Chapter IV

EVALUATION OF ARBITRATORS: AN ARBITRATOR'S POINT OF VIEW

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There exists in the Common Law of libel a privilege known as "fair comment." The exact definition of the privilege I do not recall, and as we are not now concerned with a legal problem as such, I think it unnecessary to try to state it. It is the privilege of "fair comment," however, which enables critics of books, plays and other art forms to publicize their opinions free of liability for damages at the common law even though such opinion adversely affects the author or artist. The policy supporting the privilege to publish "fair comment" without liability is that the private harm befalling the author or artist therefrom is outweighed by the benefits accruing to the community at large from public exchange of critical opinion.

In order to defend his criticism on the basis of "fair comment" however, the critic was required by law to state the facts accurately, and if he was guilty of misrepresentation of fact he could not claim the privilege as defense.

Whether or not labor arbitrators fall into that class of authors or artists whose works are subject to adverse criticism within this legal privilege, I do not know. I submit however that the policy considerations which underlie the rule of law are valid, although in a more limited sense, to the exchange of critical opinion as to arbitrators.

That arbitrators are in fact under continual criticism is self evident. The process is an integral part of our system of choosing neutrals to decide labor disputes. Not all of such criticism

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is adverse, of course. On occasions someone may say something nice about some arbitrator (if the occasion follows the receipt of a favorable award—one may regard this as "pure coincidence"). Not all of the criticism is overt in the form of words of positive action; some of it is eloquent by its very silence. And by no means does all of the criticism emanate from representatives of unions or managements.

If the word "criticism" is too specific to encompass what I am referring to (and I suspect that it is), let me substitute the word "evaluation," or "critical evaluation." It is quite clear, is it not, that labor arbitrators are continually being critically evaluated. The most frequent and typical instance occurs, I suppose, when representatives of a company and union are engaged in setting up a tribunal, either ad hoc, or permanent, and must agree (or agree to disagree, with attendant consequences) upon an arbitrator. But there are two other types of situations in which the need arises for critical evaluation of arbitrators. One occurs when some appointing agency is establishing or adding to its approved reference lists or panel. Another is when this National Academy of Arbitrators is adding to its membership roster.

I raise no question as to the right (and concede the existence of a duty) of the parties, appointing agencies, and the Academy, critically to evaluate arbitrators at these points of interest. But I have some doubt, which I would like to share with you, as to whether in practice those evaluations are being made on the basis of adequate criteria, and on the basis of accurate facts relevant to such criteria. Considerations of policy similar to those underlying the common law privilege of "fair comment" lend support, I submit, to the argument that they should be.

II

As to the criteria which might be used, it is basic to voluntary arbitration that in the parties, rather than in any appointing agency or learned society, shall repose the ultimate power to set standards for qualification. At the common law and by extradition the only test applicable in advance to an arbitrator was that the parties agreed to accept him as such. Complete

disregard for the education, experience, or character of the arbitrator may have been a realistic attitude for the courts to take—at least it was consistent with *laissez-faire* concepts of the common law of contracts—but I doubt if it constitutes a sensible perspective for the representatives of modern labor and management when they come to exercise their residual power to determine who shall arbitrate for them.

Labor unions and managements do have intense concern with the education, experience, and characteristics of labor arbitrators, and their representatives frequently demonstrate this concern by painstaking efforts to select competent arbitrators in particular instances and by occasional critical outbursts against the incompetence of some arbitrators. But seldom, to my knowledge, have they attempted to state in terms of general applicability what particular attributes of training, experience and personality are deemed desirable in arbitrators.

Explanation for absence of generalized comment from unions and managements along these lines may be attributable to two factors: the pressures of necessity to deal with arbitration and arbitrators on a case by case basis, and the lack of sufficient breadth of experience by individual representatives to prompt them to speak in broader terms. It is also attributable in part, I have been told, to the fact that by and large management and labor are satisfied with the results of arbitration, and, by inference from that, with the men now used as arbitrators.

But the lack of some generally accepted statement of what is desirable may be an obstacle to the training of new arbitrators, or the improvement of those whose acceptance is marginal. Currently there appears to exist a surge of interest in the addition of new arbitrators to the ranks of those now acceptable. What impartial objective answer can one give to the man (be he student, graduate or professor) who asks "What must I do to qualify as an arbitrator?" To those who are willing to try to qualify is there any recommended course of action for them to pursue?

