

CHAPTER II

EFFECTUATING THE LABOR CONTRACT THROUGH ARBITRATION *

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1. A Profile of Grievance Arbitration

Most labor agreements now provide for an impartial chairman, an umpire or an arbitrator. His duty is finally to determine certain disputes arising out of day-by-day operations and not resolved directly by the parties. Such arrangements have not always prevailed. Persistent disputes over the application of agreement terms (as well as disputes about matters not covered by the agreement) were formerly settled, as a standard practice, either by a strike or under threat of a work stoppage. The "terminal point in the grievance procedure" represents, therefore, a substitute for strike action voluntarily introduced for the term of the labor agreement. There is a very close kinship, indeed, between the arbitration clause and the no-strike no-lockout clause of the labor agreement.

The arbitration clause of the labor agreement has another characteristic that should be particularly noted. It is an agreement to arbitrate future disputes, since the rights to strike and to lock out are relinquished for a future period. Negotiators of an agreement cannot possibly anticipate the number or the nature of the grievance disputes that will arise. But their general agreement to arbitrate disputes that may arise in the

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future is subject to abuse because it is something like a blank check.

Grievances can be stirred up, mobilized, or thrown to arbitration for tactical or other purposes. A union may carry a number of "bad" cases to arbitration with the idea that their loss will improve its chance to win the "one important case in the batch." And I've heard tell of companies letting cases go to arbitration with every expectation of losing them but with the belief that everything will be better if the arbitrator does not have to send the union away empty-handed. Such tactical use of grievances may be deplored. They are nevertheless, among the important facts of many an arbitrator's life. Sometimes a differentiation between real problems and tactical maneuverings cannot easily be discerned by an arbitrator. He may "cross up" the parties who then look upon him as a rather naive operator.

A third important characteristic of grievance arbitration should be mentioned. Contrary to the views of many arbitrators, grievance settlement is not simply a process of contract interpretation. As will be noted presently in detail, the difficult grievances arise because the labor contract reflects only a partial or an inconclusive meeting of minds. It doesn't give the reasonably clear answer to a dispute. In such cases, grievance settlement becomes an integral part of agreement-making. At any event, the manner in which the grievances are settled provides understandings that are as durable, or more so, than the actual terms of the labor contract themselves. No one need amplify to this audience the weight of "established practices."

To summarize, the fundamental nature of grievance arbitration derives from three fundamental characteristics—(1) it is complementary to the no-strike no-lockout clause; (2) it is an agreement to arbitrate future, unknown disputes; and (3) it invariably involves agreement-making as well as agreement administration.

Because of the characteristics just mentioned, mediation has been developed as a part of the arbitration process in many plants and industries. Grievance arbitration is viewed as an

extension of collective bargaining relationships rather than as a new process in which a meeting-of-minds is not an applicable criterion for sound settlement. The so-called "mediation approach" is suspect by those who insist that arbitration must be fashioned by the "judicial approach."

I have considerable trouble with the terminology. It is my understanding that, as a standard practice, many judges in our courts hold conferences in their chambers between representatives of disputants to mediate a settlement of legal claims. They may nevertheless have to decide the case and often do so with considerable reluctance. In my judgment, there have been too many befuddled attempts by arbitrators to reason mediation out of grievance arbitration. As a process for peacefully settling labor disputes, grievance arbitration cannot be viewed exclusively as a "mediation process" or as a "judicial process." There is no "either-or" choice to be made, because elements of both are included. It is irresponsible, moreover, to attempt to turn this question into a matter of arbitration ethics.

A more critical test of any arbitration program is whether it provides a substitute for strike action that is mutually acceptable to the parties themselves. The big road-block that stands in the way of a better functioning arbitration is the inability of the parties to agree on the details about how their general arbitration clause should function. Arbitrators who get caught in the middle of such an incomplete understanding often find their positions tenuous and unhappy. Some of them have concluded that the arbitrators should say just what grievance arbitration is and how it should be conducted. As workers in the field of collective bargaining, they should know that their ideas can't effectively be put into practice in any case unless both parties accept them. Arbitration practices and procedures will inevitably be affected by the collective bargaining practices and ethics of the parties.

