representing the period of backpay should be deducted, not the amount earned during the 60-day period of suspension. The company refuses to join in the request for clarification. The union believes the arbitrator is being unduly technical in not pointing out the appropriate rule regarding the deduction of outside earnings under these facts.

These two cases concerning issues of backpay are to be contrasted with a case in which the arbitrator limited an award concerning an erroneous job assignment to the particular product being manufactured. The company changed the product, but not, according to the union, in a meaningful way. Management then assigned the work to an employee other than the grievant in the original case. The union protested but did not file another grievance. Instead, it wrote to the original arbitrator and said that the company had not complied with the original award. The company joined in a request for clarification. Actually, even though in this case the company had joined in the request, this was in fact a new case with new facts. Clearly, the Code of Ethics requires a joint submission of the issue in the latter situation. But is it a violation of the spirit of the Code of Ethics in the other two cases, those involving backpay where no new facts are involved and the answer should be readily apparent?

I will not attempt to give answers to the other problems raised. The experienced arbitrator may well find that most, if not all of the problems are easily handled. But this is an area where more than image is involved. The parties may excuse an erroneous decision. A sense of mistreatment arising from the conduct of the arbitrator in a moral sense is less easily dismissed. I will appreciate the expressions of my colleagues on the subject.

IV. COURT REPORTERS AND OTHER MATTERS

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Having accepted the topic "Practical Problems of the Ad Hoc Arbitrator," I have an implied obligation to advert to the original program reference, "Court Reporters." Please be assured, however, that you are not about to be subjected to a learned discourse

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on the vagaries of court reporters. Frankly, I have yet to encounter an arbitrator who has had any serious or mentionable problems with court reporters. It is acknowledged that the miniskirt has caused some distractions to the arbitrator where few existed heretofore, but a judicious seating arrangement can completely control this situation.

Candor compels me to admit that I consider court reporters to be good friends. It is a pleasure to find them poised and ready to record every grunt and moan, laugh and uh-huh, for the record. The fact that their records invariably reveal that your observation to the parties was not as eloquent as you had hoped it would be, and that it actually failed to express the intention you had in mind, may be disconcerting to many of us who have a secret yearning to be understood, especially where posterity is concerned. But this is a small price to pay for the leisure we are able to enjoy when our own notes do not comprise the entire record of the hearing.

The inclination to relax your notetaking when a reporter is present is an indulgence that should be enjoyed only after you have made certain that the party who engaged the reporter intends to provide you with a copy of the transcript. The absence of such an inquiry once caused me to have a sinking feeling—not unlike that experienced when an airliner hits an air pocket—when at the close of a hearing I proceeded to give my card to the reporter so she would know where to mail the transcript. The company spokesman promptly advised me that the transcript had been ordered only for management, and it was not the company's policy to furnish a copy to the arbitrator. A brief dialogue followed in which it was explained that if this had been made known at the start of the hearing, a completely different approach to notetaking would have been followed by the arbitrator. With some reluctance the company agreed that a copy of the transcript would be supplied on this occasion; but in so doing the company announced that it was doing this without prejudice or precedent, and that in future cases the arbitrator would be made aware of the company's policy at the start of the hearing.

On occasion one party will object to the other's having a reporter present and to the arbitrator's receiving a copy of the transcript. Apparently this is done because of a concern that in-

accuracies that would be of advantage to the party paying the reporter may creep into the record. In those rare instances where an objection has been raised, it has been my practice to allow the reporter to record the hearing and to agree to accept a copy of the transcript, but to point out to the parties that the arbitrator's notes constitute the official record of the hearing and that any conflict between the transcript and the notes will be resolved in favor of the notes.

In past years parties were prone to argue about paying the reporter for copies of the record. But in recent times such arguments have become very rare. A possible explanation for this change is that today it is fairly well accepted that a party wishing to have a copy of the transcript has a right to one, provided it is willing to assume the costs of that copy. If, however, the party is unwilling to pay for the copy, there is seldom a compelling reason why a copy should be furnished gratuitously.

