CHAPTER 3

THE CHANGING COMPETITIVE ENVIRONMENT AND ARBITRATION

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More than 35 years ago, Professor Dunlop called our attention to the importance of the constraints imposed on the process of collective bargaining by its competitive environment.[1] No one could anticipate then what impact the environment of the 1980s would have on collective bargaining, but the evidence is now clear to most of us.

Labor arbitration, as an integral part of collective bargaining, is subject to many of the same forces altering the nature and process of bargaining. The purpose of this paper is to investigate what changes may be occurring in the substance and process of labor arbitration as a result of competitive pressures and concomitant technological changes, and to consider the implications of these changes for the participants in the labor arbitration process. Perhaps more important, the paper raises some questions about the impact our changing environment might have on the future roles of arbitrators and of arbitration as a means of dispute resolution in the labor-management relationship.

Competitive Environment

For this audience, it is not necessary to detail the increased competitive pressures facing the parties in many collective bargaining relationships, but a few statistics will bring the point home. From 1978 to 1986, 46 percent—nearly half—of all steel industry jobs in Ohio were lost.[2] This is astounding in only eight years.

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[1]Dunlop, Industrial Relations Systems (Henry Holt, 1958).

[2]Gerhart, *The Ohio Steel Industry: Restructuring and Labor Relations in 1989*, 40 Lab. L.J. 510 (1989).

Perhaps less dramatic in percentage terms, but no less important from our perspective, has been the overall decline in manufacturing in the United States. From 1980 to 1990, there was a net loss of over two million manufacturing jobs—about 9 percent. In Ohio the net loss was about 220,000 jobs—roughly 17 percent.[3]

From an arbitration practitioner's perspective, an important phenomenon is illustrated by these manufacturing statistics. Although the net decline in manufacturing jobs for the nation may not be shocking, there has been a subtle shift of manufacturing jobs away from historically unionized urban areas of "industrial states" to the less unionized rural areas of the country. This is reflected in the much larger decline in manufacturing jobs in Ohio versus the United States as a whole. Even if jobs have not left Ohio for Arkansas or Mexico, they have moved from cities like Cleveland, Youngstown, and Toledo to towns like Marysville.

My focus on Ohio is not due solely to the fact that I live there. From the point of view of the arbitration profession, Ohio is a bellwether since, year after year, it has ranked number one in ad hoc arbitration appointments by the Federal Mediation and Conciliation Service (FMCS).[4] To twist a phrase, "What's bad for Ohio arbitration is bad for the profession."

Emigration has not been the only managerial reaction to competitive pressure; automation and technological change have been important parts of the response, as well. The goal of manufacturers to produce more with fewer workers has always existed. Over the past decade, however, that goal has been pursued with religious fervor due to the competitive environment. Although the recession of the early 1990s has ended, based on the turnaround and modest growth in the gross domestic product, job growth continues to lag. From March 1991, when the national recession officially ended, through February 1993, the number of jobs in the United States grew by a small fraction (0.8 percent). Not all areas have fared so well. For example, jobs in New York City fell by 4.3 percent during this "recovery" period,[5] a further illustration of the point made earlier concerning the migration of jobs. Indeed, the survivors of this past decade have all found ways to produce more goods or services with less labor through increased productivity.

In summary, the intense competition of the 1980s, which has led to net job loss, job migration, and employer actions aimed at

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[3]U.S. Bureau of the Census, County Business Patterns, 1980–1990.
[4]Federal Mediation & Conciliation Service, annual reports, 1980, 1985, 1990, 1992.
[5]Data are from U.S. Bureau of Labor Statistics, as reported in N.Y. Times, Apr. 18, 1993.

reducing labor costs through automation or other means, has created a tough economic environment for collective bargaining generally and for arbitration specifically.

Changes in Collective Bargaining

Transformation of Industrial Relations

Thomas Kochan, Harry Katz, and Robert McKersie (Kochan) have theorized that fundamental changes occurred in the U.S. system of industrial relations in the early 1980s which reflected ". . . deep-seated environmental pressures that had been building up gradually as well as organizational strategies that had been evolving quietly for a number of years."[6] The "central argument" of Kochan is that ". . . industrial relations practices and outcomes are shaped by the interactions of environmental forces *along with* the strategic choices and values of American managers, union leaders, workers, and public policy decision makers."[7] Kochan ascribed the changes of the 1980s principally to a withering away of the "shared ideology" that "defines and legitimizes" the roles of the parties, which John Dunlop noted was crucial to stability in any industrial relations system.[8] Although Kochan acknowledged the economic environment as a critical factor in the changes they observed in the 1980s, they also ascribed much of what was happening to independently derived new corporate strategies to avoid unions.

David Lewin, on the other hand, attributed the observed decline of union strength in the early 1980s to the increased competitive pressures facing American employers and to the weakened market position of American workers and their unions.[9] In essence, Lewin defended the original Dunlop conceptualization of the industrial relations systems and effectively took up the challenge to show that American industrial relations has been influenced primarily by economic constraints and the political climate as originally posited by Dunlop. Lewin noted:

> [I]ncreases in economic competition can be expected to influence managerial values which, in turn, affect managers' preferences or choices of business decisions, including those pertaining to industrial

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[6]Kochan, Katz, & McKersie, The Transformation of American Industrial Relations (Basic Books, 1989), at 4 (hereinafter cited as Kochan).

[7]*Id.* at 5 (emphasis in original).

[8]*Id.* at 7.

[9]Lewin, *Industrial Relations as a Strategic Variable*, in Human Resources and the Performance of the Firm (IRRA, 1987), 1.

> relations processes and outcomes. This helps us to understand why management's dominant value orientation toward unionism, which in the U.S. has long been one of major opposition, has increasingly been translated into actual union containment and avoidance behavior, especially in the manufacturing-based stronghold of U.S. unionism. . . .[10]

In short, Lewin posits that there has been no change in underlying managerial values regarding unions, only that the changed economic conditions of the 1980s provided an extra impetus to achieve or maintain nonunion status.

Whether the changes in collective bargaining and in the industrial relations system which Kochan and Lewin write about are only the result of external economic and political forces, or whether they are due in part to managerial "strategic choice," no one denies that the changes have occurred. What are these changes? They include not only the growth of the "nonunion industrial relations system" but also, where unions have survived, the "changing process and outcomes" of "cooperative" collective bargaining. These changes have potentially dramatic implications for arbitration which will be addressed in the final section of this paper.

Three Tracks for Industrial Relations

It would be a serious misreading of Kochan to conclude that all American industrial relations is following the format of the so-called "new industrial relations" toward nonunion status or cooperative collective bargaining. No two bargaining relationships are exactly alike. Based on the preceding discussion, it should be apparent that, as the competitive environment varies, so will the relationship.