Consider a hypothetical case: An arbitrator engages in practices which are so unacceptable to you and to me that we couldn't conscientiously participate in a case in which they were followed. But, the parties know all about those practices.

They like them and continually pass by all the "ethical" arbitrators in order to choose our colleague who is a member of the questionable practices school. Should labor and management be told that they are so far on the wrong track that they ought immediately to delete the no-strike clause from their agreement? Should they be compelled to choose between a kind of arbitration they don't want and the use of strikes in settling their differences?

The hypothetical case highlights an important fact. Arbitration doesn't belong exclusively to the arbitrators. On the contrary, voluntary arbitration is inherently a collective bargaining device under the control of labor and management. Theirs is the primary task of developing the arbitration process along with their more direct collective bargaining. There should be no "ostrich head in the sand" avoidance of the fact that arbitration is an adjunct of the collective bargaining process.

It follows that varying types of arbitration should be recognized as necessary and proper. As already indicated, great harassment is the lot of arbitrators whenever the parties agree to a general arbitration clause but still retain their own individual and widely divergent notions about the kind of settlement process that should be created. Like other agreement terms, conflicting meanings can be given to the arbitration clause.

Few arbitrators have avoided the dilemma of having to decide a case in the absence of a complete agreement between the parties about the arbitration procedure they desire. In recent years, unions have generally expected the "impartial man" to develop a fair and equitable decision—to solve an industrial relations problem—and not "legalistically" to apply the terms of the contract and "let the chips fall where they may." Management has quite widely assumed that the arbitrator's sole and limited function is to apply the contract in terms of the evidence formally submitted, irrespective of whether or not the results are good or bad in the arbitrator's judgment. These points of view are not rigidly held but they are not untypical of

official positions. The positions of expendability into which arbitrators are interjected cannot be materially improved until the arbitration agreement of the parties becomes more precise.

I hasten to add, and with emphasis, that arbitrators surely should take steps gradually to evolve standards for their own conduct which are important to the maintenance of a professional and an impartial standing. As representatives of the public, they also have a public responsibility which must be viewed, however, in relation to the fact that arbitrators are brought into a situation by voluntary action of the parties and they may also be excluded by the parties.

In a country which is seeking to make collective bargaining work, and with widespread public support, I have always believed that the arbitrator best meets his public responsibilities when he furthers the effectiveness of collective bargaining. That means an interest in meeting of minds and developing mutual acceptability. The foundation of collective bargaining is a public conviction that labor and management in our country can work out mutually satisfactory solutions to their problems. If that conviction ever disappears, there will be marked changes in the way men live and work together in the United States.

2. The Motivation for Grievance Arbitration

Why have labor and management so generally adopted grievance arbitration as a more or less standard practice in spite of the complex difficulties involved in its use? Grievance arbitration is very hardy. It persists despite many shortcomings and in the absence of agreement about its uses. The strength of grievance arbitration derives from the much greater disadvantages of the principal alternate method of settling day-by-day disputes, i.e., by work stoppages.

I recall a discussion, some years ago, with union and management representatives who were attempting to settle a strike over a demand for reinstatement of a discharged employee. About 800 people had lost three days' work. The company, already behind in its deliveries, was beginning to secure cus-

tomers complaints. Both parties suddenly became aware of the excessive cost of the way they were handling the dispute since no fundamental issue was at stake.

A strike is a device for obtaining group demands and group protection. If individual workers can call for strike action to secure redress for personal grievances, then the profit and loss statement covering the operation will be heavily in the red. Employees might not secure enough work to live on. They would not appraise the union as beneficial. Neither an effective union to pursue group objectives nor a competitive business enterprise to provide steady employment would be built up. In addition, whether or not the discharge of the particular employee was necessary for efficient plant operation (in which the employees have an interest) is an issue that cannot be satisfactorily answered on the basis of which side can hold out the longer. The use of economic force as the final arbitrament of grievances has marked disadvantages to both parties.

