

ministered by strikes because management can violate the contract hundreds of times for each time we can strike. Lacking a satisfactory alternative, such members are prepared, in some cases reluctantly, to live with arbitration.

Whether these positive attitudes are sufficiently widespread to counterbalance the views of those who seek to repudiate arbitration, I do not know. I do know, however, that neither management nor labor, and certainly not the arbitrators, should be satisfied with a procedure which is accepted by many of the workers only as the best of unsatisfactory alternatives. We have it within our means to make the system more appealing before it loses its currency, and we should seize the opportunity to do so.

Discussion——

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In reviewing a book by an erstwhile colleague of ours who has recently turned bitter critic, Ben Aaron observed that no other group of specialists seems to take such perverse delight as do we arbitrators in privately examining our real or imagined deficiencies and inviting criticism from others in public meetings. That is certainly proved by this program. And there have been other examples. As I think back, I find that we have done an extraordinary amount of soul-searching, self-analysis, and evaluation of ourselves, arbitration, and the decision-making process. We have talked among ourselves and with our guests about how to make arbitration work,¹ the expendability of arbitrators,² arbitration as a profession,³ critical evaluation of arbitrators,⁴ collective bargaining

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¹ "Making Arbitration Work: A Colloquium," *Challenges to Arbitration*, Proceedings of the Thirteenth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1960), pp. 101-122.

² "The Status and Expendability of the Labor Arbitrator," *The Profession of Labor Arbitration*, Selected Papers From the First Seven Annual Meetings of the National Academy of Arbitrators, 1948-1954 (Washington: BNA Books, 1957), pp. 42-65.

³ "Arbitration—A Profession?", *Challenges to Arbitration*, Proceedings of the Thirteenth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1960), pp. 20-38.

⁴ "Evaluation of Arbitrators," *The Arbitrator and the Parties*, Proceedings of the Eleventh Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1958), pp. 93-110.

and the arbitrator,⁵ ethical problems of the *ad hoc* arbitrator,⁶ and a host of other things dealing, in one way or another, with what we are talking about today. In addition, at least three Presidential Addresses,⁷ including this year's by Bert Luskin, have focused on specific criticisms of arbitration and arbitrators. No doubt it was Russell Smith's Presidential Address of two years ago that inspired today's program. Russ proposed that an Academy member should make an analysis of arbitrator acceptability and mark out areas in which investigation would be desirable and productive. As a follow-up in those areas, he suggested a major research effort by skilled outsiders, including making comparative findings of the fairness, motivations, and efforts to please by arbitrators and elected or appointed judges.

The paper given by Professor Ryder does the first part of the job. He has obviously done some serious soul-searching, as Russ counseled, and skillfully analyzed all possible elements of the acceptability syndrome. He found that some people assume that labor arbitrators render "compromise" and "rigged" awards, "split" awards, use mollifying language to make their awards palatable to both sides, "balance" wins and losses between the parties, and do other objectionable things in an effort to maintain or enhance their acceptability. Whether or not we all would agree with his identification of the elements of the supposed impact on acceptability or with the emphasis he places on some or all of them, there is no question that his paper represents a careful analysis of the subject.

One difficulty I have with his paper is that it is admittedly not the product of any research. It summarizes "chance remarks" of

⁵ "Collective Bargaining and the Arbitrator," *Collective Bargaining and the Arbitrator*, Proceedings of the Fifteenth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1962), pp. 8-59.

⁶ "Ethical Problems of the Ad Hoc Arbitrator," *The Arbitrator, the NLRB, and the Courts*, Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1967), pp. 327-330.

