COLLECTIVE BARGAINING AND ARBITRATION

A Conference Conducted in
San Francisco and Los Angeles

INSTITUTE OF INDUSTRIAL RELATIONS
University of California

INSTITUTE OF INDUSTRIAL RELATIONS

FEW AREAS in the domestic social life of the nation are vested currently with greater public concern than the field of industrial relations. The development of better relationships between organized labor and organized employers, and the integration of these relationships with the interests of the individual citizens and the nation as a whole, constitute one of the most serious problems facing our economic and social system today.

The Legislature of the State of California expressed its desire to contribute to the solution of this problem when, in 1945, it established an Institute of Industrial Relations at the University of California. The general objective of the Institute is to facilitate a better understanding between labor and management throughout the state, and to equip persons desiring to enter the administrative field of industrial relations with the highest possible standard of qualifications.

The Institute has two headquarters, one located on the Los Angeles campus and the other located on the Berkeley campus. Each headquarters has its own director and its own program, but activities of the two sections are closely integrated through a Coordinating Committee. In addition, each section has a local Faculty Advisory Committee, to assist it in its relations to the University; and a Community Advisory Committee composed of representatives of labor, industry, and the general public, to advise the Institute on how it may best serve the community.

The program of the Institute is not directed toward the special interests of either labor or management, but rather toward the public interest. It is divided into two main activities: investigation of the facts and problems in the field of industrial relations, which includes an active research program and the collection of materials for a research and reference library; and general education on industrial relations, which includes regular University instruction for students and extension courses and conferences for the community.

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Presented by the
Institute of Industrial Relations, University of California
and the Conference of Junior Bar Members
in coöperation with the Committee on
Continuing Education of the Bar of the
State Bar of California

INSTITUTE OF INDUSTRIAL RELATIONS
AND UNIVERSITY EXTENSION

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The Logic of Collective Bargaining

WILLIAM H. DAVIS, Chairman, Labor Relations Committee, Atomic Energy Commission; formerly Chairman, National War Labor Board and U. S. Director of Economic Stabilization

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FOREWORD

MORE THAN FIFTEEN MILLION WORKERS *find their wages and working conditions fixed by collective bargaining, while many others are affected by what occurs in the bargained area.* As concern has grown with the problem of labor-management disputes, arbitration has stepped forward as a leading device for their settlement. Mr. William H. Davis in the address presented here concerned himself with the underlying philosophy and development of collective bargaining. Professor Harry Shulman addressed himself to the place of arbitration in the collective bargaining process.

In collective bargaining and arbitration no figure has led to a wider divergence of opinion than the lawyer. Some argue that he has no role to play in either process, while others would make him the leading actor. His qualifications, his training, his powers, and his function are subjects of controversy. For this reason the Junior Bar of California and the Institute of Industrial Relations joined in this examination of the attorney's role in collective bargaining and arbitration.

Mr. John F. Swain, President of the Junior Bar, Dean Edwin J. Owens of the Santa Clara Law School, and Dean Carl B. Spaeth of the Stanford Law School served as chairmen of the meetings on the Berkeley campus. Mr. Sharp Whitmore, Vice-President of the Junior Bar, Dr. Frank Pierson, and Mr. Benjamin Aaron served as chairmen of the meetings on the Los Angeles campus.

An important part of the Institute's program is to share with the community broad experience in industrial relations through conferences of this type. Previous conferences have dealt with Wages, Prices and the National Welfare, Industrial Disputes and the Public Interest, and Industrial Relations in World Affairs.

CLARK KERR, Director
Institute of Industrial Relations
Northern Division

EDGAR L. WARREN, Director
Institute of Industrial Relations
Southern Division

I. COLLECTIVE BARGAINING

The Logic of Collective Bargaining

WILLIAM H. DAVIS

MY FIRST REACTION to the title, "The Logic of Collective Bargaining," was to say: There is no logic in collective bargaining; things are not carried in collective bargaining to logical conclusions, but rather to acceptable compromises. The request to deal with this question was like being asked to talk on the snakes in Ireland after St. Patrick went through.

To the superficial observer the adjustment characteristic of collective bargaining comes with an overtone of disparagement; the idea of compromise gets mixed up with the now so-disreputable idea of "appeasement." But in this discussion here we do not want to be superficial. I think the students and practitioners here at all levels want to see things as they really are, as of today. If we are to serve the future usefully it will be by helping toward a realistic view of the present; a view that can add to foresight so that the younger men, if they get anything from our older experience, will be helped to know how to handle concrete situations; the problems and responsibilities that confront them now or that lie immediately ahead of them.

Looking at the thing that way, I have asked myself: what does it really mean that we say there is no logic in collective bargaining; that such a sound economist as Dexter Keezer calls collective bargaining "that excessively praised process of fumbling, bluffing, and bulldozing toward an adjustment that should be made with hairbreadth precision," and yet prefers to fix wages by that process; that in spite of its cumbersomeness and crudity we nonetheless hold profoundly to the belief that collective bargaining is a thoroughly creative thing?

This idea that collective bargaining necessarily leads to acceptable compromises rather than to logical conclusions reaches to the very heart of things. It leads that way because it is a driving social organism with a way of life of its own. Collective bargaining is a process of growth; it is the reflection of something that is always becoming. It is a part of the developing morality that manifests itself in our industrialized society, and as such it links in with the basic moral principles of our world. Its logic is the logic of man's progress in the creative role assigned to him in the general scheme of things. It, like the cosmic order of the

universe, has an order and harmony of its own, instituted by reason but opposed by the forces of disorder. The generating "cause" of this dynamic organism is an ideal of end, persistently exercising a force of attraction, and perhaps energized by some impulse in the thing itself, constantly aspiring towards the ideal; a cause which goes on in time from one achievement to another, sometimes wavering and sometimes forging strongly ahead. Thus, when we ask ourselves what the logic of collective bargaining is, we are really asking what is its *trend?* Its goal is a social ideal, its trend, and therefore its "logic," marks the direction and perhaps the rate of man's struggling progress toward that goal against ignorance, unenlightened selfishness and fear. For the mathematically inclined, as the trend is to the goal, so is belief to truth.

It is impossible to judge a trend—the progress or retrogression of any movement—except with reference to the end in view. It seems of utmost importance, therefore, to understand the end in view—the fundamental purpose—of collective bargaining.

But first let us turn back a little. I want to put emphasis on the present and the future, to look around in the present and look ahead into the future. I want to avoid too much entanglement with the past, because I think that is one of the principal sources of trouble in industrial relations today, that we are still dragging behind us the clanking chains of misunderstanding and superstition. We have had a telescoping of events in collective bargaining that is almost too much for the lifetime of one man. We would have been better off if those who now have to go forward in the field had been born after the things that have been going on in this country since I was a young man had ended.