Although the results of grievance arbitration are criticized for many reasons, the fundamental criterion for gauging its worthwhileness is by comparison with the consequences of work stoppages. This criterion is actually applied by labor and management in deciding whether or not to continue a troublesome arbitration clause in the contract but usually not in the formation of reactions to the individual arbitration decision. There is, then, a strong staying power to grievance arbitration. At the same time, unless both parties appraise the arbitration method as preferable, on balance, to the use of economic force, the peaceful settlement of day-by-day disputes is not possible. Voluntary acceptance of arbitration by both parties is a prerequisite to its continued usefulness.

In general, the recurring renewal of interest in "slugging it out" comes mainly from those who did not live through those times of chaotic industrial relations when it was not known from day-to-day whether employees would work or the factory operate. The old method, moreover, is quite incompatible with current ideas about economic security, employment stabilization, and economic progress. To meet the needs of the times,

all of us should be concerned about making grievance arbitration so effective that rarely will its superiority to strike action be questioned.

3. Agreement-Making in Grievance Settlement

Is there any way by which the institution of grievance arbitration can be more solidly established—so that it will operate more acceptably to labor and management, and so that the high rate of expendability of able arbitrators may be reduced? In my judgment, solid improvement requires, first of all, a much better understanding of the nature of grievances than presently obtains. What kind of a dispute is involved in grievances?

At this point, I want to refer again to the widely prevalent notion that a sharp line of distinction can be drawn between agreement-making and agreement-administration. I am convinced that this is an erroneous notion. The labor contract is, in most particulars, no more than a skeleton understanding. The agreements there embodied frequently have to be given substance—they have to be amplified in grievance settlement—before a complete meeting of minds is achieved. This suggestion is so important that the reasons for making it should be amplified. Because of time limitations, I propose to analyze how the agreement of the parties is normally made with respect to only three selected but very important subjects: discipline, seniority and the wage-scale.

The Discipline Clause

Consider first the discipline clause of the labor agreement in most common use. Management reserves the right to discipline employees "for cause." The union is given the right to appeal any disciplinary action through the grievance procedure. What has actually been agreed upon? No understanding has been reached about the limits of proper and necessary discipline, but there is established a procedure for gradually arriving at such an understanding. The agreement of the

parties as respects discipline will gradually be filled out as management action in some cases is accepted as reasonable and as union protests over other disciplinary cases are settled through the grievance procedure. The term "for cause" will gradually acquire meaning.

Under the identical clause, entirely different understandings about disciplinary action have been developed in various plants. In some cases management's discipline power has been virtually eliminated; in others it remains stern and rigid. In view of this experience it is pertinent to ask: Where is the vital agreement of the parties made as respects discipline—in the labor contract or in the handling of grievances? Many of us tend to overestimate the importance of the formal agreement and to underestimate the cumulative significance of day-to-day settlements as fashioners of the fundamental understanding between the parties.

In initial agreements particularly, some written terms are sometimes no more than a meaningless compromise of language accepted to avoid a strike. Occasionally they don't represent a meeting of minds at all, and there are cases where this fact is consciously recognized by the parties. By the contract, the unresolved issue is merely transferred from one bargaining table to another. Many so-called wild-cat strikes under initial labor agreements can't easily be disposed of by a simple categorization as violations of the no-strike clause; they may be over grievance disputes involving fundamental differences that were not clearly disposed of by the applicable contract terms, either deliberately or by an unawareness of collective bargaining necessities.

There are incomparable values in collective bargaining conceived as a gradual emergence of mutual understanding through grievance settlements. This is apparent as respects discipline. Discipline is a delicate tool of management, most useful when applied with regard for plant necessities and employee equities in particular cases. The kind and degree of discipline appropriate in certain situations cannot be forecast. There can be, therefore, no sound by-passing of the grievance settlement

process by a long listing of employee offenses and applicable penalties in the labor contract. In my opinion, disciplining cannot be formalized by making up such a price list and continue to serve as an effective tool of management. In other words, much of the collective bargaining that is implicit in grievance settling can't be avoided by making the labor agreement more explicit. That course involves difficulties so numerous that they cannot be detailed in this presentation.

