Lawyers, Legalism, and Labor Arbitration

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THE last two decades have witnessed a phenomenal rise in the utilization and acceptance of labor arbitration as a means for peaceful settlement of labor disputes arising during the life of a collective bargaining agreement. The institution of labor arbitration, along with that of collective bargaining, have taken root in this country in such an amazingly short period of time "as part of a uniquely American program of industrial self-government."[1]

In view of the rapid development of the process, it is not surprising that various problems arose along the way. As a result, recent years have seen frequent stock-taking and reevaluation of the process. Let it be said quickly that few critics will deny that this unique process has contributed vastly to Labor-Management peace. However, criticisms have ranged over a wide area. To cite only a few, there

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[1] Dr. George W. Taylor "The Effectuation of Arbitration by Collective Bargaining" in "Critical Issues in Labor Arbitration", BNA 1957, Chapter VIII.

have been complaints that the process has been strangled by "creeping legalism," the role of lawyers and the law in the process have been roundly scored by some, the use of precedents has been criticized, and the cost, time and expense of the process has been decried. The thrust of these complaints which have become quite fashionable in certain quarters is to ascribe virtually all the ills of the process to the law and the lawyers with the aid of such scare phrases as "creeping legalism."

Such charges are for the most part grossly unfair and unfounded. They blindly ignore the vital and constructive role which has been and is being played by both the law and the legal profession.

After a brief exposition of the development of labor arbitration, this article will discuss the respective roles played by both law and lawyers in the process, point out the areas in which there has been an abuse of the process, and by whom, and offer a few suggestions for more effective utilization of labor arbitration.

GROWTH OF LABOR ARBITRATION—IN BRIEF

Labor arbitration has been described as being "very nearly as old as are labor disputes," with its origin in England in the 1820's and in the United States in the 1860's.[2]

However, the general acceptability of labor arbitration as we know it today dates back only to World War II when the National War Labor Board gave it tremendous impetus by inserting requirements for the arbitration of disputes over application and interpretation of contract provisions in all cases in which it passed on the issue.[3]

Following World War II the Labor-Management Conference called by President Truman in December, 1945 and composed of representatives of the major industrial and labor organizations (though unable to reach meaningful agreement on most items) did unanimously agree upon a resolution which urged inclusion of a provision for arbitration of all disputes over application and interpretation of agreements in all collective bargaining agreements. This recommendation was later endorsed by both the National Association of Manufacturers and the Chamber of Commerce of the United States.[4]

Since the end of World War II, as indicated earlier, the growth

2 "The Profession of Labor Arbitration", BNA 1957, Chapter I.
3 Id.
4 Id.

and acceptance of arbitration as a means for resolving labor disputes over interpretation and application of contract terms has been nothing short of phenomenal. In that relatively brief period of approximately 15 years, labor arbitration has received such apparent public acceptance that today more than 90% of our collective bargaining agreements provide in one fashion or another for arbitration of disputes as to the interpretation or application of the agreement.

THE ROLE OF THE LAWYER AND THE LAW

To the extent that charges of "creeping legalism" imply that law or legal procedures should be exorcised from the process or that lawyers should be excluded from it, it constitutes a completely unwarranted and unrealistic affront to both and a grave disservice and threat to the process itself. If the charge implies that lawyers and the law have imparted excessive technicality or are otherwise principally responsible for abuse or misuse of the process, it likewise points the finger of guilt in the wrong direction.[5]

The fact is that the role of the legal profession in advising the parties, in trying arbitration cases, in acting as arbitrators, has constantly expanded and the bar has played an increasingly important and constructive role in the process. The late Dean Harry Schulman of Yale, one of the pioneers in the field, said in one of his last papers, perhaps somewhat whimsically, "I suggest the law stay out—but, mind you, not the lawyers."

The vital role which has been, and is being, played by lawyers in the process is, clearly, in the best interests of the process itself. Successful arbitration practice is infinitely enhanced by the special and unique skills brought to it by the legal profession. Labor arbitration involves, basically, interpretation and application of contracts, the careful analysis and sifting of facts, and the orderly presentation of facts and arguments. This the lawyer is well qualified by training and experience to do.[6] Those who are playing key roles in the shaping

[5] Note the very interesting comments made by an official of the United Steel Workers Union at a U. of Pa. conference "The most legalistic guys in my Union are about one million guys who never went to law school." BNA Daily Labor Report #54, p. A-11, March 19, 1959.

[6] D. L. Benetar "The Lawyer's Role: Labor-Management Relations and Arbitration", Vol. 44 ABA Journal No. 8, pp. 746 et seq., August, 1958:

"The basic principles guiding the successful trial of law suits likewise control the effective presentation of labor cases in arbitration. There are differences to be sure. But in both there is the need for thorough preparation before hearing, for careful research into

and development of the arbitration process strongly attest to this fact.