We do need some perspective, even to see things just in front of us; and as one looks back over the last thirty years it may be seen that the development of industrial relations in this country can be divided roughly, perhaps with some oversimplification, into three periods:

1. Prior to 1918, the "yellow dog days," interrupted during World War I by the War Labor Board of 1918 with its recognition of the right to organize, and the return to vigorous antiunionism after the First World War. In this period the spotlight was on the individual, then thought of as a self-sufficient atom of society, rendered undesirable as an employee if he sought to join with his fellow workers for mutual aid and protection.

2. The period of struggle of individual workers for the uninterfered with right to organize; of Section 7a in the National Industrial Recovery Act; and of the Wagner Act of 1935 validated by the Supreme Court in 1937. In this period the spotlight swung to the union as an association of individual employees exercising their right to organize and to choose

their own representatives for collective bargaining, struggling under the protection of the Wagner Act for "recognition."

3. The current period of acceptance of organized labor as a component factor of industrialization with the spotlight moved again to the individual, but now as a member of a society at least partially integrated and within which the individual finds satisfaction not alone in take-home pay but, more importantly, in his relation to his fellow workers, to the enterprise for which he works, and to the community in which he lives.

It is with the spotlight in this third position that we have to look at industrial relations today. It is in this light that we need to think of our subject: what is the logic of collective bargaining? Thus brushing aside the past, looking at things as they are now with the spotlight focused on the individual in our great industrial fabric, and having in mind that what we are really concerned with is the trend of that animated and developing thing we call "collective bargaining," let us turn our attention to the basic question: what is the end in view?

That fundamental question is not too hard to answer. The right answer grows, I think, out of the interlinking of the morality of collective bargaining with the total morality of a democratic society. Dr. Albert Einstein has very truly said that the human goal of the Judeo-Christian tradition is "the free and self-responsible development of the individual so that he will freely and joyously put his energies at the service of the community of man." And, he continued, this is also a sound expression of the fundamental principle of democracy. I add further that it is a perfect definition of the goal of collective bargaining. What better directive could there be for the conduct of industrial relations in a great production plant than this: the free and self-responsible development of the individuals (managers and workers) so that they spontaneously and with self-satisfaction put their energies at the service of the common enterprise?

If one accepts this definition of the end in view, then the next question is: what means are available to achieve that end, and what are the forces of opposition? For those who are now students or practitioners, that is the fundamental question. The job ahead is to search out and understand the limits of persuasion and of necessity that determine the character and reflect the possibilities of the struggle toward that goal.

The greater part of that limit-fixing job has yet to be done. It can hardly be said that we have done more up to now than scratch the surface of the subject, although the experience I have had and the observations I have made leave me with the strong conviction that we are headed in the right direction. Experience convinces me of that. If you look back

as I do over thirty years, you cannot help but feel that we are going ahead and even at an extraordinary rate. The real adventure belongs to you who will have charge of things in the future, rather than to those of us who have had experience in the past. It is, I think, a great adventure, and I certainly wish you well.

The remarks I am now about to make as to where persuasion ends and necessity begins are not made in any dogmatic sense. They are tentative suggestions—almost random thoughts—put out for critical examination and with no more than a modest hope that you may be able, by further research and experience, to distill some truth out of them or to check and reject their errors.

For establishing and maintaining conditions favorable to this development of the individual which is the goal of collective bargaining, both management and organized labor must assume responsibility. Elmo Roper has listed the goals of the individual worker in this order: first, security; second, a chance to advance; third, being treated like a human being; and fourth, a desire for simple genuine dignity. There is nothing in these goals incompatible with the desires or with the needs of either management or organized labor. They may be hard to satisfy but nobody objects to a wageworker wanting security and dignity, to get on in life, and to be treated like a human being. We may expect, of course, in these relations the difficulties which come from the fact that, as David Harum used to put it, "there is as much human nature in one man as there is in another, if not more." These difficulties always tag our footsteps in every relation of human life. If we cannot suffer them gladly we have to suffer and surmount them as best we can.

Having made this reservation, I think we can agree that there is nothing on the employer's side fundamentally incompatible with the goal of free and self-responsible development of the individual, as we have defined it. Special instances aside, it is the normal desire of an employer to be on friendly terms with his employees. In my native state of Maine, I know today of many small enterprises—machine shops, boat yards, automobile repair establishments, and the like—in which the relation between the boss and the men is filled with that mutual respect and mutually helpful association for which the normal employer, even in our huge enterprises with tens of thousands of employees, still has a nostalgic longing. Although, in many large modern enterprises the old-time employer is now pretty much replaced by salaried managers, yet we can still expect that the managers have this same natural desire, although perhaps with slightly different motivations and slightly different emphases. Indeed, it may be assumed that the free and self-responsible development of individuals as the end in view is quite

definitely compatible with the relationship of salaried managers to wage earners, since that goal includes them both. Here again we must, of course, make considerable allowance for human nature with its misunderstandings, its fears, and its tendency to flee from reason long, long before it is compelled to surrender to necessity.

The true limitations imposed by necessity on rational agreement from the employer's side are fixed by those requirements which are really necessary to the discharge of the obligations of management.

Searching for these limitations we must take as necessities those things which are truly necessary to the upkeep of a "free private enterprise" system because there is no doubt that management and organized labor in the United States agree in their resolve to put their money on that system, at least for one more turn of the wheel. But within that one acceptable generalization almost every particular application is in dispute. This is a situation which by the logic of collective bargaining presents the greatest opportunity for progress. Tested by the criterion of free and self-responsible development of the individual up to the point of spontaneous coöperation, the true limits of necessity lie far, far beyond the present position of belief and practice. And as belief is related to truth so is the trend related to the goal.

With acceptance of the end in view, the need is for development of understanding and mutual confidence. The tools available are the basic tools of democracy: inherent belief in the dignity and worth of the individual as a person; full acceptance of the creative values of persuasion as against the deadening hand of force; and consciousness that facts are all important but hard to get at so that the two sides agree never to disagree about a fact but rather to continue to search together for the facts until they find out what they really are. With these tools, by processes of rational persuasion, shunning each resort to force as a failure and setback, it is possible to modify conflicting beliefs and step by step reach more and more creative compromises. That is, I submit, the logic of collective bargaining. Wherever an area of exploration exists between the present climate of opinion and the final wall of necessity, there lies a promising field of creative progress by reasonable persuasion; and the fertilizer is the collective goal, the free and self-responsible development of the individual toward voluntary and self-disciplined coöperation.