What is the arbitrator's task in a discipline case? Does he find a clear and unmistakable answer to the issue in the labor contract? Or is he usually called upon to exercise an industrial relations judgment? Contract clauses have been designed, of course, to limit the arbitrator's substitution of his judgment for that of management. They are not common, and in the absence of them the arbitrator must decide whether or not a disciplinary action was a "reasonable" one.

In view of this aspect of grievance settlement, it seems virtually impossible for most ad hoc arbitrators, changing from case to case, to acquire a sound basis for making the value judgments involved in these cases. The judgments may not merely be relatively uninformed, but they are likely to be inconsistent as well. Gaps between the parties may be widened. The arbitrator who serves for the term of an agreement is apt to be consistent and he should have a broader understanding of the problems to be solved. In addition, the parties will usually give facts to the permanent arbitrator rather than the arguments ordinarily supplied to the ad hoc man. And there should be no "short sale" of the greater chance for developing an agreed-upon or acquiesced-in settlement when the same arbitrator serves throughout the term of an agreement. The advantages of using the permanent arbitrator stand out if one accepts the agreement-making function of grievance settlement and also realizes the voluntary nature of the arbitration.

In the light of these considerations, there has been a too-ready disposition in some quarters to discard mutual acceptability as a useful criterion in grievance settlements. If the end objective of labor arbitration is to assist in the peaceful settle-

ment of labor disputes rather than to serve as a stop-gap truce, then furtherance of and completion of understanding between labor and management cannot lightly be tossed aside.

Seniority in Promotion

The agreement-making function of grievance settling is also clearly discernible as respects the promotion clause. A quite common promotion provision is that "seniority shall prevail among employees having equal ability, competence and potentiality." I've seen that same clause effectuated so that seniority is exclusively used to determine promotions, and also with total disregard of seniority considerations, depending upon the way grievances are settled.

It may be successfully argued in some cases that management can't objectively or conclusively measure differences between employees in terms of the subjective factors mentioned and hence seniority should prevail among employees who are competent on jobs in the line of promotion. Such competency is frequently interpreted to mean nothing more than an ability of an employee not to get fired. An entirely different approach can be taken. It may be reasoned that use of such subjective terms as "ability, competence and potentiality" is an acceptance of management's judgment as controlling in their application. How else can meaning be given to these terms? Only if management concludes that two men are equal in the mentioned qualities does seniority come into the picture at all. If management consistently fails to find equality, then seniority is no factor in promotions at all.

In view of this experience, can it be said that arbitration in promotion cases actually deals solely with agreement interpretation? Or does the real agreement of the parties respecting the use of seniority in promotion derive primarily from the settlement of grievances? The contract term itself may actually be an unimportant phase of the understanding finally reached.

I have had some experience in serving as Impartial Chairman between parties who conduct their relationships without any

formal written labor contract. In one situation, the parties reasoned that in solving today's problem they wanted to avoid unnatural limitations previously set down under hypothetical conditions. But they had a labor agreement just the same. It was developed entirely through grievance settlements. Precedents were gradually created because similar cases can't be settled in divergent ways if satisfaction and confidence are to be maintained.

I am not proposing a discard of formal labor contracts. But, there is a disadvantage in trying to anticipate too many problems when agreements are negotiated. As a result, contract negotiations can be made more difficult and artificial restrictions upon future action might be introduced. Grievance settlement must be regarded as an important phase of the collective bargaining relationship if sound industrial relations are to prevail.

In one situation with which I am intimately familiar, the initial agreement made many years ago was a simple document with few terms. They were given agreed-upon substance in the first year or two, through grievance settlement, as would not have been possible with an initial agreement which tried to "cover the waterfront." As new problems arose, they were also negotiated through the grievance procedure. On the basis of settlements there reached, agreement terms were developed from year to year to codify the understandings which had been achieved. It is one of the most successful relationships in the country, largely because the collective bargaining relationship between contract making and grievance settlement was thoroughly understood.

