.

We can explore many means of simplification; some that have been tried and tested; others that, for us at least, may be innovative and even bold.

I don't mean to suggest that what I have to say is novel; some hitherto unrevealed secret. The arbitration universe is small and there are only limited and finite ways to change it. Moreover, much has already been written on this subject by persons wiser than I. One only need glance at the prior proceedings of the Academy over the last 30 years or the pages of *The Arbitration Journal* or other periodicals to come upon the writings of Sem-bower, Seitz, Mittenthal, Fleming, and others too numerous to mention, or to scan the newly published annotated bibliography of the Academy's Research Committee under the titles "Costs and Delay," "Formality and Legalism," and "Arbitration Systems." This review may lead some to say that complexity, for-

⁵Mr. Kagel's views are in *Legalism—and Some Comments on Illegality—in Arbitration*, in *Arbitration 1985: Law and Practice*, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books 1986), 180–191.

⁶See Bornstein, *To Argue, To Brief, Neither or Both: Strategic Choices in Arbitration Advocacy*, 41 *Arb. J.*, 77–81 (1986).

mality, and delay are inherent in the process and will always be with us. As you know, Professor Stephen Goldberg of Northwestern Law School is of this view and attributes a substantial part of the complexity, formality, and delay to the victory of the "adjudicatory model of arbitration over the mediatory model" because, as he argues, the former breeds an overriding interest in winning—indeed, a compulsion to win. Further evidence for this "inherent defects" view may even be gleaned from the much shorter history of the British Industrial Tribunals. In 1971, the then president of the Tribunals spoke of them as providing "simple informal justice in an atmosphere in which the ordinary man feels he is at home." Yet a 1985 in-depth study by Linda Dickens and her associates chronicled a wide gulf between "what is preached and what has to be practised." The book, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System*,⁷ which I commend to you, found that system, with its emphasis on the adversarial method of case presentation, its reliance on precedent, and its open avenue of appeal to the courts, far from satisfactory and much less than consistent with its stated objectives and suggested that informal arbitration (the British model, not ours) might be a workable alternative.

I will have more to say about the British model of informal arbitration, but for now, let me say that the critics of arbitration who believe its defects are inherent and can't be cured may well be right. Those who say we can't cure the defects because they are caused by external forces we are powerless to change may also be right. However, at this stage, I don't think all concerned have worked hard enough or thought imaginatively enough to concede the point. Improvements can be made. The adjudicatory model we know and take for granted can be modified, the problems can be chipped at and on occasion a breakthrough might occur.

On that score, I happen to think that almost everything, except, I fear, my ever playing second base for the New York Giants, is primarily a matter of will and timing. Improvements, however, mean work—work primarily by the parties, but also by the arbitrators. As we set about that task, it might be well to use as a touchstone, a guiding light, the truth handed down to us by the

⁷Dickens, *Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System* (London: Blackwell, 1985). The overriding value of the British system, not duplicated on any significant scale in the United States, is that its protection against unfair dismissal extends to the unorganized.

Rolling Stones in “You Can’t Always Get What You Want”: “If you try sometimes you just might find, you get what you need.”

The best way to simplify the arbitration process is to avoid it—by settling grievances before they reach that stage. But this not only requires will; it requires maturity, an understanding that the relationship is long term and transcends the outcome of any particular case and an awareness that the settlement of differences, achieving what each side needs, does more for labor relations than keeping a box score on what outsiders do. It also requires a structure by which settlement is encouraged from the very beginning. Of the countless contracts I have seen, few are structured to encourage resolution at the first step or, for that matter, at any step.

Let me give you an example of a structure designed to resolve grievances at their source. Relatively recently, a major network and the broadcast union representing its technicians gave first-line supervisors and union stewards “authority to settle” grievances on a “no precedent/without prejudice” basis on terms “mutually acceptable to them” so they could resolve the issue in a way that seemed fair and get on with the job, while insulating their resolution so it would be confined to that situation alone. They built safeguards and an escape hatch—allowing either side to undo a settlement, but giving the other party the option to scrap the first-line procedure if settlements were repudiated more than three times in a calendar year at a station. It is too early to tell how effective this procedure will be. One of the problems is the habit, long ingrained, of kicking grievances up the line. I suspect that a long process of education and orientation and the throttling of the impulse to second-guess will be necessary before it reaches its full potential. But it is a structural start.

Another thing these parties did, the success of which has been more readily apparent, is to build a structure designed to cut grievances off in midstream—what I call the “Super Grievance Committee,” a more formal variant of the General Motors/United Auto Workers “shakeout” process described by past Academy President Arthur Stark at our meeting in New Orleans.⁸

⁸*The Presidential Address: Theme and Adaptations*, 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), 5.

This committee, designed to provide a long and fresh look at grievances before they go to arbitration, consists of four persons, including a labor relations representative who does not regularly meet with the local grievance committee. That's the fresh look. The long look is that this committee periodically gathers the grievances, gets away from the local environment, and subjects those grievances to intensive scrutiny for two days or more.

As this short description reveals, that structure contains many settlement-inducing elements. First, the committee is small. The fewer the voices, the lower the decibels; the fewer persons to convince. Second, it involves an individual not a party to the original denial of the grievance and thus one not as emotionally attached to what went before. Third, the committee is authorized to remove itself from the "situs-induced tension" of the workplace and often does. This means at least two things: that committee members are not distracted by normal day-to-day activity; and, of even greater importance, that they must do their homework in advance, so that when they meet without easy access to others, they know the facts well enough to discuss them intelligently and to explore new avenues of resolution. Fourth, the parties have committed themselves to spend days on the process. Thus, there can be no excuse that there is insufficient time. Fifth, the committee does not discuss in those days one grievance or a handful, but a large number. Thus, there is ample opportunity for the kind of trade-offs so characteristic of collective bargaining. All of this has led the New York committee, for example, to settle 90 percent of the grievances it has considered. Obviously, this is an impressive achievement. It's equally obvious, however, that such a procedure has to be entered into in good faith. A party can't hoard grievances just to trade them off. But if there is good faith, the procedure has potential.

