I submit that if we are committed to settling our disputes by arbitration when our own efforts fail—and the overwhelming evidence is that we are—it is then incumbent upon labor and management and the arbitration profession to continue to seek to improve the process so that we have speedy and fair conclusions to the issues in dispute. One vital area where improvement can be made is in establishing the issue and remedy prior to the hearing.

I have suggested a prehearing conference on motion of one of the parties and a preliminary proceeding at the hearing as possible ways of meeting the problem. Certainly there can be other solutions, perhaps better ones. But I believe that, for the advancement of the arbitration process, all of us have certain rights and responsibilities in this area. Arbitrators have the right to know from the outset what they are expected to decide, and they have the responsibility to decide specific questions without wandering afield and offering gratuitous advice on other questions. The representatives of labor and management have the responsibility to exhaust every effort to agree upon the question and remedy in advance of the hearing, and the right to secure a determination of the scope of the issue and remedy prior to presenting evidence on the merits.

III. PREPARING THE CASE FOR ARBITRATION

RICHARD LIEBES*

Having labored for some years as an advocate in labor relations, but never having donned the robes of impartiality, it is pleasant for me to speculate briefly on how an arbitrator approaches his task.

It is frequently noted that arbitration is a judicial process, and that the arbitrator, like the courtroom judge, evaluates the record made before him by counsel for the opposing parties. This analogy of the process is accurate enough. Yet there is an interesting difference between the courtroom and the arbitration room that bears exploration.

When litigation lands in the courts, regardless of the novelty of the issue that may be involved, the procedures are constant and

* Director of Research and Negotiating Service, Joint Council No. 2, Building Service Employees' International Union, San Francisco, Calif.

circumscribed. Plaintiff and defendant are represented by attorneys who have been exposed to much the same professional training, and have passed the same qualifying examinations. And the man on the bench has much in common with these advocates, because, with virtually no exception, he was an advocate himself at one time before his election or appointment to the seat of wisdom and impartiality.

Labor arbitration is a judicial process. But those who play the major roles—both judge and advocates—do not have the predictably similar backgrounds that can be expected and assumed in the courtroom.

There are no strictures that require labor and management to employ attorneys to represent them in arbitration. While this frequently happens, it is probably more common that management is represented in an arbitration case by its personnel manager or plant superintendent, and the union spokesman is the local president or international representative.

And what of the arbitrator? I stipulate at once that he typically has the highest qualifications in terms of training, skill, and fairness. He undoubtedly has much in common with his brother on the bench. But while the courtroom judge with his own legal background has no communication barrier interposed between himself and counsel for the parties, the same is not necessarily the case in arbitration. Almost certainly the arbitrator has not been a personnel manager or plant superintendent, and almost certainly he has not been a union officer. Indeed, such a background would result in automatic disqualification and removal from any list of potential arbitrators were such a practitioner foolhardy or egotistical enough to offer his name for such a list.

When the arbitrator enters the hearing room, he knows how he intends to conduct the proceedings; but, unless he has had past experience with the parties, he does not know what may be in store for him. Will there be a prepared statement of the issue that both sides agreed to? Is there a clearly written collective bargaining agreement? Will there be witnesses or written evidence? Will the management and the union spokesmen be of relatively equal competence?

I shall not speculate further on the thoughts that may be occurring to the arbitrator as he prepares to open a hearing. The advocates, however, may be thinking: "Now this case is nearly over. Nothing is left but the hearing itself." For in the well-ordered arbitration proceeding, the get-ready time takes longer than the presentation. And, while the presentation of a case involves much expertise, there are also special skills that must be employed in developing a case for eventual presentation to the arbitrator.

Prehearing Preparation for Grievance Arbitration

Let me suggest three phases or steps in preparing an arbitration case. I am assuming a deadlocked dispute during the life of a contract that has been processed through the earlier steps of the grievance procedure. The prehearing steps that are essential to a well-prepared case are: first, know the contract; second, get the facts; and, third, develop a theory.

Know the Contract

Even though it may seem that the parties to an agreement should be fully conversant with it, this is not always so. Really to know the contract means, of course, to know each section and what it states. It means also to know the interrelationships of various sections. Does one provision modify another? Is one clause inconsistent with another? Must paragraph A, which seems straightforward enough, be read in the light of paragraphs B, C, and D, which suggest another interpretation?