The absence of such criteria may also be a handicap to appointing agencies in the addition of acceptable newcomers to recommended lists.

The Academy has formulated a statement of policy for admission of new members that assists it in objective evaluation of *experienced* arbitrators. As last revised, such statement reads:

> "In considering applications for membership, the Academy will apply the following standards: (1) The applicant should be of good moral character, as demonstrated by adherence to sound ethical standards in professional activities. (2A) The applicant should have substantial and current experience as an impartial arbitrator of labor-management disputes, or (2B) in the alternative the applicant with limited but current experience in arbitration should have attained general recognition through scholarly publication or other activities as an impartial authority on labor-management relations. In evaluating the applicant's experience, the Academy will take into account his general acceptability to the parties. (3) Membership will not be conferred upon applicants primarily identified as advocates or consultants for Labor or Management in labor-management relations."

The foregoing statement of policy, however, gives no hint as to what studies a man ought to pursue to achieve competence as an arbitrator; or what personality traits he ought to develop or avoid; or what experience he should try to establish.

I am not suggesting that the Academy ought to try to define these or similar attributes in either a positive or negative sense. After considerable study, our organization has said, and I think wisely, that any person of good ethical reputation who has in fact achieved substantial recognition as an impartial arbitrator, or as a scholar in the field, and who is not primarily identified as a spokesman for management or labor will, in the future, be admitted to membership. This still leaves open to labor and management the dynamic process of identifying who shall become experienced arbitrators. As I have already said, it is basic to our notion of voluntarism that the residual power to do so shall remain with the parties. The question I raise is whether or not the arbitration process would benefit from an attempt by thoughtful representatives of the parties to state generally what they deem to be the essential requirements for competence in an arbitrator in terms specific enough to provide guide posts to the training and selection of new men.

III

Some of the critical evaluations to which arbitrators have been subjected were formulated from reading all or part of their published opinions. Thoughtful practioners in the field should by now be aware of the pitfalls and inaccuracies inherent in that process. Only a minute percentage of all arbitration opinions are published, and the process by which they are selected for publication is governed by a variety of unpredictable circumstances. Publishers print only a fraction of decisions submitted to them for publication, and their choice, as I understand it, is motivated by editorial considerations. As far as I know, the publishers make no attempt to report an accurate sampling of the writings of each arbitrator. It seems evident that they could not successfully do so. Few if any arbitrators attempt to submit for publication *all* of their opinions. Moreover the ethics of the profession preclude arbitrators from releasing opinions for publication without the consent of both parties. For any reason sufficient unto themselves, one party or the other may decline to consent to publication. The various combinations of these factors affecting selection of awards for publication make it clear that what is actually published in final result is not representative or the whole of any individual arbitrator's writing or reasoning.

Despite these obvious random elements entering into the selection of decisions for publication, some people still look to published opinions as evidence of an arbitrator's attitudes and opinions on various issues. Critical evaluation thus formulated strikes me as being somewhat less than "fair comment."

It now appears that there is at least one firm that, for a fee, undertakes to provide a rating report on arbitrators based on published awards. For a good many years, Dun & Bradstreet, and their competitors have been furnishing credit ratings of merchants, and under utopian conditions a comparable service might be useful in evaluating labor arbitrators. But the sources of information for rating merchants in the mercantile credit field are quite reliable, and the standards used in rating are highly objective in terms of dollars and cents. Labor arbitrators are surrounded by no comparable environment at present.

The reaction of one management representative to the idea of paying a fee for such a rating report was to the effect that he had long since abandoned the practice of trying to box score the arbitrators, and he saw no profit in paying someone else to do so for him.

Much of the critical evaluation to which arbitrators are exposed is based on gossip. But in some quarters attempts are being made to compile more reliable factual information. One union has drafted a list of sources of first hand information within the union as to experiences with arbitrators. Some employer associations, to my knowledge, maintain central reference files on arbitrators functioning within their community. It is not uncommon for lawyers in a community to telephone one another, or even to inquire of other arbitrators, as to their opinion of an arbitrator under consideration. I know of one instance in which a detective agency was retained to make an investigation of the reputation of a particular arbitrator.

