CHAPTER III

THE STATUS AND EXPENDABILITY OF THE LABOR ARBITRATOR

A Panel Discussion by

DAVID L. COLE, JESSE FREIDIN and ELI L. OLIVER *

1. Remarks by David L. Cole

Attorney and Arbitrator

This statement is intended to be provocative. It is made in the hope that the discussion which it provokes will be fruitful.

While labor arbitration has been known for almost a century, its broad use dates back only a few years. For the purposes of our discussion we may disregard the rare occasions prior to World War I when it was invoked largely as a means of combatting existing or threatened strikes. Our concern is with the kind of arbitration with which we are now familiar, where we construe provisions of existing agreements or decide what shall be the terms and conditions of new agreements. In contract interpretations I have principally in mind the cases in which the provisions are ambiguous or where there is no provision which covers the particular grievance.

Arbitrators have been increasingly subjected to criticism. As fools who rush in, and as American fools to boot, we can hardly complain about our liability to criticism. But it seems to me that in the general good it may be well for us to examine our critics, and analyze some of this criticism by labor and management spokesmen. In too many instances a good deal of this criticism is moving toward the impairment of the institution which these critics in other respects seem to desire to

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improve. If submissive acceptance would promote the cause in which we and our critics are interested, I would be one of the last to speak up.

The odd part of it is that nobody questions the value of arbitration, least of all management and labor. Following the wartime experience when thousands of dispute cases were settled by the War Labor Board, there was a Labor-Managemnt Conference called by the President in December 1945. Only one proposition had the unanimous support of all the conferees. That was that the last step in grievance procedure should be final and binding arbitration. In 1948 over 4,000 disputes were arbitrated under the auspices of the Federal Mediation and Conciliation Service, State mediation boards, and the American Arbitration Association, and it is not an over-statement to say that several times that number were conducted privately through permanent umpires or on an ad hoc basis. The number of collective bargaining agreements which have provisions for arbitration procedures to conclude grievances has now risen to over 90 percent.

Arbitration is used not only for the settlement of grievances. In a number of industries arbitration is invoked to determine the wage and other provisions to go into new agreements. This is commonly done in industries which deal directly with the public. By statute in several states public utilities and their unions must submit their differences to arbitration. If we consider fact-finding as basically arbitration, then the same is true of the railroads and other major industries. With rare exceptions, all this has come about through the voluntary choice of management and labor.

There are a number of reasons for the increasing use of arbitration, among which are these four:

1. There are disagreements which collective bargaining cannot resolve because the parties have not yet acquired the habit of negotiating effectively with the expectation of resolving their own disputes, but they nevertheless

wish to avoid trial by combat and all the losses in wages and production which that would entail.

2. The parties recognize their duty to the public at large and prefer not to inconvenience or harm the bystanders.
3. The issue is hot and one or the other of the parties lacks the courage to assume responsibility for making a change and would rather use the arbitrator as the catspaw.
4. If rates are involved which are subject to public regulation it may be advantageous to have an outsider determine the labor costs.

Assuming that generally the first reason is the motivating one, and considering the vast number of issues that are submitted to arbitration, it is appalling to think of what the consequences would be if all these disagreements were left for self-help to the parties. Every situation is potentially explosive, and the more so as business fortunes fluctuate. One can easily picture the temptation to workers to try out their strength during profitable periods and the temptation to employers to sit back and outlast their employees when business is bad. The substitute which they have found in the form of binding arbitration has made it easy for them to resist these dangerous temptations. If there is some other effective substitute, I do not know what it is.

While the economy as a whole profits from the forgoing of economic jungle warfare, the chief beneficiaries are the parties themselves. It follows that management and labor should be most jealous of the success and well-being of arbitration. The character and value of arbitration hang largely on the behavior and attitudes of the parties whom it is serving.

Let us examine some reflections of their attitudes and behavior.

Much that is said and done by parties to arbitration strikes me as thoughtless and shortsighted. I would say in fact that a number of their activities are bound to bring discredit to this process and to undermine it. Far too many labor and man-

agement critics are indifferent to the consequences of their criticism. If they would frankly study the causes of the things they complain of, they might well find that the trouble lies either in the deficiencies in the agreements or submissions they negotiate, or in their failure to reach understandings as to the nature of the arbitration they should have.

No brief is held for the incompetent or dishonest arbitrator. The sooner he is eliminated, the better it will be for arbitration. Nor am I concerned over the changes in arbitrators and the search for men who are either technically, philosophically or psychologically suited to the industry or the parties.