Knowing the contract may also involve some background knowledge of the intentions of the negotiators and what went on during negotiation of the current agreement. Also significant in some cases is a knowledge of the previous contracts, if the clauses involved in the dispute have been amended. It can be even more significant if one of the parties had sought to amend the contract but failed to do so. Let me illustrate some of these admonitions:

A contract clause states, "Union representatives shall be granted access to the premises to observe conditions of work, provided they notify management and do not interfere with production." A dispute has arisen because management contends that a representative did not make an advance appointment and also carried on

unnecessary conversations with employees. The union argues that the contract does not require a call in advance, and that the discussions with employees were not prolonged enough to interfere with production.

In this dispute, to "know the contract" would mean in the first instance to read the visitation clause in the light of other provisions. Possibly there is language in a management rights clause that would appear to modify the expressed union visitation right. The contract may have specific provisions dealing with rest periods and lunch periods which could provide a clue to the interpretation of visiting rights.

If the careful advocate takes the time to review the history of the clause, he may discover that the agreement five years ago read that union representatives "*may* be granted access to the premises," instead of the present "*shall* be granted." What were the factors leading to this change? Were there any other grievances on this issue? How were they settled? These are all elements in the prehearing problem of knowing the contract.

There may also be a record of management's efforts during last year's negotiations to add certain restrictive language to the disputed clause—efforts which failed to be incorporated into the final bargain. The advocates, if they were not also the negotiators, are well advised to check out all of these intricacies.

An arbitrator is not likely to modify clear contract language, even in the face of a strong equity argument, if the parties had discussed modifications but failed to reach agreement. An advocate unfamiliar with the history of the contract would be at a serious disadvantage.

Get the Facts

To "get the facts" is an obvious cliché. Yet the prehearing task of the advocate is not always well done. Sergeant Friday's insistence on "just the facts, ma'am," should *not* be the approach of the advocate in preparing his case. He is better advised to probe into the realm of hearsay, opinion, and feelings as well. One of the problems of an advocate at the arbitration table is that he is likely to be so committed to the position of his principals that he has failed to do all of his homework.

This is a familiar matter in discharge arbitrations. Consider the case of the worker discharged by his foreman for showing up late after two earlier warnings. The plant manager has his own problems, and so he backs up his foreman on the basis of the facts shown on X's attendance record. (X is the poor fellow who has been fired from jobs all over the country, whose plight is documented in every volume of arbitration decisions.)

If the union representative does a thorough job of getting the facts, he may build up a convincing case for arbitration. He talks at length with the grievant, and discovers a family problem with a sick wife. He finds that a neighbor had been asked to call the shop, and did so, but did not talk with the right person. Fellow workers tell of similar incidents involving other employees in which the foreman did not invoke the discharge penalty.

If the advocate requires witnesses in presenting his case, then his prehearing task of getting the facts has certain special hazards. Advance discussions with potential witnesses may well be the most important aspect of preparation. It cannot be overstressed that the advocate must exercise the greatest skill and judgment in talking with possible witnesses. What is the extent of their knowledge of the disputed facts? Does their story conform with the grievant's? Do they have any special axe to grind? How will they behave when it is time for opposing counsel to cross-examine? It is a sad time when one's own witness falters on the stand, or comes out with some revelations that were not disclosed during prehearing conversations. I suppose that every advocate has experienced this nightmare at some time. It can at least be minimized by adequate preparation—not, of course, in the sense of "coaching" a witness, but rather through sufficient discussion with him to determine what he knows, and if his knowledge will be useful in the case.

Develop a Theory

My final step in preparing a case—after knowing the contract and getting the facts—is to develop a theory. By this I mean that a case should have an extra ingredient over and above just the submission of evidence. The advocate should organize his presentation in such a way that the meat and bones take on a definite configuration. If he seeks to persuade the arbitrator that a contract provision has been violated, he should plan how his evidence

should be arranged and ordered to reach such a conclusion. If his task is to convince the arbitrator that just cause existed for a discharge, again it is necessary to analyze his data and plan how it can be put together in a logical form.

Part of this last phase should also involve some effort to anticipate what the other side might do. It should be assumed that opposing counsel will be equally diligent in his preparation. He will be getting, of course, a different perspective on the disputed issue. A plant manager is not likely to appreciate fully the viewpoint of an aggrieved worker. And the union officer who represents the worker will not easily cast himself in the role of the boss. Yet it is essential in working up an arbitration case to anticipate the theory of the opposing side and to shape one's presentation accordingly.

Take for instance these two situations: The union is defending a discharged member; the advocate will be wise to anticipate the justifications that the employer is likely to advance for his action, and to seek to have its rebuttal arguments in readiness. Management is defending its interpretation of a contract clause; it had best be prepared for the evidence and arguments that the union is likely to put forward.