This process of evaluation by hearsay is time honored, and will undoubtedly continue to be used. I express the hope, however, that those who participate in it will not forget the rationale behind the privilege of "fair comment" and will exert care to be accurate in their representations of fact and to limit their expressions of opinion to the area covered by the facts.

IV

What point of view may an arbitrator reasonably adopt with reference to this whole uncertain process of critical evaluation to which he is exposed? What I have said thus far reveals much of my attitude toward this question. But I have one point more to make. A number of years ago it was fashionable among some students of labor management relations to decry the urge on the part of union representatives and management lawyers to enter arbitration with a fervent desire to "win the case." A more benign climate was sought to be introduced into the hearing room by exhortations to the parties to come in to try to "solve a problem."

That number of years ago I was not as far removed from being in the general practice of law as I am today, and it

struck me as being highly unrealistic to expect an advocate to shed the mantle of his calling and don the garb of the peacemaker. I was never of the opinion that the advocate's duty was to win at all costs—my professors taught me respect for facts and intellectual honesty—but for twenty years I had been comfortable in the belief that the advocate's duty in a trial was to do his honest best to win. My views on that subject have not changed much. I still respect the two-fisted union representative and the blunt management lawyer as long as they are intellectually honest, and I do not really expect them to make life much easier for the arbitrators, or students of labor management conflict.

By the same token I think it is far more realistic for the representatives of labor and management to evaluate arbitrators in the light of the uncertainties and difficulties surrounding their function rather than against some unverbalized notion of perfection. Arbitrators are not judges of courts of law vested with the mighty power of the state, and bolstered by a stream of precedent carefully coded or indexed for ready reference. Neither are they legislators, empowered singly or in groups to translate the attitudes of a constituency into general rules of conduct. They are not investigators armed with subpoena powers and possessed of great amounts of time to search out obscure facts and resolve deep contradictions. They are private citizens called upon by disputants to exercise their individual judgment to terminate a particular dispute on the basis of evidence and arguments: evidence, that is almost always contradictory and unresolvable except by the uncertain processes of credulity and belief; and arguments that seldom emanate from any generally accepted set of principles, and on occasion are so diverse in their basic premises that they defy analysis within existing laws, contracts, and customs. The labor arbitrator of today is functioning at a frontier of industrial society beyond the area of settled rules for behavior, and his guideposts for decision are few and uncertain.

My impression is that he is doing well, indeed better than was expected of him a few years ago, at least in some quarters. There is room in which he can improve. The National

Academy is dedicated to his improvement. That he is exposed to critical evaluation by the parties and is expendable in the process is one of the facts of his life as long as we adhere to voluntarism. But I submit that he should be regarded realistically and is entitled to "fair comment."

Discussion—

JAMES C. HILL *

When Pearce Davis first asked me to discuss this paper, I completely misunderstood the meaning of the topic. I assumed that Gabriel Alexander would himself engage in an evaluation of arbitrators. This appealed to me as a subject with lofty and limitless possibilities. It was only when, just a week or two ago, I received a first draft of Mr. Alexander's remarks—a document which bears only a distant relationship to the final paper—that I realized that this was to be an arbitrator's evaluation of the evaluation of arbitrators by employers and unions. I would much prefer to engage in a discussion of the topic as I had misunderstood it to be.

Further, I would warn you that my experience in arbitration has been largely in the New York area, and that most of what goes on there is, as Abram Stockman tells me, *sui generis*. I am not sure what this means, but I gather that it is to suggest that any generalizations emanating from that vicinity are of doubtful validity beyond the Hudson River or the Bronx line and *vice versa*. I know there have been expressions of concern over some of the organized gossip-mongering which passes for labor relations consulting. I don't pretend to know what goes on in terms of the extent of this flow of information or the uses to which it is put, especially out here in the far west.

I think this subject needs research. I recall that a survey of current research was reported a few years ago in the *Industrial*

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and Labor Relations Review in which one of the four topics listed as subjects of current or anticipated research was "factors in the selection and tenure of arbitrators." [1] But it was mentioned as a subject of interest by only five of those responding to the questionnaire, and only one was contemplating an actual study, on the question of tenure.