Yet another structure to avoid arbitration is the mediation of grievances. Steve Goldberg and Mollie Bowers have written extensively on mediation as an adjunct or aid to the arbitration process, and Steve, as you know, reported on the impressive results of his Coal Industry Experiment at the Academy's Quebec City meeting in 1983.⁹ He recently informed me that the

⁹See *Grievance Mediation: The Coal Industry Experiment*, 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), 128-136. See also, Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 *Nw. U.L. Rev.* 270 (1982); Brett & Goldberg, *The Mediation of Grievances in the Coal Industry: A Field Experiment*, 37 *Indus. & Labor Rel. Rev.* 1 (1983); Bowers, *Grievance Mediation: Another Route to Resolution*, 59 *Personnel J.*, 132-136 (1980).

results since then continue to be impressive and that the process is increasingly taking hold. In the coal industry, the mediated settlement rate is still at approximately 80 percent. That rate has been duplicated in approximately 100 non-coal-industry cases, including discharge cases mediated during the last year between Communications Workers of America and Southern Bell. Moreover, the process has spread to the Washington Education Association and certain school districts in that state and is about to begin between the city of Chicago and an 8,000-member American Federation of State, County and Municipal Employees public employee unit. The latter could be particularly significant because it is a new contract. There, the parties have had no experience with arbitration or its asserted flaws and it will be interesting to measure the effectiveness of voluntary mediation in that setting.¹⁰

I won't dwell on this particular subject because you all have some familiarity with it. I will say, however, as a long-time mediator, one who has not only mediated labor disputes but community and prison conflicts, often rooted in violence, that the voluntary mediation of grievances, under the kind of system Goldberg and his colleagues have devised, can be of great value. Value not only because of what it can save in time and expense, but for what it can do in positive terms for the relationship of parties. Mediation—that informal process in which participants are encouraged to expand their thinking to explore options, some previously unconsidered—clearly increases their capacity to resolve future conflicts on their own. I've seen it happen, you've seen it happen. It is no accident that Frank Sarno, the Labor Relations Director of AMAX Coal and one of Professor Goldberg's discussants in 1983, stated that after exposure to the process, his company's ultimate goal was to put Steve's mediation board out of business by improving the parties' own skills to the point where they could settle disputes without resort to arbitration or even mediation.

Another highly promising and strikingly untraditional approach to simplifying arbitration, either by avoiding it altogether or streamlining it if it occurs, is the joint fact-finding process in which our good friend Sam Kagel is involved on the West Coast. That process has been used by the Bay area soft

¹⁰The up-to-date statistics were supplied by Professor Goldberg in a March 12, 1986, interview with the author.

drink industry for 14 years, by a large supermarket chain for half that time, and is now in place in a major brewery and some installations of an electric power company. As described in a 1984 *Arbitration Journal* article by John Kagel and his colleagues, there are variants in the process as between these parties, but it works essentially like this:¹¹ Immediately after a grievance arises and is not resolved by the supervisor, the union and the company appoint joint fact-finders. Together, they interview all witnesses, review all relevant documents, and otherwise fully investigate the grievance. They then prepare a joint report, setting forth the stipulated facts and those facts, if any, still in dispute. That report is then submitted to company and union representatives, generally nonlawyers, who meet in an attempt to resolve the issue, with the stipulated facts entered as a binding joint exhibit if the matter goes further. The prearbitration benefits of such a system are obvious. It forces the parties to concentrate on the grievance procedure's true function: the resolution of conflict. It also gets the facts out on the table at a time when they are still fresh. And, it turns the reviewers of the report, to use Sam Kagel's words, into jurors rather than advocates. Obviously, the system takes more time than a simple first step, second step, third step, and fourth step discussion and denial, but that time can pale into relative insignificance when one considers the time often wasted at the upper ends of a traditional procedure. The benefits at a hearing, if it comes to that, are equally obvious. A good number of facts are already stipulated. Consequently, both preparation time and hearing time are substantially reduced, with the arbitrator in this process able to hear with no sense of unease four to five cases a day rather than one. Moreover, there are no surprises. This eliminates the need for adjournments and additional time to counter new developments. It also relieves advocates of the sometimes agonizing decision as to whether those unforeseen developments now require a written brief.

Does the procedure work? The permanent umpire (our friend, Sam), with whom I spoke at length and the party representatives interviewed for the aforementioned article attest that it does. Its cardinal benefit, according to all of them, is that it facilitates settlement. The bulk of cases are in fact settled, leaving

¹¹Kagel, Kelly, & Szymanski, *Labor Arbitration: Cutting Costs and Time Without Cutting Quality*, 39 *Arb. J.* 34, (1984).

to arbitration only those matters that should go to arbitration—those the parties in truth can't resolve for themselves. Another benefit is the speed with which the process works. In discussing his soft drink industry experience, the arbitrator told me that he could not recall a grievance heard in arbitration in recent years that was more than 40 days old. Whether you are party or advocate, contrast that with your own experience. Contrast, too, the ease and simplicity of a hearing when you have joint fact-finding and stipulated facts.

Though the joint fact-finding process has obvious hearing benefits, that procedure and the others I have touched upon so far have as their major thrust an emphasis on settlement. They are designed to encourage it, to make the parties work at it, which, as everyone knows, they should. Rather than focusing on the ultimate rights of the parties, these procedures direct attention to the problem itself. Those groups plagued by unsettled and seemingly unseizable grievances might examine their own procedures to see how they can be structured so that the possibilities of settlement—quick settlement—are enhanced, and whether any of these procedures, or variants thereof, can work for them.

Some, of course, take the position that settlement should not be made easy, that the road to arbitration should be marked by obstacles and pitfalls and that arbitration itself should be burdensome. That view, in my opinion, is shortsighted. I speak, not just as an arbitrator who has seen the effects of that attitude, but as one who, in other lives, wore both union advocate and management representative hats. The goal of management is efficient production. That goal depends in no small measure on the morale of the work force—bargaining-unit personnel and supervisors alike. Unrest, anger, frustration at delay, or the lack of an opportunity to be heard fully and fairly interferes with that goal. Witness, for example, the month-long strike of some 7,500 International Union of Electrical Workers around Boston in February and March of this year simply because the grievance procedure wasn't working and stewards were assertedly abused during grievance meetings. It appears self-evident that those who never have the opportunity to be heard or those who lose because they are "outspent or outlasted" will not be joyful, productive workers, but will turn hostile, a condition management can ill afford. So it seems to be in management's interest,

both in the short and long run, to see that its contractual grievance procedure is working smoothly and effectively.