Discussions with my colleagues confirm my personal experiences that few, if any, problems are associated with the presence of a court reporter at the hearing. I am unaware of any cases in which reporters have volunteered rulings on the admissibility of evidence, although, considering some of the technical objections I've heard in some recent cases, I think a judicious hint might be dropped to a reporter that any help she might offer on this subject would be welcomed.

Recently I shared an unusual experience with a reporter which attests to the fact that we sometimes underestimate their worth.

It seems that one of the hotels in Boston booked one of our utility companies and a jewelry manufacturer for the same oversized conference room on the same date. The utility company then scheduled the room for an arbitration hearing, and the hearing began promptly at 10:00 a.m. on the appointed day. A half hour later the jewelry manufacturer appeared in the room and informed us that we were in his room. He was assured that there must be some mistake, and it was soon discovered that a clerical error had caused the mixup. Unfortunately, there was not another room in the hotel suitable for either an arbitration hearing with some 20 people involved or for the jewelry company, which had a truckload of material and its carpenters ready to install booths and rearrange the room for a display.

The hotel management acknowledged that the utility company had a superior right to the room since we were in possession of it. But an apology and a promise to make reimbursements did not placate the jewelry people, who were far more concerned about having their display ready when the buyers began to arrive.

In any event, we continued our hearing and the jewelry people waited impatiently in the hall. Whenever anyone from the hearing ventured into the hall, he would be anxiously approached and asked if we were finished with the room. On learning that we were not, they would ask how long it would be before we would leave the room. When we all left for lunch and the poor people learned it was only a luncheon break, they became most upset and thoroughly unhappy. Fortunately, they restrained themselves and made no effort to take over the premises during lunch, but evidently they put sufficient pressure on the hotel manager to cause him to assign them the room at 5 p.m. This arrangement, however, was not cleared with the utility company. Our hearing continued beyond 5 p.m. and the door of the room, which fortunately was a good 50 feet from where we were working, kept opening every two or three minutes. At about 5:15 p.m. the spokesman for the jewelry people came in and advised us that the hotel had agreed that they could have the room at 5 p.m., and since we had not evacuated the premises, he had no choice but to bring in his materials. A short but animated colloquy followed.

Finally, an unspoken compromise was reached whereby we continued our hearing and the jewelry manufacturer quietly moved all his equipment into the other end of the room. It was an unbelievable situation. Our people were angry and so were they. And, typically, no one from the hotel appeared to attempt to effect a resolution.

Fortunately, we had reached the point of the final arguments in the hearing and were nearing adjournment. While the union attorney was recounting the evidence and presenting his conclusions, the workmen were bringing in lumber and plywood at the other end of the room. It was then that the voices of two workers could be heard as they began a quiet conversation about where to put such and such a frame. One of our group was about to admonish them angrily when the good reporter called out in a loud

voice in the direction of the workmen, "You will have to speak up loud and clear if you expect to get that on the record." This eased the tension, and we concluded the hearing without incident while the material buildup continued at the other end of the room, which resembled the wharves at Saigon during the recent longshoremen's strike.

With the statement that this incident renewed my respect for court reporters I will conclude my remarks about them and turn to the consideration of some other practical problems.

Postponements and Cancellations

The subject of postponements and cancellations is one of the most pressing problems facing the *ad hoc* arbitrator. It becomes more serious as time goes by, and the advent of municipal collective bargaining can only serve to aggravate it enormously. It seems to me that the problem would become a minor one if we could be given reasonable notice of cancellations and postponements. When we learn about a cancellation two or three days in advance of the scheduled hearing date, there is no chance of scheduling another hearing for that date. Even if we have 15 days' notice we may not be able to schedule another hearing, since the number of hearings that are set with only two weeks' notice would not amount to 1 percent of the caseload for most arbitrators. But 15 days' notice would certainly be of immeasurable help in balancing our caseload. Today, we try to compensate for postponements and cancellations by crowding more hearings into our schedule than we ever expect to hold. Generally, postponements and cancellations are not predictable, and, consequently, overscheduling is not the answer to the type of balanced workload that is desirable.

In February 1965, because of postponements and a desire to be accommodating to the parties, my schedule showed 17 hearings with 17 different companies in various locations in three states. At first this was no cause for alarm, as I expected that at least five or six of these cases would not be heard as scheduled because of anticipated postponements and cancellations. When all but one of them was heard on the appointed date, my workload was seriously unbalanced for nearly four months.