One of my objections is to the attitude of certain parties that they are dispensing largesse when they engage an arbitrator and that they have the right to expect special consideration in return. The concomitant of this initial approach is the blacklisting of arbitrators who do not give the complaining party the victories it seeks. A subhead would include the unions and management groups which keep box scores and favor or condemn an arbitrator not on the basis of the merits of his several cases but on the ground that he has rendered more decisions in favor of labor than the other way around or vice versa. I shall not detail this further, and will leave this matter by stating simply that such approaches and threats to arbitrators are distinctly offensive and insufferable.

The more serious criticism of our critics is their failure to realize that many of their complaints about arbitration are the result of their own remissness or of their own behavior, and that the repetition of such complaints is certain to lead to its deterioration rather than to its improvement.

It is obvious that self-respecting arbitrators will not rush into print to defend themselves against direct or implied attacks on their ability, judgment or integrity. No similar restraint has as yet been accepted by employers or unions or their spokesmen. Thus, at the very threshold we have a most unequal kind of conflict.

Underlying much of the criticism of arbitrators and of arbitration is the inordinate zest for victories. I need not empha-

size the point often made that, unlike court litigation which usually involves money damages, labor arbitration involves the conditions under which people must continue to live together. This in itself raises delicate problems, because in each case numerous people with varying viewpoints, antagonisms and traditions are involved. It is made more difficult by the court-room type of technique in which each party seeks to win his case at all hazards rather than to find a sound solution, and by these tactics witholds both information and guidance from the arbitrator.

Most contracts and arbitration submissions contain no standards or rules by which arbitrators may be guided. Moreover, in most instances there is not even an agreement between the parties that such standards or rules are proper or necessary. There is no basic understanding as to whether arbitration of the types here being considered is strictly a judicial process or in the nature of an extension of collective bargaining seeking what has been called the fair "area of acceptability." Yet an antagonist does not hesitate to find fault with awards because the arbitrator has not adhered to the rules or type of approach which that party had in mind but had failed to persuade the other party should be included in their agreement.

It is perfectly plain that in such circumstances the parties should carefully screen the arbitrators nominated for their case and select one whose general philosophy and capabilities meet with their approval. They must certainly know that when they impose no restrictions, and furnish him with no guides he is left in the position where all he can do is to apply his best judgment to the facts and arguments they present.

Because of the lack of such standards to govern statutory boards of arbitration, the Public Utilities Law of New Jersey was held unconstitutional last May. Part of the opinion of Chief Justice Vanderbilt is quoted because it has a bearing on the point I am making and also because it reflects the feeling toward arbitration of an eminent lawyer who has had long trial experience:

> Furthermore, in the absence of standards, the very term "board of arbitration" carries with it the implication that the board will act in the way that arbitrators customarily act, not according to established criteria but according to the ideas of justice or of expedience of the individual arbitrators.
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> Anyone who has had experience with arbitration realizes that this is the inherent weakness of arbitration as a remedy. Unless standards are set up in any submission to arbitration the tendency to compromise and be guided in part by expediency as distinguished from objective considerations and real right is inevitable.[1]

Following this decision a new statute was drafted. It is interesting to note the standards which were included in the New Jersey statute when it was reenacted. Among such standards are every conceivable kind of wage comparison—comparisons with employees of similar skills, in the area and in other industries, comparisons with public utilities and industry in general, both in New Jersey and throughout the nation. The first and fifth factors named are particularly noteworthy:

> (1) The interests and welfare of the public.
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> * * *
>
> (5) Such other factors not confined to the foregoing which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, arbitration or otherwise between the parties or in the industry.

Unions and some employers have criticized arbitrators because they make rulings merely sustaining or rejecting their positions. They say this is bad because it does not promote collective bargaining. On the other hand, arbitrators are criticized for not being more judicial and simply ruling directly on the issues presented. Not infrequently, however, advocates of this judicial approach take liberties with arbitrators which

[1] New Jersey v. Traffic Telephone Workers' Federation, 24 LRRM 2071.

they would not think of taking with judges. After all, the arbitrator wears no robes, has no bailiff, and neither by tradition nor law may he punish offenders for contempt.