Now, let's turn to the hearing itself, for it's the hearing that's at the heart of the "arbitration" process. Of course, parties can simplify this aspect of that process by not having hearings. That has been done more than once, with parties stipulating the facts and putting their arguments in writing. Sometimes, parties have not done so even though the case was readily susceptible to that technique. As an example, I recently left my home rather early one morning and flew to a large midwestern city on one of my regular biweekly trips for parties who know me well. I arrived at the hearing approximately 30 to 40 minutes before the scheduled hearing time, but everyone was ready to proceed. So we did. It was a past-practice case—and the issue was whether a benefit which the company had provided and subsequently discontinued was a gratuity or whether it had become binding. There was no individual grievant, the grievance having been filed by the union on behalf of a group. There was no dispute as to the facts. The parties had already stipulated them. The hearing consisted of a reading of the fact stipulation, which was short, and past-practice arguments by counsel. It was over before it was originally scheduled to begin. Whereupon, the arbitrator thanked the parties and returned to the airport, thinking only of the backlog of grievances that would be further delayed.

All examples may not be so apt, but the parties should consider whether particular matters actually need hearings. One element in that consideration, of course, is what we have come to call the "therapeutic value" of arbitration—the ability to participate in the hearing process, to see, sense, and feel it. In many cases, that value may be of overriding weight. But I venture to say that this may not be so in all matters and that the parties should deliberately consider in each particular case whether a hearing is actually necessary.

If you must have a hearing, you, the arbitrator, might consider scheduling it on Saturday or Sunday. You'll be surprised, as my ALPA friends can attest, how, like the proverbial rope, that concentrates the mind and shortens hearing time.

In a more serious vein, let's assume that for one reason or another a hearing is necessary. It seems to me that two factors, above others, contribute to the length of hearings and unduly complicate or obscure the process: the need to educate the arbitrator and the adversary system of case presentation.

We arbitrators, as a class, pride ourselves on being notoriously quick studies. Yet, it's indisputable that we are often required to begin our participation in the dark of night, with light coming, sometimes as a false dawn, only after the hearing is well under way. It may be that this is not the best approach.

As to the adversary system, let me, in that unforgettable phrase, make some things "perfectly clear." I draw a distinction between the adjudicatory model of arbitration and the adversary system now a part of it. The arbitrator's basic function is to adjudicate, to decide the issue or issues the parties have presented. He or she may mediate or "problem solve," when asked—we have all done it in certain circumstances I presume—but neither is the primary task. That task is to decide the question on the record presented and within the confines of the agreement. Except in isolated pockets, the adjudicatory model has carried the day over what has been termed "consensus arbitration" and quite probably is here to stay. The reasons have been detailed elsewhere and are readily summarized.¹² They include the unique history of the American labor movement, our legal tradition, and the increasingly detailed contracts embodying statements of rights, responsibilities, and obligations which those two phenomena have fostered. But along with the adjudicatory model, we have adopted with some modifications the court-inspired adversary system as the usual means of "informing a decision maker about the dimensions of a case." One can argue whether history, tradition, training, or personal predilections compelled that result or whether it was based on rational considerations of efficiency and convenience. However, the fact is that it is now the normal way we proceed. The theory behind it is that each side is best equipped to present its own case with the greatest effectiveness. But, as Jack Dunsford pointed out in his admirable Presidential Address last year:

What is not so often recognized in debates about the desirability of the adversary system is the ultimate justification which must be offered for it: that it is a better and more efficient method than any other available for ascertaining the truth and providing for the just resolution of disputes.¹³

¹²See, e.g., Prasow & Peters, *Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations* (New York: McGraw-Hill, 1970), 1-14.

¹³*The Presidential Address: The Adversary System in Arbitration*, in *Arbitration 1985: Law and Practice*, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1986), 1, 12.

He went on to say that it could not be justified merely on the basis of selfish interest or convenience, that while it was "defensible as a good means to a desirable social end," it was "not an end in itself" and that in its present form, "truth may inadvertently be a product . . . but . . . not a conscious goal."

He suggested, for the same reasons I emphasized in my 1985 NYU paper, that arbitration "should not be thought of as a purely adversarial procedure" and that since its purpose was to "develop all the information . . . necessary and relevant to an informed decision," that an arbitrator "ought not to think of himself strictly as an umpire," and "should not hesitate to inquire about whatever he thinks he needs to decide the case properly," but to do so cautiously and with great prudence and courtesy, while maintaining a healthy respect for the professional competence and integrity of the parties and their representatives.

I share that healthy respect and that caution. You're looking at an arbitrator who is mindful of the admonition of the Code of Professional Responsibility and who never (well, almost never) asks a question of a witness until the parties have completed their respective examinations. Yet, I suggest it might be worthwhile at this point in our history for parties to examine the adversarial system more closely and after that examination decide for themselves whether it best meets their needs. So, let's step back for a moment. As you know, closeness, total immersion in an accepted system often distorts perspective. I'm reminded of the story of the between-the-wars anticommunist who lived in a small village in a middle European country. Staunchedly anticommunist over the years, he was about to die and told his assembled friends that they should bring the communist mayor of the village because he wanted to join the party before he expired. When his incredulous friends asked why after all these years he now wanted to switch allegiance and jettison everything he believed in, his reply was, "If I die, better it's one of them than one of us." Let's also look at this question through the prism of that illustrious Russian director and actor Gregory Ratoff, who, when asked to describe a movie in which he had appeared, replied, "There are no villains in this piece, only values."

As has already been said, many aspects of the adversarial system in its purest form are antithetical to arbitration's purposes. The heart of that system is its method of direct and cross-examination and we might well explore the desirability and

necessity of that method in arbitration. The unfolding of a case through direct examination can be a time-consuming process. The facts presented, many of which are background or not really in dispute, can often be revealed in a simpler and shorter form. As to cross-examination, Wigmore told us once that "Cross-examination is the greatest legal engine ever invented for the discovery of truth."¹⁴ I suggest too many have been through too much to hold unswervingly to that view—at least in the real world as opposed to the world of television or film. Given the experiments of the sociolinguists Danet and Bogash, who concluded that the adversarial system works properly only when both adversaries are highly combative and equally matched in combativeness,¹⁵ we might more readily agree with the view of one of our most reflective judges, Jerome Frank, who equated the American trial method to "throwing pepper in the eyes of a surgeon when he is performing an operation."¹⁶

Let's reflect for a moment on a possible different method, the arbitrator's inquiry. I hesitate to use the phrase "the inquisitorial method," for, as another reflective judge, Marvin Frankel, reminded us in his Cardozo lecture, *The Search for Truth—An Umpireal View*, it "conjures up visions of torture, secrecy and dictatorial government."¹⁷

Yet, the method, more properly described as a mixed "inquiry/adversarial" method, has long and honorable roots in European countries whose devotion to just results is no less than ours.¹⁸ Indeed, it even exists in what the Anglo-Saxons among us would call the mother country where the judicial system is adversarial in the highest sense of the word. Dickens and her colleagues, after examining the Industrial Tribunals and finding fault with them, suggested, as I said, that an alternative might be informal arbitration as now practiced in England. They described that process as follows:

The hearings are not subject to any set procedure; this is a matter for the arbitrator. The hearings generally are conducted informally and

¹⁴Evidence, Section 1367 at 29 (3d ed., 1940).