The Wage Agreement

How about wage grievances? Aren't they different? Isn't there a complete understanding about wages right in the labor contract? Only if there is also an agreement covering job descriptions, relative job values, and rates for those values. Since such comprehensive wage agreements are not common, a

considerable amount of basic wage negotiation is actually carried on in the settling of grievances.

An example will illustrate. Most of you, I am sure, have been face to face with the problem in which a B Millwright believes he should be classified as an A Millwright. The labor contract clearly specifies the two jobs and applicable rates, all right, and they can't be changed by the Arbitrator. The wage agreement of the parties is usually incomplete, nevertheless, because there has been no meeting of minds about job descriptions.

The union maintains that the A and B designations reflect differences in the ability of individual employees. It shows convincingly that the claimant in the case is now as able as certain A Millwrights. Typically, the claimant can do and is assigned some A work. The management answer, however, is that the provision of Jobs A and B in the contract signifies two operations with different job contents. The A man may do both A and B work, but more of the A type, and he also has "greater responsibility." The B man does both A and B work, but gets more B assignments. The answer to the dispute is generally not to be found in the labor contract, because that document embodies only an incomplete understanding of the parties about these wages. A fuller meeting of minds has to be worked out in the settlement of wage grievances.

Employer Grievances

Grievances may arise under the no-strike clause and their settlement can also serve to bring about a full and complete meeting of minds on that subject. A full realization of this point will show how ill-advised is the section of the Taft-Hartley Act that provides for court action by and against labor unions to secure redress for alleged violation of a labor agreement. There is an urgent need to give much more thought to employer grievances than has yet been accorded.

Most grievances are initiated by employees. This will always be the case as long as management retains the right to initiate

administrative action. It is important for management to retain this right because a plant can be operated effectively under collective bargaining only if management makes the operating decisions, the union being guaranteed the right to appeal. If the management decision deprives employees of their rights or equities, they can secure redress by invoking the steps of the grievance procedure, including arbitration.

The same reasoning should apply to the no-strike clause of the agreement. This clause generally does not represent a complete meeting of minds, primarily because it is silent about remedial steps to be taken if violations occur. That gap in the mutual understanding should be filled in by the parties and not by the courts. No simple problem is involved. A stoppage in violation of the agreement is more often than not accompanied by counter charges of violation or of provocation by management, and not infrequently raises a question of the ability of a union to "discipline" its members. Here are a number of vital collective bargaining matters.

In the well-functioning relationships, the employer's grievance has provided an avenue for further bargaining to effectuate the no-strike clause. (The employer may also choose to develop his own remedial action by exercise of his discipline power.) I have served as Impartial Chairman under numerous agreements where both parties fully recognize that the arbitrator is to provide the remedial action—in the form of penalties upon the union. In making such a decision, no real progress is achievable unless the parties, especially the union, at least acquiesce in the determination. The criterion of mutual acceptability has a high priority in such cases. This kind of approach is found almost exclusively, therefore, under contracts which provide for a permanent impartial chairman.

The point is that the grievance is a vehicle for completing the understanding of the parties about any terms of their relationship not fully worked out in the labor contract. Most of the vital clauses of the agreement have to be given substance in grievance settlement. This applies to the no-strike clause, as well as the discharge, seniority and wage clauses. The notion

that alleged violations of the labor contract terms can soundly be made the subject of court action is based upon an entirely erroneous concept of collective bargaining relationships.

4. Substitutes for the Strike in Grievance Settling

Since grievance settlement has many elements of fundamental agreement-making, both labor and management have been understandably reluctant to depend entirely upon an outsider to resolve their difficulties. They accept arbitration in principle, as preferable to strikes over grievances, but try to limit the arbitrator's discretion to decide adversely as respects vital matters of their joint relationship. Various policies are followed to limit dependence upon arbitrators and the principal ones will be briefly discussed.