As one leading authority in the field properly pointed out, labor arbitration has been most ineffective where there has been a "failure of the parties to define the issues" or "poor presentation of cases."[7]

A former President of the National Academy of Arbitrators has said in this connection:

"Another responsibility which the parties have is to present a well-prepared case. I would venture that more poor awards result from inadequately presented cases than from any one other cause. If a case is worth presenting to arbitration it is worth presenting well. I suppose every arbitrator has had the experience of having the parties waltz into a hearing without having prepared the case, and with a very inadequate knowledge of the facts themselves. If an arbitrator is to make a satisfactory award, it is absolutely essential that the parties present the basic and essential facts."[8]

Still another well-known arbitrator has said:

"Important cases ought to be carefully presented and parties are entitled to the most effective spokesman they can obtain."[9]

The current President of the National Academy of Arbitrators likewise acknowledged:

"The assistance which attorneys or skilled advocates can render in arbitration hearings in developing the facts of the case more clearly and expeditiously than is possible by those advocates not skilled in separating fact from opinion, fact from argument."[10]

To the same effect is the following statement made by still another prominent arbitrator in the field:

"As many an arbitrator will testify, a well-trained lawyer who under-

the facts and into applicable precedents, preparation of witnesses, both for direct examination and in anticipation of their cross-examination of opposing witnesses. When one adds to this list of necessities the requirements of ability to organize material and to present persuasive arguments, the specifications for the part to be filled leaves no room for question but that a lawyer is best qualified to fill it. The appearance of labor counsel in labor arbitrations has been commonly accepted as fitting and proper by management and labor and by arbitrators as well. The latter in particular have welcomed expert counsel for the contribution they knew such counsel would be able to make to the preservation of relative calm at the hearing and to objectivity in presenting the facts."

[7] E. E. Witte "The Profession of Labor Arbitration", BNA 1957, Chapter I.

[8] P. N. Guthrie, "The Arbitrator and the Parties", BNA 1958, pp. XIII-XIV.

[9] A. M. Ross, "Problems in Labor Arbitration," Univ. of Calif., Institute of Industrial Relations Bulletin, Vol. 2, No. 1, February, 1959 at p. 3.

[10] G. Allen Dash, "Critical Issues in Labor Arbitration," BNA 1957 at pp. 106 et seq.

stands the nature of collective bargaining and the purposes of arbitration is always a welcome participant. His ability to outline and dispute clearly and simply, to come directly to the point at issue, to present his evidence in an orderly fashion, and, finally, to sum up his arguments and to relate them to the record made at the hearing, not only aids the cause of his client, but also enhances the worth of the arbitration process. The principal responsibility of our hypothetical attorney, therefore, is to inform himself as extensively as possible about the nature, purposes, and common practices of arbitration; by so doing he will prepare the way for the effective use of his considerable talents in the common interest of employers, unions, and the public at large."[11]

This is not to suggest that all members of the bar *per se* are equipped to participate constructively in the labor arbitration process. On the contrary, there undoubtedly have been cases of misuse and misunderstanding of the process by members of the bar, as well as others. The fact is that while lawyers can be of immeasurable aid in the arbitration process, and while there is no magic or unusual complexity in the process, it must be acknowledged that techniques and attitudes and adjustments far different from those required in the general law practice and in common law litigation are required of lawyers.

Attorneys who enter the labor law field with extensive prior experience in the common law courts find themselves in a strange new world with a jargon all its own, informality unheard of in court, and evidence of virtually all shapes and stripes readily accepted. To be effective in such a medium it is of vital importance that the attorney must largely discard the mantle of the common law lawyer and assume in its place the cloak and the habits and the techniques of this new type of "litigation."

In common law litigation the case at issue is normally the only case in which the same litigants will ever be involved and every possible effort is exerted to win that particular case. When the case is over, the parties will go their respective ways and they may never meet again. The antagonism, the sharp and angry words engendered by the dispute, the heat of the contest will all go with them. Not so in labor matters. Here counsel can never afford to forget that the union witnesses today will tomorrow be on the assembly lines and in the offices again working hand-in-hand with management, and vice versa,

[11] B. Aaron, "Some Procedural Problems in Arbitration—Presenting the Case," 10 Vanderbilt Law Review at p. 739, June, 1957.

as before. There is, in other words, what writers in this field for a long time have labeled "a continuing relationship" between the parties. While all attorneys as well as their clients have the desire to win their cases, the concern of counsel in labor matters for the future well-being of his clients should transcend the immediate problem or case at hand. No responsible advocate would desire to win the battle and lose the war. Hence, in advising the client, in presenting his case, in examining and cross-examining union witnesses, counsel must never lose sight of the nature of the relationship between the parties and the overall goals.

Moreover, he must be conscious of the fact that these arbitration proceedings frequently partake of the characteristics of Roman holidays. They may be attended by large numbers of representatives of the employee body in whose eyes the company's counsel is the company. His actions are the company's actions. Similarly, the union lawyer is the union and his actions symbolize the union.

In this connection, counsel for the parties must also recognize that what they say may have a profound effect upon future company or union policy as the case may be. All of this imposes an even greater than usual responsibility on counsel for the respective parties to conduct themselves in such fashion as to reflect well upon their clients.

It sometimes happens that counsel, particularly those who have recently been recruited from other fields of law, have a distinct antagonism for the whole labor arbitration process. This antipathy, hard as he may try to conceal it, almost invariably communicates itself to the arbitrator, with the result that counsel's usefulness to his client is seriously impaired. Here again is emphasized the need for complete adaptation to the forum if counsel is to be effective in it.