The Role of the Attorney in Collective Bargaining

GEORGE O. BAHRS

Does the attorney have a role in collective bargaining? There is the familiar slogan, "throw out the lawyers and get down to business!" There is some merit in that suggestion, but, like many generalizations, it is basically false. I say there is some merit in it because lawyers, due to their training, are at times not well adapted to collective bargaining. Their training emphasizes absolute rights, such as the right to forbid a trespass, and the convenience of others is immaterial in its determination. The trial lawyer, furthermore, frequently attempts to jockey a witness into the position of making a statement favorable to his (the lawyer's) side. He does not expect to see and probably never will see that person again, and a momentary victory at the trial is all that he is seeking.

The lawyer, however, like the economist, the engineer, and the statistician, does have something positive to bring to the bargaining table. I believe that the lawyer, particularly where he possesses a "judicial" attitude, is eminently fitted for collective bargaining. In bargaining the spokesmen on both sides attempt the extremely difficult role of convincing each other. The man with a judicial attitude, an open mind receptive to the statements and arguments presented to him, is far better suited than the man who has the answers ready before his opponent has completed his presentation. Collective bargaining is not a wild and woolly game in which no holds are barred. Anyone who believes that he accomplishes a purpose by putting a "sleeper" into a contract that is not discovered until afterward can be characterized only as smart and not wise. It may well prove far more costly than the benefits achieved by the tactical victory. The question that should be posed is: what is the objective of the collective bargaining contract? I think that the objective is not to gain an advantage over the other party but to produce a contract that both will consider fair and reasonable and under which they will work willingly.

Obviously, it is the responsibility of the attorney to advise his client as to whether the contract complies with the law. In addition, he frequently is in a position to be of service to both parties by supplying appropriate language to set forth in the contract what the parties have

agreed upon. In that connection plain speaking in the simplest and clearest language is an advantage.

JAY A. DARWIN

A lawyer in the field of industrial relations should know the relevant statutory requirements. He ought to have more than a bowing acquaintance with the Labor-Management Relations Act. He should be familiar with the functions of the Federal Mediation and Conciliation Service. If his state has a little Taft-Hartley Act, he ought to know its provisions.

The lawyer should also be familiar with the difficulties that arise during original as contrasted with renewal negotiations. In negotiating the *first* collective bargaining agreement a difficult psychological problem is often faced. One side may present inordinate demands from the point of view of the bargainer on the other side. It is the first meeting and the issues have not been fully thought through. If the attorney is to play a role in collective bargaining, he should be aware of this psychological hurdle. It is often wise in these first negotiations to conduct prenegotiation conferences in order to determine precisely what the issues are. By this means it may be possible to avoid the shocks to which the parties and the lawyer are sometimes subjected when they meet for the first time.

There is then the question of the authority of participants in negotiations. The charge is frequently made, and sometimes justifiably, that there is not enough authority in the negotiator to close an agreement. Union people, for example, have told me that the men with whom they were sitting and bargaining were sometimes only "messenger boys," for when an understanding has been reached in the matters negotiated, the management representatives then ask for time to seek approval from "higher authority." Sometimes it is not forthcoming and negotiations then result in a waste of time, with nothing accomplished. Regardless of whether or not the charge is altogether justified, it is one to merit the consideration of lawyers interested in collective bargaining.

I think a lawyer should realize that the labor relations under a contract are of a continuous nature. It entails a continuing duty to bargain changes in working conditions not already covered, as well as interpretations and applications of the contract. A lawyer is well advised, therefore, to be acquainted with this obligation and be sure that his client is aware of it.

In this field of industrial relations, in other words, the lawyer cannot behave as he does in the courtroom.

Finally, lawyers with interests in the field of labor-management relations should be acquainted with the results of the National Labor-

Management Conference held in Washington in November, 1945. The participants were top labor and industry spokesmen and a fine report was put out by the U. S. Department of Labor, Division of Labor Standards in 1946, Bulletin No. 77.

PAUL ST. SURE

Lawyers have a limited role to play in collective bargaining. If they act as office lawyers, contract lawyers, or advocates, in other words, as they would in the courtroom, I do not feel that they have a proper place in this field.

One of the most difficult problems we face in bargaining is to convince the lawyers for the people we represent that what we have done is legal and workable and that it should not be written up in language other than that which the negotiators agreed upon. The problem is particularly pointed on this Coast because we are essentially a branch-house operation. Those who represent branch plants are constantly faced with the difficulty after reaching a workable agreement of selling it to lawyers who did not participate in the discussions, who had no direct relationship with the parties, and who look at the cold contract from a narrow lawyer's viewpoint. Frequently the changes they urge are perfectly proper from this viewpoint. But they overlook the fact that the negotiators used terms and phrases which they understood and do not like changes that may not be in keeping with what they agreed upon.

I do not feel, however, that lawyers should be barred from participation in collective bargaining. I think they should participate when they are willing to abandon the attitude of acting as lawyers in the narrow sense, when they are ready to enter bargaining sessions to deal with human problems and not with case or statute law. The approach to such sessions should entail knowledge of the problems at issue and respect for the opposition side of the table. In essence this means being fair, not from the social worker's point of view but from the standpoint of plain honesty.

I have found that in writing up contracts lawyers on both sides have done a considerable disservice. They have sometimes written language into agreements which seems necessary from the lawyer's position but which leads to considerable confusion during their administration. It seems to me, in fact, that the lawyer's limited function should be carried forward into the administration of contracts. The approach here should not be, what does specific language mean literally, but what was intended by the negotiators and what fairly should be the application of their language? This should be the objective even though the result may seem to run counter to the literal phrasing of the contract itself.

CHARLES P. SCULLY

The attitude the lawyer adopts is, of course, colored by the type of client he represents. Management, for example, in many instances hires an attorney for the sole purpose of carrying on negotiations. Hence the fee he receives and his continued employment depend upon the success he achieves in that field. Or perhaps the attorney may himself be an executive officer of management. In that case he comes to the table as a management representative rather than as a lawyer.

When viewed from labor's standpoint and particularly that of traditional AFL unions, however, the situation is somewhat different. Historically in those organizations representation is the result of elective action. The official of the union is elected by the members because they believe that he possesses exceptional abilities to represent them in collective bargaining. Normally the organization does not retain an attorney to speak for them in bargaining. And so the latter's role in the typical AFL union is an advisory rather than a participating one.

Assuming then that he has this limited role, his first duty is to safeguard his client with respect to the proper form in which demands are to be presented. He should not, however, interpose his judgment in lieu of that of members and decide, for example, to demand a health and welfare plan rather than an increase in wages.