At a Northeast Ohio Industrial Relations Research Association meeting,[11] Irving Bluestone, former vice president of the United Automobile Workers Union (UAW) and now professor at Wayne State University, presented a succinct analysis of where U.S. industrial relations is headed. He acknowledged the Kochan model but argued, as had Lewin, that where competitive pressures arise, whether from overseas or from onshore start-up companies, many firms and industries have adopted union-avoidance strategies as a reaction to the competitive climate rather than because of any deep-seated change in values.

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[10] *Id.* at 15–16.
[11] December 6, 1989.

Union-avoidance strategies come in two basic formats. The first is the more notorious antiunion campaign based on threats, fear, and often illegal tactics. The second is a "union-substitution" or neo-human relations approach, in which the employer provides benefits, such as a nonunion arbitration procedure, to persuade employees that the additional benefits of a union would be limited and not worth the cost of organizing or maintaining a union. This is the so-called union-substitution strategy.

The evidence suggests that this strategy has been successful. Much has been written about the declining proportion of workers in the U.S. labor force who are union members. Indeed, the decline has been dramatic, from about 23 percent in 1970 to about 15 percent in 1990. The decline in the actual number of union members has been less sensational, falling from a peak membership of about 20.2 million in 1978 to about 17.0 million in 1990, a decline of about 16 percent.[12] It is notable that 14 points of that 16 percent decline came between 1980 and 1984, during what many in the industrial heartland refer to as the Reagan Depression, when 9 percent of U.S. manufacturing jobs and 17 percent of Ohio's manufacturing jobs were lost.

As the second track for the future of industrial relations, Bluestone identified a situation where the union continues to exist but in a new kind of relationship with management similar to a model found in the Kochan research. At the workplace, labor and management have jointly introduced changes with two objectives:

> (1) to increase the participation and involvement of individuals and informal work groups so as to overcome adversarial relations and increase employee motivation, commitment, and problem-solving potential; and (2) to alter the organization of work so as to simplify work rules, lower costs and increase flexibility in the management of human resources.[13]

Perhaps the most prominent example of employee involvement is the General Motors Saturn experiment; however, the literature is full of similar but less extensive programs where labor and management have jointly agreed to change the way work is performed and to increase the degree of employee involvement in decisions regarding the workplace, including participation in hiring decisions, scheduling, and similar matters heretofore exclusively within the province of management.

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[12]Holley & Jennings, The Labor Relations Process, 4th ed. (Dryden Press, 1991), at 20.
[13]Kochan, *supra* note 6, at 147.

A dramatic illustration of the new industrial relations is occurring at the L-S Electro Galvanizing plant (L-SE) in Cleveland, jointly owned by LTV and Sumitomo Metals. The Steelworkers agreement calls for joint union-management committees, which have significant responsibilities in scheduling, pay and progression, gainsharing, and training. The "dispute resolution procedure" (it is not called a grievance procedure, and the difference is more than semantic) provides employees with a choice for resolving their problems: (1) review by a committee of peers, or (2) review in the traditional arbitration procedure, which is still part of the agreement. Since operations began at L-SE in the mid-1980s, not one grievance has been submitted to arbitration.

Finally, Bluestone noted that a third track for the future of collective bargaining is alive and well, even if it is diminished a bit in volume. This is the traditional arms-length, business unionism relationship around which labor arbitration, as we know it today, has developed. Kochan acknowledges that the traditional system of industrial relations has changed little where competitive pressures have been minimal.

Despite the competitive health of many parts of the traditional industrial relations system, however, some spillover of tactics from the first and second tracks may be observed. Even on the third track, elements of the collective bargaining process, including grievance processing and arbitration, are subject to change.

Implications for Labor Arbitration

The competitive environment facing the parties, which has had such a dramatic impact on collective bargaining, inevitably has had an impact on arbitration. This final section of the paper will consider the volume of cases, the case mix (including the industries and issues involved), and the way the process itself is conducted (including the emerging new roles for arbitrators).

Caseload

The preceding analysis, including the emphasis on the decline in union membership and the shift from adversarial to more conciliatory labor-management relations, strongly implies that there should have been a decline in the number of grievances and, therefore, in the number of cases reaching arbitration.

In fact, available data show a decline in the total number of arbitration cases. At the 1992 Annual Meeting in Atlanta,

Stephen Hayford reported that FMCS awards declined from 7,539 in 1980 to 5,288 in 1990 (30 percent); American Arbitration Association (AAA) awards declined from 7,382 in 1980 to 5,651 in 1987 (23 percent).[14] Of course, these data do not reflect the declines associated with the reduced reliance on umpireship or private panels, which anecdotal evidence suggests may have been more significant. For example, expedited arbitration cases under the mini-Steel procedure have dramatically declined to almost nil in northeastern Ohio.

The steel industry is a stark microcosm of the larger picture in many of the traditionally unionized sectors of mining, manufacturing, and transportation and, perhaps to a lesser extent, utilities. Caseload is declining even more rapidly than union membership. A reasonable inference is that this is due to the rise in alternative forms of dispute resolution, such as grievance mediation, or better shop-floor relations, both of which have reduced grievance filing even where unions continue to represent employees.

One final note regarding caseload relates to the increasing trend over the past decade for cases scheduled for hearing to be settled or withdrawn. That trend may be related to the competitive pressures facing the parties. Unions, with declining membership and resources, may be forced to make hard choices among the cases they take to arbitration. Cases that have merit may be withdrawn for lack of resources to pursue them. The direct cost of the arbitrator is one element, but more important is the limited staff to prepare and present cases. Also, companies face similar resource shortages and, at least in some cases, they may be more willing to compromise grievances that they would have arbitrated in an earlier era.

Case Mix

Aside from numbers, there has been a shift in the types of cases reaching arbitration. Two dimensions of case mix are considered here: (1) industry sector, and (2) the nature of the issues in dispute.

Industry Sector. Certainly, not all sectors have been affected by competitive pressures in the same way. As the steel industry shrinks, collective bargaining continues to grow in the public sector. Twelve colleagues who attended the Academy Region 9

[14]Hayford, *The Changing Character of Labor Arbitration,* in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1993), 69, 71–73. Although FMCS data for 1991 and 1992 show a slight increase in the number of awards, it is unlikely that these represent a reversal in the decade-long trend.

meeting in Cleveland in April 1993 responded to a questionnaire concerning their caseload mix. Although this is a small number, it represents more than one third of all Ohio Academy members, and I believe it was representative of that group. Ten of the 12 reported a shift in the proportion of cases they hear toward the public sector; 5 of the 12 reported that it was a "substantial" shift.[15]

Issues in Dispute. The issues in dispute are also a function of the environmental pressures on the parties. To the extent that management experiences competitive problems, it is likely to tighten policies related to efficient operations or to enforce more vigorously its already-existing policies. Hence, we would expect to see more cases involving the types of issues listed in Table 1.