Arbitration has been publicly attacked from time to time by large and important segments of industry, the local transit industry being an example. About two years ago a top executive of a major company published his opinion that labor arbitration has a record of error and injustice. In the American Bar Association Journal of December 1949 there is an article by a well-known management attorney, Theodore Iserman, entitled "The Arbitrator in Grievance Procedures: Is Arbitration the Way to Settle Labor Disputes?" The question in the title is not answered in the article, but some of the conclusions reached leave little doubt about what the author believes should be the fate of arbitration. The author makes these points:

> One sees . . . the extent to which labor arbitration undermines collective bargaining, substituting for it collective litigation.
>
> . . . also, how arbitrators, all strong believers in arbitrating, further the process, taking great pains to make their awards as palatable as possible to "both sides" [they seem rarely to consider the public's interest in efficiency and increased output].
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> * * *
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> But one wonders to what extent arbitration, now so widespread, and the predilections of arbitrators, their unconscious but often clearly recognizable tendency to "balance" awards between employers and unions on a more or less arithmetical basis, pressures of internal union politics, pettifogging, fine word-chopping, involved and tortuous reasoning on simple problems, and theoretic rulings, distort this aim and obstruct it [the aim being to produce goods more efficiently and cheaply]

And, finally,

> This attitude [which the author says many arbitrators take, of babying and favoring unions] encourages mis-

conduct, subverts the aims of collective agreements and undermines output.

Mr. Iserman states, however, that a minority of arbitrators do not fall within the descriptions with which his article is replete, and that "Their awards . . . contrast sharply with those of their more theoretic colleagues."

This indictment sounds very much like a conviction from which there is no appeal. Unfortunately, expressions and criticism of equal condemnation have been made by union people, although on somewhat different grounds.

The wide circulation and prominence of some of these statements would seem to foreshadow a bleak future for labor arbitration. Ironically, however, very few authoritative representatives of either labor or management say that arbitration should be abolished. The constant growth and enlarged use of voluntary arbitration proves that they believe the contrary.

If they like and need the process, they have an odd way of saying so. It should be self-evident that as a product of voluntary action arbitration will assume and maintain only the tone and character which the participants give to it. If arbitrators are constantly disparaged, or if they are subjected to a general feeling of instability through pressures, blacklistings, or threats, the unavoidable consequence will be a serious impairment of the dignity and respectability of arbitration itself. As I have said, no case can be made for arbitrators who are unable to meet the necessary ethical or competency standards. I am concerned nevertheless, with the elimination or discouragement of competent, conscientious men, because frankly I do not believe they will be easily replaced. After all, the experience which would qualify an arbitrator would normally come from work either on the side of an employer or a labor organization, but such experience tends usually to disqualify the person before he is permitted to act.

To sum up, I think most of the criticism comes from disgruntled participants who when they lose not only yell "Kill

the umpire," but really do their best to kill him. Or worse, some seem to have undertaken to kill the game in order to get rid of the umpire. Very few of these critics will admit that if they want more certainty in arbitration methods it is up to them to work out rules or other binding directions to govern the arbitration. They either don't bother to get such rules written and agreed on, or they find the other side disagrees with them and they are not persuasive enough to change this viewpoint. Nevertheless, despite their own shortcomings in working out the underlying agreement or submission, they feel free to hold the arbitrator to account if he does not meet the rules or standards which that party unilaterally advocates.

This paper has been submitted in advance to our two capable guests who have been asked to speak freely on the subject as spokesmen for labor and for management. Both have had a great deal of experience in this work and both have demonstrated for years that they are ardent supporters of labor arbitration. We believe that an exploration through a full and frank discussion can help to improve arbitration, an end to which we are all devoted.

I must add, in fairness, that most of what I have said has not been the result of personal experience. It would be exceedingly unfortunate if the impression were left that most employers and unions concur in what the extreme critics of arbitration have said or done. The extended and constantly enlarging use of voluntary arbitration and the acceptance of the awards which have been made are the best proof of how management and labor as a whole feel about this institution.

2. Remarks by Jesse Freidin

Attorney

A query concerning the status and expendability of arbitrators could well receive a short answer. With a good deal of justification we could state that arbitrators have become expendable in the process of giving status to the institution of arbitration. Our declaration merely recognizes what is the

common observation: that when one or both parties are dissatisfied with an arbitral experience, they do not abandon resort to arbitration—they merely refer future differences to another arbitrator.

And the thesis that I shall try to support in this discussion is that expendability must continue to be an occupational hazard if arbitration as we know it is to survive. The use of the word "expendable" does not conceal the fact that what we are really speaking of is a process of selectivity.

It seems to me to have been inevitable that the parties to labor disputes should have been engaged in some mechanic of selection. It was inevitable for at least two reasons: first, because of all persons engaged in the making of decisions that affect important interests, the labor arbitrator alone must assume personal and exclusive responsibility for his award—he has neither statute nor standards furnished by the parties, nor a body of established doctrine to which he can assign responsibility for his conclusion. He has only his naked judgment. Unlike judges or administrative officials, or even commercial arbitrators, he cannot relieve himself from pressure by impersonalizing the process through which his decision is reached.