Histrionics, oratory, emotional displays have little place in arbitration proceedings. Such proceedings are not jury trials; they are not criminal or police court cases. They are simply fact-finding proceedings tried usually before sophisticated and experienced triers of such cases. Emotional or dramatic displays by counsel will usually have an adverse effect on the arbitrator. As one prominent practitioner in the field well put it:

"The days of speech-making and table-pounding are happily gone. Arbitrators are interested in fact rather than opinion."[12]

Labor-Management relations have matured to the point where

[12] Abelow, "Arbitration of Labor Disputes," 14 Brooklyn L. Rev. 28 et seq., 1947.

there is no reason or justification to view each labor arbitration case as a "lynching party" or an opportunity to embarrass, vilify or inveigh against one side or the other or their respective representatives or witnesses. While a certain amount of emotion is unavoidable, the parties should make every effort to view the proceedings as calmly and as objectively as possible lest they get out of hand and do serious harm to their relationship from a long-term point of view. An arbitrator recently pointed out that one difficulty with Union presentations is the failure to stick to the issue. Too much belittling of the other party's position and too many personal attacks do not make a favorable impression, he said.[12a] In an article which appeared in the New York World-Telegram a few years ago (June 7, 1955), Mr. David Sarnoff, head of R.C.A., is reported to have said that labor-management relations have progressed to the point where the need is for statesmen and not warriors. This applies with equal force to the trial of labor arbitration cases.[12b]

Pomposity and excessive and purposeless legalism likewise are out of place in an arbitration proceeding. In this connection, it would be helpful for us in the legal profession to take heed of some of the comments of leading arbitrators.

Arbitrators' criticisms of attorneys in the arbitration process center mainly upon excessive argument about burden of proof, too-frequent injection of the matter of arbitrability of the issue before the arbitrator, misplaced use of certain legal procedures and forms which normally have no proper place in labor arbitration, such as motion procedures and the like.

Thus, one arbitrator caustically put it:

"The contrast between the objectives and procedures of an arbitration hearing and those of a law suit has been so generally noticed by arbitrators, lawyers, and laymen that one is puzzled by the ubiquity of certain procedural arguments in arbitration. Of these, surely the most senseless is the dispute over which side should proceed first. An insistence that the other side has the burden of going forward implies a plaintiff-defendant relationship in which the former must set up a prima facie case before the latter is obligated to respond. But this concept is plainly inapplicable to an arbitration proceeding. As an extension of the grievance procedure, an arbitration hearing serves many purposes, not the least of which is to give the grievant the satis-

[12a] 45 LRR 459 (March 21, 1960).

[12b] R. A. Levitt, "Presenting an Arbitration Case," Eighth Annual Conference on Labor, N.Y.U., at pp. 282-3.

faction of knowing that the other party has been compelled to account for its conduct before an impartial third person. Again, the hearing may serve to educate a union committee, or a group of foremen, on the manner in which their respective actions may subsequently be reviewed and questioned. Even when it is apparent to an arbitrator, therefore, after the complaining party has presented its case, that the grievance lacks merit, he will almost never grant a request by the opposing party for an immediate ruling in its favor.

"By far the greatest number of procedural problems arising in *ad hoc* labor arbitration concern the introduction of evidence and the examination of witnesses. These are the problems, too, which seem to bring out in some attorneys those irritating qualities that comprise the average layman's stereotype of the lawyer. A few of the more unpleasant of these traits may be mentioned in passing. First, by a wide margin, is the use of legal mumbo-jumbo: the monotonous objection to the introduction of evidence on grounds that it is 'incompetent, irrelevant, and immaterial', or 'not part of the *res gestae.*' A close second is the eat-'em-alive method of cross-examination: the interrogation of each witness as if he were a Jack the Ripper finally brought to the bar of justice. Last, but scarcely least, there is the affectation of what may be called advanced documentship: throwing an exhibit at one's opponent across the table, as if contamination would result if it were handed over in the normal way, or contemptuously referring to the opponent's exhibits as 'pieces of paper that purport to be', and so forth. These tactics may be well suited to stage or cinema portrayals of the district-attorney-with-a-mind-like-a-steel-trap or the foxy defense counsel at work, but they are wholly out of place in an arbitration proceeding. Moreover, they can be counted upon almost invariably to exacerbate the feelings of those on the other side and to initiate bitter and time-consuming arguments between the parties."[13]

Another highly respected arbitrator pointed out:

". . . As a general consideration, this preliminary dispute at the opening of a hearing starts the proceedings off in a strained atmosphere and creates a tenseness that is neither desirable nor necessary in an arbitration proceeding.

". . . [T]he argument on burden of proof serves no purpose."[14]

Another arbitrator, referring to the matter of raising the issue of arbitrability in an arbitration proceeding, said:

". . . [M]any respondent parties now make it virtually a routine to raise the issue of arbitrability at the outset, with the result that the proceeding is launched upon a legalistic footing.

[13] See Note 11, supra at 739, 743.

[14] B. C. Roberts, "Precedent and Procedure in Arbitration Cases," Sixth Annual Conference on Labor, N.Y.U. at p. 157.

". . . [T]o raise the issue of arbitrability should be regarded as strong medicine to be used only where it is truly significant. To abuse it as a trumped up plea in abatement or a harassing tactic is to encumber arbitration with the very sort of technicality that should be eschewed by all those interested in its continued effectiveness."[15]

It is felt that these criticism are not unjustified in many cases. It is important to bear in mind, however, that they are leveled principally at those members of the profession who are new to the field and simply point up the necessity for each attorney who enters the field to become thoroughly familiar with the nature of the process if he is to serve his client best.

The following statement by the Chairman of the Board of the American Arbitration Association, as to how a lawyer can best perform his role in the arbitration process, is particularly worth noting:

"The following list is but a brief summary of things which a lawyer experienced in arbitration will do for his client in an actual case, whether the client is a company or a union.

"(1) He will make a completely fresh investigation of the grievance and take a new look at the problem to be presented to the arbitrator. His investigation will be as thorough as time permits and, because he is not so close to the emotional atmosphere of the dispute, he may have a greater insight into the problem. As a matter of fact, from his observation of the job in question or the job description, you may be saved from going to arbitration with a faulty case.