An advance appraisal of the other side's case, given as much objective consideration as possible, is a necessary part of prehearing preparation.

Prehearing Preparation for New-Contract Arbitration

So far my discussion has been limited to grievance arbitration during the life of the agreement. Admittedly such matters constitute the bulk of labor arbitration. What I have to say, however, would be incomplete without some reference to prehearing preparation for arbitration involving substantive contract issues.

It has been observed [2] that arbitration of contract terms has become increasingly rare and unusual since War Labor Board days. No doubt this is true. Richard Miller attributes the diminishing

[2] See Irving Bernstein, *Arbitration of Wages*, (Berkeley: University of California Press, 1954). Richard Ulric Miller, "Arbitration of New Contract Wage Disputes: Some Recent Trends," in *Industrial and Labor Relations Review*, January 1967, p. 250.

role of wage arbitration to the emergence of long-term contracts and the decline of wage-reopening clauses in favor of automatic adjustment provisions. But I believe it would be an error to project the trend of the past two decades and thus conclude that "issues" arbitration will ultimately disappear from the scene. In my opinion it is more likely that the coming years will witness an increase in arbitration of wages and other contract provisions.

I base this opinion on certain developments that are apparent in union growth. The potential new elements in organized labor are such groups as public employees, professional and nonprofessional hospital workers, and white collar employees. There is some indication that these groups may find arbitration a more satisfactory device than the strike in resolving contract issues.

I would guess that the arbitration of contract terms will be used increasingly as collective bargaining rules are developed for government employees. Private hospital disputes in California involving nurses and also nonprofessional employees have been settled recently by arbitration processes. The fledgling AFL-CIO United Farm Workers Organizing Committee has committed itself to the arbitration of deadlocked contract terms with employers who have consented to representation elections. A landmark case in this area involving 26 issues has in fact just been submitted to arbitration.

The difference between grievance arbitration and the arbitration of contract terms—from the viewpoint of the arbitrator—has been well expressed.[3]

The assignment facing the advocate in preparing to arbitrate the substantive terms of a contract is, of course, quite different from that of preparing a grievance arbitration. The major admonition in this situation is to "get the facts." This can involve a major project in economic research instead of the relatively uncomplicated task of interviewing witnesses. And in an "interests" arbitration it is particularly important to develop a theory. If the issue is wages, then there should be a prehearing decision by coun-

[3] Adolph M. Koven, arbitrator, *in re Hospital & Institutional Workers Union Local 250, AFL-CIO and Associated Hospitals of the East Bay, Inc.*, September 13, 1965 (unpublished). Koven distinguishes between "interests" disputes, involving a first contract or a change in contract terms, and "rights" disputes which involve the interpretation or application of laws, agreements, or customary practices.

sel about its own posture. If the employer is pleading inability to pay, he should be prepared to substantiate this defense with data. If the union is arguing prevailing wages, it must, of course, have the facts and give thought to the arrangement of its data to make an orderly and convincing presentation.

The arbitrator, in his seat of eminence, authority, and impartiality, is just beginning his work when he calls a hearing to order. The advocate is going on stage for the final act of his performance. If both sides have done their best in prehearing preparations, then hopefully the post-hearing problems of the arbitrator will be lessened.

IV. APPLICABILITY OF PRETRIAL PROCEDURES TO ARBITRATION

ALBERT BRUNDAGE*

Commencing with *Lincoln Mills,* followed with the oft-cited *Steelworkers* trilogy and a series of landmark cases thereafter, the United States Supreme Court has labored during this past decade to formulate the interrelationship between the judicial and the arbitral process, in an attempt to differentiate the scope of jurisdiction between the arbitrator and the judge, and to assign to each his proper functions and responsibility.

The line of demarcation between the role of the judge and the arbitrator, particularly with respect to substantive issues, still remains somewhat hazy and indistinct, but far less obscure is the division of labor between the arbitrator and the judge insofar as procedural matters arising in the arbitration process are concerned. Here, the preeminence of the arbitrator has been recognized. As stated in *Wiley,* procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

The delegation of power by the court to arbitrators, I believe, presents unique opportunities to the arbitration profession. Unlike the judge who is constrained by judicially promulgated or legislatively enacted procedural rules, and unlike the NLRB, which is inhibited by statute, the arbitrator has virtually free scope

* Brundage, Hackler & Roseman, Los Angeles, Calif.