It is evident that the parties are using scheduled hearing dates as deadlines for the settlement of grievances, and they should be

encouraged to continue to do so. Any technique that will provide an incentive to the parties to resolve their own differences is to be applauded. But the present system is very costly to the arbitrator and it need not be.

If the Academy, the Federal Mediation & Conciliation Service, and the American Arbitration Association will recognize that we have a problem in this regard, it can be reduced to manageable proportions in short order. What we must do together is to educate the parties to undertake meaningful reform. This can be done with a minimum of effort. It simply requires including a note to the parties in the notice of appointment to the effect that upon less than 15 days' notice of the postponement or the cancellation of a scheduled hearing, the arbitrator shall have the right to charge the parties for one day of hearing, and in the case of a postponement, he shall have the right to charge the full cost to the party responsible therefor.

If a policy of this kind is adopted by the appointing agencies, this will automatically set the settlement deadline back 15 days and will eliminate 99 percent of the cancellations on less than 15 days' notice. Further, it will reduce greatly the number of postponements, as many postponements are requested for reasons of convenience only, and there will be fewer requests if the parties know that asking for and being granted a postponement may cost them a day's pay for the arbitrator.

Bill Collecting

Another of our mundane problems is that of bill collecting. During the tight-money period beginning last summer, many of us noted that a greater proportion of parties had become dilatory in their payments. When the prevailing party fails to pay for six or eight months, we can be sure that money is really tight. One of my colleagues has suggested that when all else fails, and prior to resorting to small-claims court, we might try to obtain some leverage from the party who has paid by advising the nonpaying party that if payment is not immediately forthcoming, we will feel obliged to inform the other party to the agreement of this nonpayment. Also, if the contract language is susceptible to this construction, it could be pointed out that nonpayment constitutes a violation of the provision wherein both parties agreed to assume one half the

fees and expenses of the neutral arbitrator. The arbitrator who used this approach reported that the results were most satisfactory. It is something to be considered in cases where all else has failed.

Extension of Time Limits

One of the most common problems we all face on occasion is the need for an extension of the time limits for issuing an award. A single call to the AAA office will accomplish this when one of its cases is involved. When it is an FMCS case, we have a different situation. The FMCS requires an extension in writing, and I heartily endorse careful adherence to this rule. My practice has been to call the parties and request the extension advising them that a letter would follow which should be signed and returned to me in conformance with FMCS rules.

In a recent FMCS case the need for an extension arose, and I called the company attorney and explained the situation to him; he readily agreed to my request. A call to the union representative yielded a similar agreement to the extension. A day later a call was received from the company attorney and he began the conversation something like this, "I know that I promised to give you a written extension and I intend to keep my word. But something has come up which I thought you should know about. The union representative called the company's personnel director after talking with you on the phone yesterday. He informed the personnel director that, in addition to requesting an extension, you told him that all of the matters in dispute would be resolved in favor of the union."

This was a shocking accusation and I replied that it was a good thing it was so clearly false, because if it were true I would have had no need to request an extension; I would simply have forwarded the award to the parties. I assured the attorney that under no circumstances would I ever give one party advance information about a prospective award and that it had not been done in this case. He replied that he was certain this was so. He then explained that he attributed this unfortunate occurrence to an arteriosclerosis condition which evidently accounted for other puzzling statements by this representative that had been of concern to the company in the past.

When it came to drafting the opinion and award in that case, I began to have an eerie feeling as each issue, collateral question, and argument had to be resolved in favor of the union. I was tempted to include a note to the company attorney about our telephone conversation along with the award, but I resisted and decided to confine all explanations to the opinion.

Within two days I received a two-page letter from the company's personnel director advising me that I had ignored the evidence and was guilty of unethical conduct in advising the union representative of the award in advance of its issuance, and that this matter had been turned over to the company's attorney for possible legal action. In addition, he said that I had clearly padded my bill as the hearing had begun at 2 p.m. and concluded at 7 p.m., and, as anyone could plainly see, this did not amount to a full day of hearing. Copies of this letter were sent to the FMCS and the AAA.