"(2) He will prepare what may be called an opening brief, whether oral or written, which should be uncomplicated and unemotional. He will not make an impassioned and flowery appeal since such an appeal usually does not impress an experienced arbitrator.

"(3) He will save you from unnecessary arguments about the burden of proof because in most instances in arbitration it is the duty of each side to present its case and to justify its position. It may be noted that this is somewhat of a reversal of court procedure. At the same time, it points out to management or to labor that their prime job is to accentuate the positive.

"(4) He will not destroy the usefulness of employees in the future by rigid, sarcastic or over-aggressive cross-examination. This does not mean that he is a 'Mister Milquetoast', but he will bring an atmosphere of calm, thoughtful reasoning to the case and be no less the strong advocate because of his temperate approach.

"(5) He will recognize that the rules of evidence are not strictly applied. This does not mean that he will calmly admit all sorts of

[15] J. F. Sembower, "Critical Issues in Labor Arbitration," BNA 1957, at pp. 98 et seq.

irrelevant matters and hearsay evidence. He knows that the arbitrator will recognize such matters as comparatively unimportant. He will by mild observation and comment point to the appropriate weight to be given to such testimony, if any. In turn, he will not offer hearsay evidence if more direct sources are available. If he must present hearsay evidence or affidavits, he will lay the ground work for this in his opening statement.

"(6) Finally, he will give you a careful, brief, but adequate summation, making sure that essential points have been covered, at the same time eliminating extraneous matters and freeing the issue from the quicksand of technicality.

"(7) The skilled lawyer's services are especially desirable for the preparation of post-hearing briefs, in which he will ascertain and correlate all the facts so as to present a comprehensive statement of the contentions and supporting proofs which have been advanced at the hearing."[16]

THE ROLE OF LAW AND LEGAL PROCEDURE

Implicit in the charge of "creeping legalism" is the suggestion that all legal rules and legal procedures have little place in the trial of labor arbitration cases.[17] Surely such critics do not yearn for a return to the "cracker-barrel" type of arbitration in which the parties sit around a table with their feet up and shout at each other across the table (DLR No. 54, p. A-10, BNA March 19, 1959)—what one

[16] S. Gotshal, 10 Vanderbilt Law Review, pp. 652-654, June, 1957.

In regard to paragraphs numbered (6) and (7) of the statement quoted, it is observed that, though such briefs are undoubtedly of great aid to the arbitrator in many cases, whether or not a post-hearing brief is appropriate or necessary should rest upon the nature of the specific case, the parties and their traditions and practices. Attorneys should not assume that they have a special mission to insist on briefs in each and every case regardless of the particular situation. Moreover, if briefs are to be filed, summations would normally be unnecessary.

[17] Thus, for example, one authority has stated (Simkin and Kennedy, "Arbitration and Grievances," U.S. Dept. of Labor, Div. of Labor Standards, 1946, at 25):

"There is only one general over-all rule which can be applied to the evidence submitted in informal grievance arbitrations. This rule is that any evidence, information, or testimony is acceptable which is pertinent to the case and which helps the arbitrator to understand and decide the problem before him. Obviously, this is the broadest kind of rule and does not conform to legal concepts of evidence. It serves to reemphasize the point which has already been made, that grievance arbitration is not a judicial process in a strict legal sense."

See also Singer, "Labor Arbitration: Should it be Formal or Informal," Lab. Law J. Feb., 1951, at 89;

Dean Shulman put it this way (68 Harv. L. Rev., 999 at 1017):

"The more serious danger is not that the arbitrator will hear too much irrelevancy, but rather that he will not hear enough of the relevant. Indeed, one advantage frequently reaped from wide latitude to the parties to talk about their case is that the apparent rambling frequently discloses very helpful information which would otherwise not be brought out. Rules of procedure which assure adequate opportunity to each party to

authority described as ". . . shirt sleeves, seat-of-the-pants, look:—no-hands" arbitration.[18]

That the abandonment of orderly procedures and restraints in labor arbitration would be unwise was underscored by Professor Cox of Harvard when he said:

"The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements. I have already expressed the view that the courts would ignore the plea but surely it is unwise even if they would sustain it. Many legal rules have hardened into conceptual doctrines which lawyers invoke with little thought for the underlying reasons, but the doctrines themselves represent an accumulation of tested wisdom, they are bottomed upon notions of fairness and sound public policy, and it would be a foolish waste to climb the ladder all over again just because the suggested principles were developed in other contexts and some of them are demonstrably inapposite."[19]

At another point, Professor Cox also had this to say on the same question:

". . . When legal principles are invoked in arbitration proceedings it is well not to brush them aside impatiently but to recall that behind them lies the weight of thought tested by experience. If the policy behind the legal rule holds true, the case should turn upon it. If the policy is unimportant, the legal rule may safely be disregarded.
"Time prevents pursuing an inquiry into the applicability of some of the legal principles most often invoked in labor arbitration. If I have not already provoked controversy, I am sure that on these questions

prepare for and meet the other's contentions, or rules designed to encourage full consideration and effort at adjustment in the prior stages of the grievance procedure may be quite desirable. But they should not be such as to prevent full presentation of the controversy to an arbitrator before he is required to make final decision. For that would not only limit his resources for sound judgment, but would tend also to create dissatisfaction with the system."

[18] W. W. Wirtz, "The Arbitrator and the Parties," BNA 1958, at p. 44.