Mr. Alexander accepts and gives full support to the *voluntary* character of arbitration. He points out that voluntary arbitration must mean free choice of arbitration and of arbitrators. He is concerned about the kind of evaluation process that takes place in the selection of arbitrators. He suggests that our critics should at least be governed by some of the same considerations that underlie the legal rule of "fair comment." He addresses himself first to the criteria, or lack thereof, and then to the factual basis on which evaluations are made, and he points up serious shortcomings in both.

This is a serious indictment. If the standards are faulty or lacking and the facts are meager and distorted, we are left with a double vacuum which will be filled somehow, and it is worth examining how—unless we are content with the summation by the lawyer who turned to the jury and said, "Passing over the law and the facts in this case, let's see what we really have here."

And I would note in passing that when Gabriel Alexander dealt with criteria he first referred to education, experience and *character*, and in two succeeding sentences the word *character* was changed, first to *characteristics* and then to *personality*. I'm afraid he was slipping into the viewpoint of the consumers.

I am favorably drawn to the analogy to the common law rule of "fair comment," but I would note that the critics of books and plays express themselves publicly through published reviews. Not so with most evaluations of arbitrators, which are done privately and usually unknown to the objects of this critical analysis. I would invite them to be more outspoken. It is a lonely role we play, and so often we leave a situation with

[1] Jean T. McKelvey and Robert L. Aronson, "Current Research in Labor Arbitration," *Industrial and Labor Relations Review,* Vol. 8, No. 3 (April 1955), pp. 468-472.

little or no insight into the way our decisions are received and applied. I remember receiving a long letter which began: "Dear Sir: We have received your award and are at a loss to comprehend . . ." Compare that with the contemptuous incision of cold steel which is embodied in the envelope that contains, with no accompanying message, a check. Why, it produces a warm and friendly glow.

I am aware of the uses of the confidential reference services through a personal experience ten years ago in which I learned that a managerial organization in New Jersey maintained a card file in which I was clearly branded *persona non grata*, although I had not then served as an arbitrator outside of California—a conclusion that was apparently based on the facts that I had worked for the War Labor Board and I had taught at a well known Communist college—the University of Chicago. It was happenstance that this came to the attention of Peter Seitz who was then General Counsel of the Federal Mediation Service, and who happened to know me pretty well, and who could at least provide some factual information. And it was in the same location that I experienced that fine first careless rapture of being called back by the parties for several cases after the first assignment. The message came by phone from a salty character who inadvertently gave as good a definition of grievance arbitration as I know. He said, "The company and the union have negotiated a new agreement and we'd like you to come down here and tell us what we meant."

I would agree completely with Alexander's caution about the unrepresentative character of published awards—at least from the standpoint of statistical sampling. But I think both the arbitrators and the customers may be expecting too much.

The subject of the publication of awards is controversial and this is not the place to debate it. I am prepared to argue on either side of the question, provided no statement of mine is considered final and binding beyond the hour of sundown on the day it is made. By the same token I am unable to participate fully in the passions that are sometimes aroused. I do have certain reservations, however, concerning the more common complaints of those who oppose publication or, on the other side, those who harbor resentment that the readers might

draw conclusions from the published opinions without giving proper consideration to the author's unpublished decisions—which the reader, of course, couldn't read. In making these comments, I offer equal time to John Stewart of BNA; and to Mr. Prentice or Mr. Hall if either is present.

The most common objections to publication, I believe, are four: (1) That it promotes the building of a common law, a tendency to surround and to limit the arbitration process by codification of precedents, on the fallacious assumption that the interpretation of one contract can be carried over to the same or similar problems arising under the same or similar union agreements; (2) that the written decision does not convey the full story, that it does not express all of the consideration that went into the final decision—and therefore leads to distorted and improper conclusions; (3) that publication violates the privacy of the arbitration proceeding; and (4) that it provides ready access to the raw materials of insidious score-keeping.