Table 1

Issue	Percentage Frequency
1. Absenteeism policies	75
2. Subcontracting	58
3. Management rights, especially attempts to tighten work rules	50
4. Severance pay, layoff procedures, and other matters related to downsizing or plant closing	42
5. Poor job performance	33
6. Denial of disability benefits or challenge of employee's right to benefits	33
7. Refusal to fill vacancies or to post jobs	33
8. Seniority vs. ability in promotions, layoffs, or other job assignment	25
9. Performance appraisal or discipline for poor work	16
10. Denial or reduction of benefits, such as holidays, vacations, and coffee breaks	16
11. Job classification or improper pay	16
12. Out-of-class assignment to lower classified employees	16

The frequency in Table 1 reflects the proportion of arbitrators surveyed at the Academy Region 9 meeting in April 1993 who indicated they had encountered a *relative* increase in the number of cases involving that issue. Although the results are not scientifically reliable, the response pattern reflects the kinds of cases expected from the competitive environment faced by many

[15]*See also* Hayford, *supra* note 14.

employers and their unions. Only one respondent indicated that there had been no relative increase in any of the issues listed over the past 10 years.

Technological change may be an employer's way of meeting a rising competitive challenge. The final question asked of the Region 9 arbitrators was whether they had heard any cases since 1980 which involved technology or methods that did not exist prior to 1980 (e.g., supermarket scanners). Half the arbitrators indicated that they had heard such cases. Unfortunately, there is no baseline from earlier periods with which to compare this statistic. Certainly, in any period there will be new technology introduced leading to grievances. However, *a priori*, one would not anticipate that half the arbitrators would have been involved in such cases. This finding suggests that the increased competitive pressures of the 1980s may have induced substantial technological change so that the frequency of cases related to this change was greater than might have been expected.

Another element of technological change relates to the skills and educational background of the employees using the new technology. Higher tech equipment, coupled with higher tech employees, suggests that grievances and issues before arbitrators are likely to involve higher levels of technology. For example, determining whether an employee is "qualified" may be more complex in the future.

The preceding discussion concerned the early pattern of arbitration issues as competitive pressures rise. As the parties adapt their relationships to these pressures, new issues are likely to emerge. For example, in a "new industrial relations" bargaining relationship, consider a grievance where the employees participated in the selection of a new hire, voted not to extend a job offer, but were overruled by the personnel department. Or consider a grievance where the *employee* complaint concerns poor quality output because the *employer* has postponed purchase of a new high-tech machine. Naturally, as always, the labor agreement will be the arbitrator's guide, but those grievances may require nontraditional thinking by the arbitrator. Despite the current low level of conflict in these innovative bargaining relationships, inevitably misunderstandings and unforeseen events will occur requiring the services of trusted neutrals. At this point the nature of the issues is purely speculative.

Arbitral Role

The last element for discussion is by far the most controversial. In the context of the 1990s competitive climate, in many cases the

arbitrator role will be different, procedurally or substantively, from what it has been in the past. In the preceding discussion, two types of changes altering the arbitrator's role were noted which are already upon us: (1) employer nonunion strategies, and (2) more cooperative collective bargaining relationships. Even in the traditional arm's-length business unionism environment, the roles of arbitrators will change.

Nonunion Arbitration. Nonunion industrial relations systems and their increasing reliance on unilaterally created arbitration schemes are topics with which this audience is fully familiar. Procedurally, I would agree with those who contend that a nonunion procedure is fundamentally different from a union-negotiated one. Foremost among the differences is that the grievant, not the union, is the party at interest vis-à-vis the employer. Where the grievant is represented by an experienced advocate, matters involving due process may not be at issue. However, where there is no experienced advocate or the advocate for the grievant is an employee of the same employer, due process shortcomings, in my view, require the arbitrator to intervene in the proceeding to a much greater extent than would be necessary or acceptable in the traditional union-management case. If the nonunion arbitration process is to be more than a mere sham, an arbitrator cannot merely sit passively and listen to arguments of learned counsel regarding whether there was due process, as may occur in a union-negotiated procedure. Where there is no experienced counsel representing the grievant, the arbitrator must take an active role to ensure that: (1) the employer process, as promulgated, allows due process; (2) the grievant understands the process and rights under it; and (3) the grievant has, in fact, obtained all the elements of due process, including notice, adequate representation, the right to confront the evidence, and the right to refrain from self-incrimination, and a fair investigation before final action is taken by the employer.

In the absence of an active investigation by the arbitrator into procedural questions in nonunion arbitration procedures and assurance that the usual standards of due process have been observed, it is arguable that hearings and awards under those procedures should not be called "arbitration" at all.

Cooperative Relationships and Grievance Mediation. Turning to the more cooperative relationships, there is a changing view of what contract administration means—a broadening view aimed at problem solving, not merely answering grievances.

Regardless of their competitive health, many employers and unions are seeking more efficient, and perhaps more effective, ways to address what may be broadly described as "problems in the workplace." These problems encompass not only issues within the traditional grievance procedure, but also the changes every workplace is undergoing to achieve increased efficiency, quality, and productivity.

In the past 10 years, much work has been done to develop methods and procedures encouraging mediation of grievances. William Ury, Jeanne Brett, and Stephen Goldberg (Ury) have reported on a substantial effort in the coal industry toward this end.[16] This experiment instituted a prearbitration step in the grievance procedure where an experienced mediator listened to an abbreviated version of the evidence and issued an advisory opinion on the probable disposition if the dispute were heard by an arbitrator. In the process, the mediator is free to explore with the parties their underlying interests ad perhaps achieve an outcome more satisfactory than an arbitration victory for either party.

The Ury analysis relies on a framework for dispute resolution, suggesting that disputes may be resolved on the basis of interests, rights, or power. They note that, while rights arbitration is superior to the imposition of power (e.g., the right to strike over grievances) in terms of costs versus benefits, a focus on interests through the mediation process is likely to be superior to both rights arbitration and the right to strike.[17] When grievance mediation is successful, it produces greater gains for *both* parties and costs less to resolve the underlying dispute.

