not writing for BNA, nor for your own glory, nor for posterity, but to and for the parties who hired you.

As for your report cards, I think that most of you do a creditable job. Your grades would reflect a typical bell curve—mostly Bs and Cs. A very few would get As and yet another few would get Fs. Those Fs would be for decision-writing, not for the decision itself. I truly believe that arbitrators are honorable women and men who diligently strive to apply the parties' labor agreement to the dispute they are asked to resolve. My only quarrel with your performance is when you begin to reduce that decision to writing.

No matter how many of your awards are published, no matter how many text books and law journal pieces you write, no matter how many of your arbitral decisions are upheld in the courts, remember this one, inescapable fact: No matter how famous you become, the weather will still determine the size of your funeral. On a nice day like today, you would probably get a good turnout.

II. A UNION POINT OF VIEW*

WINN NEWMAN** AND CAROLE W. WILSON***

> "The reasons for the development and increased use of arbitration are clear. Neither the judicial process nor resort to economic warfare is a practical method of resolving disputes over contract interpretation and application. Litigation is too slow, expensive, and technical. . . . Arbitration offers greater speed, less expense, more flexibility and a more rational and knowledgeable result than any alternative, and does not interfere with the continuity of the enterprise."[1]

> "[T]he grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective bargaining agreement contains a nondiscrimination clause similar to Title VII,

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[1]Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958).

and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee."[2]

The promise of arbitration in the oft-quoted statements above has unfortunately not been realized. There is a substantial gap between what arbitration once was and was intended to be—cheap, simple, quick, and informal, and what it has become—costly, legalistic, lengthy, and formal. Arbitration is suffocating on legalisms. More and more arbitration is taking on the appearance of a courtroom procedure, with lawyers, transcripts, swearing in of witnesses, use of formal rules of evidence, pre- and posthearing briefs, and long delays throughout. The result is that the arbitration process is often frustrating and alien to the complaining worker and the supervisors immediately involved. Arbitrators have also failed to live up to their social responsibility to utilize arbitration to its fullest capacity as at least one antidiscrimination tool, if not the only one.

This paper will focus on these particular failures, which are a source of concern and challenge to all who participate in the arbitration process and care about it, whether as management or union participants or as arbitrators. Although we make no apologies for the management or union participants, who need to put their own houses in order, the basic thrust of this paper is on what arbitrators themselves can do to improve the process.

Imperfections of the Arbitration Process

One reason for the failure of arbitration to live up to the motto of the American Arbitration Association (AAA)—"Economy, Justice and Speed"—is the parties' heavy reliance upon the process. Arbitration is the victim of its own success. The sheer volume of arbitration cases has significantly eroded the efficiency of the process. In 1982 the AAA handled 17,038 labor arbitrations. In fiscal 1981 the Federal Mediation and Conciliation Service (FMCS) issued 6967 awards.

Wider reliance on the arbitration process has contributed to this expansion. It is now estimated that 97 percent of the collective bargaining agreements provide for some kind of arbitration of grievances.

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[2]*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 55, 7 FEP Cases 81 (1974).

Failure to Strip Unnecessary Cases From the Process

A significant reduction in the caseload could be achieved if the number of grievances was reduced in the beginning. When unions agree to a no-strike promise in return for a grievance and arbitration process, they have every right to assume that it will be an effective mechanism and that the employer will, in accordance with its obligations under Section 8(a)(5) and 8(d) of the National Labor Relations Act, continue to bargain with the union in good faith over the disputes subject to that process.[3] Moreover, unions have an equal right to assume that the employer will uphold the integrity of the contractually agreed-upon procedures. We submit that the quid pro quo for the no-strike promise is not merely a formal agreement to arbitrate, but an employer pledge to strive in good faith to resolve disputes during all phases of the contractually agreed-upon procedure. More often, it is only after the grievance and/or arbitration procedure has consistently failed to resolve these disputes, or after employers have deliberately violated this pledge in spirit, if not in essence, that workers will resort to a contract-violating walkout.

Unfortunately, too many employers see the grievance procedure as a necessary evil, a means of delaying resolution of problems, or a method of wearing out the union and bleeding it dry financially. It is common to find first-line supervisors inadequately instructed about employee rights, contractual obligations, or past practices. Nor are they sufficiently empowered by management to settle disputes verbally at the first stage in most grievance processes on the shop floor.

Our experience with the electrical manufacturing industry has been that, once grievances are reduced to writing, it becomes increasingly difficult to obtain meaningful relief, for each higher level of management becomes more concerned with backing up their underlings, saving face, and passing the buck, than in resolving the problems. This rubber-stamping of grievance denials undermines the viability of intermediate stages in the grievance process and appears to unions and workers to be nothing more than a means of delay and intransigence.

Instead of achieving speedy and fair results, even when the

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[3]Newman and Mauro, *Strikes in Violation of the Contract: A Union View,* Proceedings of the New York University 31st Annual National Conference on Labor (Albany, N.Y.: Matthew Bender, 1978), 149–63. Canadian law has a similar requirement.

grievances are denied, disputed issues are pushed higher up the grievance ladder until they accumulate in great number at the top. Then, at that stage, every decision takes on policy implications or plantwide or even national dimensions. As the dispute becomes further removed from the shop floor, lost in the thousands of open grievances at the plant or national level, lower level union representatives and affected rank-and-file employees lose confidence in the efficacy of the system, and even in the union's ability to represent their interests.