Looking back on these objections in order, it is well known that contracts differ, and that each is a particular instrument of agreement between particular parties, and that the same, or very similar, language may reflect different assumptions, practices, and intentions of the parties. But it should be equally apparent that there are a great many similar problems and issues in the relationships of unions and management generally, and if there is any meaning at all to the designation of this business as a profession, there must be some significance and relevance to the reading and discussion of decisions of various arbitrators on problems that have substantial elements in common.

At this point I am reminded of a story. In fact I have pondered long these past few days to think of an appropriate story that would come to mind at some point in this discussion, and the story of which I am about to be spontaneously reminded concerns a fellow citizen of my home town—or any town you wish—who was quite well-to-do but who would never contribute to the annual drive for the Community Chest. Knowing that this miserly character was extremely well-heeled, the local committee decided to call upon him. They spoke to him

of the needs of the program and urged upon him the view that everyone should contribute something, and surely he was in a position to make a substantial donation. The gentleman agreed that he was far from poverty-stricken, but he said: "Look here, there are many things you don't understand." (Just as in these arbitration awards, there are many unknown factors). He said: "My wife is in a sanatorium, under special care, day and night. My mother is an invalid who is confined to her home. And I have a brother who has lost his job, and has three children to support." The visiting committee began to nod its understanding, and the gentleman continued: "And I don't give a penny to any of them! Why should I be expected to contribute to the Community Chest?"

As to the second objection, that the published decision does not give the full story, the same holds for many opinions of the courts. Arbitrators, as judges, presumably address themselves to those highlights which they consider worthy of, or to require, recording and explaining. If the major issues and salient considerations are not set forth in the written opinion, then I would ask: Why should the opinion be published at all? The reader may be properly cautioned that the substance and style of any arbitration opinion are conditioned by the type of arguments, attitudes, and atmosphere of the particular proceeding, but the arbitrator can hardly object to the reading of decisions for what they actually say on grounds that the outcome was really determined by some unstated factors in the relationships of the parties or the conduct of their representatives or witnesses. If this is the case, the award would seem most unsuitable for publication in the first place.

I would agree that the arbitration proceeding is a private one, and Mr. Alexander has noted that it is part of the Code of Ethics of the Academy that opinions should not be released for publication without the authorization of both sides. It seems to me that certain objections to publication, such as an understandable reluctance to disclose the names of individual employees involved in discipline cases, might be readily avoided by instruction to the publisher not to identify such persons by name. And I dare say that it might be charitable in some cases

to ask that the names of attorneys on one side or the other be deleted.

Arbitration awards are considered the property of the parties. I would urge that they are also the property of the arbitrator, who should have just as much right as either party to give or to withhold authorization for the award to be published.

Finally, I am sure that the box score method of selection prevails, and probably always will. My impression, however, is that its uses have greatly diminished in recent years. Arbitration has grown in extent and in the experience of the parties so that they have outgrown this crude methodology. At least, I can report the advice of one of the more sophisticated union advocates who tells me that his organization does not make use of box scores, except in extreme cases where the arbitrator has decided more than 50 percent of the cases for the other side. And, of course, the practice, if widely used, is self-defeating. It's no good if both sides do it—unless, as sometimes happens, it leads them through opposing theories of probability to harmonious agreement, one side feeling endeared to the arbitrator who has decided a string of cases in a favorable manner, and the other reasoning that by the law of averages he is now "due."

I have been troubled by the language of some opinions which seem to be addressed to a posterity whose claim to such solicitation seems highly dubious. I was quite struck with the remarks of Robert Vining this morning who said that arbitration opinions should be written for the men in the shop. I think it is excellent advice. I am reminded of a contrary situation in the story told by George Taylor of a case before the War Labor Board in which a learned professor of economics served as a panel chairman. The dispute involved a wage evaluation and progression system and the professor was reporting to the Board in language more suitable to the *American Economic Review*. One of the Labor Members of the Board interrupted to ask the professor: "Who do you write that stuff for?" The professor rose to his full height and replied: "We economists write for each other." I would blend these two and suggest that arbitrators should write for the men in the shop but should publish for each other. I feel that published awards serve as a very useful means of communication and that arbi-

trators should submit them for publication in the small minority of cases in which there is something of interest to report, and let the chips fall where they may among assorted scorekeepers, psychoanalysts, and touts.