It is disturbing to receive a letter of this kind. You certainly cannot give it credence by ignoring it. Although you know it to be libelous, there is always a question of proof of malice and of whether a suit is the proper avenue for redress. In this case, I drafted a point-by-point refutation of each and every accusation and gave a detailed explanation for my fees and expenses. I requested payment by return mail. Copies of my reply went to the AAA, FMCS, the union representative, and the company attorney. I was frankly surprised to receive full payment from the company by return mail along with a note thanking me for my explanation.

This is the type of situation over which you have no control; nor can you even anticipate its occurrence. But you can minimize the damage involved by carefully observing the rules. If the request for an extension had only been in writing, at least the false accusation of giving anticipatory advice about the award could never have been made. On the other hand, if the time limits had not been complied with the chances are extremely good that the award would have been ignored by the company on the ground that the arbitrator had failed to comply with the rules. This would then have imposed upon the union the burden of seeking enforcement of the award, and, judging by some recent decisions on this point, the chance of success in such an attempt is questionable.

Other Problems

There are many other practical problems of the *ad hoc* arbitrator that deserve discussion, but time permits no more than a fleeting comment about them.

A procedural problem is whether we should suggest to the parties when we arrange for the hearing that they confer and attempt to agree on a submission and a brief statement of facts. The statement has been made that even in some of the most cooperative and enduring relationships the parties must be constantly urged to make efforts to confine the submission to the specific issue involved and to agree on a statement of facts. If this is so in the best relationships, wouldn't it be worth the effort to urge parties whose relationship may be a question mark to us to make a further effort to resolve their dispute by suggesting that they meet to agree upon the facts and the issue?

A substantive problem involves the question of whether the arbitrator's duty is to the process or to the parties. For instance, take the case where the union fights hard at the hearing for a discharged employee and continues to urge reinstatement at the executive board meeting. Simultaneously, however, hints are dropped that convey unequivocally the union's desire to lose the case. In such a situation you know an award upholding the discharge will please both sides and may well result in a better relationship by removing a contentious employee. However, if the weight of evidence is evenly balanced or inclines in favor of reinstatement, do we not do a real disservice to the process by taking the path of least resistance? It seems to me that our duty to the parties is secondary whenever it conflicts with the inherent obligation we have to maintain the integrity of the arbitration process itself.

A further problem is of a mixed procedural and substantive nature. It relates to the question of how to treat the reluctant witness who is properly called by one of the parties, when there is a prima facie showing that his testimony is material to the issue and might even be controlling. Should we advise the witness that, although he can not be compelled to testify, his continued refusal will cause the arbitrator to draw whatever adverse inferences might properly flow from such a refusal? Should we so instruct the witness on our own volition, or should such an instruction be given

only at the specific request of the party calling the witness? Or, would it make a difference whether the party calling the witness was represented by counsel?

I suggest that where it is evident that the reluctant witness possesses information vital to a determination of the dispute, and no privilege is involved, the general rule should be that he be instructed either to testify or to have adverse inferences drawn because of his refusal to do so. Further, it seems proper to me to do this with or without a formal request for such a ruling and regardless of whether the party calling the witness has counsel.

In closing I would like to touch upon a recent development occasioned by the acute labor shortage confronting many employers throughout the country. This area is bound to become a source of problems to some of us in the near future, if in fact this has not already occurred. I refer to the use of in-plant subcontracting of bargaining unit work.

An employer cannot obtain permanent employees, so he asks an employment agency, such as Manpower, Inc., to supply him with temporary help. According to their employment contract these workers are employees of the employment agency, yet they are hired to perform bargaining-unit work on jobs normally assigned to bargaining-unit employees and union members. If there is a union-shop provision in the contract, can the union demand that these workers become members at the end of the probationary period? Or are dues payments, in lieu of membership, a proper alternative? Also, can these employees be paid less than the contract rates for the jobs they are performing? Or more? What about holidays and vacations? In other words, is the collective bargaining agreement applicable to these temporary hires, where the agreement is silent and in the absence of a concurrence on this by the parties? Further, does the union have the right to prevent the use of these people, on a temporary basis, where it cannot supply workers to meet the needs of management and where the employer cannot obtain employees elsewhere?