[19] A. Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Michigan Law Review at pp. 14-15, November, 1958. See, also, Elkouri, "How Arbitration Works," BNA at p. 263, which states:
". . . . While arbitration is a distinct institution, however, it would be totally unrealistic to deny the close relationship now existing between it, especially 'rights' arbitration, and our formal legal system. Indeed, labor arbitration has drawn heavily from the standards and techniques of that system. In this connection, the author believes that on the whole sound judgment has been exercised by arbitrators in effectively utilizing established legalisms without paying slavish deference thereof."

there would be sharp differences of opinion. Possibly it is only lawyers who feel misgivings on observing the tendency of some labor arbitrators to receive testimony from the parties as to what they thought and said during the negotiation of the contract which an arbitrator is seeking to interpret. It is easy to brush aside a principle called the parol evidence rule with the explanation that you are getting to the bottom of the problem. Yet behind the technical label lies the policy of enabling men who sign written undertakings to rely on the pretty plain meaning of an agreement which purports to speak for itself, without speculating as to what a judge or arbitrator will conclude after hearing conflicting testimony on the claims, demands or understanding of this and that party prior to the contract's execution. The policy was developed for commercial dealings, but might not adherence to the same approach in labor arbitration prove salutary for both management and labor, and at the same time relieve witnesses of undue pressure on their 'recollection' concerning past contract negotiations?"[20]

Labor arbitration proceedings should not be as formal as court proceedings. They should not be subject to a strict application of the common law rules of evidence. However, such proceedings should be conducted in an atmosphere that is dignified and according to a procedure that is orderly—with adherence to sensible and practical rules of evidence. It is certain that when arbitration cases degenerate to round table, shouting-across-the-room, feet-on-the-table discussions they are not conducive to the finding of fact and truth which is their prime objective. Where *that* happens cases are time-consuming, expensive and confusing. Moreover, the cause of arbitration is hardly advanced, because rank and file employees and supervisors present at such haphazard hearings gain a lasting impression of arbitration and of the arbitrator that does the cause of arbitration no good.

In the final analysis labor arbitration can survive only so long as it has the acceptance and confidence not alone of management and unions but of the rank and file employees as well. Dean Shulman put it very well as follows (68 Harv. L. Rev., 999 at 1016):

"To the extent that the parties are satisfied that the arbitrator is properly performing his part in their system of self-government, their voluntary cooperation in the achievement of the purposes of the collective agreement is promoted. When I speak of the satisfaction of the parties, I do not mean only the advocates who may present the case to the arbitrator, or the top echelons of management or union representatives. I mean rather all the persons whose cooperation is required

[20] A. Cox, "The Profession of Labor Arbitration," BNA 1957 1957 at p. 86.

—all the employees in the bargaining unit and all the representatives of management who deal with them, from the job foreman up."

Though the rules of evidence should concededly be applied more liberally in arbitration cases, it is equally thought that "the arbitration proceeding must be kept from becoming a field day for the voicing of displeasures which are irrelevant to the dispute and lead to an unnecessary digression from the issue at hand."[21] In this connection reasonable limits should be imposed on the use of hearsay evidence in order that the opposing party may have an adequate opportunity to rebut statements made in the absence of direct testimony.[22]

Citation of Precedents

A principal component of the "creeping legalism" charge is the assertion that there is excessive citation of arbitration case precedents and court decisions by the parties and excessive consideration of the same by arbitrators.[23]

In assessing this contention, we cannot disregard the facts of life in arbitration matters. Though it is true that arbitrators are not bound by decisions of arbitrators in cases involving different parties, the fact is that arbitrators, for the most part, like other human beings, are often interested in the views previously expressed in similar situations by their colleagues—and particularly respected colleagues. Moreover, many fundamental principles of labor relations have, by repeated acceptance by many arbitrators, become firmly engrafted on the body of labor arbitration and labor relations. To suppose that arbitrators generally will not follow such precedents or at least be guided by them, disregards reality.

Where there are such cases of widespread acceptance of particular principles, counsel would be remiss in his obligation if he did not make reference to them and present them to the arbitrator in the course of his argument. It would be a rare case where an established arbitrator

21 B. C. Roberts, "Precedent and Procedure in Arbitration Cases," supra at p. 154.

22 Id., at p. 155; note also the author's comment (at p. 156):
"Another practice which deserves some comment is the acceptance of evidence by the arbitrator, 'for what it is worth.' When evidence is accepted 'for what it is worth,' it adds incalculable components. The opposing counsel, not knowing what worth the arbitrator will put upon that evidence, is compelled to explore every ramification of the testimony. In reply, the other similarly must counter the opposing evidence and argument. It frequently imposes an unproductive exercise for both parties. It may mean that the hearings are unnecessarily extended. It is suggested that this acceptance of proof 'for what it is worth' be avoided."

23 See editorial entitled "Creeping Legalism in Labor Arbitration", 13 Arbitration Journal, 1958, pp. 129 et seq.

would not follow such principles. This is no excuse for ferreting out innumerable obscure and irrelevant citations which the opposing party must review and comment upon and which then require long research and study by the arbitrator at great expense to the parties.