¹⁵*Fixed Fight or Free-For-All*, 7 Brit. J.L. & Soc'y 36 (1980).

¹⁶Courts on Trial: Myth and Reality in American Justice (Princeton: Princeton Univ. Press, 1966), 85.

¹⁷123 U. Pa. L. Rev. 1032 (1975). For a critique of Judge Frankel's views in the context of a criminal trial, coupled with the concession that the inquiry method might be suitable for a judge sitting without a jury, see Uviller, *The Advocate, The Truth and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. Pa. L. Rev. 1067 (1975).

¹⁸See Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure, A Comparative Study*, 121 U. Pa. L. Rev. 506, 556-561, 569-561 (1973).

in private. There is no oath taking and the parties remain seated in the same places. The parties make written submissions to the arbitrator prior to the hearing and are asked to exchange these with each other. At the hearing they make oral presentations. The arbitrator questions both sides and they may ask questions of each other, but through the arbitrator rather than by cross-examination. . . . advisors and witnesses may be brought to the hearing; any witnesses being questioned by the arbitrator. . . . Legal representation [you'll love this part] is extremely rare and notice is required if it is intended that a legal representative be used so the other party may consider whether to employ one also.¹⁹

This description is not based on a large number of cases, for "private arbitration" as we understand that term is very limited in Great Britain, primarily because of the availability of the more formal Industrial Tribunals and the fact that "private arbitration" must be agreed to by both sides.²⁰

I suspect we will hear more of this procedure when Sir John Wood, the Chairman of the Central Arbitration Committee for the United Kingdom, speaks to us tomorrow. But, for the moment, let's examine how big a step such a procedure would be for us. For some, it would be large indeed; for others, really not very far. It would certainly be a small step for those who had already adopted the previously described system of joint fact-finding and not a much bigger step for those who, while not adopting joint fact-finding, had agreed to a full disclosure or "no surprises" mechanism. Typically, in such a mechanism, the parties meet beforehand and disclose all documents and prospective witnesses together with the nature of their testimony. If the matter is not thereafter settled, both parties prepare offers of proof in narrative form which are read in the arbitration proceeding. Cross-examination is then permitted. In such a system, adaptations more closely approximating the inquiry model would be relatively simple.

Let me carry it a step further by describing the agreement recently negotiated by the Equal Employment Opportunity Commission and the union representing its employees. There, both parties are required to submit to the arbitrator at least 30 days prior to the hearing a statement of facts, a prospective

¹⁹*Supra* note 7 at 280.

²⁰Such arbitrations may be set up under the auspices of the Advisory Conciliation and Arbitration Service (ACAS), the Central Arbitration Committee (CAC), both statutory bodies, or arranged by the parties at their own expense. In 1983, the ACAS arranged arbitration in only 51 dismissal cases; the CAC's private arbitration case load was even smaller. See Dickens et al., *supra* note 7 at 278-279.

witness list, the arguments in support of their respective positions and all supporting documentation and evidence. The grievance file is also submitted as a joint exhibit. So much for the prehearing ignorance of the arbitrator. At least 10 days prior to the hearing date, the arbitrator contacts the parties to secure, if possible, agreement on a stipulation of facts, to suggest whether or not a hearing is necessary, and to decide, if the parties cannot agree, on the framing of the issue or the need for particular witnesses.

The hearing itself proceeds in the conventional manner, but it would be a small step, given the knowledge the arbitrator brings to the proceeding, for the arbitrator's queries to come first, followed by the questions of the parties. I would not propose—indeed, I am not proposing anything but simply exploring ideas—that cross-examination be eliminated or conducted solely through the arbitrator as is the case in the informal British system. Such an approach might possibly be in conflict with certain state provisions and would certainly send shudders through those whose code prescribes a “duty to the adversary system” in judicial proceedings. Moreover, it seems to me that there are lines of questioning, particularly in fact-bound cases involving matters of credibility, that parties might well explore on their own. But it also seems to me that a procedure cast along the above lines would tend to diminish unnecessary examination, both direct and cross, while at the same time highlighting to the parties those matters the informed decision maker, and under this procedure he or she would be informed, considers significant.

If all this simplification is becoming too complicated for you, one reason may be that we habitually think of an arbitration hearing as the place where everything finally gets done and finally comes out. On the other hand, joint fact-finding or full disclosure, coupled with prehearing education of the arbitrator and an agreed-upon diminution of direct and cross-examination as the means of presenting the case, may mean that the hearing, unlike many all of us have seen, can be confined to exploring nuances and sticking points and the factual conflicts that really matter. I can envision a procedure in which the arbitrator begins by describing his understanding of the parties' respective positions and proofs and thereafter explains that he has two concerns—the conflict of recollection between X and Y on what appears to be a critical point and the significance each party

attaches to undisputed event A. X and Y are then questioned by the arbitrator and the parties. The parties then give their views on event A. The parties then sum up, emphasizing what they consider of primary importance, and all move to the next grievance on the agenda.

Obviously, such an approach to hearings may not be necessary or even suitable for all parties or all cases. Moreover, the approach requires rethinking and more work at an earlier point on the continuum, but if it only succeeds in eliminating the corridor counsel, whose preparation occurs between 9:30 and 10:00 a.m. of the hearing day or the countless caucuses which often take up the bulk of a hearing day, there may be some merit to it.