Making Arbitration Unnecessary

Some companies and some unions have been able substantially to dispense with both strikes and arbitration. In such cases, each party looks upon grievance settlement as agreement-making. Each has a similar point-of-view about the limitation of depending solely upon labor contract terms as an expression of their understanding. The grievance settlement machinery is used as a collective bargaining mechanism.

When this approach is taken, the labor contract is usually a simple document with few terms. A designation of abstract rights, that may interfere with their collective bargaining over grievances, is avoided. It often becomes quite logical to provide for ad hoc arbitration as the final step in the grievance handling and even to provide for formulation of an exact stipulation of each issue to be submitted to arbitration. The parties thus evidence their confidence of working out their own difficulties without outside intervention.

Parties who have developed this kind of relationship do sometimes choose to name a permanent impartial chairman to insure having someone in reserve who is thoroughly conversant with their policies. They hope never to use his services.

There is a labor contract in which I have been named as Impartial Chairman for the past fifteen years. Not a single case has been submitted to me in all that time. That's highly successful use of arbitration. In another similar situation the parties say that the impartial chairman is their "fire insurance policy"—a protection which they hope never to use. They boast about the fewness of the cases referred to the Impartial Chairman but, at the same time, they tell me that the mere availability of the final step assists the parties in their agreement-making endeavors.

The kind of relationship just referred to can be developed only when the role of grievance settlement is thoroughly understood and when both parties fully accept a responsibility for arriving at a meeting of minds even though that entails a substantial modification of their initial positions. Far too generally, negotiators for both the union and the management do not accept a meeting of minds as the mark of achievement in industrial relations. The objective may be to obtain rights or to preserve positions by other means. The arbitration process, then, has to be adapted to these realities.

The Impartial Chairman

Many kinds of arbitration procedures and policies are in operation. Their basic differences can most readily be discerned by noting the opposite points of view implicit in the use of the Umpire and of the Impartial Chairman. I don't mean to imply that clear definitions of these terms are commonly recognized. Confusion in nomenclature is one of our problems. But, there are two fundamental approaches which can be, and I think should be, designated by a precise use of the two terms.

The Impartial Chairman setup is peculiarly adapted to developing a meeting of minds in the settlement of grievances. In the absence of contractual authority, the terms of the labor agreement are, of course, not subject to change by the Chairman. As previously indicated, however, grievance settlement

has important attributes of agreement-making. Since the parties are understandably averse to relinquishing all control over the important grievances, their representatives may sit in at the final step. There may be a regularly established three-man board, or the Impartial Chairman may, in a sense, convene a board for each case. Collective bargaining is then carried along through the arbitration step. The word chairman connotes consultation with others and taking their views into account. And the essential task of most chairmen is to bring about a meeting of minds if that is possible.

An Impartial Chairman, then, is first of all a mediator. But he is a very special kind of mediator. He has a reserve power to decide the case either by effectuating his own judgment or by joining with one of the partisan board members to make a majority decision, depending upon the procedure designated by the agreement. A new reason for labor and management to agree is introduced—to avoid a decision. By bringing in a fresh viewpoint, moreover, the Impartial Chairman may be able to assist the parties in working out their problem in a mutually satisfactory manner. To me, such a result has always seemed to be highly preferable to a decision that is unacceptable to either of the parties. What's wrong per se about an agreement when agreeing is the essence of collective bargaining?

There is a widespread belief among industrial relations people, nevertheless, that the arbitrator must not mediate, and that it is even unethical for him to do so. They reason that a case should go to arbitration only after collective bargaining between the parties has failed utterly. Then an altogether new method of dealing has to be introduced in which meeting of the minds is no criterion of a sound settlement. That's a rationale in support of the Umpire approach, which I'll discuss presently. It's no argument against a mediation approach desired by both parties.

From a more practical standpoint, it is often urged that an arbitrator should not mediate, simply because he thereby

"takes a position" which would be prejudicial if the mediation fails and if the arbitrator must then issue a decision. There is, of course, such a danger. It is not a very great danger if the task of the arbitrator is performed in a workmanlike manner. One of the job requirements of the Impartial Chairman is an ability to mediate without prejudicing his position should a decision become necessary. For it is apparent that all or even most cases will not be closed with an agreed-upon settlement.