As one arbitrator very candidly put it:

"As to arbitral decisions rendered under other contracts between parties not related to those in the case at hand, usefulness depends upon similarity of the terms and of the situations to which they are to be applied. They must be weighed and appraised, not only in respect to these characteristics, but also with regard to the soundness of the principles upon which they proceed. Certainly, an arbitrator may be aided in formulating his own conclusions by knowledge of how other men have solved similar problems. He ought not to arrogate as his own special virtues the wisdom and justice essential to sound decision. In at least two instances in recent months I have found by investigation that a strong current of arbitral decisions had overborne my first impression of the implications of particular language. To yield to this 'common sense of most', especially as, on examination, the reasoning on which it was based carried plausibility, was neither to evade my responsibility nor to sacrifice my intellectual integrity. Contrariwise, it reduced discriminatory application of similar provisions. It enabled me to make use of the wisdom of others at work in the same field. It increased the reliance which draftsmen of future contracts might feel as to the application which would be made of the words which they had chosen. It informed these same draftsmen of words to be avoided if they desired a different result. And it could lessen the need for future arbitrations by adding to the consensus in favor of the particular interpretation of commonly used forms.

"This resort to precedent in aid of interpretation and application does not deserve the scornful appellation of 'playing follow-the-leader.' One is not to accept a single prior decision elsewhere as binding precedent. Indeed, no number of decisions has such an effect. The resort to the opinions rendered under other contracts is simply for the purpose of making available, for what they are worth, the judgment of informed and able adjudicators and the developing usage of the community. In each instance the arbitrator is to apply his own acumen in valuing the decisions of the past. Certainly, he must use them with due regard to the facts of the case before him, which well may call for a disposition different from that in other instances. Particularly he will need to take into account any light that the negotiations preceding the contract or the practices of the parties may shed on the problem of interpretations. Such factors often dictate a result varying from determinations elsewhere."[24]

[24] M. H. Merrill, "A Labor Arbitrator Views His Work", 10 Vanderbilt Law Review, at p. 798, June, 1957.

Similarly, another prominent arbitrator said:

"It would be erroneous for an arbitrator to take the position that he is not interested in what other arbitrators have found in cases involving different parties and different contracts where similar issues are presented. The thinking of others sitting in judgment on these issues should be of educational value to the arbitrator. He does not live in a vacuum."[25]

Misuse of Arbitration

Recent times have brought increasing criticisms of the cost of arbitration and the time and expense involved in arbitration matters.[26] Sometimes these critics have laid the blame for these with arbitrators. Others have criticized the legal profession and still others the law itself. We believe that these criticisms are, for the most part, grossly unfair and misdirected.

We believe that the great bulk of the responsibility lies with those parties themselves who fail to exhaust their obligations under the grievance procedure before rushing into arbitration in cases which might easily be disposed of during the course of the grievance procedure, or who pervert the arbitration process by taking an excessive number of plainly unmeritorious cases to arbitration for purely political or other similar purposes.

In this connection the following very candid recent statement by the administrative director of the Industrial Union Department of the AFL-CIO is refreshing:

"For the longer pull, decisions based upon political judgments or pressures rather than upon the immediate fact situation are harmful to everybody concerned. . . .

"We in organized labor need to understand better the arbitration procedure for what it is, recognizing both its advantages and limitations. We must recognize that arbitration is no substitute for the bargaining process and that we cannot win good contracts by taking everything to arbitration."[27]

[25] B. C. Roberts, "Precedent and Procedure in Arbitration Cases," supra at pp. 159-60.

[26] The following excerpt from U.S. Dept. of Labor Bulletin # 1225 "A Guide to Labor-Management Relations in the United States" is interesting:
"The process of arbitration necessarily involves delay and often substantial costs to both parties, who typically share the expenses. Such costs include, in addition to the arbitrator's pay, the time spent in preparing briefs, assembling witnesses, transcribing minutes, etc. Although these expenses and the delay involved in the process tend to reduce the use of arbitration, they also have beneficial effects in retarding its abuse (as, for example, in carrying trivial or frivolous cases to a decision of a third party) and in providing more of an incentive for union and management to work out their disputes peacefully without arbitration."

[27] Daily Labor Report (BNA) No. 50, p. A-9 (3/14/60).

One arbitrator put it this way:

"There is no doubt, for example, that some parties arbitrate too much. Arbitration becomes a mill rather than a court of last resort, a substitute for the grievance procedure rather than a means of strengthening it. Issues multiply through a process of continuous division and subdivision, so that trivial disputes which should have been buried at Step 1 of the grievance procedure are solemnly and painstakingly dissected in a full-dress hearing."[28]

Another authority said:

"Who would say that cases go to arbitration only after a failure of assiduous and purposeful bargaining? The really pertinent facts in a case are occasionally produced for the first time at an arbitration hearing and, not infrequently, only then does the real issue emerge. The best arguments may be 'saved for the hearing' for maximum tactical effect. Should arbitrators simply refer issues 'back to the parties' in such cases to insure the 'proper' use of collective bargaining? There is much to be said for this kind of action. But, that would not be at all what some parties expect or want."[29]

A third arbitrator (and a former president of the National Academy of Arbitrators) very pointedly said:

"I do not deny that the parties occasionally fail to bargain on grievances and head straight for arbitration. This is particularly true in the so-called 'face-saving' and 'buck-passing' type of cases. Where the parties habitually do this sort of thing without making a real effort to settle the dispute themselves, they are not only avoiding their responsibilities but are also weakening the bargaining relationship. But this is an abuse by the parties of the collective bargaining process . . . experience teaches that as parties to a bargaining relationship gain in maturity, excessive resort to arbitration becomes more the exception than the rule."[30]

A great deal of the time and expense incurred in labor arbitration might readily be avoided if the parties took to heart a recent penetrating analysis of the significance of each submission to arbitration—that it represents an admission by both parties that collective bargaining has failed and that the parties are prepared to accept "an imposed answer by a third person."[31]

[28] A. M. Ross, "Problems in Labor Arbitration," Univ. of Calif., Institute of Industrial Relations Bulletin, Vol. II, No. 1, February 1959, p. 3.