The procedure I have described—the arbitrator's inquiry—comes with costs and this is where we must discuss values. The sense of participation in the hearing by those who would otherwise be traditional witnesses may seem diminished, thus cutting into the therapeutic value of the process. This must be considered. I point out to you, however, that if joint fact-finding preceded the hearing those individuals have already told their story in detail. It may also be that arbitrators will be deprived of the opportunity to observe all the witnesses as they fully relate their recollections during friendly direct examination and lengthy hostile cross-examination. But both Dick Mittenthal and Ted Jones reminded us some eight years ago in New Orleans how weak and intangible the reed of witness demeanor really is in determining credibility and truth.²¹ I would suggest that nothing has changed since to invalidate their observations. Obviously, those whose tendency is to dominate and control hearings may find their loss of control in the atmosphere I described not to their liking. But, to many, that attempted dominance and what follows in its wake is part of the problem and if the parties decide they should end that opportunity for either side, who is to say they should not. Under this procedure, some of the required prehearing work may be in vain because the matter is settled on the hearing's eve. But those costs must be weighed against the failure to settle, often caused by a lack of

²¹Mittenthal, *Credibility—A Will-o'-the-Wisp*, and Jones, *Truth When the Polygraph Operator Sits as Arbitrator (or Judge): The Deception of "Detection" in the "Diagnosis" of Truth and Deception*, in *Truth, Lie Detectors, and Other Problems in Labor Arbitration*, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern & Barbara D. Dennis (1979), 63–64 and 128–133.

preparation at a time before positions have hardened, and the expense and delay of a traditional proceeding.

At this stage, there is no scientific way to measure monetary savings, if any. I don't think any of us know exactly how such a procedure would work, how it would sit with all concerned, how it would survive, how many cases it would help resolve before hearing, or what it would cost in comparison to traditional approaches. We don't know because it hasn't been tried on a full scale. But if parties want greater openness and more settlements, and, therefore, less cost on that account alone, if they want diminished rancor, an abatement of the undesirable features of a system they have come to know but not always love, if they want a mechanism more in keeping with Professor Kochan's second scenario, if they want to experiment with a procedure whose potential for sorting out the facts and making reasoned decisions appears to equal what we are accustomed to but is more closely akin to "simple informal justice in an atmosphere in which the ordinary man feels he is at home," then the process I have described may be worthy of your consideration.

Ladies and gentlemen, you may cross-examine.

Comment—

THOMAS W. JENNINGS*

I have been assigned the rather unenviable task of following and briefly discussing George's excellent presentation. In light of my personal background, I have the very strong sense that I was selected for this task not because of my obvious erudition, but rather to perhaps cast a somewhat different perspective on the question. Accordingly, using my intended role as a shield, I will take full advantage of it and offer my own concededly jaundiced perspective of the problems inherent in any attempt to "simplify" the arbitration process.

The process of labor arbitration—simplified or otherwise—does not exist in a vacuum. It functions in a very real and practical world. Moreover, it is but one factor that must be considered in the overall operation of labor arbitration. As a consequence, any voluntary modification to that process can

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only occur if all concerned agree that such change is in their best interest.

Regrettably for the process, any change that would improve its operational efficiency need not necessarily be in the ultimate best interest of either the union or the employer. On the contrary, external forces that operate largely independent of the process itself may make such change either impractical or undesirable.

I suggest that there are at least two principal external forces that must be considered and reconciled with any attempt to "simplify" the grievance and arbitration process. These forces are the increasing judicial overview of the process and the inherent economics of arbitration.

It comes as no surprise to anyone in this room that the number of lawsuits alleging a breach of the union's duty of fair representation by either its refusal to arbitrate¹ or by its conduct during arbitration² has dramatically increased during the past decade. The judicial attitude developed through these cases has been largely supportive of the arbitration process and reasonable in its expectations of the quality of union performance. However, there have been more than a few decisions that have had a clear impact upon any effort to simplify the process by either avoiding arbitration or by modifying the combative, adversarial character that it has adopted and that is nondecried.

For example, at least two courts in the recent past have held that a union may breach its duty of fair representation in failing to arbitrate a grievance that both the jury and the union had concluded had no merit.³ Since 1983, a union is liable for a substantial portion of the back pay attributable to a grievance that a jury later determined should have been taken to arbitration.⁴ While one such verdict and the litigation costs preceding it can easily bankrupt a small union, the cost of a single arbitration to avoid such a verdict will not. Thus, the issue of whether to arbitrate a particular grievance becomes a business decision that

¹*Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967).

²*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 91 LRRM 2481 (1976).

³*Bygott v. Leaseway Transp. Corp.*, 622 F. Supp. 774 (E.D. Pa.), appeal docketed, No. 86-1027 (3d Cir. 1985); *Wood v. Teamsters Local 406*, 593 F. Supp. 355, 117 LRRM 2618 (W.D. Mich.), appeal docketed, Nos. 85-1964, 1963, 1880 (6th Cir.).

⁴*Bowen v. United States Postal Serv.*, 459 U.S. 212, 112 LRRM 2281 (1983). For an excellent discussion of the impact of recent duty of fair representation decisions on the arbitration process see Waldman, *A Union Advocate's View*, *The Changing Law of Fair Representation*, ed. Jean T. McKelvey (Ithaca: ILR Press, 1985).

may be totally unrelated to the merits—or the obvious lack thereof—of a particular grievance.

The union's conduct before and during the arbitration hearing is also subject to question by a jury. It is an unfortunate fact that grievants—potential plaintiffs all—have rarely participated in an arbitration proceeding other than that which decides their fate. As a consequence, they evaluate their union's performance from a perspective drawn from the great courtroom battles—both real and fictional—of our time. The grievant, whose sole desire is to win, has little concern over whether the ultimate good of the process is served by his arbitration proceeding. Moreover, it is when victory is not forthcoming that the grievant, and sometimes a jury, begin to second-guess the union's efforts.

Notwithstanding the clearest of judicial charges provided to the jury, it is extremely difficult to convince a juror, who has just sat through four or five days of the adversarial system at its best, that "fair representation" need not be adversarial and may be entirely cordial. In that formal atmosphere of paneled courtrooms, form replaces substance, and prehearing agreements on facts and issues, such as have been suggested by George, in the eyes of a jury, become "deals." The absence of a vigorous, though thoroughly useless, cross-examination during the hearing is viewed by the disappointed grievant as being little short of a "sellout."