This gains additional significance in light of the second reason —that it is the natural disposition of nearly all parties to nearly all controversies to want to win. Labor arbitrations have many subtleties and colorations, but they are nonetheless controversies involving, in fact, passions that have their roots deep in habit and conviction, and it is unreasonable to expect that each side will not do its utmost to win a favorable award. If we are to approach our subject with complete candor I don't think this fact can be ignored or obscured.

The multitude of arbitration awards over the last 5 or 6 years have put unions and employers in a position to exercise more of an informed judgment regarding the acceptability of a particular arbitrator. They have become, as we were bound to expect they would, more selective in judging the total competence of a given arbitrator, competence, not in any abstract or

scholastic sense, but in terms of the specific issues of the immediate case. Certain men are no longer being called on at all, some less, and some more than before, others are asked to arbitrate only grievances on an ad hoc basis, a few enjoy the relative security of permanent umpireships, while yet another group are entrusted with the fixing of contract terms.

This is what might have been anticipated, is it not—the working of a process of selection—the arbitrators have now had opportunity to demonstrate their fitness, unions and management a chance to judge the qualities of those who are to make decisions that affect social and economic interests of great magnitude. And no compelling reason can be offered as to why arbitrators should be exempt from this continuous process of critical reappraisal, for while the same general system of choice obtains in nearly any other field we can think of—it is more important that it should be preserved and freely exercised in this field than in any other, for only here are the contestants obliged to rely on the personal discretion of the adjudicator, unrestrained by established rule or agreed upon standards or by threat of reversal on appeal to a higher body. I do not advocate the latter. I only cite it as a fact that has an important place in this discussion.

I think then, that we must conclude that so long as we intend to leave with the parties the right to choose from among many the particular individual who is to act as the arbitrator, expendability of those not chosen is to be considered as one of the inherent characteristics of the arbitrator's profession.

I realize that there may be grave disadvantages in this view, that it may be construed as an invitation to ill-conceived compromise, that it may restrain some arbitrators from giving expression to their deep convictions, that we may lose experienced and thoroughly competent arbitrators—but whether or not these consequences are inevitable, they are, I submit, less important to the maintenance of arbitration as a method of settling labor disputes than that the parties should be denied the free right of selection and rejection.

If we had compulsory arbitration governed by statutory standards these potential evils might be avoided, for there being less room for an arbitrator's personal predilections, there would be fewer risks involved in designating a particular person. But this would be a system different from anything we now know. It would involve an entirely altered concept of industrial relations, and the arbitrators would be the first to oppose such an innovation.

It has, of course, been urged that the absence of standards and guides to serve as restraints upon an arbitrator is the fault of the parties; that they control the arbitration and can set the standards that are to govern the proceedings; if they fail to do so they have asked the arbitrator to use his unfettered judgment and they cannot complain when the arbitrator does exactly what they have asked him to do. This is part of Mr. Cole's criticism of the critics. But I submit that he proceeds, uncharacteristically, on an illusory premise and the illusion seems to me to be that there exist standards that can effectively limit the area of decision.

Consider that whatever standards may exist which can be said to be acceptable to the parties or to labor and management set only upper and lower limits. Did they set limits of a more precise nature, the parties presumably would be able to apply them and thus resolve their own dispute. But in the normal case destined for arbitration, the limits upon which they are able to agree are so distant from one another that where the decision shall fall still remains essentially a matter of judgment.

Such standards as these we are familiar with. Even if unexpressed they will still play their part. But that they do not yield predictable results no one will deny. And I believe that given a free market economy the nature of the issues precludes any hope of agreement on such criteria. Even the application of such an apparently simple criterion as cost of living may, in a given case, involve such questions as the effect of an increase upon ability to compete, financial capacity, the possible loss of job opportunities if you're dealing with a marginal employer, what is to be considered as offsetting the equity. Comparative

wage rates create issues of job content and comparability, of the area within which the comparison is to be made, of the weight to be given to other contract terms, etc. Pension and insurance benefits—shall they be granted, how large shall they be and to whom shall they be available, who is to bear their cost, should they await government action.

The solution to such questions as these rests ultimately, I think, upon ethical and moral considerations and not upon premises founded upon some eternal truth.