When the time comes to participate in negotiations he should not be the spokesman of the group but rather should counsel and advise with respect to the legality of proposals and counterproposals. While the attorney may counsel, the final determination should be made by the representatives themselves. In formulating the language of the agreement reached by the parties it should be his objective to avoid legalistic confusing language as well as ideas he may think desirable but which were not discussed at the table. His duty is to state as simply as possible what the parties, his clients in particular, agreed upon.

The next step, and one I think normally overlooked, is that he thoroughly familiarize himself with the provisions of the contract. Counsel all too frequently indulges in "off the cuff" decisions without fully understanding the terms of the agreement. If the business agent must know his contracts to police them, how much more must the labor attorney know his contracts in order to interpret and apply them!

DEANE F. JOHNSON

This discussion is directed to the role of the lawyer in private practice engaged by his client to render legal advice with regard to collective

bargaining. We are not concerned with the industrial relations consultant or the attorney employed full time by a firm or a union.

Many times such lawyers play an important role in collective bargaining. The attorney's primary obligation is, of course, to his client and to achieve the best results for that client. The lawyer discharges that obligation best if the bargaining results in a sane and sensible agreement. However, the manner in which that is done is one which is subject to serious debate.

There are two extreme positions in this field. On the one hand, there are employers and unions who feel that lawyers are a blight upon the land and should have nothing to do with collective bargaining. Contrasted with that group are those who turn all their bargaining over to counsel. These attorneys formulate and present proposals and counterproposals, advise on the merits of economic demands, in short, run the whole show. They make decisions not only on legal matters but on issues involving the exercise of independent business judgment. My own view falls somewhere between the extremes. At best, it seems to me, the lawyer is a supporting player, supporting his clients with legal advice practically applied. He should leave the exercise of economic judgment to the client to determine. I take this compromise position because I believe that it best effectuates the purpose of the attorney and the interests of his client. The parties have the intimate knowledge of the day-to-day operating problems and should play the larger part in deciding the terms of the contract under which they are going to have to live.

There are, of course, legal problems that frequently crop up during bargaining sessions. They cannot be avoided simply because the parties do not see them or discuss them. An example is the current difficulty with respect to overtime on overtime pay. Such problems must be taken into consideration in bargaining. In addition, difficulties in the administration of contracts can be avoided by careful draftsmanship. An attorney should see to it that the contract is written in clear and unambiguous language.

Attorneys, of course, are advocates and it is sometimes difficult to restrain them. They often inject themselves unnecessarily. I think therefore that it is important for attorneys themselves to do a little soul-searching before they enter bargaining sessions.

ALEXANDER SCHULLMAN

A study of the history of labor reveals that fears exist with respect to the legal profession. This is understandable since labor was exposed to injunctions filed by lawyers and was penalized by judges, who are lawyers once removed, during the early predatory days. Workers therefore

were justifiably frightened. In the old conspiracy days a lawyer gave an interpretation to "combination" which subsequently became the criminal charge. I am inclined to believe that when Samuel Gompers made his admonition during the Buck Stove and Range Case, "God save labor from the courts," he also had in mind, "and from the lawyers." Within recent years, however, I believe that there has been a recognition by labor that lawyers can and do play a constructive role in collective bargaining.

I shall address myself to the role of the lawyer with respect to the manner in which he participates in bargaining, the equipment he must bring with him, and his obligations not only to his client but to the other side as well.

The manner in which counsel plays his role in collective bargaining is threefold. In the parlance of the motion picture industry, he can play the part of the heavy, and I do not mean from a villainous standpoint, that of the ingénue, the naïve uniniated performer, and, oftentimes, that of a mere supernumerary. The client, however, is always the director. He must determine which role the lawyer will play and it is not proper for the attorney to initiate his own part.

The equipment the lawyer must have to serve his client well cannot be limited legalistically. In negotiations, sometimes, it works out better to throw the law out the window in order to get human beings together. If the lawyer plays the principal role, he must remember that he is the conduit for his client and that he must create amicable personal relations. If he antagonizes, he has interfered with the human relationship and bitter antagonism may develop later. Sometimes it is necessary for the attorney to do all the negotiating because the group he represents is uninitiated. In other cases he merely advises because they are experienced. A lawyer who represents labor in bargaining must know the facts and the human beings involved. He should know not only the job description but also the people who fill the jobs. On occasion he must go out and actually live with the workers. He must as well know management's side, because no lawyer can prepare a case properly without preparing the other side first. He must recognize that gaining an undue advantage often has detrimental effects, and so he must be fair. No lawyer should misquote the law before laymen or he will create a bad trust.

Finally, the lawyer has an obligation. One cannot represent labor with his mind alone; he must also represent labor with his heart. And, of course, that heart cannot be limited to labor but must reflect service to all of society within our democracy.

BENEDICT S. NATHANSON

In spite of the old saw that some of my best friends are lawyers, I must take the position that at least in collective bargaining they are no friends of mine. I am assuming that the discussion is directed towards the lawyer who actually participates in bargaining sessions. I do not think that lawyers serve a useful purpose in those meetings on either side of the table. If, on the other hand, we refer to the attorney as consultant, who, for example, assists in drafting a provision after the contract has been tentatively agreed to, he may have a place.

Collective bargaining is a living, constantly expanding, dynamic thing. Since lawyers are inclined to become involved in legal exactitudes, they do not fit. In my experience they are round pegs in square holes.

By the very nature of collective bargaining lawyers have a difficult time orienting themselves. They lack the technical background, for instance, in a problem like seniority, since they do not come out of the plant. Of course, they know the words. In addition, they have legal training and know how to present an argument which sounds good. That, however, constitutes a danger.

Union committees always come out of the shops. In most organizations they are assisted by international representatives, business agents, or technical advisers who also came from the plant originally. These people all have the background and the problems, often problems of emotion, have real meaning to them. No matter how thick the contract, how inclusive the provisions, how legal the terminology, the element of human relations remains. It cannot be written into words. It has to be dealt with on a day-to-day basis by the plant people on both sides, by the committeemen who participated in the negotiations and who know what the words were intended to mean.

No lawyer can do that. In fact, the more competent the lawyer the more grave the danger. In such case the committee becomes heavily dependent upon him. Eventually, when the local union's finances can no longer endure the burden (and this is a real problem at times), they must dispense with counsel's services and are left with no one competent to take his place in dealing with management. Most unions maintain a competent staff and do not need an attorney during the bargaining. I think that he tends to remove the warmth of the human relationship that should exist and introduces in its place the mustiness of the tomes from which the legal definitions come. That is not good for labor relations.

DAVID EVANS

I wonder whether Mr. Nathanson would contend that management is as well equipped with staff people for collective bargaining as unions. My own experience has been that management is not, except in the case of large concerns or of small companies who combine into a large bargaining unit. Therein, I think, lies the reason for the fact that management has employed lawyers more frequently than unions.