Clearly, relatively few arbitration hearings are ultimately scrutinized by a federal judge and jury. However, given the substantial expense of defending one of these suits and the potentially devastating financial exposure that can flow from an adverse jury verdict, only the most foolhardy union would ignore its risk and fail to adjust its conduct accordingly. As a consequence, the union is compelled to accommodate its activity within the arbitration process to meet its member's, and a potential juror's, often unrealistic expectations. In the real world of litigation tactics, vigorous, adversarial combat, although often counterproductive to the resolution of the dispute, is vastly easier to defend than cordial discussion. Under these tactical constraints, lofty issues regarding the ultimate betterment of the process through simplification remain someone else's concern.

I would hasten to note that even if the threat of suit were not present, a somewhat similar form of unrealistic expectation must nevertheless be considered in attempting to simplify the process. I would suggest that the vast majority of proposed

simplifications assume a level of sophistication and experience with the process on the union officer's part that is simply not present in the smaller unions that are the "bread and butter" of arbitration.

Federal law requires that the election of local union officers be held at least every three years.⁵ That same law essentially prohibits the union from imposing any requirement that a candidate for union office possess meaningful experience in administering the union and its grievance procedure.⁶ The end product of this system is that many union officers have no experience with the arbitration process and bring to that process the workers' unrealistic perspective of how it *should* function.

I am not, of course, demeaning the leadership, ability, or devotion of labor union officers. However, it is simply a fact of life that niceties regarding the historic role and function of labor arbitration or its nonadversarial genesis are not factors in their perspective of what the system is or should be. They are *not* interested in merely resolving the dispute; they are only interested in winning the dispute. They have fully embraced the Vince Lombardi approach to the dispute resolution—"show me a good loser and I will show you a real loser."

In like fashion, any effort to simplify and expedite the actual arbitration process itself must also take into consideration the very real economic differences that exist between the large, well-staffed, and well-financed national unions and industry groups as compared with the vast majority of unions that finance arbitrations through a small dues base.

It is no great secret that labor unions have of late fallen on hard times. Their membership is down, but their costs of servicing the remaining membership have substantially increased. As a consequence, any modification to the status quo that would entail additional expense must be justified by a perceptible, immediate benefit.

If one could resolve the potential duty of fair representation problems inherent in any prehearing meeting of the parties that is conducted outside of the presence of the grievant, the issue to be considered by the union would be whether such prehearing meetings are "cost-effective." Clearly, some benefit would flow from an in-depth review of the merits of the grievance and an

⁵Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §481(b).

⁶*Id.*, 29 U.S.C. §481(e).

effort to stipulate as to some or all of the facts that would ultimately be presented to the arbitrator. Assuming the good faith and equal sophistication of both parties participating in such meetings, attorneys need not—and really should not—be involved.

However, the first time that either party loses a case, or is otherwise prejudiced as a result of what it views to be poor draftsmanship of a stipulation or, worse yet, deception by the other party during these meetings, the system will either collapse or become a haven for lawyers then to argue about every word and its implications in the tactical posturing of the case.

Whether the participation of lawyers throughout the labor arbitration process is a good or bad influence is a subject of hot dispute far beyond the scope of this discussion. Suffice it to say that one fact is not in dispute—at least from the perspective of the parties—that being that lawyers are expensive (present company obviously excluded).

This being so, it would be the rare union that could afford to use legal representation at an early stage in the procedure. The benefit to be derived through a less rancorous and, therefore, more expeditious hearing would simply, I believe, not be outweighed in the union's mind by the legal fees thus incurred.

Intellectually, I share George's concern and, I am sure, that of all in this room, for the increasing complexity that attaches to arbitration. Clearly, with very sophisticated and experienced parties that are not inhibited by limited financial resources, the suggestions posed by George are unquestionably worth considering and have actually worked.

Notwithstanding my seeming pessimism regarding the effects of external pressure on an effort to improve the process, I do believe that there are steps that can be easily taken to produce a more effective, "simplified" process without sacrificing the "fairness" of the representation accorded to the employee.

Given George's proclivity to recommend changes by the parties, I would suggest that a partial solution lies with the arbitrator as well. It does no good to bemoan the negative effect of excess adversarial exuberance, needless witnesses, and useless briefs and transcripts unless one is willing to do something about it.

Throughout the history of American jurisprudence judges have exercised substantial control over the conduct of the adversaries without compromising their neutrality. I see little reason, therefore, for the arbitrator to cast his or her role in the process

as being little more than a passive observer of whatever excesses in which the parties engage.

As a participant in, and a beneficiary of, the system, the arbitrator bears a heavy degree of responsibility for its efficient operation. There is a vast distinction between dictatorial manipulation of the hearing and firm control of its procedure. Effective control of the parties and the hearing through the inherent power of persuasion would simplify not only the process, but the lives of the parties themselves. If the fifth witness to prove the same point is unnecessary, let the participants know. If briefs are unnecessary, say they are unnecessary. Firm control is not only warranted, but welcomed.

In conclusion, I suggest that much of the complexity and waste of effort that has crept into the arbitration process is a result of external considerations that have little, if anything, to do with the system itself. Clearly, the system can be simplified without sacrificing its inherent fairness to all concerned. However, that simplification can only occur if it is consistent with the needs of the parties including those that are extraneous to the system itself.

I thank you for your attention.

Comment—

JAMES H. JORDAN*

Over a quarter of a century ago at the 1959 meeting, Harry Platt brought to the Academy's attention that: "Complaints that arbitration is becoming too costly, too time consuming, too formal or informal are not uncommon."¹

This theme and its ramifications have caused members such as Sembower, Aaron, Simkin, Garrett, and now Nicolau to address this Academy. Reviewing the contributions of those distinguished people has made it relatively simple to see that my comments are made with well-deserved humility.

There are, however, two main areas that George has focused upon in his provocative paper that I would like to address:

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¹*Current Criticisms of Labor Arbitration*, in *Arbitration and the Law*, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959), viii.

The first, that his comments “were meant to bring us back to the true nature and original intent of the grievance process and to highlight those practices . . . in conflict with it.”

And the second, is an analysis of what I will call the procedural aspects—the transcripts, briefs, hearing, delay, and cost.

George’s analyses and solutions draw heavily from his assumption there is a “true nature and original intent of the grievance process,” a proposition I wish to challenge. Not because I am unsympathetic to George’s vision, but rather because I believe industrial relations are too complex and diverse to accommodate such a notion which then becomes the model against which the parties’ practices in arbitration are to be measured.