It must also be realized that as the area of bargaining expands there are constantly brought within it union demands to participate or to have a voice in operating techniques and methods which have heretofore been a matter for management decision. Whether the demand shall be granted in whole or part calls not only for the exercise of judgment but for a technical competence which standards can do little to supply.

That Mr. Cole's gibe at the critics rests on a false premise is demonstrated, too, by the efforts of state legislatures which have tried to specify the criteria that are to govern the compulsory arbitration of public utility disputes. Aside from those that fail to make even a pretense at the practical and fair, they have progressed no further than the designation of a number of factors to be considered by the arbitrators without indicating the relationship of one to another, or how they are to be applied, or of how their influence is to be affected by other considerations not mentioned in the statute but pertinent to the dispute.

Under these circumstances, the personal judgment of the arbitrator plays a dominant role in arriving at an award. The parties must, then, if the institution is to survive, remain free to choose arbitrators whose personal judgment they trust, respect and regard as favorable to their position.

Mr. Cole acknowledges the right of the parties to engage in this process of selection, to put through a careful screening the arbitrators nominated for a case in an effort to select one whose philosophy and capability they approve. But this acknowledgement he puts in the abstract. He is more concrete

in his criticism of the parties for trying to select an arbitrator whose past decisions indicate a promise of victory. This he equates with the box score method of choice—and roundly condemns both.

What I think he has overlooked is that the essence of the right to select, and to reject, which he concedes, is the expectation of winning, which he condemns.

I would agree with Mr. Cole that the box score is a bad basis of choice. I have found it, in the first place, to be unreliable. Moreover, as a philosophical matter, I would be opposed to it because acknowledged use of the box score system—as criteria for the choice of an arbitrator would undermine the institution of arbitration even to the most cynical components in the camps of labor or management. I venture to say that the person who measures an arbitrator by the number of times he has decided for management or for labor is the person who is most resentful when the opposing side utilizes the same measuring rod, for it is a system whose basic philosophy break down when opposing litigants both resort to it.

But while Mr. Cole doesn't come right out and say so he intimates quite plainly that he disapproves of the parties use of their right of selection if that use is frankly predicated upon securing a victory in the particular proceeding. This disapproval I believe is unjustified for there being no standards, the only means available to me to reduce the uncertainties that inhere in arbitration is the right to reject an arbitrator whose past decisions appear to foreclose the possibility of victory in the particular case.

It seems to me obvious that when the result in an important arbitration depends so largely upon the person of the arbitrator, the test of his selection must be one which measures his view.

This, I submit is not the crude box score system and is not entitled to censure. It appears to me to be a restrained exercise of the right of selection and one calculated to preserve arbitration because it undertakes to do what the available standards are not capable of doing—to limit the hazards of arbitration in a rational manner. For while I grant to an arbitrator the

right to express and to act on whatever views he may hold, I think he must grant to me the right to accept, or to reject, his services, after I have learned what those views are.

If employers, and unions, too, were not free to select or reject arbitrators, on the basis of principles or views embodied in earier awards, they would be loathe to subject themselves to the even larger risks which arbitration would then involve, and the system of arbitration itself would suffer.

Where does this procedure leave the arbitrator? It must be anticipated that at least as to some arbitrators, parties with greater or lesser frequency will find their past decisions uninviting in the light of the case to be litigated. But this, I believe, is a risk to which arbitrators are obliged to submit if we are to give permanence to arbitration, particularly the arbitration of new contract terms.

There is one further aspect of Mr. Cole's paper that I think warrants a comment. In his dressing down of the critics he has made no distinction between criticism directed against the arbitration of contract terms and criticism directed against the arbitration of grievances. I suggest that there is a considerable difference which ought to be observed in evaluating this discussion, for in contrast to resolving a dispute over basic contract terms, the disposition of grievances generally allows much less room for the play of personal judgment. It is in this area of grievances that labor arbitrators may have contributed to their own expendability. For in the stipulations of the agreement the parties have provided standards that, at least, sharply limit the area of discretion. This is, in any event, the way most parties think of their agreement. Criticism comes, when the arbitrator chooses (as some do) to think of it differently, as a vehicle to carry forward his personal concept of cooperation. Where enforcement of the agreement yields a result that might jeopardize his idea of cooperative enterprise, he believes himself free to fashion a different result, subordinating the contract to dictates of what he conceives to be the necessities of a continuously working relationship. This view of the contract, if the parties held it, would be ideal. But it

is, you will agree, a highly sophisticated view of a collective agreement. Where the parties have graduated to that advanced stage, an arbitrator may be justified in applying such a view.