The situation is often as deplorable at the national appeal levels of nationally negotiated contracts. Again, our general experience with the most significant companies in the electrical manufacturing industry has been that employers are extremely reluctant to settle grievances satisfactorily at a national level. Of the several thousand grievances processed each year at a national level between IUE and Westinghouse Electric Corporation, less than 1 percent are settled at this final step in the grievance procedure. And, routinely, rather than conceding error and demonstrating the usefulness of these national appeal level grievance meetings, companies prefer to resort to the face-saving device of remanding the case back to the plant level for further review and adjustment, with additional delay and expense to the union.

The lessons of this management irresponsibility are clear to workers: when the issue becomes sufficiently serious, it pays to take matters in your own hands through direct action, albeit in violation of the agreement, in order to avoid endless delays and have some say in the result.

Some companies deliberately refuse to settle significant grievances, in the hope that they will win some percentage of the cases they provoke, thereby forcing local unions to arbitrate countless clear-cut contract violations. They cynically abuse the process, realizing that because of the increasingly prohibitive costs of arbitration, local unions—especially small ones—can arbitrate only a finite number of cases each year. Consequently, many legitimate issues are abandoned simply because the union cannot afford to fight every contract violation and every unjust discharge. As a sheer practical matter, the relinquishment of the strike weapon for the type of costly and time-consuming arbitration procedures contained in most contracts is hardly an even trade.

Unions are not without blame. Too often they file weak or trivial grievances solely for political or tactical purposes.

The burgeoning caseload is not directly the fault of arbitrators. Arbitrators, however, could play a key role in discouraging these abuses of the prearbitration process by admonishing and penalizing parties for cluttering up the process by filing weak or frivolous grievances or, in the case of meritorious grievances, deliberately delaying resolution until the arbitration stage. There is a growing body of law that successful plaintiffs can recover the costs of litigation. Title VII, for example, is one area in which this is common. Similarly, although there is a question as to whether it should be done in all arbitration cases, arbitrators should give serious consideration to awarding unions fees for their costs in processing cases through arbitration, at least in those situations where the employer's position is frivolous.[4]

Arbitrators could further trim down the number of cases that get to arbitration in the first place if they would award back pay with interest to successful grievants. Moreover, it is the right thing to do. If employers were dealing in good faith, they would not oppose union contractual proposals mandating interest.

Although the focus of this paper is primarily upon providing suggestions intended to restore the attributes of grievance arbitration which made this procedure attractive in the first place, we would be remiss if we did not mention such alternative dispute-resolution procedures as grievance mediation[5] and fact-finding in resolving employee complaints arising outside the scope of the grievance procedure.[6] These novel and promising approaches to resolve grievances and complaints short of arbitration, with consequent savings in both time and money and improved workplace democracy, need to be encouraged and explored further.

Even if the arbitration caseload were decreased by the stripping away of all unnecessary cases, those that properly belong in arbitration could be expedited if the three fundamental problems of time lag, cost, and arbitrator availability could be alleviated.

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[4]*See Tiidee Products, Inc.*, II, 196 NLRB 158 (1972).

[5]Bowers, Seeber, and Stallworth, *Grievance Mediation: A Route to Resolution for the Cost-Conscious 1980s,* 33 Lab. L.J. 459 (1982); Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration,* 77 Nw. U. L. Rev. 270 (1982).

[6]Briggs, *Beyond the Grievance Procedure: Factfinding in Employee Complaint Resolution,* 33 Lab. L.J. 454 (1982).

Time Lag

The maxim "Justice delayed is justice denied" applies even more to a local grievance than it does to any court case. FMCS statistics for fiscal 1981, the most recent year for which they are available, show that the arbitration process takes an average of 168 days, or 5.6 months, from the time a request for arbitration is filed until an award is handed down. Often this is in addition to many weeks or even months that have dragged on while the grievance has been argued through succeeding steps of the in-plant grievance procedure before the request for arbitration.

This means that it is not unusual for a grievance to take a year from its inception to the issuance of the arbitration award. The average for fiscal 1981 was 247 days, according to FMCS statistics. Of those 247 days, almost 34 were taken up in the interval between the arbitration hearing and the rendering of the arbitrator's award. Such delays in a series of accumulated grievances can cause plant unrest and strain union-employer relationships.

One method of cutting delays prior to arbitration is to encourage the resolution of grievances at the lowest possible level. One approach is contract language providing that early resolution of grievances does not create precedent. This reduces the pressure on front-line supervisors and stewards. Another way of addressing this problem is to keep grievances verbal as long as possible.

Still another device to streamline the prearbitration stage and encourage the settlement of grievances at the early stages is to require that, in the first steps, the stewards and committee members and their management counterparts prepare a joint fact-finding report that pinpoints the areas of agreement and disagreement, along with a proposal to resolve the issue. Such reports can also assist a grievance committee in deciding whether to recommend arbitration.

Spiraling Costs

The costs of arbitration have spiraled upward to the point where a union, attempting to fulfill its duty of fairly and effectively representing employees for whom it is the bargaining representative, may find the cost of arbitrating a meritorious grievance almost prohibitive because of the drain it would be on the union treasury.

According to the FMCS, in fiscal 1981 the arbitrator's average

per diem charge was $299.62, the arbitrator's average fee was $988.76, and the arbitrator's average expenses were $143.55. Excluding attorney fees and other expenses borne separately by the parties in a case, total arbitration charges averaged $1132.31 in fiscal 1981.