If the Ury method attains the promised results, many parties will opt for the method. The implications for both advocates and neutrals are clear. If we restrict our practice to the traditional methods of labor arbitration and if the process of grievance mediation becomes the predominant method of industrial relations dispute resolution, we can expect to see an ever-declining caseload. On the other hand, the future of grievance mediation is by no means settled. Even the success of the experiment in the coal industry has not led to widespread adoption.

Beyond the narrow issue of grievance resolution is the movement toward better shop-floor relations. Successful grievance

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[16]Ury, Brett, & Goldberg, *Chapter 7*, in Getting Disputes Resolved (Jossey-Bass, 1988) (hereinafter cited as Ury).

[17]*Id.* at 169.

mediation can contribute to better union-management relations, but a complementary program of greater employee involvement in matters heretofore considered managerial prerogatives has gained widespread acceptance, as has been discussed earlier.

While competitive pressures and threats of job loss have inspired many of the changes going beyond contract administration in the common use of that term, employers and unions have begun to recognize the desirability of these new approaches to greater employee participation. In the view of some, they are not new but reflect an older conceptualization of democracy in the work place.[18] In other words, the parties recognize the intangible value as well as the bottom-line effects of better shop-floor relations. Thus, even in the absence of competitive pressures, they have found it desirable to adopt new approaches. Despite occasional setbacks and legitimate criticisms of these programs based on their first round imperfections, and despite a longer term concern with the potential for cooptation of union leaders, these programs will undoubtedly have a growing impact on the way problems which used to become grievances will be handled in the future.

Traditional Relationships. Finally, we turn to the substantive role of the arbitrator in situations involving extreme competitive pressures. As always, arbitrators must be mindful of the admonition of Justice Douglas:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.[19]

In the context of today's competitive climate, this passage takes on new meaning. For example, consider the case of XYZ Drydock Company. A tanker of the ABC Oil Company is brought into the drydock for a mandatory hull survey. While the survey is being conducted by XYZ employees, ABC crew members overhaul the tanker's diesel engine. The union claims the diesel overhaul work based on a prior arbitration award involving subcontracting at XYZ Drydock. In that earlier case, XYZ had subcontracted work that was covered in the recognition clause of the labor agreement and had traditionally been performed by XYZ employees. The arbitrator

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[18] *See, e.g.*, Derber, The American Idea of Industrial Democracy, 1865–1965 (Urbana: Univ. of Ill. Press, 1970).

[19] *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960).

found an implied obligation, based on good faith and fair dealing, for XYZ Drydock to preserve the work of the bargaining unit and held that "all mechanical work performed on XYZ premises rightfully belongs to the XYZ employees in the bargaining unit." The company proves that (1) its own employees have little experience in performing diesel overhauls, while ABC crews routinely overhaul their own ship's diesel every year; (2) if ABC Oil Company had been denied the right to use its own employees by XYZ Drydock, ABC would have taken its oil tanker elsewhere for the hull survey; and (3) if XYZ Drydock had not obtained the ABC hull survey job, the shipyard would have been closed.

The agreement is silent with respect to the arbitrator's use of economic criteria to interpret its meaning. The earlier arbitration award had relied only on the principle that every labor agreement has an implied term protecting and preserving work traditionally performed by the bargaining unit, and the decision was based on this inference. Can that same "preservation of the bargaining unit" principle be used to support management in this instance? Where the employer acts to preserve the enterprise and thus the bargaining unit and contrary action would have the opposite effect, can the arbitrator rule that the agreement has been violated? Is preservation of some work not superior to losing all of it?

Or consider a different case where the agreement contains an incentive pay system permitting adjustments in rates only when there is "a change in method, technology or other factor." The union argues that the words, "other factor," were intended to include only factors, such as work method or technology, which substantially alter the physical volume of production. The company argues that the union labor costs in the plant are above its competitors, that sales can be maintained only by price cuts, and that the term "other factor" means any factor affecting what the worker can produce. Should an arbitrator consider the competitive environment threatening the viability of the plant as an "other factor"?

There may be other circumstances that an arbitrator would want to consider before reaching a conclusion, but the point is that some cases leave an open door for the arbitrator to consider a severe competitive environment as a factor influencing interpretation of the labor agreement. If that happens, the arbitrator's role has clearly been broadened to make judgments about the longer term best interests of the parties.

In this regard, it has been alleged that a prominent management attorney once referred to George Taylor, in a less-than-complimentary

way, as "the arbitrator who thinks he is an industrial doctor." That is, Taylor saw his role not only as an adjudicator of narrow issues but also as a solver of problems arising in the parties' relationship. It is understandable why one party or the other would like to restrict the scope of an arbitrator's role, and where relationships are stable and economic conditions "normal," it is reasonable to expect arbitrators to limit their action to the narrowest possible reading of the contract. However, in turbulent times when the future of a plant or a company and thus of the employees is in doubt, it becomes arguable that an arbitrator must limit the criteria for the decision to the narrowest possible matters, and disregard the effect of the decision. So long as the arbitrator subscribes to and practices the ethical medical principle to "do no harm," the model of the industrial doctor may actually be quite appropriate. Although the *Trilogy* defined the role of an arbitrator as most of us practice the profession most of the time, it is my view that the doctrines of the *Trilogy*, particularly the principle in the passage cited above, encompass a broader "industrial doctor" role when that is essential for the future of the enterprise.

There may be arguments against this interpretation, and I expect that we will hear some in a few minutes. Perhaps the most compelling argument against broadening the arbitral role relates, as Lewis Gill has noted,[20] to the qualifications of arbitrators. Are arbitrators qualified to deal with or assess competitive issues? Are they prepared to act as "industrial doctors"? During the past 30 years, the focus has been on training arbitrators to act with as little intrusiveness as possible. Under normal circumstances that does seem to work best. But these are not normal times, at least as "normal" has been defined throughout most of the post-World War II era. Arbitrators should take notice of that fact.

Conclusion

Collective bargaining and arbitration have changed, particularly in the traditional strongholds of both institutions. The way arbitration and the roles of arbitrators have been defined in the past 30 to 50 years may no longer be entirely effective. One certainty is that no set of environmental conditions will remain constant forever. As the environment of collective bargaining and arbitration changes,

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[20]Gill, *The Nature of Arbitration: The Blurred Line Between Mediatory and Judicial Arbitration Proceedings*, 39 Case W. Res. L. Rev. 540 (1988–1989).

these institutions must also change—or die. The issue is not whether the rules of arbitration and the roles of arbitrators will change; they will or they will not last. The issue is whether the current environment provides sufficient basis for redefining arbitral roles and, if so, just what those new roles should be.