But he must feel very sure of himself before he begins to read out of the parties' agreement what he regards as the impractical results called for by its language and reads into it what he regards as a more desirable result.

Even then, he ought not to apply this pragmatic view to his task unless he is sure that both parties are desirous of his doing so.

This should be so for a number of reasons. It is undoubtedly true that the pragmatic view would result in far finer industrial relations if the parties themselves viewed their relationship as one of trying to understand and meet the needs of the other, and if their jointly held view of cooperation happens to coincide with the arbitrator's, and if they are willing to waive or accept a modification of the terms of their contract to reach that result. But the plain fact is that these are big "ifs." Many employers and unions have not yet been educated to such an advanced outlook, and cooperation sometimes means three different things to the three different parties to the arbitration proceeding. However long a collective bargaining relation has existed, a collective agreement is more often than not regarded as fixing rights and obligations, and the parties consider that they have a right to expect the arbitrator to look at it in the same way. Against such a background, for the arbitrator to treat their collective agreement differently upon demand of only one of the parties, who will urge such an enlightened view in one case but oppose it in another, undermines confidence in the agreement, the arbitrator and the arbitral process.

This view of the collective bargaining agreement is not uniformly or necessarily the product of hostility by one side to the other. Just as often, it springs from the desire, particularly on management's part, for as much certainty and predictability as possible in the continuing administration of the contract. This effort to reduce uncertainty in the future administration of the contract by being able to rely on the dogma that

like cases ought to produce like results is, I think, one of the compelling reasons why many representatives of management have urged that awards in grievance arbitration be accompanied by reasoned opinions, and that arbitrators be free to use past awards as and if the particular case before them warrants.

This is not taking the view of some commentators who urge that arbitrators should act as judges do. Their reasoning is that since arbitration involves a judicial process the arbitrator is obliged to act as a judge, and to observe fixed rules of procedure and precedent. This view I would reject. True, arbitration is a process of judging, but it need not thereby be assimilated to the judicial process. It is a separate process and its procedures should be developed in the light of its own peculiar functions.

In the final analysis of this question of expendability, what we face are two conflicting claims to security. The arbitrators, on the one hand, complain that management and labor, by the exercise of their power to select and reject particular arbitrators, in particular cases, have been expending them unncessarily, thereby seriously diminishing their security. Management and labor—on the same side this time—protest the radical implications in the arbitrator's complaint. They point out that to deprive them of, or to limit by censure, their right of selection imposes upon them risks of unlimited dimensions. What is more, they object to a policy of reducing Peter's security in order to increase Paul's.

How the conflict is to be resolved, I do not know. I suspect that it may be irreconcilable. But this I do believe—if we are to have a system of voluntary arbitration, we must preserve not only the right of the parties to accept or reject arbitration, but their right, as well, to accept or reject arbitrators. The two will stand or fall together.

3. Remarks by Eli L. Oliver

Economist, Labor Bureau of the Middle West

Permit me, first, to say that I greatly appreciate the opportunity given to me to comment on the subject of Mr. Cole's

paper. Naturally, the question of the status of arbitrators is of the greatest interest and importance to anyone concerned in the handling of labor controversies in the United States. The Academy could hardly have made a better choice of a person to discuss this subject of expendability than Mr. Cole. His record of recent years has shown that he is considered not to be expendable, either by the parties in our major labor controversies or by the government authorities dealing with those controversies. In other words, he has what it takes not to be expended.

Mr. Cole's paper separates the question of the status of arbitrators into two general sections: the first of these, dealing with the whole matter of competence and integrity, is deliberately omitted from his discussion; the second, relating to partisan objections to arbitrators, seems to me to be composed of three major indictments. Mr. Cole feels that the parties are not properly respectful of arbitrators in many instances and that they manifest their lack of respect in a variety of ways. He feels, also, that they are too greatly possessed by the desire to win, and that their attitudes toward arbitrators are too much dominated by the consideration of whether or not they have won in past arbitrations. He seems to feel, further, that the parties are too critical in the matter of rulings or standards in arbitration awards. I assume that these comments are applied, whether equally or not, to representatives of both labor and management.

With respect to most of these things, of course I can speak only for myself. From that necessarily narrow viewpoint, I must say that I cannot plead guilty to having less respect for arbitrators than for judges. I do not think the arbitration process would be improved if arbitrators possessed the power to compel respect or to punish disrespect in arbitration proceedings. In some very notorious criminal cases in recent months, in fact, the power of a judge to punish contempt doesn't seem to have been too successful, in compelling respect. Union representatives who are not reasonably respectful of arbitrators will ordinarily be curbed by their own membership.