In this current effort to exclude mediation from arbitration is a disposition to search for procedural rules that will meet the needs of arbitrators rather than the needs of the parties. I am firm in the conviction that the institution of arbitration cannot be firmly established by seeking any such policy. And the status of individual arbitrators will not be strengthened by lulling them with the pleasant thought that by some magic their decisions will automatically be the basis for sound industrial relations, irrespective of the acceptability of those decisions to both parties.

Let me be the first to warn that the Impartial Chairman approach is not universally applicable. It is only usable when both parties see eye-to-eye on the point. If either party insists upon a decision based "on the merits of the case as presented," that is, as judged solely by the arbitrator, then the meeting of minds objective is unattainable. A decision then has to be imposed. But consider the consequences. If ad hoc arbitration is the rule, the loser of the case will often bring the same issue again and again before new arbitrators. On the basis of the resulting confusion, or without it, a critical issue may be drawn for the next contract negotiations. If either side believes the decision to be grossly inequitable, plant operations may also be adversely affected. Sound development of arbitration requires, in my opinion, a full recognition of the real nature of grievance settlement and a much fuller development of the Impartial Chairman approach by labor and management with mutual acceptability of decisions as a major criterion.

The Umpire

Some parties fear, often with reason based on experience, that the Impartial Chairman setup invites disagreement at the earlier steps of the grievance procedure. Responsibility can be shifted to higher echelons of union and management representatives without a loss of control over the case. Three-party bargaining may then supplant two-party bargaining. There is also a concern lest the Impartial Chairman acquire vested interests and encourage the submission of cases to the final step in the interest of his job security.

My predilection for the permanent Impartial Chairman is not shaken by the "vested interest" argument. Permanency obtains only for the term of the contract, and maybe not that long. This observation secures dramatic support from recent changes in the General Motors umpireship. The impartial man actually holds a sort of fiduciary relationship with both parties, and he steps out when it is evident that he has lost the confidence of either party.

Weight must be given, however, to the argument that the Impartial Chairman procedure, as just described, may enervate the meeting of minds process at the earlier stages of the grievance procedure. Such a result does not obtain when union and management leaders are able to work out protective measures and when the Impartial Chairman refuses to cooperate with a short-cutting of collective bargaining.

There are instances where either the union or the management will not assume the various risks in having a third party participate in making vital collective bargaining decisions as an Impartial Chairman. The Umpire system can then be developed and it can be built up, moreover, as a support for the meeting of minds criterion in grievance settlement. Only if it is so conceived does the Umpire machinery fit in with collective bargaining necessities.

The Umpire may be looked upon as a substitute for the strike. In collective bargaining, the risks and potential losses that go with a stoppage of production induce compromise

and agreement. That applies to grievance settlement as well as to new contract terms. Arbitration carried on by an Umpire may be made a risky proposition and thus serve as an inducement for the parties to settle their grievance difficulties directly.

Although common sense and compromise can be freely exercised by the parties in the earlier steps of the grievance procedure in an effort to hammer out a meeting of minds, much less latitude is possessed by the "outsider" under the pure Umpire system. It is the Umpire's job to rule "legalistically" on the contract as written and on the evidence as adduced, irrespective of whether or not the result, in the Umpire's judgment, is sound from an industrial relations standpoint. If the decision is difficult or impossible to live with, then the parties will be made aware of the urgency of compromising their difficulties and of avoiding arbitration.

The Umpire system would doubtless be effective if it actually induced agreements at earlier stages of the grievance procedure. But if large numbers of cases are arbitrated, the basic purpose of the system will not be achieved, and the program will inevitably fail. Submission of a large volume of issues to an Umpire evidences an inability of the parties peacefully to resolve their differences. A backlog of extremely difficult problems may be built up for treatment when a new contract is negotiated. And grievances unacceptably handled during the term can't be satisfactorily dealt with in contract negotiations.