MANAGEMENT PERSPECTIVE

R. THEODORE CLARK, JR.*

Paul Gerhart's excellent paper is both comprehensive and provocative. In commenting on his paper, I will discuss five areas: (1) the current competitive environment, (2) changes in collective bargaining, (3) grievance mediation, (4) employer-initiated arbitration, and (5) the role of the arbitrator in the current competitive environment.

The Current Competitive Environment

While competition (and the very real pressures it creates) is much greater now than it was when grievance arbitration became the established mode for resolving disputes during the term of a collective bargaining agreement, the existence of competition is not something new to the Academy. At the 1962 Annual Meeting, David Cole observed:

> The greater and more keen competition for our domestic as well as world markets with people in other countries, the vital need of economic growth to absorb the present roster of unemployed and to make places for the growing work force—all this is a very important matter to a great many people. People generally, who may not be experts in the field of labor relations, recognize that these are matters of major consequence to our nation as a whole.[1]

While the pace of competition is greater today, the issue has been with us for a long time.

Changes in Collective Bargaining

Gerhart accurately discusses and documents the decline of the manufacturing sector of the economy and the resultant decline in

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*Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois.

[1]Cole, *Neutral Consultants in Collective Bargaining: Discussion*, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1962), 96, 101–02.

the rate of unionization. He used aggregate figures that include union membership in both the private and public sectors of the economy. Use of the aggregate figures, however, masks what has actually occurred. When union membership data are disaggregated by sector, a different picture emerges.

For that purpose, I have taken 2 years as benchmarks—1960 and 1990—and examined what has happened. During that 30-year time span, on an aggregated basis union membership as a percentage of total employment fell from 28.6 percent to 16.1 percent. During that same period, on a disaggregated basis private-sector membership fell from 32.6 percent to 11.9 percent. In sharp contrast public-sector membership rose from 9.8 percent in 1960 to 36.5 percent in 1990. As a result of these divergent trends, the impact of public-sector union membership on union membership overall has dramatically changed. Whereas only 6 percent of all union members in 1960 came from the public sector, that figure increased more than sixfold to 38.7 percent in 1990. Based on these statistics, as well as my own experience in representing many public-sector employers, it comes as no surprise that the public-sector caseload mix for arbitrators has increased significantly. The public sector is clearly where the action is in the American labor movement.

It should be noted that many of the concerns discussed in Gerhart's paper primarily relate to the highly charged competitive environment in the private sector and are not necessarily directly applicable to the public sector. For the most part, public employers, at least in terms of the services provided (e.g., fire and police services), are not competing with other employers, either locally or worldwide, to provide services in the same sense as private employers. Moreover, public employers are not driven by the profit motive but rather by politics. This is not to say the public employers are not affected by the overall competitive environment. They are. If a major plant shuts down or moves, that has a major impact on public employers in that geographical area.[2] But the impact on collective bargaining and dispute resolution is not the same. For example, in Illinois there is a major move in the public education sector toward a collaborative bargaining model. That move, however, has been driven not by the need to be more competitive in a global economy

[2]Recognition of the fact that major layoffs and plant shutdowns can have a major impact on local communities is found in the Worker Adjustment and Retraining Notification Act, which requires that local governments receive the same advance notification employees and unions receive.

but by the belief that interest-based bargaining produces better results and more nearly meets the needs of both parties.

Let me comment briefly on what Gerhart refers to as a "union-substitution" approach, in which the employer provides many of the benefits that unions have negotiated to persuade employees that a union is not necessary in such an environment.[3] Use of the pejorative term "union substitution" can be construed to mean that employers who operate in the admitted 90 percent of the private-sector labor market which is not organized are acting underhandedly or immorally by adopting industrial relations systems that are employee friendly. I categorically reject that notion.

A number of years ago the late Jerry Wurf, who was then president of the American Federation of State, County and Municipal Employees (AFSCME), made the following remarks to the United States Conference of Mayors:

> Unions would be unable to sign up a single employee if he were satisfied, if his dignity were not offended, if he were treated with justice. What is important is not the motives of union officials in organizing public employees, but the astonishing rapidity and success of their efforts. Barren ground yields poor crops. But here, the ground was fertile beyond belief.[4]

Is it immoral or somehow improper that some management officials have heard comments such as these and have responded affirmatively? I think not.

Grievance Mediation

Contrary to Gerhart's comment that "the future of grievance mediation is by no means assured," my own anecdotal experience, supplemented by many discussions with Stephen Goldberg at Northwestern University School of Law (where I also teach), strongly suggests that there is significant momentum toward this interest-based process.[5] In many situations it is part and parcel of the

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[3]Our national labor policy, at least since Taft-Hartley, has been pro-choice in that employees have the right either to engage in collective bargaining or to refrain from that activity. Moreover, employers and unions both have the right, absent illegal coercion, interference, threats, or promises, to express their views on the pros and cons of collective bargaining and unionization.

[4]AFL-CIO News, June 24, 1967, at 6.

[5]For example, in the telecommunications industry, grievance mediation has been adopted by operating units of AT&T, Southern Bell, NYNEX, Ameritech, and GTE with one or more of the unions with whom they have labor contracts. Moreover, grievance mediation is being used by both United Airlines and US Air under one or more of their collective bargaining agreements. Contrary to Gerhart's suggestion, Goldberg has ad-

collaborative bargaining model finding more adherents each day, a model seeking to resolve disputes based on interests rather than positions. As I understand the classic theory of grievance procedures in collective bargaining agreements, every effort should be made to resolve disputes at the lowest level possible without resorting to third-party intervention. One of the strengths of the grievance mediation model is that it encourages the parties to arrive at their own solutions. An important by-product is that it teaches the parties the skills necessary to resolve disputes.

My fear is that many arbitrators and many lawyers representing management and labor view grievance mediation as a threat to their economic livelihood and therefore are not enthusiastic about learning about or using the process. The parties themselves, however, concerned about the high cost of arbitration, both in dollars and time, and seeing the need to develop better dispute-resolution skills, are increasingly turning to grievance mediation as a viable option. Since a mediated resolution fashioned by the parties themselves with the aid of a mediator is far preferable to an arbitrated solution, grievance mediation should be encouraged rather than discouraged.