It seems eminently reasonable, however, to expect that practitioners will gather these chips and build the best blocks they can. If the arbitrator peppers his opinion with citations of other awards, especially if he puts the citation in brackets, after each of his own profundities, without so much as a "Cf." or a "thus, for example . . .," for all the world as though the citation were compelling authority for the assertions made, then it should not surprise him if some shortsighted union attorney will mark him down as precedent-bitten. If the arbitrator ignores well established practices that run counter to the literal terms of the agreement, or *vice versa*, someone is likely to brandish the label of strict, or loose, constructionist, as the case may be. If an arbitrator finds satisfaction, visceral or otherwise, in laying down sweeping declarations, such as "in the absence of express limitations in the written agreement, or in the provisions of applicable law, the employer is endowed with all the rights and privileges with which he was born," then it should not be surprising that some partisan attorney will draw the conclusion that this was what the arbitrator meant. It might even lead to the same conclusion which the farmer drew when his hunting dog treed a 'possum. The dog circled the tree and barked for hours, and for weeks thereafter whenever the dog came near this particular tree he stopped and circled and barked at the 'possum which had long since gone its way. "Had to get rid of that dog," the farmer said. "He generalized too much."

And there are dangerous pitfalls in this business of referring to other people's awards. I was deeply troubled in a recent arbitration case that raised, among other things, the question of the employer's right to schedule and require overtime work. I thumbed through the volumes of the BNA and found several most compelling statements. An arbitrator whom I shall designate as "Chance" stated what he called the "universal rule" on the subject. Or, rather, Arbitrator Chance asserted that Arbitrator Evers had correctly stated the "universal rule"

when he quoted Arbitrator Tinker in a certain cement case. Now, this was a concatenation of authority which is seldom equalled in our trade. I confess that, for a fleeting moment, my mind harbored the image—you'll excuse the expression—a precedent. Imagine, then, my utter deflation when I turned back in the volumes and pursued the matter from Chance through Evers to Tinker, and found that it wasn't Tinker at all who had started the play. It was a midwestern arbitrator, Harry Platt.

And to mention this shattering experience is to raise for your consideration a serious failing in the conduct of arbitrators. It is the objectionable practice of referring to themselves in the third person. Arbitrator Platt was not guilty of this offense. But Arbitrator Platt, having arrived at his conclusion, sought to distinguish his own case from an earlier decision of Arbitrator Tinker, in which Mr. Tinker had ruled the other way.[2] Arbitrator Platt wrote: "The foregoing conclusion is not in conflict with the Arbitrator's decision in the case of Connecticut River . . .," and went on to discuss Tinker's case, referring to Tinker as "The Arbitrator." [3] Well and good. But it appears that Arbitrator Evers read all this to mean that this was Arbitrator Tinker referring to himself in the third person and distinguishing his present decision from some previous one.

This third person style of writing is a propensity for which I have no sympathy. The only excuse which I can find for an arbitrator to refer to himself as "the arbitrator" or "the undersigned" is an apparent desperate hope that the parties will forget who he was. (This presents no problem, of course, in the case of opinions of Aaron Horvitz, since in this case the reference to "The Arbitrator" would be given in Capital letters.)

The only practice that I deem to be even more obnoxious is the use of the plural first personal pronoun in some awards. One or two arbitrators are known to express themselves constantly by what I suppose is an editorial "We." In reading their awards I constantly refer back to see who else was on the panel. When it is plainly indicated that the award is being

[2] *Connecticut River Mills, Inc.*, 6 LA 1017.
[3] *Huron Portland Cement Co.*, 9 LA 735.

handed down by a single arbitrator, the only conclusion which I can draw is that he must have conferred with someone else in making up his mind. Under New York statutes, this could be grounds for vacating the award.