With respect to the second count in his indictment, I feel that Mr. Cole has perhaps misunderstood the attitude of those labor representatives who seem to be determined to win in arbitration proceedings. Let me preface my remarks on that subject by a few platitudes on the importance of the arbitration process, particularly in disputes relative to changes in agreements. To begin with, we are functioning in what is the most critical area of social conflict, the employer-employee relationship. This is an area of rapid and dynamic change. During the last thirty years, while the process of arbitration has been developing, not only have real wages of American workers risen rapidly and their working conditions, as exemplified in work periods, vacations, pensions, etc., greatly improved, but labor organizations have also succeeded in extending their participation in control over large sections of their relationships with employers. It is certain that the pressure for improvement in this area, perhaps I may say for continued change in the same direction, will continue; that pressure will probably intensify. Looking at the last thirty years in perspective, I am inclined to believe that we could find no period in the whole history of our so-called Western civilization, where such drastic, rapid and fundamental changes occurred, unless it was in the development of the British Constitution, in the second half of the thirteenth century. Those of us who are involved in the arbitration of labor disputes are caught up in that very rapid change, whether we like it or not, and our conduct and our capacities must be judged in relation to that tremendous social flux.

The United States, as a nation, is confronted with no more important domestic question than that of whether continued change in the area of employer-employee relationships is to be orderly, amicable and peaceful, or whether it is to be attended by bitter, antagonistic and violent conflict. Among the possibilities, probably very remote in the United States, is that this conflict might merge into something approaching revolution.

The dynamic, fundamental changes occurring in the area of employer-employee relationships are to be found not only in

the actual wages and working conditions, but also in the standards properly applicable in this field. Certainly, the standards appropriate in 1919 would require drastic amendment to be satisfactory in judging of the conditions to prevail in 1949. I believe that an arbitrator, to be competent to deal with the conflicts developing in this field, must understand and accept the very rapid change in the direction of improved wages and working conditions and higher status for the working people of the United States. Union proposals that were radical innovations ten years ago are now commonplace; some of the drastic changes proposed today will be commonplace next year. The arbitrator who considers himself a Rock of Gibraltar under such circumstances is not only expendable, he is endangering the future of the arbitration process.

To add one more to these platitudes, let me say that I believe the process of arbitration may well be the major hope for averting industrial conflict of a scope and character that might completely undermine our basic institutions. Against that need and prospect for labor arbitration must be placed the simple fact that it is not yet accepted as a method for settling labor contract disputes in any one of our basic industries—not in the coal industry, not in the steel industry, not in the food industries, not even in the railway industry.

To turn now to the matter of that "zest for victory." Here I can speak for myself first. I think I do have a zest for victory. I think I would like to win an arbitration case sometime; I haven't yet given up hope that I may. But, actually, in each arbitration the situation of the labor leader is this: He has persuaded his membership to agree to the arbitration of very important questions. He knows that not alone a vindication of his judgment, but also the future acceptability of arbitration, depends upon the outcome of these individual cases. He is fighting not alone for the laurels of victory, but also for the future of this process for settling labor disputes. It is clear to him, as it must be to each one of you, that the future of arbitration in any one industry, or in industry generally, depends

primarily upon the ability and the character of the arbitrators and upon the reasonable justice of their decisions.

I think frequently of a statement in Thucydides' history of the Peloponnesian war. Before that war began, the Athenians appealed to the Spartans to abide by an existing agreement and submit the outstanding question to arbitration. The Spartans refused. Had they arbitrated, and thus avoided the disastrous war, the whole subsequent history of Western civilization might have been fundamentally different. As I have thought upon that crisis in human history, I have wondered who had been the arbitrator in the last previous case involving those Spartans.

Since we are dependent upon arbitrators not only for individual decisions, but also for the whole future of this process, I should like to comment on some of the requirements for a good arbitrator as seen from the standpoint of labor representatives.

Arbitrators, it seems to me, ought first to understand how to conduct a hearing in a manner that will not seriously antagonize the parties. Two characteristics of arbitrators—seen, thank goodness, very infrequently—are most undesirable from the labor standpoint in this matter. A few arbitrators are inclined publicly to sneer at labor proposals in arbitrations. I admit that sometimes unions may ask for things that look farfetched. It is more likely that an arbitrator does not understand that which seems to him ridiculous. But I have never seen any proposal so outrageous or so unfounded as to justify a sneering, contemptuous dismissal in a public hearing. Labor leaders, too, are frequently dismayed by an excessive verbosity in an arbitrator. I have found it necessary on one occasion to ask for a recess and to tell the arbitrator that if he did not discontinue the kind of comment he was making, I would lead the union committee out of the hearing. Such cases are, fortunately, rare.