In the long term arbitrators and lawyers can prosper only when they are genuinely responsive to the best interests of the parties. That should be the governing principle when considering other ways of resolving labor-management disputes without resort to arbitration. As David Cole noted 31 years ago at the 1962 Annual Meeting of the Academy:

> [I] think it would be in ill grace for arbitrators to resist this change. What the parties now need is some broader use of the new skills, talents, and standards that have been developed, so that arbitrators above all others should not become set and say, "we like the old mode of doing things and we decline to change our role."[6]

In his address to the Academy in 1957, Ralph Seward asked the right question, one that is especially apropos to the issue of grievance mediation:

> Do we mean what we say so often, that the objective of an arbitrator should be to put himself out of a job ultimately, to aid the parties, as

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vised me that use of grievance mediation continues in the coal industry, including the one remaining district of the two which were the focus of the study by Ury, Brett, and Goldberg, Chapter 7, in Getting Disputes Resolved (Jossey-Bass, 1988), mentioned in Gerhart's paper.

[6]Cole, *supra* note 1, at 104.

> best we can, to cease using us as a crutch, and to measure up to the responsibility of solving their problems themselves, as they ought to be solved.[7]

If the Academy is to continue to prosper, its focus must be open and responsive to dispute resolution in all its forms and must not be limited only to arbitration in a collective bargaining setting. There will always be the need for conventional grievance arbitration, but the focus must be broader.

Employer-Initiated Arbitration

I detect in Gerhart's comments some reservations bordering on hostility about whether labor arbitrators should become involved in employer-initiated arbitration procedures. He accurately notes that there is a fundamental difference between nonunion and union procedures, namely, in the latter situation the union, rather than the employee, is the party at interest. He also suggests that in the union setting due process is seldom an issue because there is, to use his phrase, "learned counsel representing the grievant."

In my judgment, his analysis is flawed both factually and legally. Factually, while many learned union lawyers do represent grievants, the statistics show that, in the overwhelming majority of cases, grievants are not represented by union lawyers but rather by union business representatives. Legally, Gerhart's belief that due process is better served by having a union involved is not shared by the courts. In its 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[8] the Supreme Court in a 7–2 decision, authored by Justice Byron White, upheld arbitration of a brokerage employee's termination against a contention that an employee could not be forced to arbitrate a statutory claim under the Age Discrimination in Employment Act (ADEA).[9] In distinguishing *Gardner-Denver*,[10] the Court,

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[7]Seward, *The Next Decade*, in Critical Issues in Labor Arbitration, Proceedings of the 10th Annual Meeting, National Academy of Arbitrators, ed. McKelvey (BNA Books, 1957), 144, 149.

[8]111 S. Ct. 1647, 55 FEP Cases 1116 (1991).

[9]In order to be employed, Gilmer had to become a securities representative at the New York Stock Exchange (NYSE), among others. The NYSE application required that he agree to arbitrate "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* at 1651.

[10]*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974). In *Gardner-Denver* the Court held that an employee, who arbitrated his discharge under the grievance and arbitration procedure and lost, was not precluded from bringing a subsequent action under Title VII based on the same conduct that was the subject of the arbitration proceeding.

after referring to "the potential disparity in interests between a union and an employee,"[11] stated:

> [T]he claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.[12]

It was precisely union representation, not the lack of it, that led the Court to distinguish *Gardner-Denver.*

Many of Gerhart's reservations with respect to employer-initiated arbitration were summarily rejected by the Supreme Court in *Trilogy*-like fashion. Quoting from its earlier decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[13] the Court said, "'[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'"[14] The Court noted that Gilmer, not unlike Gerhart with respect to employer-initiated arbitration, raised "a host of challenges to the adequacy of arbitration." The Court responded:

> Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[15]

Referring to the "liberal federal policy favoring arbitration agreements,"[16] the Court noted that it had previously ruled that statutory claims under the Sherman Act, the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations (RICO) act, and the Securities Act of 1933 were "appropriate for arbitration."[17]

Gerhart implies that employers are increasingly adopting union-avoidance strategies and that employer-initiated arbitration is part and parcel of this strategy. While organized labor may be somewhat paranoid about this, factually it is simply not correct. Employer-initiated arbitration of employee discipline is a direct response to the unprecedented onslaught of wrongful-termination litigation triggered by the erosion of the employment-at-will doctrine in

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[11] 111 S. Ct. at 1657.
[12] *Id.*
[13] 473 U.S. 614 (1985).
[14] *Supra* note 8, at 1656 n.5.
[15] *Id.* at 1654.
[16] *Id.* at 1651.
[17] *Id.* at 1653.

many states.[18] Although employer-initiated arbitration may make unionization more unattractive to employees, that result is not the driving force behind the adoption of these procedures. This conclusion is proved by the fact that employer-initiated arbitration procedures frequently cover managerial and supervisory personnel who do not have employee status under the National Labor Relations Act (NLRA), as well as employees, such as the securities broker in *Gilmer*, who are not normally targets for union organizing drives.

In the final analysis, members of the National Academy of Arbitrators will have to choose which market they will serve. The choice is either to limit their practice to the unionized 10 percent of the private-sector workforce (apparently because they fear organized labor's reaction) or to accept arbitration cases from the unorganized 90 percent. If you refuse to arbitrate in the unorganized private sector, I have a question for you: Do you have the same reservations about a union-initiated arbitration procedure for fair-share disputes? If not, why not? Are you not as concerned about the due process rights of individuals who object to paying fair-share fees to unions as you are about the due process rights of employees under an employer-initiated arbitration procedure?

Whatever decision Academy members make on this issue will not deter the movement toward alternative dispute resolution.[19] There are many alternative sources for neutrals, including an increasing number of former federal and state court judges. I hope, however, that the tremendous knowledge and expertise of Academy members can be tapped. Parenthetically, I note that, if members of the Academy accept appointments under employer-initiated arbitration procedures, they should take those procedures as written. They should not feel free to redesign or reconstruct these procedures to fit their

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[18] *See generally* ADR Techniques Gaining Favor in Non-Traditional Settings, 28 Daily Lab. Rep. (BNA), C-1 (Mar. 15, 1993).

[19] For example, both the Americans With Disabilities Act, 42 U.S.C. §12212 (West Supp. 1993), and the Civil Rights Act (CRA) of 1991 encourage the use of alternative dispute resolution (ADR). Section 118 of the CRA reads:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, §118, 105 Stat. 1081 (1991).

The Civil Justice Reform Act of 1990 urges federal courts to consider ADR among a broad package of efficient case management devices. 28 U.S.C. §473(a)(6) (West Supp. 1993). Similarly, the Administrative Dispute Resolution Act of 1990 encourages greater use of ADR among federal agencies and removes some barriers to the use of ADR. 5 U.S.C. §572 (West Supp. 1993).

own notions of industrial democracy. The parties do not sanction that activity under a collective bargaining agreement, and it will not be tolerated under an employer-initiated arbitration procedure.