Collective bargaining starts when a union becomes the representative of a group of employees for bargaining purposes either through certification or otherwise. From that point on it remains bargaining until the parties have signed the agreement. Anything beyond that, for the purposes at hand, shall not be considered collective bargaining. From this definition it follows that bargaining consists of three elements: formulation of proposals by each party; meeting together and negotiating on these proposals until they concur; and, finally, putting the agreement into words so that it can be signed.

The combined operation involves two major factors: first, a series of policy determinations at each stage and, second, the factor of expression, of writing down in reasonably intelligent language the substance of what has been agreed upon. A lawyer may perform the first if the concern for whom he is acting wants him to. Just as certainly, however, he is not acting as a lawyer while performing it; he is acting as the company itself. That function does not enter our discussion here. The other factor, I think, is really the one before us. I would be the last to suggest that lawyers have a monopoly on the ability to write things down on paper clearly. Nevertheless, I think as a matter of probability that if one does something often enough he tends to become more expert than one who is not called on to do it. Putting things on paper is a normal part of the lawyer's job. I think therefore he tends to do a little better at it than most others.

The really important issue, I think, is this: does the lawyer belong in the actual bargaining room during the negotiations? Objections to his presence have been raised by both labor and management. My inclination, on the other hand, is to take a middle ground. I am not certain that it makes much difference whether a lawyer is physically present. His advice, in any case, will be used prior to or after the conclusion of each day's negotiations. The answer depends upon the lawyer and the client. If the former can participate with restraint, injecting himself only where clarification of language is needed, I think his presence will expedite the negotiations. If he cannot, we can only hope that the client is able to carry on the negotiations alone.

ERNIE WHITE

Able attorneys become good practitioners in collective bargaining not because they are lawyers but in spite of it. I disagree that the legal profession can assume unto itself alone the functions of writing contracts, analyzing them, and determining their legal impact. We have centers of education which teach youngsters to read and write. Perhaps if laws were written by practical men instead of lawyers we could understand them and would not run afoul of them so easily. It has been stated that lawyers are useful in putting contract provisions on paper so that they can be readily understood. Our experience has been just the reverse. They do have a practical monopoly on writing clauses that no one but themselves can successfully interpret. If you read a provision once and don't understand it, you should throw it out and write another.

The collective bargaining pattern in the relationship between a company and a union develops over a period of years. It is not put together from a blueprint. It flows rather from their collective experience. The contract grows within the relationship by the cut and try method. If a series of grievances arises out of a provision, you don't need a lawyer to look at the grievance register to find out that it is giving trouble. An intelligent union will strive to remove or simplify the objectionable language.

Most industrial relations people in larger companies that I know do not need legal advice. They are as capable as attorneys of interpreting labor laws that have an impact on collective bargaining. That is their job. If they are not competent to do so, they do not belong in a position where so much is at stake.

II. ARBITRATION

The Role of Arbitration in the Collective Bargaining Process

HARRY SHULMAN

PEOPLE NOT INTIMATELY concerned with collective bargaining are likely to think of it in terms of the periodic negotiations of wage increases or other terms of collective agreements. But to the inititate, this, though highly important, is a minor part of the process. The major part deals with the daily adjustments required in the greater period of time between contract negotiations.

For collective bargaining now deals with problems that arise from the fact of large-scale employment where numerous people are required to work under direction in the performance of individual tasks that must be integrated smoothly into an efficient total operation, and when these people are free citizens in a democratic society. Workers of this character want active recognition of their dignity; they want a voice in the determination of the conditions under which they must work. To them their industrial government which affects most of their conscious hours and interests, is more immediate, more meaningful, more influential, than their civil government. Collective bargaining is the method—indigenous to private enterprise in a free society—for providing such employees, not just greater bargaining power and increased material rewards for their labor, but the sense of worth, recognition and participation without which they would react against the system and seek another.

The need is continuous. The process of satisfying it must also be continuous. The function cannot be performed by a dramatic incident once a year. To the extent that the continuous need is continuously met, a reserve is built which helps to avoid or alleviate crises.

Theoretically, and perhaps ideally, collective bargaining does not require a collective agreement. It requires merely joint consideration and participation. This could be the method employed in the adjustment of problems as they arise without a collective agreement. Mature parties who have enjoyed a long relationship which is not characterized by hostility and who share an accepted body of custom or practice can, and do, proceed in this manner. But more commonly, each side, while quite willing to reserve its own freedom of action, wishes to be assured about the future action of the other side. This desire for assurance, for

security, leads to term agreements setting forth the rules and policies which are to be in force for a stated period of the future.

The adoption of the collective agreement begins, rather than obviates, the process of daily adjustments and continuous administration. Here, as in the governmental regulation of complex affairs, successful results depend perhaps even more on the quality of the long-term administration than on the detail of the underlying legislation or agreement. And, as with the maintenance of public health, good labor relations depend not so much on the strenuous efforts made in the sporadic crises, though they are obviously important, as upon the persistent efforts at advance care and preparation to ward off crises and build health by eliminating avoidable sources of disease.

Accordingly, the grievance procedure becomes, as is often said, the heart of the collective bargaining relation.

Tempted by the analogy of our civil government, some speak of the grievance procedure as the judicial branch of industrial government. But this beguiling metaphor diverts attention from the principal thing to its incidents.

To be sure, the grievance procedure contemplates the fair ascertainment and enforcement of rights and duties under the collective agreement. But its principal function is to advance the parties' coöperation in their joint enterprise. It is to the labor factors in the enterprise what maintenance is to the machine factors. It provides the lubricant to ease friction, the advance inspection and care to avoid interruptions, and the repair when repair becomes necessary. This function is not, of course, inconsistent with the fair ascertainment of rights and duties in the collective agreement. But it is far from being equivalent or coextensive with that.

For, consider the nature of that agreement. It is not the "typical" offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; indeed, it rarely speaks of the ultimate product. It is not made by parties who seek each other out to make a bargain from scratch and then each go his own way.

The parties to a collective labor agreement start in a going enterprise with a store of amorphous methods, attitudes, fears and problems. Though cast in an adversary position, both are dependent upon their common enterprise. In a real sense, the welfare of each is a concern of the other. They are in a relationship which neither of them can terminate completely except by suicide. Whatever their disputes and whatever their methods of adjustment, they must ultimately adjust them and continue to work together.