[29] G. W. Taylor, "Critical Issues in Labor Arbitration," BNA 1957 at pp. 152 et seq.

[30] H. H. Platt "Current Criticisms of Labor Arbitration," a paper delivered at the 1959 meeting of the National Academy of Arbitrators.

[31] Id.

This same authority pointed out that "a quite limited dependence on arbitration in many, or most, situations is one indication, . . . of the long-sought-for maturity in industrial relations." He emphasized that arbitration might thus be looked at as insurance—that is, that it should be available, but hopefully never resorted to.

There undoubtedly are other reasons for increased time and expense of labor arbitrations. And many of these have been hereinabove adverted to, such as poorly prepared and presented cases, over-prepared cases in matters of small import, excessive legalism such as unnecessary motions, arguments as to arbitrability,[31a] burden of proof, excessive resort to citations, propounding of obscure legal theories not directly related to the case at hand, etc., admission of totally irrelevant evidence, excessively long opinions, and the like. However, as indicated, these are dwarfed by the principal problem which is that of going to arbitration in too many cases which should never reach that stage.

Some Additional Suggestions for More Effective Utilization of Labor Arbitration

There are a great many ways, in addition to those hereinabove noted, in which the arbitrator, the parties and their respective attorneys can contribute to the more effective utilization of the arbitration procedure. It is important to emphasize, however, the unwisdom of cutting down on necessary preparation and the orderly presentation of cases in the interest of saving time or expense. As a general proposition, if a case is worth taking to arbitration, it should be properly prepared at the beginning. "If a case is worth presenting to arbitration it is worth presenting well."[31b] Without a clear and complete understanding of the facts and issues, the arbitrator cannot be expected to reach a fair decision. The special counsel to AFL-CIO said on this score:

"In all honesty I must also note that a union can also block the effectiveness of the arbitration process. If the union's representatives

[31a] It is not suggested that the parties should refrain from contesting arbitrability in those cases where they have good-faith doubts as to arbitrability. As one law review writer indicated recently:
". . . the values of arbitration depend essentially on the parties' willingness to use it after a particular controversy has arisen. This contention reflects the concern expressed by thoughtful students that judicial action compelling recourse to the contractually prescribed arbitral procedures threatens the values of arbitration as a self-operating instrument of self-government."

[31b] B. M. Meltzer "The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II" 59 Col. 1 Rev. 269, 288, Feb. 1959.

do not present the facts and arguments adequately, the arbitrator has a difficult time determining the case fairly. Both parties have a major responsibility to the arbitrator: they hire him; he is not imposed on them. He is entitled to help from the parties so that he can reach a fair conclusion. He has no source of information or of understanding of the context in which to view contract clauses except the parties themselves."[31c]

Rather, the following suggestions for improving the arbitration process are submitted for consideration:

1. *An attorney's "Step 4-1/2" in the grievance procedure*—Counsel for the parties can make a real contribution to the elimination of a great many issues which might otherwise go to arbitration. This can often be accomplished depending, of course, upon the relationship between counsel, through a candid discussion of the facts and issues before the matter actually goes to arbitration. Being further removed from the immediate heat engendered by the disagreement of the parties, their respective attorneys can view the dispute dispassionately and in a more objective light than the parties. There undoubtedly are a great many cases which might be resolved as a result of such a frank discussion between counsel. However, it should be borne in mind that this is no substitute for competent, good faith grievance handling and care should be taken to avoid buck-passing by respective grievance representatives in the belief that the matter will be handled in the so-called "4-1/2" step anyway.

2. *Stipulations of fact and clarification of issues*—Similarly, attorneys for the parties can contribute greatly to cutting down time and expense and simplifying the issues by making serious efforts to stipulate as many of the facts as possible before hearing, and by seeking to simplify and agree to the issues involved. Much time is needlessly wasted in too many cases in argumentation about what the issues are, and also in putting in lengthy and time-consuming proof on facts which are not really disputed.

3. *"Small claims" procedures*—It has been suggested that a special calendar or docket might be created for what might be termed "small claims" arbitration cases. Such a docket would include cases of lesser import and involving small employers or unions which might be tried more expeditiously and less expensively with prompter awards and without briefs or written opinions. Moreover, such a calendar

[31c] A. J. Goldberg, "Labor Arbitration—A Dedicated Calling"—I.U.D. Digest, Summer, 1959 at p. 127.

might well be used as a vehicle for the training and development of new arbitrators.[32]

4. *Tri-partite boards*—A great many arbitration clauses today call for the appointment of three arbitrators, one of whom is a designee of management, the second a designee of the Union, and the third an impartial designee selected by the other two or by some other agency. The fact is that in virtually all such situations the so-called company and Union designated "arbitrators" are not impartial but are simply additional advocates for their respective sides. To label them "arbitrators" is not only a misnomer but it also raises serious ethical and legal questions. A report of a Committee on Ethics of the National Academy of Arbitrators properly raised questions as to the wisdom of labeling all of the members of such tri-partite boards as arbitrators as follows:

"If arbitration is a judicial process, the use of tri-partite boards of arbitration to determine questions of contract interpretation may involve a problem of ethical content. While the use of experts to assist a court is not unknown, as, for example, in admiralty proceedings, participation by a litigant or his representative in the *decision* of a case is foreign to Anglo-American judicial tradition. In arbitration proceedings, however, it is not uncommon to have a question of interpretation presented to a board composed of an equal number of 'neutral' members and members designated by management and the union, with equality of voting rights. It is common knowledge that the members designated by the parties almost invariably view the case as partisans, though purporting to sit as impartial judges and in some States (like New Jersey) actually taking an oath as such.