The cost of the arbitrator is only a small percentage of a union's total cost in arbitration cases. There also are transcripts, legal fees, filing fees, and lost-time payments. The total cost to the union in a simple case involving one day of hearing, using average figures for all expenses, was estimated to be $2220 in 1976.[7] For a small local union, such expenses can spell financial ruin. If a local union has only 100 members, for example, and retains only $3.00 of the monthly dues per member, on the basis of these figures one arbitration would cost over seven months' income.

The presentation of multiple, possibly related, grievances to a single arbitrator would substantially cut time and costs, but most employers have refused to allow it. They ignore or deliberately flout the maxim, "It's cheaper by the dozen." Despite the fact that arbitrators have indicated their general inclination to consider multiple grievances, where the contract does not expressly so prohibit, General Electric and other employers have opposed this cost-cutting practice. For example, in the IUE's 1963 negotiations with GE, the company successfully insisted upon a specific prohibition against arbitrating multiple grievances.

No employer who truly believes in making the arbitration process workable can reasonably defend this position. One of the reasons they give—that arbitrators will be inclined to "split the baby in half"—is an insult to the arbitrators' integrity. Arbitrators have an obligation to make their resentment clear.

Reasons for Delay and Increasing Costs

These problems of time lag and increasing costs of arbitration can be largely explained by (1) failure to consolidate grievances; (2) too much legalism in the presentation and hearing of arbitration cases, with the parties using lawyers and both they and the arbitrators insisting in many instances on transcripts, taped

[7]Zalusky, *Arbitration: Updating a Vital Process,* AFL-CIO American Federationist (November 1976).

hearing, and/or posthearing briefs—even in routine cases; (3) protracted hearings due to the admission of irrelevant testimony and exhibits and a reluctance on the part of arbitrators to take charge so as to expedite the hearing and eliminate irrelevancies and rhetoric; (4) excessive delay between the hearing and the award; (5) arbitrator opinions that are so lengthy and legalistic as to be incomprehensible to the average managerial or bargaining unit employee; and (6) a chronic tendency of many arbitrators to overcommit themselves to the point that they cannot offer hearing dates and decide cases within reasonable time constraints. In addition, the number of "acceptable" arbitrators has not kept pace with the increased demand for arbitrations, so that a small percentage of experienced arbitrators are responsible for the overwhelming percentage of cases assigned. It's Catch-22: the parties, by and large, want only experienced arbitrators, and new arbitrators cannot get experience because they are not acceptable to the parties.

Expedited Arbitration

The problems of delay and excessive costs in arbitration could be substantially lessened if the procedure were streamlined. Over the past decade, a few unions, employers, and organizations such as the AAA and the National Academy of Arbitrators have grappled in a limited way with the problem of formulating a process that would be quick and inexpensive. Various types of expedited arbitration were proposed. A survey of four such programs follows.

International Union of Electrical, Radio and Machine Workers (IUE)—General Electric (GE) Program

Scope of Program. Among the first to adopt expedited arbitration were the IUE and GE. In July 1971, they introduced a procedure that provided for the elimination of written opinions on the request of any party in all discipline cases, including discharge cases, where an employee refused to perform an assigned task.

IUE and GE expanded this procedure in 1976 to provide for (1) the scheduling of hearings in all discharge and upgrading cases within 60 days, and (2) if the parties mutually agree, the elimination of transcripts in all cases and the issuance of sum-

mary decisions in all discipline and discharge cases, but not in upgrading cases, if questions of contract interpretation, arbitrability, due process, or discrimination were not involved and the only issue was just cause. In practice, the parties have not eliminated transcripts, briefs, and full decisions in discharge cases.

GE rejected IUE's proposal in 1976 that all cases (not only discharge and upgrade) come under the expedited procedure and that opinions, briefs, and transcripts be eliminated in all cases except where the parties mutually agree otherwise or the arbitrator makes a specific finding that he or she needs a brief limited to a specific issue or issues.

In 1979 IUE and GE negotiated a "supplemental arbitration procedure" for disciplinary cases other than discharge in which the only issue is just cause. It provides for (1) no transcripts, (2) no posthearing briefs or other written arguments, and (3) an award without opinion no more than 24 hours after the close of the hearing.

Arbitrator Development Program. In response to the need for qualified new arbitrators, IUE and GE conducted a joint arbitrator development program in cooperation with the University of Michigan, the IUE-GE Board of Arbitrators, the FMCS, and the AAA. Affirmative action objectives were included, with the goal of involving minorities and females in the system. The program provided participants with both academic training and actual arbitration experience, and many of the graduates have achieved acceptability with other parties as well.

Fees. Arbitrators under the "supplemental arbitration procedure" receive a total fee of $325 for each case, plus travel expenses.

Time Targets. According to AAA statistics on GE-IUE arbitrations, between April 1979 and April 1982, 42 cases were arbitrated under the "regular" procedure and 59 pursuant to the "expedited" and "supplementary expedited" procedures. All expedited cases that went to award were closed in an average of 182 days, or six months. All supplementary expedited cases that went to award were closed in an average of 69 days, or 2.3 months. All regular cases that went to award took an average of 257 days, or 8.5 months—only 2.5 months more than those under the expedited procedure.