Arbitrator's Role

Should an arbitrator be aware of the highly charged competitive environment that confronts most employers today in resolving disputes under collective bargaining agreements? Absolutely, but the guidepost, as always, must be the contract itself. Should arbitrators take it upon themselves to go beyond the contract to fashion awards in line with their worldview? Absolutely not.

In discussing an arbitrator's role in a highly charged, competitive environment, Gerhart posited several hypothetical disputes. I will discuss two of them and give you my reaction. The first involved XYZ Drydock Company and whether an arbitrator should be bound by a much earlier arbitration award interpreting the parties' contract which was silent on the issue as to whether all work performed on ships on the company's premises must be done by bargaining unit employees. In that situation the customer demanded that, unless its employees were permitted to do the diesel overhaul work, the customer would take its ship to another drydock company. In light of the contract's silence on the issue, I would agree that an arbitrator should take the changed circumstances into account. A customary canon of contract construction which arbitrators have regularly applied is that, where there are two possible interpretations—one reasonable and the other leading to an absurd or harsh result—the reasonable interpretation should be adopted. The XYZ Drydock scenario illustrates that today companies must be customer driven; if they are not, customers will look elsewhere. In my judgment, that fact should be decisive and should lead to a decision that the contract was not violated. As Neil Chamberlain noted at the Academy's 1964 Annual Meeting:

> I suggest that the agreement *incorporates* the surrounding relevant circumstances at the time it was negotiated, and that when such relevant circumstances have changed, the clause—even though it remains in the agreement—necessarily takes on a different meaning, which the arbitrator can interpret when he is asked to do so.[20]

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[20]Chamberlain, *Job Security, Management Rights, and Arbitration*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1964), 224, 235.

Dresser Industries is an excellent example of an arbitrator's decision which took competition into account.[21] The case involved the question as to whether the company had the right to automate the dispatch function and assign some remaining residual duties to employees outside the bargaining unit. In upholding the company's right to do so, Nicholas noted that "technological improvements in manufacturing have the inevitable effect of bringing on reductions in the work force"[22] and concluded:

> [I]n the absence of an express or specific limitation upon its right to eliminate jobs, management continues to have the reserved and inherent authority to make its operations more efficient and more productive by whatever means are available, including the improvement and updating of its production processes. In a highly competitive market, this discretion is essential to the survival of the firm and the continued operation of the plant.[23]

However, I come to a different conclusion with respect to Gerhart's hypothetical case involving an employer who sought pay cuts because costs were higher than those of competitors. An incentive pay clause permitted rate adjustments based on output only when there was "a change in method, technology or other factor." Gerhart asked whether the competitive environment threatening the plant's viability could be considered as an "other factor." While this is a very creative argument, I am very concerned about pouring that meaning into the phrase "other factor," especially when the right to make an adjustment is triggered only by a change in output—something that was not indicated in the hypothetical. While my concern may seem antithetical to the employers I represent, such as unorthodox interpretation would open a Pandora's box. Could the union argue that, if the cost of living goes sky-high, this too is an "other factor" and warrants an upward adjustment? Or, could the union argue that, if the company makes an unexpectedly big profit, this is another "other factor" and justifies an upward adjustment? Even though that interpretation may favor the employer community at the current time, arbitrators should not become industrial doctors and render decisions not justified by the contract language. It's a two-edged sword, and not many on either side of the collective bargaining table are likely to advocate that approach.

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[21] 96 LA 1063 (Nicholas, 1991).
[22] *Id.* at 1068.
[23] *Id.*

Conclusion

The competitive forces at work in the economy today have changed the labor-management landscape, affecting the institution of collective bargaining as well as the grievance and arbitration process. The issues raised by Gerhart's paper are important and should be discussed candidly and openly by all parties to the process. I hope that my discussion, including the reservations or disagreements with some points, moves the dialogue forward.

LABOR PERSPECTIVE

JOHN ZALUSKY*

In his analysis of declining union membership, Paul Gerhart considers the substantial loss of employment in industries where organized labor representation had been deep and broad, namely auto and steel. He then considers whether or not the causes are a result of domestic and global competition as well as strategic choices by management.

Rather than argue about the decline in union membership, I want to cast a different causal light on the issue. The decline in private-sector union membership is due to employer opposition to unions and the failure of national policy to adequately support free independent democratic trade unions. If only competitive pressures were causal, rather than public policy and enforcement, low wage states should lose fewer union members than high wage states. Yet, that is not the case.

A look at the difference in union membership in low wage, "right-to-work" states compared with higher wage, collective bargaining states shows union membership dropping faster in the low wage, "right to work" states. The rate of decline of union saturation was nearly twice as fast in the low wage states as the higher wage states. This indicates that something else is operating in addition to competition. That "something else" is employer animus and attempts to be union-free. The right of workers to form unions and bargain collectively is not safeguarded by existing U.S. laws and policy, and fails under basic international standards.[1]

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[1]In November 1992 (Case No. 1543), the International Labor Organization (ILO) found that the United States had violated ILO international human rights standards,

In the public sector, where frustration, threats, and corruption of the expression of free choice is less tolerable, union membership has increased 1 million over the last decade to 6.7 million in 1992, and the percent of the work force organized has held steady at 37 percent. Public-sector union membership more than tripled from one million in 1958 to 3.6 million in 1978. In the meantime, private-sector union membership declined.

Another factor contributing to the decline in arbitration is the maturing of labor-management relationships. I believe more mature labor-management relationships find ways of problem solving less dependent on the rule of law and third-party intervention—they see themselves in a common fate relationship.

One of the older examples is the electrical construction industry. The union and the employers have used the Council of Industrial Relations to deal with interest and rights issues since 1926—nearly 70 years without a strike or arbitration. The Council is made up of industry representatives, the National Electrical Contractors Association (NECA), and officers of the International Brotherhood of Electrical Workers (IBEW). Although this arrangement is old, it took nearly 35 years of mutual need and conflict to get to this system. Yet, even with this arrangement union market share has declined since the late 1950s. There are many reasons, but antiunion animus by some contractors and a non-responsive public policy have contributed, as did nonunion competition. Other mature relationships that have produced similar arrangements are seafaring, performing arts, and bricklayers.

I also agree with Gerhart's view that the newer labor-management arrangements working at cooperation, participation, employee involvement, and the Saturn-type agreement described by Kochan, Katz, McKersie, Lewin, and Bluestone account for some of the decline in arbitration cases. It takes a very long time to move from conflict-oriented, rights-based labor-management relationships to collaborative relationships, often more than 30 years.