Proceeding from this view of arbitration the conclusion is reached “that parties need a conflict-resolution system as much as they need a ‘correct’ result in any particular case.”

If the point being made is to recognize that the grievance procedure is the heart of the contract and that the parties should be encouraged to seek their own solutions and avoid arbitration, I’m all for it. Indeed if that were the real world, it would eliminate the need for today’s discussion and perhaps turn this session into an unemployment colloquium.

The best way to avoid the costs of arbitration is not to arbitrate; and there are few who would disagree that the parties’ own solutions are to be preferred to an arbitrator’s award. But when this process doesn’t occur the suggested improvements are largely based on a concept of arbitration that couples fact-finding and mediation and that has, as George puts it, as its “major thrust an emphasis on settlement.”

Advocating this settlement model of arbitration, the paper treats the issues of adversarial relationships, legalisms, and formalities as resultant by-products when the parties fail to recognize the true intent of the grievance and arbitration process.

Based on that model, the examples chosen almost exclusively deal with arbitration conforming to that view which is found in permanent arbitration systems. Not only do such permanent systems make up a small part of the arbitration universe which is predominantly ad hoc, but upon examination they are found to be unique products of a particular collective bargaining system.

What we have to recognize is that with few notable exceptions, arbitrators and the arbitration process have little impact on the structuring of the conflict resolution system of the parties.

Arbitration is just one event in the much larger industrial relations system which has many demands seeking accommodation. What needs to be questioned is the thought that if we could agree on the true intent of the grievance and arbitration procedure this would somehow fashion a more effective conflict resolution system and structures emphasizing settlements and simplifying arbitration.

The difficulty is that industrial relations are much more complex. Grievance and arbitration procedures will continue to reflect the industrial relations system of which they are only a small, but significant part. The reason for so many types and shapes of grievance and arbitration procedures, both good and bad (and why there are no "quick fixes") is the scope and complexity of industrial systems described by John Dunlop:

An industrial-relations system is comprised of three groups of actors-workers and their organizations, managers and their organizations, and governmental agencies concerned with the work place and work community. These groups interact within a specified environment comprised of three interrelated contexts: the technology, the market of budgetary constraints and the power relations in the larger community and the derived status of the actors. An industrial relations system creates an ideology or a commonly shared body of ideas and beliefs regarding the interaction and roles of the actors which helps to bind the system together.²

The product of this matrix is 160,000 collective bargaining agreements negotiated by unions and management who are in the best position to agree to the compromises necessary to get a contract. Inherent in that compromise process are grievance and arbitration systems based on a wide variety of value systems not representing in any way a "meeting of the minds."

Perhaps this complexity and diversity of industrial relations systems is why the concept of the permanent arbitrator-mediator that George Taylor described never emerged.

Ad hoc arbitration is at best a transitory method entailing disadvantages that outweigh its advantages to labor, management and arbitrators. A permanent arbitrator is a prime requisite. Out of the continuing relationship consistent policy and mutually acceptable procedures can evolve.³

²Industrial Relations Systems (Carbondale: Southern Ill. Univ. Press, 1958), 383.

³Shils, Gershenfeld, Ingster, & Weinberg, *Industrial Peacemaker* (Philadelphia: University of Pa. Press, 1979), 47.

Instead the parties have largely chosen ad hoc arbitration, where it is far more difficult to achieve a meeting of the minds as to arbitration's role in conflict resolution.

Further, my experience is that policy can't be established from the bottom up. For the most part, the players at the arbitration table aren't the policy makers that can implement the proposition that what is needed is "a conflict resolution system as much as they need a 'correct' result in any particular case."⁴

This conclusion may indeed be true but achieving such a result can only come from the parties' collective bargaining and then only if such a concept makes sense in the context of the strategic needs of a specific larger industrial relations system.

Consequently, ad hoc arbitration has an outlook that by nature is more short run and adversarial. Although some may feel the landmark principles have long been decided, the parties in the average case still look upon arbitration as an important event.

Freeman and Medoff in their book *What Do Unions Do?* found:

Our most far-reaching conclusion is that, in addition to well advertised effects on wages, unions alter nearly every other measurable aspect of the operation of workplaces and enterprises, from turnover to productivity to profitability to the composition of the pay packages.⁵

Experienced advocates know that the grievance and arbitration procedure plays an important role in those outcomes. Confronted with the realities of the workplace they will behave as advocates—they want to win their case. Briefs and transcripts will be viewed in terms of competitive advantage. Their use is affected both by the resources available to the advocate (generally greater on the management side) and the hoped for effect on the arbitrator—a favorable outcome.

Accordingly, I am not optimistic that the mediation-settlement model will emerge in the search to simplify the process. Arbitration is but part of collective bargaining; itself a product of an industrial relations system the characteristics of which make it highly unlikely that there will be an agreement about the true nature and intent of a grievance and arbitration system.

⁴*Id.*

⁵*What Do Unions Do?* (New York: Basic Books, 1984), 19.

To provide a perspective on the procedural aspects of the arbitration process dealt with in the paper, I would like to cite certain characteristics of the arbitration process gleaned from studies made by the AAA and FMCS.⁶ They are offered as "orders of magnitude" not as definitive statistical analysis.

Approximately 17,400 cases were filed with the AAA in 1984 of which 50 percent were withdrawn. In that same year, the FMCS had requests for 30,159 panels, made 11,156 arbitrator appointments, and about 5,834 cases closed with an arbitrator's award.

The AAA conducts a survey of a large sample of case reports which in 1984 comprised 3,307 cases or about 40 percent of all awards. Private sector cases totaled about 60 percent and public cases 40 percent.

- Five percent of all cases used expedited or the streamlined procedures.
- Five percent of the cases were settled at the hearing.
- Discipline and discharge represented about 35 percent of all issues.
- Lawyers were used by management 73 percent of the time and represented unions in 53 percent of the cases.
- Transcripts were used in 21 percent of cases and briefs filed by one or both parties in 51 percent of the cases.

Another study the AAA has conducted covers all bills submitted by arbitrators in concluded cases. In 1984, 1,087 arbitrators submitted billings for 8,714 cases.

The AAA Labor Panel has 3,400 arbitrators.