These AAA statistics demonstrate that the GE-IUE expedited

arbitration process—182 days as compared to 257 days for regular cases and 69 days for supplementary expedited cases—is not very expedited. Explanations include (1) the lack of a contractual time limit for decision after hearing, in contrast to the supplementary expedited procedure; (2) the filing of posthearing briefs, again in contrast to the supplementary procedure; and (3) not enough panel arbitrators (eight more were added in 1982).

United Steelworkers of America (USWA) Program

One of the best known, well developed, and successful expedited programs was adopted by the USWA and the major steel companies in August 1971 to deal with routine grievances. This procedure was later extended to the can, aluminum, and nonferrous industries as well as to several independent companies.[8]

The expedited arbitration procedure, first introduced on an experimental basis, was a reaction to growing dissatisfaction of local unions with the length of time for grievances to reach arbitration. It was a compromise struck after the union proposed to remove the arbitration procedure and reinstitute the right to strike.

The USWA expedited program now has 109 panels utilizing 293 arbitrators. It involves 77 companies with 301 plants and 390 local unions. Over 261,000 employees are covered by the program. As of June 28, 1982, more than 8773 decisions had been rendered under expedited arbitration.

Scope of Program. Contractually, minor discipline cases involving suspensions of five days or less, if appealed to arbitration, are expedited automatically. The only other grievances that are arbitrated under the expedited procedure are those which the parties "mutually agree" to submit to this procedure. The contract provides that grievances "must be confined to issues which do not involve novel problems and which have limited contractual significance or complexity."

Recently, in the can industry, the USWA negotiated the unilateral right to send a case to expedited arbitration, subject to a ruling by the arbitrator, if contested, on the suitability of the case for expedited arbitration. If the arbitrator rules that the

[8]Assistance in the research for this section was given by Dee Gilliam, Director of the USWA's Arbitration Department.

grievance is a proper case for expedition, it is heard by another arbitrator from the expedited panel.

In practice, the greatest number of expedited cases have been suspensions and overtime grievances. There have been a few expedited discharge cases.

Procedures. Pursuant to rules embodied in the collective bargaining agreements, there are no transcripts, no formal rules of evidence, no posthearing briefs, and only summary awards. The cases are nonprecedential. Each party's case must be presented by a local representative, and the parties have an unwritten agreement that such local representatives cannot be lawyers. They also have agreed to arbitrate up to four cases a day, and such a load is quite common.

The contractual grievance procedure contains a provision which requires a kind of disclosure by both parties. Under this provision, if a complaint is not settled in Step 2, each party must submit to the other a statement including its understanding of facts, position, and reason therefore. These statements comprise the written record which, pursuant to the rules of procedure, is mailed by the company representative to the arbitrator as soon as the company is notified of the assignment of an arbitrator.

Arbitrators. An unusual aspect of the USWA procedure is that it usually draws its panels from inexperienced arbitrators. The parties jointly conduct an initial search, usually visiting deans of law schools and requesting that they recommend some recent graduates (five to ten years in practice). The parties then jointly interview and select candidates.

Following selection, the union and company sponsor a half-day orientation program, run alternately by a union or company representative, during which the new arbitrators are briefed on the contract and rules of procedure.

If an arbitrator's decision is "incorrect," a company or a union representative writes to the arbitrator and explains what he or she did wrong (e.g., reduced the degree of discipline when the contract explicitly limits the arbitrator's authority to do so). At the outset of the program, several of these letters were sent to arbitrators each week; now there is less than one a month.

Expedited arbitration has also been an excellent source of candidates for the USWA's regular Board of Arbitrators.

Fees. Because the parties allow and encourage the hearing of up to four cases a day, they have a sliding fee schedule: (a) $200/half-day if one or two cases; (b) $250/day if one or two cases; and (c) $300/half-day if three or four cases. They do not pay arbitrators for study and writing time.

The average cost per arbitration per party is less than $70.00. The low cost is attributable to the fact that the arbitrators are paid only for the time spent at the hearing and that three or four cases are frequently heard in a day.

Time Targets. Under the agreed-upon rules of procedure for expedited arbitration, the local parties, after agreeing to expedite, agree on a date for a hearing which is usually not more than ten days thereafter. They communicate the date, time, and place of the hearing to the panel's administrative secretary for appointment of an arbitrator, who is selected in turn from a rotating panel.

The contract provides that the arbitrator's written award issue in 48 hours. This time limit is usually met.

Local Participation. One of the significant features of the Steel expedited procedure is the requirement that only local representatives present the cases. Because of this requirement, some union locals and local managements in the original experiment hesitated to submit cases to the expedited procedure. The parties on the national level responded in two ways.

First, they separately held seminars for their local people on how to present a case for arbitration. If the representatives at a particular location remained reticent, the national parties went back for further training sessions.

Second, the parties established a built-in screening system on the national level, which is contained in the collective bargaining agreement. All grievances appealed to Step 4 (for arbitration by the regular board) are reviewed by each fourth-step representative (on the national level) within ten days. These representatives can jointly determine that the grievance is appropriate for expedited arbitration and refer it back to the local parties. Any grievance referred back must either be settled or submitted for arbitration under the expedited procedure within 15 days, or it is considered withdrawn.

One of the most salutary by-products of the procedure has been better trained local-level representatives, for both man-

agement and union. This, in turn, has led to a substantial reduction in grievances in the entire procedure through increased settlement short of arbitration. The union representatives do not take as many bad cases and the company representatives are more apt to settle the good cases.