It is my experience that the grievance issues which appear in contract negotiations are finally shoved under the rug at about 5 a.m. some morning when the negotiators sign up to avoid a stoppage scheduled to begin at 6 a.m. Old unsettled grievance issues then remain year after year to plague day-by-day operations. Not infrequently they underlie many of the wildcat strikes which test the ability of the union and the management to develop smooth operating relationships.

Although the Umpire system can conceivably operate effectively, success in its use requires a far more comprehensive understanding of its characteristics than presently obtains with

employees, union and management representatives, and with arbitrators as well. It is highly doubtful, moreover, if employees can ever be sold on an arbitration system under which their claims for equity are of secondary importance or of no consequence at all. Although the Umpire system is theoretically an alternative, it seems to me that, as a practical matter, the Impartial Chairman concept will become more and more accepted as the sound way in which to develop grievance arbitration.

5. Conclusions

The central problem of grievance arbitration is whether, at the final step in grievance settlement, a meeting of minds or mutual acceptance should be a vital criterion. Distinguishing between the Impartial Chairman and the Umpire concepts brings this question into sharp focus. In actual situations, the problem is usually far more complex. Use of one of these terms does not reflect a mutual acceptance of a particular approach. Each party has a tendency to switch from a demand for a fair and workable decision, not incompatible with agreement terms, to an insistence upon a so-called legalistic decision, depending upon the necessities for winning a particular case.

Despite the complexities of the task of developing grievance arbitration as a sound instrument for industrial peace, great progress is possible, in my judgment, if a number of fundamental principles are recognized. As a start in the search for such principles, and solely for that purpose, I suggest the following basic ideas:

1. Grievance arbitration cannot be made to conform to any single, rigid pattern. It is a substitute for the use of strikes and lockouts and must be developed in each case as a procedure that the parties will mutually accept as preferable to the use of economic power.
2. No sharp line can be drawn between agreement-making and agreement-administration. Grievance settlement involves not merely the application of clear and unmistakable agree-

ment terms to individual cases but, particularly in the early stages of a relationship or as respects new terms added to an old contract, is also related to a completion of the agreement of the parties. This applies to the arbitration clause itself which commonly does not constitute a complete meeting of minds about the kind of arbitration to be employed.

3. In many situations—perhaps in most of them—procedures for grievance settlement have not yet been adapted to the agreement-making functions involved. Careful consideration should be given to the desirability of arbitrators assisting a mutual understanding between the parties as respects the kind of arbitration they are desirous of developing. Discriminating attention could well be directed toward the use of arbitration procedures that tend to bring about mutual acceptance or acquiescence in arbitrators' decisions.

4. Ad hoc arbitration should be looked upon, at best, as a transitory method and as entailing disadvantages that outweigh its advantages to labor, management and arbitrators. As a support for industrial relations stability, a permanent arbitrator is a prime requisite. Out of the continuing relationship, consistent policy and mutually acceptable procedures can gradually be evolved. Conflicting awards and those based upon an incomplete appraisal of all the circumstances in a case may increase, not decrease, the range of differences that ultimately have to be reconciled.

5. It is highly doubtful whether the cause of industrial peace can be advanced through legislation requiring the parties to include in their labor agreement clauses providing for the arbitration of grievances. Such legislation could conceivably be helpful by directing the attention of labor and management to the necessity of dealing with this problem themselves. In the last analysis, however, an effective grievance procedure can only be worked out by labor and management as long as collective bargaining and the right to strike obtain. Unacceptable arbitration procedures and unacceptable arbitration decisions could contribute heavily to the difficulties of avoiding strikes over the renewal of agreements.

This presentation has been quite long, and I apologize for taking you through such a technical and detailed analysis of the problem of grievance settlement. In extenuation, I can only express a deep conviction that this vast and vital area of industrial relations has yet to be thoroughly explored. If these remarks stimulate those interested in industrial relations, including arbitrators, to evaluate the task of grievance settling in fundamental terms, they will have served their purpose.