They meet in their contract negotiations to fix the terms and conditions of their collaboration in the future. But the resulting collective agreement covers only a small part of their joint concern. It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to attempt to list in the agreement. It is similarly impractical, if not impossible, to attempt to anticipate and provide against all possible future contingencies. Yet there is usually lacking even a common understanding as to the general effect of the agreement. Doubtless the parties believe that the agreement is binding with respect to its express provisions. But what of the numerous matters of mutual interest with which the provisions do not deal? Is the employer free to take such action as he pleases? Or is he prohibited from taking any action without the prior consent of the union—or at least without prior negotiation? Is the union free to make demands with respect to such matters? To use otherwise legal methods of persuasion or coercion to secure them? Or is the collective agreement the exclusive catalog of the employees' rights; and what is the significance of past practices? Rarely does the agreement specifically answer these fundamental questions; and quite frequently the parties actually have different notions about them.

Apart from its failure to cover all contingencies, the collective agreement is necessarily uncertain in much of what it does cover. This is not due merely to the vagaries of language; nor is it due to the fact that the agreement is drafted under pressure and in haste, even after protracted negotiation; or to the fact that it is drafted by men who are not experts in the precise use of language; although these are some reasons. It is due chiefly to factors peculiar to the nature of the collective agreement.

The agreement is negotiated and drafted by representatives on both sides for acceptance by numerous people. It must be satisfactory not to one person, but to a multitude. The multitude will contain a variety of objections to different provisions. What will pass one person or group will be harped on by another. To each the whole may be acceptable except for the one detail; none would reject the agreement because of that alone. But the aggregation of the diverse objections to the different details may create the impression of total inadequacy and unacceptability. Specificity and multiplicity of detail, while desirable for allaying some doubts, may therefore be purposely avoided, in order to prevent the aggregation of diverse insignificant criticisms from becoming an effective total objection. If employer and union were each one mind, one authority, speaking with one voice, there would be no need for this sacrifice of precision. But the possibility is inevitable when the acceptance of numerous constituents is required.

Granting honest bargaining, the negotiators seek agreement. Even when they would like to provide answers for all concrete cases that might arise, and even when the concrete cases can be hypothesized, the parties may be unable to agree on the answers, particularly in the relatively short time that can be devoted to contract negotiations. Yet, precisely because general propositions do not decide concrete cases (as Justice Holmes said), the parties may well agree on the general propositions. The vagueness which to the interpreter shows no "meeting of minds" may be the very factor which made agreement possible. I am not speaking now of more or less unintended vagueness in setting down general rules without exploration of all the particulars. I am speaking rather of the purposeful vagueness which the parties embrace when they know that they cannot agree on more precise statement and prefer to take a chance on future application rather than break up in total disagreement.

Many illustrations can be cited. Negotiators can readily agree that the employer should have the power to discipline for cause. But they would probably negotiate for years without reaching agreement on all matters that should or should not constitute proper cause and what specific penalties should be appropriate in the diverse circumstances.

Negotiators can generally agree that "merit and ability" should be a factor, perhaps the paramount factor, in promotions. But they are likely to leave the agreement with quite different notions of what is meant by "merit" and by "ability" and how the factors are to be established.

I am considering a case now involving this situation: The parties' prior agreement had defined the bargaining unit and set forth a long list of classifications excluded from it. Many of the classifications were of office and clerical jobs. It contained a promise by the union that the union would not organize or aid in the organization of the excluded groups. In the negotiations for a successor contract, the union strongly insisted on the elimination of this promise—bolstered in its demand by a so-called "mandate" from its convention. The employer was strongly insistent upon retention of the promise. The parties reached an agreement which recited that the union will not organize supervisors, "employees who in the regular course of their employment utilize information confidential to the company, and other representatives of management." This is clearly different from the provision in the preceding contract. But what does it mean? The lawyers for one of the parties now argue that there was clearly no meeting of minds and that the promise therefore cannot be enforced. I think his conclusion is probably wrong. But I am inclined to agree with his premise that there was agreement only on the words and not on their meaning, if any. The parties embraced the verbal formula, to save the agreement, probably just because they

could not agree on substance. The formula enabled them to postpone final adjustment without loss of production.

Sometimes one is tempted to frown upon such purposeful vagueness as evasion or face-saving. But one might as justifiably frown upon the ducking of the head to save the face from an approaching stone.

The object of collective bargaining is not the creation of a perfectly meaningful agreement—a thing of beauty to please the eye of the most exacting legal draftsman. Its object is to promote the parties' present and future collaboration in the enterprise upon which they are dependent. Efforts at achieving that objective by in effect postponing adjustment of details is not face-saving. Moreover, in this sphere leaders and negotiators are in the open, watched both by innocent and designing eyes, vulnerable to both warranted and unwarranted attack. Even straight face-saving becomes an important interest to be ignored at the cost of cessation of operations or served at the risk of vagueness. The choice must depend on a realistic comparison of the cost and the risk, not upon a moralistic disapproval of human frailties.

The collective agreement thus incorporates a variety of attributes. In part it is a detailed statement of rules, particularized and clear; in part it is a constitution for future governance requiring all the capacity for adaptation to future needs that a constitution for government implies; in part it is a statement of good intentions and trust in the parties' ability to solve their future joint problems; in part it is a political platform, an exhortation, a code of ethics.

Such is the stuff of the grievance procedure. Its function is to make the adjustments required for the maintenance of operations during the term of the agreement within the framework of the clarities, the ambiguities, the hopes, and the fears which the agreement symbolizes.

The procedure can be tailored to meet the needs of the particular parties. It can consist of one step or seven; it can provide narrow or broad time limits; it can be simple or intricate. But the best performance of its function depends on other factors. For that best performance, the parties must recognize the importance of the function as the agency for the accommodation of fundamental human needs. They must be willing to entertain and consider seriously all complaints without narrow jurisdictional restrictions, and without the demurrer for failure to state a cause of action under the contract. They must believe that the true measure of their maturity is not the degree of their compliance with the literal contract, but rather the extent to which they are willing to understand each other's needs and generously consider means of adjustment. They must believe that the touchstone of success is a much greater value than victory in an ephemeral case.

Of course, this is highly idealized. In a few enterprises, the parties approach the ideal closely. In many more they do not even attempt it. In most they are at various stages between these extremes.

While I have not yet mentioned the word "arbitration," it should be apparent that I have been talking about it all this time. For arbitration is an integral part of grievance adjustment during the term of the collective agreement. Its character, its quality, its purpose and function are all determined by the attributes of that process.

If arbitration were merely the judicial process of awarding redress for violations of contracts, there would not be much reason for preferring it over the courts. The objections that litigation is too slow and too costly for this subject matter are not insuperable. They could be met by the sometimes proposed plan of specialized labor courts with expeditious and inexpensive procedures.

The reasons why arbitration is preferable are of a different order. Courts would inevitably develop uniformities or principles which would be applied to all enterprises. They would have to absorb the full shock of criticism that pervades this field. They would become objects of attempted manipulation like the N.L.R.B. and other governmental agencies. They would become agencies of authoritative control from above removed from the unique atmosphere of the particular enterprise.