United Mine Workers of America (UMW)—Bituminous Coal Operators Association (BCOA) Program

The UMW and the BCOA have had an expedited arbitration procedure for more than a decade.[9] Its most notable feature is that it applies to all grievances. There is a separate so-called "immediate" arbitration provision, discussed separately below.

Procedures. The single most important factor contributing to the success of the UMW-BCOA program appears to be the informality of the arbitrations. In turn, their informality has been attributed by the parties mainly to the absence of lawyers. This is the only program which *contractually* prohibits the use of lawyers by either side at any step of the grievance procedure, unless mutually agreed upon.[10] There are no transcripts of the arbitration proceedings.

The contract provides, as an option, for the submission to an arbitrator of a joint statement of facts and exhibits for decision without a hearing. Only about 10 percent of the arbitration cases nationally are decided pursuant to this provision.

There are generally no posthearing briefs. The contract contains the following exception: " . . . in cases where the arbitrator determines that such briefs are necessary for a full understanding of the matter before him." When both parties have requested the right to file briefs, the arbitrator has usually allowed them, but in general arbitrators have accepted the contract language and they themselves have seldom requested briefs.

Finally, the contract contains a provision affirmatively obligating both parties to disclose to the other all facts relied upon by the party in pursuing or opposing the grievance. In addition, the union has the duty to disclose all contract provisions relied

[9]The expedited procedure was established in response to the history of wildcat strikes in the industry.

[10]Surprisingly, neither side uses lawyers except when an outside legal issue is involved, *e.g.*, successorship or federal/state safety acts.

upon. This provision was introduced in 1978 and is designed to unclog the procedure by weeding out grievances which should be settled.

The Discharge Case: "Immediate" Arbitration. Any employee discharged by an employer covered in the BCOA agreement is entitled to "immediate" arbitration of whether the discharge was for "just cause." Pursuant to the contract, following a meeting within 24 to 48 hours between management and the union, the UMW district can arrange for an arbitration hearing within five days. In practice, the hearing is usually held within ten days.

Pursuant to the contract, the arbitrator announces his or her decision "from the bench" at the close of the hearing. Some refuse to issue bench decisions, however, and instead inform the parties of the decision within 48 hours by conference call.

Arbitrators. Prior to the 1978 UMW-BCOA contract, expedited arbitration was handled mainly at the national level, with both parties drawing arbitrators from a national panel. Since 1978, the regional UMW districts and employers within those districts have assumed more direct responsibility for arbitrations. Regional arbitration panels are now established in most districts (a few exceptions), with the union district organization and the companies working together within the district's geographic area.

The national panel is administered by the Coal Arbitration Service (CAS). During 1981 and 1982, about 3000 cases were heard under the national plan procedure, as contrasted with 6000 cases in 1975 before the institution of the regional panels in 1978.

The total number of participating arbitrators, across the nation, is about 90. Many arbitrators serve on more than one regional panel, where they are called upon on a rotating basis. The CAS informs the parties when a given district has a backlog or when timely hearing dates are becoming difficult to obtain. Upon being so advised, the parties add arbitrators to the panel.

The parties have had no trouble finding arbitrators to sit on their panels. Unlike some procedures, under the UMW-BCOA program, arbitrators are paid their normal rate not only for the hearing, but for study and writing time as well, which the parties feel is an inducement in obtaining the services of arbitrators. It was estimated that the arbitrator's average fee is $1200–1500,

including fairly high expenses for travel and accommodations at mine-sites.

Time Targets. On paper, the time targets for the "regular expedited" arbitrations are quite good; in reality, they are certainly better than those in traditional arbitration. It is estimated that the typical nondischarge grievance is resolved in approximately 9 to 12 weeks, from date of event giving rise to arbitration to date of award.

Although the contract states that a hearing shall be held within 15 days of a referral, the reality is about three weeks. The amount of time depends on the availability of an arbitrator and the nature of the grievance, with the parties usually being willing to wait longer for a hearing on a grievance of a noncontinuing nature in order to expedite the more important ones. Arbitrators are closely monitored as to the length of time from hearings to their awards and as to their general availability for cases. The parties strive to retain arbitrators who are available and cooperative about scheduling and who address the issues expeditiously.

The contract does not specify a time period for the arbitrator's award, but it aims for 30 days by providing that any arbitrator who does not have a written decision within 30 days must give the parties a written reason why it is not forthcoming and an estimate of the time needed to complete it. By and large, most arbitrators take about 60 to 90 days to prepare a written decision; those who take longer usually do not file a written reason, and the parties do not enforce this contract provision.

International Union of Electrical, Radio and Machine Workers (IUE)—General Motors (GM) Program

Since 1973, the IUE and GM have had a procedure whereby, prior to an arbitration hearing, the parties can mutually direct an umpire to issue a nonprecedential memorandum decision *in any case* that may be presented to him during that hearing.[11] The umpire must issue such a decision within ten days following the conclusion of the hearing. In practice, most IUE-GM cases are now handled under this procedure. The time limit is almost always met.

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[11]Assistance in the research for this section was provided by Robert Livingston.

The contract provision covering the IUE-GM regular arbitration procedure merely specifies that an umpire decide the case "within a reasonable period of time." In the past it has not been uncommon for umpires to take more than four months to decide cases. Since fees and expenses include study and writing time, this has resulted at times in great expense to the parties.