More often we find arbitrators who either fail to understand or are contemptuous of economic and statistical evidence. Everyone knows there are many deficiencies in statistical data and techniques, but it is disturbing to hear an arbitrator dismiss all statistical evidence on the ground that "statistics can be

made to prove anything." Occasionally, one finds the other extreme in an arbitrator; there are some economists serving as arbitrators who are possessed of a full and complete body of economic theory, upon which they rely with the certainty of a medieval theologian. Economic conclusions, to be of much value, must be close to actual facts, and have a minimum mixture of theoretical abstractions.

The most disturbing of all phases of this problem, however, is in the matter of impartiality. It is an astonishing thing to me that a man can serve on both sides of the employer-employee conflict; I have, however, known of attorneys who simultaneously represented labor unions and employers in different collective negotiations. It is even more incomprehensible, however, that any man can serve as a representative of employer or employee groups and either simultaneously or intermittently be accepted as impartial in other labor disputes. Yet it is true that this is happening; men who may next week be opposing a wage increase or an extension of union influence in one establishment are this week sitting as impartial persons in deciding wages, working conditions or union influence in another establishment. I realize that the complexity of human psychology makes it impossible to generalize with respect to such situations, but for myself, I think that with the best of effort I could never completely eliminate the influence of next week's situation in trying to settle this week's dispute.

I hope these general comments on arbitrators will not be misunderstood; very few arbitrators, who serve in that capacity repeatedly, have any of the shortcomings I have mentioned. But the rapid development of arbitration has resulted in many incompetent, inexperienced and unsuitable persons being selected to act as arbitrators, sometimes even in important disputes. I do not believe we can separate the question of the status of arbitrators from that of the processes by which arbitrators are chosen.

While unions and managements do agree upon arbitrators in many cases, it is, I believe, still true that more arbitrators are designated by other processes or agencies. The method used

by the Federal Mediation and Conciliation Service has been, I believe, reasonably satisfactory, in that it gives some range of rejection to each party and yet assures the designation of an arbitrator. Each party can be sure at least that it does not get the worst man. Other processes have been much less satisfactory. Appointment by mayors, for example, are too frequently guided, if not controlled, by local political considerations. Appointments by judges seem often to be of the same character as the appointment of receivers in bankruptcy proceedings—a matter of favors to some lawyer who is thought to merit such favors. Appointments of arbitrators by most state governments have the same defect as appointments by mayors. We have had the experience recently, for example, where a state governor appointing a local employer as impartial chairman had given as his explanation for the appointment that the man had been a loyal party worker. Subsequently, the same governor appointed another loyal party worker whose primary public interest and activity had been in the supervision of sporting events, and who owned and operated a small restaurant. The evils of these appointment processes perhaps merit one or two other illustrations.

In one case in which I was involved, a governmental agency with appointive power picked a man who was the chief statistician of an employer association; in another case a judge with appointive power designated an employer to act as impartial chairman. When the union in that latter case made a direct but confidential objection to the judge, he said, bluntly, that if the objection were continued he would of course request his appointee to withdraw; he added that he could not assure the union that he would appoint a man any more impartial. We were forced to go through with that proceeding. Each morning at nine o'clock the chairman of our arbitration board met with a committee representing his own employees to negotiate on contract changes in wages and working conditions; at ten o'clock he began to sit as impartial chairman in our proceeding.

The most unfortunate thing about all of these situations is that the membership of the average union does not distinguish

between the follies and injustices of these compulsory laws or other unwise arbitration procedures and the normal process of voluntary arbitration. The union that has been slapped in the face by an arbitration board set up under one of the compulsory state laws or by some other incompetent authority is unwilling to agree to any kind of arbitration afterward. Thus, not only the opportunities for usefulness of competent and impartial arbitrators but also the possibility of development of the arbitration process are being undermined by the actions of state and local governments under compulsory arbitration regulations.

Speaking from the basis of my own limited experience and my strong conviction that the process of arbitration must be protected, preserved and extended, I believe that anyone interested either personally or as a public spirited citizen, ought to do whatever is possible to eliminate such compulsory arbitration. Statutory standards for judgment are invariably static if not reactionary, and only exceptionally are the governmental agencies operating under such laws able and willing to select fair and competent arbitrators.