However, I dispute the view now heard in the Academy that its members should leave the labor movement and start looking for new markets. I argue that the interests of the Academy are tightly linked to an organized labor movement. Working to revitalize the labor movement is likely to produce future work for Academy

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namely, Freedom of Association and Protection of the Right to Organize Convention (No. 87, 1948), and the Right to Organize and Collective Bargaining Convention (No. 98, 1949). The finding was based on the ability of U.S. employers to replace economic strikers, that is, that such action limits freedom to join unions and the ability to bargain collectively.

members, whereas supporting the nonunion employer is self-destructive in the long run. The Academy will need to change with organized labor. The Academy must face the fact that nonunion employers do not want workers with rights.

There should be no doubt that employer representatives and their associations oppose worker rights, the foundation necessary for any arbitration work. Employers have not supported worker rights—not the Civil Rights Act, the Americans with Disabilities Act, or any other social justice legislation. The only exceptions are those rights that apply to corporate executive officers. Without enforceable rights there will be little or no work for arbitrators in employment relations.

Even with AFL-CIO support for state laws which provide nonunion workers with an implied fair employment contract, there has been no significant growth in such legislation over the last 10 years. In fact, state laws passed in the last decade have strengthened the traditional "employment at will" doctrine, giving workers fewer enforceable rights than the courts are willing to allow.

I am also convinced that there will be little work for arbitrators through nonunion employers based on commercial rules of arbitration. For arbitrators to find work under these rules, there must be employee rights or promises made to employees. The personnel and human relations literature I have read in recent years recommends avoiding promises to employees, and these recommendations seem to be effective. Moving the labor arbitration profession in the direction of nonunion employers is analogous to trying a dry well, only to find it poisoned. There may be a little more work for some arbitrators, but the role of the Academy will be limited and the trade union tradition on which it depends in the long run will be weakened.

By now, it must be clear that I disagree with the view of my good friends, Tony Sinicropi and Bob Coulson. Last year Sinicropi said that "the current problems faced by organized labor are largely separated apart from the dynamics effecting change in the employment dispute resolution field."[2] Without a strong labor movement, where will he find the social movement able to support the call for changes in state and/or federal laws that create worker employment rights? Today, nonunion employment arbitration, as offered

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[2]Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1993), 1, 18.

by a few progressive but nonunion employers, is ephemeral. It is unstable and will disappear in a breeze because under pressure the nonunion employer will change and/or take away worker rights. Ephemeral or not, I agree with Gerhart that without a union the role of the arbitrator in a nonunion setting must change, or that arbitration becomes a sham. Someone must investigate, talk to witnesses and protect them from reprisal, obtain and prepare evidence, and, finally, be able to appeal an adverse outcome.

I know the professionals in the arbitration field believe they do a good job dispensing justice, and that is generally true when a union is present. However, without unions, I doubt that it will stay that way, and I don't think the public will see it as fair for very long. Plainly stated, the cards are stacked against the claimants who (1) must plead under contracts designed by an adversary; (2) must come before a preselected panel, governed by those whose future business income is dependent on the adversary; (3) have little or no ability to contact others similarly situated; and (4) are all the while unable to afford adequate counsel.

For the purpose of analysis, use of arbitration in investment disputes is probably as close as one can come to the use of arbitration in the nonunion work situation. The individual investor agrees to arbitration when he buys securities through a brokerage. The choice he has is not to buy, which is about the same level of free choice a worker has in the nonunion establishment.

There have been a number of complaints about the use of arbitration in investment disputes. Congress became interested in whether it is fair and asked the General Accounting Office (GAO) to look into the matter.[3] The GAO found the system lacked the controls needed to ensure that investors get a fair shake. Stockholders have no choice but to agree to mandatory arbitration advanced by the American Arbitration Association, and in this way, are like nonunion workers. But the stockholder is much better off than most nonunion workers would be. There is, at least, a national organization overseeing the process, the National Association of Securities Dealers. It is unlikely that a credible organization could be set up to perform a similar function with any kind of power over the nonunion employers. Also, investors are often better able to afford counsel and research, and in some ways, have less at risk. In short, supporting nonunion arbitration is a regressive search for

[3]U.S. General Accounting Office, "Securities Arbitration: How Investors Fare" (Document No. GTD 92-74), May 11, 1992.

arbitration work likely to harm nonjudicial dispute resolution in the long run.

New Roles: National Academy of Arbitrators

Many members of the Academy have found a new role on their own—mediation. The AFL-CIO arbitrator-reporting system and data base is showing growth in mediated settlements. In fact, in 1986, when mediation and med-arb was just beginning to catch on, a significant percentage of arbitrators were handling this nontraditional form of dispute resolution.[4] It is interesting that non-Academy members were doing more of this work than Academy members. This is an area where the Academy should expand. The Academy's reputation for professionalism can make a real contribution to the parties and to its own membership.

Different and complex skills are needed in mediation, and different rules are used in judging performance. In mature relationships rights eventually give way to interests, mutual goals, and a living relationship. Procedures become less binding and standards of conduct and fairness become paramount. There is a need for a fresh look at the Code of Professional Responsibility for Arbitrators of Labor-Management disputes with an eye to mediation. There is also a need to train arbitrators in interest-based dispute resolution.

Finally, the labor movement would like the constructive views and thoughts of the Academy, while the Dunlop Commission (the Commission on the Future of Worker-Management Relations) considers the future of employee relations. Contrary to the picture painted by the popular media, organized labor is fundamental to any institutional means of dispute resolution. Many of us remember the chaos and violence of the two independent trucker strikes and the farmer strikes of the 1970s. There was no union, no leaders, and no institutions to deal with the conflict. Without strong unions there are likely to be more of these intractable problems arising with little chance of resolution short of the National Guard. The United States cannot long afford that kind of image in a global economy. There needs to be an effective labor movement as the global economy develops.

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[4]Holley, *Members of the National Academy of Arbitrators: Are They Different From Non-Academy Arbitrators*, in Labor Arbitration in America: The Profession and Practice, eds. Bognanno & Coleman (Praeger, 1992), 43, 62, Table 3.15.

Among the basic problems with existing labor law is the obvious one—workers select a union, and the employer frustrates the negotiation of a first agreement. One solution is the arbitration of first agreements. With the Academy's expertise and years of experience, I believe it should be in the forefront of this discussion now.

Conclusion

Competitive forces eliminate old ways and create new opportunities. It is up to the players, of the stature here today, to recognize and seize the new opportunities. If and when U.S. labor law is changed, there will be new opportunities for arbitrators and the Academy. We in the AFL-CIO would like to see the Academy working with its traditional associates—union employers and trade unions—rather than choosing nonunion employers and lending credibility to the nonunion ethereal arbitration processes.