Failure of Arbitrators to Live Up to Social Responsibility to Combat Employment Discrimination

Another area where arbitration has not fulfilled its promise is in employment discrimination claims. In *Alexander* v. *Gardner-Denver Co.*,[12] the Supreme Court unanimously held that an employee's right to trial de novo under Title VII of the Civil Rights Act is not foreclosed by a prior arbitration award under the antidiscrimination clause of a collective bargaining agreement. However, the Court also stated that an "arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[13] Although the Court declined to adopt any specific criteria as to the weight, if any, to be given to such arbitration decision, at the end of its opinion, the Court added the oft-quoted footnote 21:

> "We adopt no standards as to the weight to be accorded an arbitral decision. . . . Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."[14]

As the Court pointed out:

> "[T]he grievance-arbitration machinery of the collective-bargaining agreement remains a *relatively inexpensive and expeditious means for resolving . . . claims of discriminatory employment practices.* Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make

[12] 415 U.S. 36.
[13] *Id.* at 60.
[14] *Ibid.*

available the conciliatory and *therapeutic processes of arbitration which . . . may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.*"[15] (Emphasis added.)

In 1975, in an address to this Academy, Winn Newman stated that "the arbitral forum appears to be the best avenue for a genuine solution of these [EEO] disputes."[16] Newman based this conclusion on four premises:

> "1. The typical arbitrator, if firmly convinced that both employer and union desire nondiscrimination and if empowered by them to exercise whatever powers are essential to effectuate a solution, is in a better position than any 'other' outsider to devise a durable solution, satisfactory not only to employer and union but also to discriminatee.
>
> "2. Issues of discrimination because of sex and race are becoming inextricably entangled with so many other problems as to decimate the arbitration process if all grievances involving such issues cease to be arbitrated.
>
> "3. The relative speed of the arbitral solution affords tremendous advantages as compared with the delays imposed by the backlog before the Equal Employment Opportunity Commission, other federal and state civil rights agencies, and the courts, especially in view of the inevitable additional problems generated by the uncertainty during periods of delay.
>
> "4. With innovations such as selection of arbitrators from a special roster approved for decision of discrimination cases, preferably under arrangements with EEOC not only to establish such a roster but also to pay all fees and expenses of the arbitrators, and with the right of discriminatees to counsel of their own choice in situations where solely personal issues of discrimination are involved, arbitration will afford as favorable a forum for discriminatees as civil rights agencies or courts."[17]

Newman urged arbitrators to demonstrate "true statesmanship in engineering equal opportunity," which in turn would "strengthen the institutions of both arbitration and collective bargaining."[18] He also suggested that arbitrators needed "to have their consciousness of race and sex discrimination raised,"

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[15] *Id.* at 55.

[16] Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims,* Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 36, at 41.

[17] *Id.* at 36–37.

[18] *Id.* at 44.

so "the organizations representing minorities and women begin to feel that arbitrators can be trusted. . . ."[19]

Newman asked arbitrators, in deciding issues of race and sex discrimination, to resist "economic self-interest and the desire to be loved, which are linked with future acceptability,"[20] and not to defer to the wishes of a "hostile employer and a union that acquiesces in race and sex discrimination" in order to gain reappointment by the parties.

Unfortunately, a recent study by Stephen Owens of arbitral reaction to *Alexander* v. *Gardner-Denver,* as reported in 97 published grievance-arbitration awards from 1974 to 1980 involving issues of racial discrimination,[21] showed that arbitrators have continued to steer clear of any meaningful role in discrimination grievances. Owens found the following:

> "1. In more than two-thirds of the cases the parties executed a labor contract incorporating provisions similar to that of Title VII into the antidiscrimination clause. . . .
>
> "2. Arbitrators referred to public law associated with Title VII in 43 percent of the cases. . . .
>
> "3. The awards did not reveal any special effort by the arbitrators to provide the procedural fairness prescribed in *Gardner-Denver.* The data did show that one grievant was represented by individual legal counsel; the remainder were represented by a union attorney and/or a union official.
>
> "4. Predominantly, the arbitrators included in the study had a legal background. More than one-half were also members of the National Academy of Arbitrators. . . .
>
> "5. Despite an indication of their increasing reliance on public law to decide racial discrimination issues, the overall response of the arbitrators studied showed *no concerted attempt to specifically follow the guidelines enumerated in the Gardner-Denver decision.*"[22] (Emphasis added.)

Similarly, in a recent study of 27 arbitration awards made between 1966 and 1981 in cases of women bidding on jobs where sex discrimination was alleged, Elaine Wrong concluded:

> "*Many arbitrators feel constrained by the contract and are reluctant to apply the law in their awards involving sex discrimination.* They do not readily

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[19] *Id.* at 47.

[20] *Id.* at 54, quoting Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination,* 39 U. Chi. L. Rev. 30, at 44 (1971).

[21] Owens, *Arbitral Reaction to Alexander v. Gardner-Denver Co.: Analysis of Arbitrators' Awards, 1974–1980,* Proceedings of the 34th Annual Meeting, Industrial Relations Research Association (Madison, Wis.: IRRA, 1982), 60–61.

[22] *Id.*

find circumstances of sex discrimination, even when the contract contains a nondiscrimination clause. It is true that an arbitrator's award is not a legal finding, but it can be enforced in a court of law. Many arbitrators avoid the use of precedent, however, and do not feel confined to the rules of evidence that would apply in court. Therefore, in civil rights cases involving sex discrimination, one wonders how well the grievant's interests are protected under these circumstances."[23] (Emphasis added.)