- Only 1,087 heard any cases.
- 90 percent of the arbitrators heard 20 or fewer cases.
- Nine percent or 98 arbitrators heard 21–50 cases.
- One percent or 11 arbitrators heard 51 or more cases.
- Average arbitrator per diem charge was \$355. Average case cost including study and travel was \$1,030. The hearing day to study time ratio was one day of hearing to 1.36 study days.

Recognizing there are problems with any study of averages let me venture into the water where I appreciate I might go under in the proverbial three-foot average stream.

⁶American Arbitration Association and Federal Mediation and Conciliation Service, Internal Studies (1984 and 1985).

There's a lot of cancellations out there. It's good news that 50 percent settle, and I'll hold the bad news until later.

Despite all the talk about delay, only 5 percent of the parties use expedited or streamlined procedures. If Sam Kagel's characterization of these as "bargain basement" procedures is correct—they're not selling. Further it's not even close in the mediation-settlement versus award as only 5 percent of cases are settled at the hearing.

Horror case aside (and there are some to be told) the facts are that the arbitrator's costs are not the most significant part of the expense story. And here is where one should recognize that the real depth of the stream can be deep, the average hearing day to study time ratio of one day hearing to 1.36 days of study does require much more analysis. As one experienced friend pointed out, it's what happens to study days when transcripts and briefs are introduced. Unfortunately there are no data on this and there should be. Right now all we can agree on is that there has to be delay and costs associated with both the preparation and the required study.

Lawyers now represent management in almost three-quarters of the cases and unions in over half. Without debating the need for the transcripts in 21 percent and briefs filed in over 50 percent of the cases, the conclusion is inescapable that they add to the cost and contribute to delay.

The debate over lawyers in the arbitration process should be over, since at least in the survey group they are the majority players. Our organizational behavior friends have a word called adaptiveness. This is the extent to which a system can and does respond to changes whether internally or externally induced. This suggests it is largely the external factors of legislation and increasing acceptance of the judicial aspect of the process that have led the parties to increasingly use lawyers as their advocates.

But why should the lawyer's presence alter the arbitrator's exercising control of the hearing? I suspect that arbitrators can and should play the significant role in seeing that legalisms do not interfere with what is needed for a full understanding of the case.

It is not the arbitrator's job to tell the parties how a case should be presented, but it might help both cost and delays to suggest that if the parties need to file briefs, all the arbitrator requires is a

five- to six-page memorandum and that should only require a week to 10 days. A page limit on papers, you may remember, was a delightful surprise in school; would it sound so bad coming from an arbitrator?

The statistics confirm what you've known all along that approximately 10 percent of the arbitrators hear 90 percent of the cases. This occurs even though their busy schedules contribute to the 200-day average processing of a case from receipt of demand to award.

Realistically, I don't believe you're going to change this in any significant way. The parties are telling us that waiting for the acceptable arbitrator is most important even if this entails delay.

This cadre meets their expectations of the arbitration process. The parties know what to expect, not in terms of the decision, but rather the way these arbitrators manage the process. That's vitally important for advocates who are just as busy as the arbitrators. What I see happening in this arbitrator selection is that the advocates are gaining some of the advantages of the permanent systems while still retaining the freedom of the ad hoc selection process.

Testing an idea George suggested in an earlier paper,⁷ I found it true that although these busy brethren couldn't give you a date for three to four months, because of the 50 percent cancellation rate, you could via a conference call probably get a date this week or over the next several weeks. As George has noted, expedited panels of such arbitrators could be put together which would be helpful in the troubled area of delayed discharges.

Discipline and discharge cases continue to represent about 35 percent of all cases. Combine that with an average of 200 days to award and if you add one postponement, time stretches to nine months or to a year. There are too many discharge cases with long delays that constitute nothing but trouble for arbitrators and advocates—to say nothing of the process itself. No one need remind this audience of the difficulties of trying these cases or the problems of remedy in case of reinstatement. There are many reasons for delay, some legitimate, some not; it is a problem to which each of the three parties

⁷Nicolau, *An Inquiry into Arbitration's Conventional Wisdom and Some Modest Proposals*, paper presented at American Arbitration Association, Arbitration Day, 1984, New York City.

to the process have contributed and it needs a creative tripartite solution.

Quality need not be sacrificed for speed. Permanent panels of experienced arbitrators as George has suggested can be established, and a number of you have done just that.

Unfortunately, there are no quick fixes for the problems. Most of the solutions must come from the parties. No action will be forthcoming unless the problems are serious enough to achieve a higher priority than they presently have.

Meanwhile, having in this forum focused the parties' attention upon the process, it seems incumbent upon arbitrators in their case handling not to provide material that can be cited as contributing to time, cost, or delay. The continued acceptability of arbitration is so important it demands that we manage our part in this tripartite process to the best of our ability.

Rejoinder—

GEORGE NICOLAU

I agree with both discussants that arbitrators should expend energy controlling the hearing, but that alone won't solve the matter. My point, dealing with structural changes in the hearing as well as the grievance procedure, was more basic.

Mr. Jordan, in my view, misread it. I was not suggesting a return to consensus arbitration. The suggestion was that parties should build prearbitration mechanisms designed to encourage their own settlements and that, for matters in which settlement could not be achieved, they adopt a less adversarial hearing procedure so that the arbitrator, now called upon to *decide*, could do so without having to dodge the pepper normally thrown at the decision maker. The point was that the parties, whether they use a permanent umpire or an ad hoc arbitrator, do not have to try cases as they now do.

I agree with Mr. Jordan that arbitration is but a small part of an industrial relations system and that only the policy makers can decide what kind of conflict resolution system they want. That's why the paper was directed to "the parties," not just their representatives at the arbitration table. On this point, it's quite puzzling and more than a little incongruous that so many parties are opting for quality of life circles, productivity councils, and

other nonadversarial mechanisms on the shop floor while continuing their adversarial ways in the hearing room.

I appreciate the duty of fair representation concerns raised by Mr. Jennings and fully agree that changes will occur only if they are in the parties' best interests. Indeed, I was not suggesting otherwise. However, I cannot agree that "table pounding" must continue simply because union members have a misconception, based on fantasy, that this is the way arbitration should be run. Arbitration hearing rooms are not courtrooms; arbitrators are not jurors. And if members think that, and if they have, as Mr. Jennings suggests, "unreasonable expectations," then responsible leadership requires that they be disabused of those notions.

Change will not come overnight. As I indicated, it will only come from a sustained effort. It will not come, however, if parties, while knowing something should be done, nevertheless take the position that they cannot do it.