"Is this an 'ethical' arrangement? Whether it is or not, if the decision is to be made by majority vote, it often puts the neutral arbitrator in an impossible position if his function is to decide the case 'judicially.' Yet the parties may have entered into such an arrangement in perfect good faith. They may have sound practical reasons for preferring such an arrangement, uppermost of which is the fear of having an arbitrator unfamiliar with the mores of the particular company-union relationship go off 'half-cocked.' When it is realized that an award in a labor dispute is not merely the decision of a legal issue but may materially affect the day-to-day relationship of an employer and his employees for an indefinite period in the future, the concern of the parties is understandable. Yet serious questions exist as to the propriety of tri-partite arbitration in the interpretation of labor contracts —if the arbitration and the judicial processes are indistinguishable."[33]

32 See editorial entitled "Controlling Costs in Labor Arbitration", 14 Arbitration Journal at pp. 27-8, 1959.

33 "The Profession of Labor Arbitration," BNA 1957, Appendix A, pp. 151 et seq.

It is a perversion of the arbitration process to have individuals serving and labeled as "arbitrators" when they actually represent one party or another. It is true that there may be cases where the parties may feel that it is advisable, particularly in technical cases, to have their respective representatives sit or participate with the impartial arbitrator. In such cases the parties' individual designees should not be called arbitrators but rather "advisers" or "consultants," or the like.

5. *The "sweetheart" arbitration*—From time to time over the years there have been a few reports of instances where Union and management agreed upon the decision which the arbitrator should reach and then transmitted their decision to the arbitrator for effectuation by him. Such cases arise in many different settings. For example, the Union may agree that a discharged employee deserves to be fired but refuses to accept the responsibility of agreeing with the employer publicly or the issue involved may be one in which the parties agree but for which neither wants to take specific responsibility insofar as either the employee body or the general public are concerned. While such instances are rare, it is believed that such "agreed" or "sweetheart" arbitrations in which the result is pre-ordained by the parties and the arbitrator acts merely as a rubber stamp are unwise and do serious harm to the integrity of the arbitration process. If the parties have reached agreement on a proposition, they should not seek to make it appear that the decision is not theirs but that of the arbitrator; nor should the arbitrator lend himself to such perversion of his functions.

6. *Development of new arbitrators*—Pitifully little consideration has been given to the question or recruitment and training of future arbitrators. Much of the present fraternity of outstanding arbitrators was spawned at the War Labor Board during World War II. These same men continue to bear much of the weight of the arbitration load even today. Those anxious to enter the field find themselves confronted by almost insurmountable barriers. The law schools, the universities, the arbitration agencies both public and private, labor, management and arbitrators themselves must give serious thought to how best to recruit, train and utilize those who have the qualifications and wish to enter the field. Concededly this is a difficult problem but solutions must be found if the process is to survive.[34]

7. *Selection of arbitrators*—A related problem is that of selecting arbitrators for specific cases. It is frequently standard operating pro-

[34] Id., Appendix D. pp. 170 et seq.

cedure when a case arises for each side to scurry about making telephone calls to parties who have appeared in cases before particular arbitrators under consideration, to read all obtainable decisions previously rendered by such arbitrators, to check "confidential" reports by services maintained for the purpose of keeping tab on arbitrators and to check "black lists" and "approved" lists of arbitrators maintained by various sources. This haphazard, hit or miss procedure is not only burdensome, time-consuming and frequently ineffective, but it also tends to degrade arbitration and the arbitration process. It may be time for labor and management to give consideration to finding some means for avoiding this ritual in each and every case.

One alternative now in use in some situations is for the parties to agree in advance on an approved panel of arbitrators who are used in order as each case arises. Others have one arbitrator for the life of the agreement. Still other agreements may call for the designation of an arbitrator by a prominent judicial or other public officer. It is not suggested than any of these methods furnish a complete or satisfactory answer to the problem. It is clear, however, that the problem deserves serious attention.

CONCLUSION

In conclusion it is suggested that there is a vital need for continuous self-searching and reappraisal by the legal profession and all others involved of their respective roles and responsibilities in the labor arbitration process to the end that labor arbitration may survive as an effective tool of self-government in industrial relations. The alternative is government intervention, a result desired by few.[35]

[35] NLRB member J. A. Jenkins in an address to the College of Law of the University of Utah on May 2, 1959 (NLRB Release R-609) quoting his own recent article in the Spring 1959 issue of the Georgetown Law Journal, very aptly stated:
"One of the fundamental problems involved in all systems of jurisprudence is striking a balance between the demands of the State, on the one hand, and the rights of individuals, on the other. When a free society—based economically on free enterprise and idealogically on the concepts of individual freedom, limited governmental power, and government by the consent of the governed—is faced by other societies that have solved their problem in jurisprudence by lodging all powers in the hands of the State, it behooves all of us to so conduct ourselves that the 'government of the people' will survive on this earth. In the final analysis, management and labor should and must shape their own destinies. They must accept the responsibility of their own actions for themselves and society as a whole. They must be mature enough and wise enough to solve their problems without government intervention. This is the very essence of all self-government. Conciliation, mediation and arbitration are great tools to this end. Nothing would please me more than to see the day when most, if not all problems in labor relations are solved by the parties themselves, either by private agreement or resort to private third party methods."