⁷ "Current Criticisms of Labor Arbitration," Presidential Address of Harry H. Platt, *Arbitration and the Law*, Proceedings of the Twelfth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1959), pp. VII-XIX; "The Presidential Address," by Russell A. Smith, *Problems of Proof in Arbitration*, Proceedings of the Nineteenth Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1967), pp. 74-85; "The Presidential Address: Arbitration and Its Critics," by Bert L. Luskin, *Developments in American and Foreign Arbitration*, Proceedings of the Twenty-First Annual Meeting of the National Academy of Arbitrators (Washington: BNA Books, 1968), p. 125.

some arbitrators, remarks by some parties who have not experienced arbitration at its best, and remarks by some advocates who yield to the easy escape of venting their disappointment on arbitrators and the arbitration process. It also answers inquiries he directed "to some experienced arbitrators and clients of arbitrators," and includes assumptions by some parties and their advocates "that an arbitrator's regard for his continuing need for acceptability will influence the decisional product he produces." Of course, without knowing to what extent these views are held and without further research, it is impossible to assess the degree or seriousness of the problem, if indeed there is one.

In my opinion, there is no basis for the view that "experienced arbitrators" are guilty of the frailties attributable to the desire to remain "acceptable." It is one thing to say that arbitrators, like judges and others engaged in the adjudicative process, have a sharp awareness of the need for the acceptability of their awards and decisions. It is quite another to say that their awareness of it constrains arbitrators to shape their awards in a manner calculated to insure their redesignation in future disputes and their survival as arbitrators. Frankly, I have never heard any experienced arbitrator acknowledge such purpose or personal motive or, except by way of idle gossip, impute these to other arbitrators.

It has become fashionable in some quarters to speak with great intensity of feeling, and sometimes contemptuously, of the pressures on arbitrators which influence their decisions. What are these influences and how do they manifest themselves in our awards? Mike Ryder has identified some types of nonrational behavior by arbitrators, but these rest only on assumption. In law terms, an assumption is a fiction. More precisely, it is a supposition that a thing is true which is not true or which is probably as false as true. Making use of fictions to understand or facilitate the decisional process is not necessarily sinful, provided that it is recognized that they are only suppositions. What troubles me is the tendency among some of our critics to palm off their assumptions and their *ex cathedra* pronouncements as verified statements of what actually happens in the arbitration field.

Doubtless, arbitrators and arbitration have not escaped the suspicions of connivance, prejudice, pettifoggery, or stupidity

which courts and litigation sometimes evoke. An arbitration hearing is essentially an adversary procedure. Therefore, it is subject to the same restraints and criticisms as other adversary procedures. Now, it happens that I do not regard the adversary nature of the arbitral proceeding as a fatal defect. Rather, in most cases I have found that an adversary presentation marked by intelligent and vigorous advocacy on both sides affords the best opportunity for impartial judgment. It also enables me to feel fully confident of my decision. Of course, there is another side to the coin. The arbitration proceeding has been increasingly compared to a court proceeding. And while that is precisely what some would like to see arbitration become, as witness the sudden burst of proposals for the establishment of labor courts, others who base their judgment on their experience with both courts and arbitration certainly would not.

Yet the current criticism of labor arbitration and arbitrators is not altogether unhealthy. It performs a useful function to the extent that it emphasizes the need for the parties to select upright, qualified arbitrators. It also keeps the parties, their representatives and advocates, and the arbitrators on their mettle. But, as I see it, neither the arbitral or the decisional process nor the punctiliousness of arbitrators is likely to be much altered if our critics continue to blame the arbitrators for real or imagined abuses without recognizing that an obligation rests equally on the users of arbitration and their advocates to eliminate the abuses.

Let us be specific. I assume that few here would be willing to ditch arbitration and urge resort to some other means of resolving grievance disputes because they feel that arbitration's shortcomings are so flagrant or that many arbitrators permit their concern about their continued acceptability to affect their decision-making. But does it matter if the number of arbitrators who behave in that fashion is small? Obviously not. The parties are entitled to protection from all abuses in the practice of arbitration, whether inflicted by few or by many, which are beyond their own power to control. We know, however, that some abuses are actually and knowingly provoked, if not invited, by the disputants and are within their power to control. In such cases, have the parties failed in their duty to exercise the necessary control to prevent the abuses from occurring?