But arbitration can be highly personalized to suit the needs and the temperaments of the parties who employ it. It can operate as an extension of their selves, as a further joint conference in their own grievance procedure. Like the other steps of that procedure it can be ever consciously directed—not merely to the redress of past wrongs—but to the maintenance and improvement of the parties' present and future collaboration. Its authority comes not from above but from their own specific consent. They can shape and reshape it. And if they are dissatisfied with the tribunal they can supplant it by their own action without the necessity of instigating a war in the political arena.

Arbitration is, then, not a single, standard process, but a range of processes that may vary with the enterprise and from case to case within the same enterprise (as I shall presently show).

Spurred on by the policies promulgated and applied by the National War Labor Board, there has been a great increase in the use of arbitration as the terminal step in the grievance procedure. The increase has been so great and so rapid that some revulsion is setting in. It seems probable that many have adopted the practice without really knowing what they were getting into or how to use it.

The most common provision is for *ad hoc* arbitration, that is, requiring that a tribunal be separately constituted for each case. An increasing

number of contracts, particularly in very large enterprises or multi-employer contracts, provide for a standing tribunal that serves for a stated term or so long as it continues to be satisfactory to both parties. And here is a differentiation of greatest moment.

For the performance of the ultimate function of the grievance procedure including arbitration as I have described it, *ad hoc* arbitration is quite inadequate. It is suitable enough, of course, for some cases—cases (of which there are a great many) which do not lie at the heart of the parties' relationship, which present unique circumstances, which are not symptomatic of any deeper trouble or pregnant with serious implications for the parties' future, which ever way the decision goes. Even here it is, of course, highly desirable that the decision be as wise and realistically just as possible. But by hypothesis the decision will not shake the relationship and will do no other harm than displease one of the parties or reflect on the arbitrator's intelligence and understanding.

It is with respect to other cases and the positive improvement of the parties' relation that *ad hoc* arbitration is inadequate. (And it is significant that the severest and most frequent criticism of arbitration comes from those whose knowledge derives from the *ad hoc* type.)

A law school colleague of mine was wont to quote the proverb: "Things are not always what they seem; skimmed milk often passes for cream." This is particularly true of labor relations. A grievance which may seem to present a highly individualized, unique issue may in fact be the symptom or clumsy expression of a widespread and deep dissatisfaction. Its deceptive garb may have been created unwittingly; or it may have been consciously so designed as a tactic for victory otherwise deemed improbable. In some cases a decision does not merely dispose of a controversy as to an alleged past wrong, but affects the future operations; it may cause more harm than good—even to the winning party.

In such cases, the *ad hoc* arbitrator is in a most unenviable position. He comes into the situation, a stranger to it and to the parties. After a relatively few hours of exaggeration and distortion by partisan advocates—euphemistically called a hearing—he is asked to render a wise, just and practical decision. He does the best he can and leaves. He does not even have the satisfaction of seeing the results of his labor.

The standing arbitrator is in a much superior position. By continuous or repeated association with them, he gets to know the parties and their problems to a degree unattainable in a single hearing, no matter how protracted; and they get to know him. If they know him and respect him, they will be less likely to think that they can fool him or attempt to do so. He can more readily get the "feel" of a situation and avoid the

pitfalls into which good intentions unchecked by knowledge might otherwise hurl him. His sources of information are not confined to the histrionics of the hearing. If he enjoys the confidence of the parties, he can make all sorts of other inquiries. He can learn who is trustworthy and who is irresponsible. He can get from private conversations franker statements of the problem and its implications. And he can more readily learn the practical place of the case in the total operation.

These are advantages which few would deny if they were not thought to be accompanied by risks. But are the risks significant? The risk of outright corruption can surely be put aside as not involved. Persons willing to resort to bribery and corruption would surely not be deterred by a prohibition of socialization. More likely they would observe all the amenities and make their nefarious deals behind the screen of strict regularity. The freedom and openness of which I speak is, indeed, itself a deterrence of corruption—if that notion can be contemplated at all with respect to a standing arbitrator selected by the parties themselves to serve as long as he is mutually satisfactory.

The risk of unconscious undue influence or reliance upon erroneous unchecked evidence is more real. But it is slight and may adequately be guarded against. An arbitrator worthy of the parties' confidence, alert to the vagaries in labor relations, and able to maintain his objectivity despite all the influences around him outside his work as arbitrator may reasonably be expected to guard against undue influence from "socialization" with the parties. And the necessity to explain and justify his decision in writing, or orally when called upon—particularly in the very process of socialization—is a sufficient assurance that he will adequately check his evidence secured *ex parte*. The justifiable fear of *ex parte* investigations in the case of governmental agencies or other independent bodies is based on considerations which do not exist in the case of a standing arbitrator selected by both parties, working with them almost daily and subject to their own control.

Apart from better decision-making, the standing umpire may make other positive contributions. If he is not restricted to contact with specific advocates or other specific representatives of the parties, he can perform a valuable, widely educational function. The process can be brought home to the subordinate personnel, to the rank and file. As a mutual friend, he may act as catalytic agent to bring the parties together for mutual undertsanding. He can act in this manner at the request of one or the other of the parties or on his own motion. When he deems it advisable, he may seek to effect adjustments by agreement without an award or by prior consent to a particular award. This may be advisable in those cases in which a decision of the particular case would not really

solve the underlying problem which gave rise to it. An example is a grievance of an employee who was laid off, which disclosed that the underlying difficulty was the lack of a specific seniority agreement. Decision of that grievance would have disposed of it, for good or ill, but would leave its source to breed more grievances and wider dissatisfaction. Upon the arbitrator's prodding the parties tackled the source; and with his aid as mediator or friend, ultimately sealed it up.

Or the case may be one in which the limitations on the arbitrator's jurisdiction are such as to prevent him from awarding the most appropriate solution. For example, an employee was discharged when it was discovered that he made a false statement in his application for employment. The discovery was made after he had been an employee for some time. It seemed quite clear that the falsification should be a proper cause for discharge. But it seemed equally clear that some period of limitation should be fixed. The arbitrator fixed such a period, but only after previously consulting the proper persons and securing their consent to it. In another case, a hot dispute arose as to the transfer of certain men. The arbitrator concluded that the company had a right to make the transfer. But he also felt that it could be accompanied by certain assurances which would be of considerable importance to the men and would not unduly burden the company. He discussed the matter with the company and upon its consent made the assurances as conditions of the award.