Wrong found that in cases where the sex discrimination grievance was dismissed, the arbitrator upheld the contract in 17 awards. In three cases the arbitrator made reference to other arbitrators' decisions, and in three other cases arbitrators quoted public law. She found that in only one instance did the arbitrator cite court cases. From this she surmised that "most arbitrators are unfamiliar with the law or insecure about applying it and prefer to be bound by the contract."[24]

In cases where the sex discrimination grievance was sustained, the author found that three of the successful awards were based on the contract. Of the three other awards, one referred to a judicial decision, one to another arbitration decision, and one to literature in the field. Out of six successful cases, in only three was the grievant awarded back pay. In two awards the employer was found guilty of discrimination. In only one case, a successful one, was the grievant represented by her own attorney.

Wrong also found that seniority, which is usually controlling, was not regarded as an important factor by arbitrators when the issue was sex discrimination. In 12 cases where the women had more seniority, the grievance was denied; in only one was it a helpful factor.

On the basis of her study, Wrong concluded that there was a need for specially trained arbitrators who are perceptive about issues of discrimination and knowledgeable about the law, who would be screened and tested by the AAA and FMCS, and, if necessary, licensed.[25]

The nondiscrimination clause has not, in general, been used effectively and has had little or no impact on discrimination in the workplace.

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[23]Wrong, *Arbitrators, the Law, and Women's Job Bids,* 33 Lab. L.J. 798, at 807 (1982).

[24]*See also* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* Arbitration—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), 59–92.

[25]*See also* Newman, *supra* note 16.

Conclusion

The promise of arbitration as a final resting ground for grievances while life in the workplace continues peacefully and without interruption, as a proving ground for industrial democracy giving workers a vital role in shaping their relationship with their employer, and as an antidiscrimination tool has not been fulfilled. Because of the vices of cost, delay, and legalism now embedded in the process, arbitration has become estranged from the local grievance process.

Expedited arbitration is still not widely used, being employed by only a limited number of unions and employers for only a limited number of cases. Nonetheless, although it has not proven to be the panacea expected, as the foregoing analysis of expedited arbitration programs reveals, it is working much better than the traditional procedure. Indeed, there have been definite benefits in terms of (1) stripping unnecessary cases from the process short of arbitration, (2) minimizing the time and cost in processing arbitration cases, (3) developing a crop of acceptable new arbitrators which includes women and minorities,[26] and (4) returning grievance resolution to the local level which, in turn, has a salutary effect on the labor relations of union and management.

Unfortunately, the fact that we have to call the faster procedures "expedited" means that we have turned the arbitration process on its head from its original purpose. The "expedited" procedures should be "normal" and the longer "regular" procedures should be "abnormal."

Although some commentators and companies have expressed the fear that the streamlined procedural features of expedited arbitration may contribute to increased fair-representation liability, particularly in discharge cases, there is no empirical evidence to support this claim. Representatives of the IUE, USWA, and UMW programs as well as the Postal Service program (described in Chapter 9) do not feel that expedited arbitration has led to more fair-representation lawsuits, and all of them agree that the quality of the awards is generally equal to that of regular arbitration. Given the excessive costs of regular arbitrations, we believe that expedited arbitration is worth the

[26]It is interesting to note that, according to one astute observer of the arbitration scene, the newer arbitrators are even more legalistic than the older ones.

slight risk of a court reversal in a duty of fair representation lawsuit.[27]

It is clear that there is no reason why an arbitration case cannot be fairly presented without lawyers, transcripts, and briefs. From a political point of view, expedited arbitration has resulted in reducing member dissatisfaction generated by delays in the arbitral process. Finally, another beneficial by-product, cited by both the UMW and the American Postal Workers Union, is improved effectiveness of local representatives, stemming from the policies of these unions that only local representatives can present cases for expedited arbitration. Further, they are convinced that the noticeably improved capabilities of the local representatives have led, in turn, to improved relations between the parties on the local level.

Nonetheless, as our surveys show, many arbitrators are (1) failing to exercise proper self-discipline to meet deadlines prescribed in both the regular and expedited procedures, frequently because of overcommitment; (2) requesting or permitting posthearing briefs routinely; and (3) writing awards of unnecessary length, often causing the parties to pay a premium for the arbitrator's ego and economic gratification in publishing a literary masterpiece, which the parties have not sought. The parties merely want to know, in language that workers and supervisors understand, why the arbitrator sustained or denied the grievance. A full explanation does not necessarily have to be long.

Arbitrators have a professional responsibility to avoid overcommitment. They should promptly notify the AAA and FMCS not to send out their names when they find that they cannot offer a hearing date within a reasonable period of time, or when their caseload has become so heavy that they cannot render a decision within a reasonable time after the close of a hearing.

Employers and unions are often helpless victims of decisional delay by arbitrators. The parties told us repeatedly that they were afraid to criticize arbitrators for excessive delays because they did not want to offend them and jeopardize their chances for a decision in their favor. That is why arbitrator self-discipline is essential to solve the problem of the gap between contractual deadlines and reality. We urge the Academy to address this seri-

[27]Some unions, such as the UAW, explain to grievants the differences between expedited and regular arbitration and allow them to elect either procedure.

ous question of missed deadlines and to explore the possibility of asking the AAA and FMCS to publicize the timeliness records of individual arbitrators. Any requests for extension of time by arbitrators should also be sent to the AAA and FMCS and reported by them.