Just a word about the role of the designating agencies. In order to provide a workable system of selecting the arbitrator, the majority of union contracts, apart from those with permanent umpires, provide that in the absence of agreement on a particular individual the arbitrator will be designated by an agency such as the American Arbitration Association, the Federal Mediation Service, or a state mediation agency. The designating agencies, in order to retain the maximum degree of voluntary choice by the parties, and also for their own protective coloration, will generally submit a panel of names rather than just one. This is a well known procedure, but I wonder if we have thought of how it brings into sharp focus the processes of evaluation, for good or evil. In the first place it operates in greatest volume in the industrial centers that are heavily peopled with highly competitive lawyers and labor relations experts with a tremendous zeal to win. If there can be discovered ever so slight a propensity of one arbitrator on the list to lean in a favored or unfavored direction, the chance of winning may be enhanced. And even if one side were willing to trust the good sense and integrity of anyone on the list, he is likely to fear that the other side may have some insight that will yield an advantage. In the larger cities attorneys seek similar advantage by maneuvering the timing and focus of court cases to obtain a favored judge. I suspect that parties, faced with the small list to choose from, are caught up in this compulsion although they might have been willing to let the designating agency appoint one man to begin with.

Another phase of this problem is the difficulty of getting the parties to accept new people. I have frequently heard the complaint of parties that they are always seeing the same old names and faces on the panels. But when we change the mix and throw in the newer or less experienced arbitrators, they are almost invariably crossed off because, it is said, "We don't know anything about them." And the little three—or four-line squibs that are inserted in many panel listings are not, I sus-

pect, of much help. We at the New York State Board of Mediation have profited by the first draft of Mr. Alexander's paper. We used to send out a list of names with a footnote statement that biographical data was available on request. We have now begun to enclose a full page summary of the background and experience of each person on the list with each submission of a panel of names. We hope that it will lead to more enlightened selection and a greater willingness to utilize some of the very able people who have not had a great deal of arbitration experience.

I am impressed with Gabriel Alexander's plea, but I am left with a sense of dilemma unresolved. He does not decry the zeal to win, and he acknowledges that arbitrators must be expendable if arbitration is to remain voluntary. He pleads for accuracy of information and the development, by the parties, of general standards of evaluation. In asking for a realistic viewpoint he reminds the critics that arbitrators are not judges, or legislators, or investigators; that they deal with "arguments that seldom emanate from any accepted set of principles," and that they are "functioning at a frontier of industrial society beyond the area of settled rules for behavior." But it is this very lack of settled rules or principles, not in the character traits of arbitrators but in the procedures and subject matter with which they deal, that sharpens the problem of evaluation and points it in directions of which many complain. The point was made by an able advocate at a previous meeting of this Academy. Jesse Freidin, responding to David Cole's admonishment against the excessive zeal to win, referred to the same lack of guiding rules and standards and argued: "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." [4] (Which reminds me of the public statement of the Superintendent of Schools in my home town of Richmond, Virginia, who said that he was seeking a sound and unbiased history of the War between the States,

[4] "The Status and Expendability of the Labor Arbitrator," a panel discussion in *The Profession of Labor Arbitration.* (Washington: BNA Inc., 1957), p. 54.

written from a Southern point of view.) The point is that I think Gabriel Alexander is concerned with the problem of developing standards for the evaluation of a good arbitrator. The parties to whom his appeal is made are more likely to be concerned with developing the information and standards by which to judge the best arbitrator to win the particular case.

I think it should be noted that Gabriel Alexander has purposely left it to the parties to define the standards for evaluation. In his first draft he made a number of specific suggestions of his own, and I tend to wish he had developed them here. But he has dropped these because, he has told me, he did not want to leave an impression that arbitrators should define these criteria or evaluate themselves. I think his handling of this question has been modest and constructive. In closing I would tell him the story of a New England parson who was beloved of his parish and his community, and whose only failing—if we must make these evaluations—was that he was excessively fond of his little nip. The parson issued a regular weekly church bulletin, with all the tidbits of news and gossip, and he always acknowledged in the bulletin any visits or gifts which he had received. The deacon and friends decided to put Parson Jones to the test. They brought him a gift in the form of a bottle of strong brandy with a few cherries floating on top, and they waited to see if this would be mentioned in the weekly bulletin. On Sunday the members received the bulletin as usual, and in it this message: "Parson and Mrs. Jones gratefully acknowledge the receipt of a lovely gift of fruit from Deacon Brown," and it went on, Gabe, to say what I would say to you: "we appreciate even more the spirit in which it was given."