We have often heard the generalization that managements get the types of unions they deserve. The same could probably be said of the arbitrators selected by the parties. It is no secret that the arbitrators who have the greatest acceptability are those who combine competence and sound judgment with deep personal integrity, independence, impartiality, and unflagging loyalty to the arbitration profession's highest ideals and standards. Now unions and managements know this as well as the arbitrators do. They also know they have absolute power of selection and rejection of arbitrators. In a voluntary arbitration system, no one imposes arbitrators on the parties. There also are agencies and other sources available to the users of arbitration for checking the reliability and performance of nearly all who serve as arbitrators. Thus, if any abuses are occurring which affect the integrity of the arbitration process, the parties have full power to control them. Surely some of the frequent users of arbitration have not hesitated in the past to reject or terminate an arbitrator with or without reason after long or short service. That is a right we all agree the parties must have. The strength of the labor arbitration system lies in the fact that the choice and retention of the arbitrator are within the parties' exclusive control. I am reminded in this connection of an observation by Harry Shulman in one of his early opinions. After lecturing the parties about overloading the umpire's agenda, he said:

Another, and perhaps less lofty thought, should be expressed. There seems to be a feeling on the part of some that a party can win a greater number of cases if it presents a greater number for decision, the assumption being that some purposeful percentage is maintained. There are many reasons why this point of view is wholly unsound. No umpire should be retained in office if he is really believed to be making decisions on such a basis. An umpire should be employed only so long as he renders decisions on the basis of his best and honest judgment on the merits of the controversies presented, and only so long as both parties believe that he does so. If he is believed to be making his decisions on a percentage basis, the remedy is to put him out of office rather than to give him more cases for arbitrary decision.⁸

Shulman further commented that there are many honest and reasonable differences of opinion about important questions of interpretation and application. Thus, it can be expected that, in

⁸ *Ford Motor Company*, 1 ALAA ¶67,274, p. 67,620 (1945).

proper course, arbitration decisions will fall on both sides of the line and a purposeful percentage would be as unnecessary as it would be dishonest.

The integrity of the decision-making process thus depends on the participation of the parties' representatives, i.e., those responsible for the decision to arbitrate and those who appear in the hearings as advocates. We view their participation not as a regrettable necessity but as an aid to reaching an informed, impartial judgment. Doubtless all adjudicatory systems present temptation to partisan manipulation, frustration of purpose, and mischievous misinterpretations. Partisan advocacy renders a service to the arbitration system only when it contributes to a sound, informed, impartial determination of the dispute. The equality of the arbitral process is a reflection of the people engaged in it, their intellectual endowments, character, courage and independence, diligence, imaginativeness, and, yes, idiosyncracies. I refer not only to the arbitrators but to all participants in the arbitration. Unquestionably, the parties' representatives and advocates have the capacity to aid or hinder the decision-making process. They can try to exploit the proceeding to achieve their own advantage. Or they can ease and advance the parties' participation in the proceedings and thereby facilitate the decision-making process and assure a judgment on the merits of the case. Unfaithful to their responsibilities, union or management advocates can disrupt hearings or distort or becloud the issues and thus undermine the very foundation of the voluntary arbitration system and its usefulness to the parties.

Now, a final word. We tend to view the world in terms of *our* "truths" and *other people's* "assumptions." I would not deny that some arbitrators are prone to a greater or lesser degree to weigh the consequences of some awards on their continued retention or future acceptability as arbitrators. Nor would I deny that new and old arbitrators strive to do their jobs competently and unabusively with the expectation that their acceptability and chance of remaining arbitrators may thus be increased. But I find nothing sinful in that. Judges, too, ponder the consequences of their decisions on their future acceptability by the voters and their ambition to remain judges is no different from the ambition of arbitrators to remain arbitrators. For me, the wide acceptance of

arbitration makes it doubtful that any really serious abuses of the arbitral decisional process have occurred. However, if any *have* occurred, the arbitrators are not alone to blame. The parties have the power to prevent nearly all such abuses. In my opinion, they can be substantially eliminated by a straightforward exercise of the power of selection and rejection of arbitrators and by intelligent and responsible representation of the parties in arbitration proceedings.