Attention should be given to developing a plan for the forefeiture of all or part of the arbitrator's fee when a decision is delayed beyond the contractual time limits for no just cause. Guidelines should be developed that differentiate between reasonable excuses (serious illness) and unreasonable delays. The Academy and the AAA should also be prepared to determine at what point decisional delays become unethical conduct and to prescribe appropriate disciplinary action.

While the parties must initially bear the responsibility for developing new arbitrators on a systematic basis and be prepared to take a chance on new arbitrators, the arbitrators themselves must assume more personal responsibility by cooperating in such programs to ensure the development and utilization of new faces in grievance arbitrations, particularly those of women and minorities.

Arbitrators also need to curb their desire to be "loved" by the parties who have the power to reappoint them.[28] Instead, they should help expedite cases and protect the integrity of the process by exercising more firmness in the conduct of hearings, refusing to admit testimony or exhibits that are irrelevant to the issue, requiring the parties to stick to the issue in their presentations rather than engaging in meaningless rhetoric, and encouraging the use of arbitration to combat employment discrimination.

While it is impossible to predict the future, nonetheless it seems clear that expedited arbitration is a step in the right direction, albeit a limited one, to make the arbitration process more responsive to the needs of the parties, and thus to have it come close to fulfilling its promise as "the substitute for industrial strife."[29]

Expedited arbitration, however, can work only where both the company and the union want it to work. It is doubtful that voluntary expedited arbitration can be successful unless the parties

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[28]Hays, Labor Arbitration: A Dissenting View (New Haven, Conn.: Yale University Press, 1966), 10–76.

[29]*Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

already have a fairly sophisticated relationship. If union and management truly wish to make their arbitration a first-rate process, we submit that they should *require all* cases to be expedited unless they mutually agree otherwise. Briefs should be filed only if an arbitrator states that he or she needs one and specifies the limited number of issues the brief should cover.

As to the use of arbitration as an antidiscrimination tool, notwithstanding the fact that arbitrators apparently are resisting its use for the resolution of employment discrimination cases, we still believe that, for the following reasons, arbitrators and participants should give renewed consideration to the expanded use of arbitration in Title VII matters.

First, arbitration is clearly the most expeditious means to resolve many simple employment discrimination cases. The EEOC still has a significant backlog of cases. Moreover, it still takes many years from the filing of an EEO charge to the successful prosecution of a Title VII lawsuit. Most important, Title VII is not being enforced by the Reagan Administration, which has persisted in having anti-civil-rights foxes, hostile to the laws they are supposed to enforce, guard the civil rights chicken coops.

Second, the arbitration alternative is a relatively inexpensive dispute-resolution mechanism, at least when it is compared with a full-blown Title VII trial, including discovery and possible appeal.

Third, discrimination claims are closely related to the entire spectrum of employment and collective bargaining processes, and it is artificial to separate them. Since the parties must continue to deal with each other on a day-to-day basis, and a Title VII court case is merely a single-shot effort to correct just one phase of a continuing broad problem of discrimination, it is far better from an industrial democracy point of view for such disputes to be resolved pursuant to the grievance-arbitration process set up by the parties rather than in a court of law.

Fourth, the resolution of equal employment claims, although requiring some expertise, is not a "new frontier."[30] Although employers often resist arbitration of employment discrimination claims on the grounds that, in the case of alleged wage discrimi-

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[30]Newman and Wilson, *IUE Testimony Before EEOC Hearing on Job Segregation and Wage Discrimination Under Title VII and Equal Pay Act,* BNA Daily Labor Report, April 28, 1980, E-11-12.

nation, they do not want a third party to resolve the matter, correcting wage inequities is "old hat" to the industrial relations scene. Unions have regularly grieved and arbitrated the proper rate for a job, and arbitrators have been called upon to resolve disputes over these rates and to establish the rate the employer must pay. An arbitrator might determine whether the rate set by the employer was proper or should be changed on the basis of testimony and/or his or her personal observation of the job. Contrary to much current thinking, formal job evaluation has never been held to be essential to an arbitrator's determination of the relative worth of a job.

On the other hand, the male-dominated world of industrial relations and arbitration appeared to wear blinders when the job inequity resulted from a comparison of sex-segregated jobs. Whether this resulted from basic prejudice, a fear that men's wages would be reduced, the enactment of state protective laws, which unfortunately had the effect of creating a sex-segregated job structure wherever women were hired, or a combination thereof, is no longer relevant.

Finally, we think that arbitrators should encourage the use of arbitration to combat discrimination as a matter of living up to their social responsibilities. The fact is that employment discrimination has been illegal under the Civil Rights Act for over 19 years, but employment discrimination continues. Although arbitration may not be the perfect solution for ending discrimination, it can make a significant contribution. To paraphrase the Supreme Court, it seems that arbitrators have an obligation to utilize arbitration to its fullest capacity as at least one antidiscrimination tool, if not the only one, as "a matter of simple justice to the employees themselves. . . ."[31]

III. A CANADIAN ADVOCATE'S VIEW

ROY L. HEENAN*

It is a great privilege for me to be invited to address this distinguished gathering. I am also pleased to follow Bob Garrett, not only because I enjoyed the humor of his remarks, but also because I can subscribe to them almost entirely. When I say almost entirely, coming from Canada and particularly Quebec, I must

[31] *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 205, 207, 9 FEP Cases 919 (1974).

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