Or the case may be one which should not yet be decided for any of a variety of reasons; and particularly for the reason that the arbitrator is not clear in his own mind as to the proper choice to be made. Decision-making becomes progressively more difficult as the decider increasingly feels responsibility for the effects of his decision. The standing arbitrator does increasingly feel this responsibility as he lives with the parties, learns more of their problems, and recognizes the potentialities of alternate choices. Of course, in his case, as in others, doubts cannot be permitted to paralyze action and decision. But there are frequently instances in which the wiser and more practical course is to continue operations without finally settling the issue sought to be raised until there has been more time for experience. An arbitrator's award—unfortunately or otherwise—has greater rigidity than a decision by the parties. It generally must be quite specific and cannot embrace the vagueness to which the parties may resort for the purpose of reaching agreement. It normally cannot be made for a temporary and experimental period. Yet in some circumstances a temporary period for experimentation may be essential. For example, the matter of production standards, that is, the quantity of work to be required from employees and the measures which the employer may take to enforce the standards, is a highly controversial

and explosive issue. Apart from the differences as to technical factors in the setting of standards, there are the tense emotions about the stop watch and the application of the standards under the slightly varying circumstances of day-to-day production.

An erroneous decision by the parties themselves can be corrected as it is frequently experimental. But an erroneous decision by an arbitrator, made prematurely before it can be confidently felt that it is the practice to be adopted, may cause much more harm to the enterprise than a general wage increase or decrease, if erroneously made, could do. In circumstances of that kind it may be highly important for the welfare of the enterprise and both parties involved that the decision not be made even though the case as presented seems to require decision. Under those circumstances, an arbitrator, particularly a standing arbitrator (the *ad hoc* arbitrator will have greater difficulty), would be well advised to try to effect an adjustment of the particular instance without deciding the more fundamental question that the case seems to present and that one or both of the parties may, in effect, be asking to decide at the moment.

The arbitration procedure, as indicated earlier, can vary from case to case. In some cases, the issue may not be very important. It may be merely an attempt to find out whether the contract does or does not grant that which the employee is seeking, and the employee may be seeking it not because he is unhappy about it but because he believes that the contract entitles him to it. The very existence of a collective agreement tends to breed some grievances because we are all lawyers and the non-lawyers are more legalistic than those trained in the law. They read the agreement and, if it seems to provide for something they are not getting, they file a grievance. There are grievances of that kind which may be submitted to arbitration which the arbitrator can dispose of very quickly.

There are other grievances which do concern the men. In those cases it is highly desirable that the arbitration be brought home to them; that they or a number of them or their immediate representatives in the shop sit in at the hearing and see how their problem is being taken care of; that they be given the opportunity to see the arbitrator's award; that the arbitration process be made an educational device, not for the lawyers or the international representatives who know the process, but for the men in the plant, for the stewards and the subordinate personnel in management who do not know it.

It is partly for this reason that the advocates on both sides, whether lawyers or non-lawyers, should attempt to conduct the proceeding in a rational manner without quibbling and with as little heat as possible.

It is true, of course, that heat does get generated, but, to the extent that it does, it interferes with the function of the arbitration proceeding as an educational device which can do positive good apart from the decision in the particular case.

The Role of the Attorney in Arbitration

SAM KAGEL

I think it is necessary to find out where the legal profession has stood in the past in order to assay its proper role in arbitration. Historically arbitration was considered a second cousin and common law courts opposed it for the reason that it constituted competition. As a matter of fact, it is only recently in the United States and most of the states that arbitration agreements and awards have become specifically enforceable. A committee of the New York State Bar surveyed 27,000 cases in the files of the American Arbitration Association and found that in 1926 36 per cent of the parties were represented by lawyers, while in 1947 91.6 per cent involved lawyer participation. Attorneys, in addition, have taken over most of the jobs as arbitrators, in labor arbitration, for example, in 61 per cent of the cases. I point to this peculiar situation: first the lawyers did not want arbitration; now they dominate the field.

In my experience it is not significant whether the advocate or arbitrator is a lawyer. Arbitration is part of the collective bargaining process and the objective of bargaining is to arrive at an agreement.

Lawyers are primarily interested in this field because it constitutes work which they believe to be within their profession. The California Bar for some years had a committee which urged that all bargaining, including arbitration, be restricted to lawyers. Lawyers are not bashful and so they seek this work. In addition, the attorney today is a sort of medicine man, whether he wants to be or not. Clients who have lawyers on retainer have the strange notion that he knows everything about everything. Since most lawyers are not bashful, they do not deny it. The result is that attorneys are called on for advice in fields of which they have no knowledge. The field of collective bargaining, however, is a specialized field like taxation. It seems to me that too many clients put their lawyer forward when he cannot add much.

I would say that most lawyers are acceptable with respect to the mechanics. They can state an issue, prepare a case, present it, and become as nasty as the lawyer on the other side, if that is necessary. When it comes to attitudes, the necessary flexibility of bargaining, I do not think the lawyer has a monopoly. I have seen "good" lawyers do "bad" work in collective bargaining, and the reverse.

The real point at issue is not the role of the lawyer but rather, once the client decides to use one, whether he knows the field. Generally speaking, the client assumes that the attorney knows the law, but even that is not always true. If he loses the cow that is the end of the deal. But if the lawyer makes a bad bargain for the factory the client will have to live with it for the life of the contract. It seems to me that if lawyers do not know the field they should reject the work or associate themselves with experts as in other fields. The attorney himself knows whether he is qualified. If he is not, he should learn something about it and that means more than falling back upon the books, namely, experience. If lawyers are to predominate (and we have captured the field), the law schools ought to do a more rounded job. Students should learn something about the mechanics and the attitudes in collective bargaining and arbitration.

JOHN B. LAURITZEN

The answer to the question of whether there should be an attorney in arbitration cases is basically for the client to decide. In my experience there is a place for the lawyer in certain fields of arbitration. There is, however, a fundamental rule that he should observe, namely, that he forget in many circumstances that he is a lawyer. He must avoid the technical requirements and the technical training of the law.

The character of the case often determines whether a lawyer will be needed. Arbitration is certainly a semijudicial procedure. It requires the gathering of evidence, examination of witnesses, and presentation of argument before the umpire. Lawyers have been trained in this field and therefore have an advantage. But it does not mean that they have an exclusive place. Many men in industrial relations are as well equipped because they also have the human element as a result of coming up the hard way through the plant itself. On technical issues, such as reclassifications, lawyers are probably not necessary. A plant man can explain such a problem better than a lawyer.

While arbitration is semijudicial, it is not a court proceeding. There is little place for technical legal objections. In presenting a case the lawyer is often amazed at the evidence admitted, for example, newspapers and periodicals. When they are submitted he may object for the record on the ground of hearsay. The arbitrator then says: "I will give note to your objection and consider it in weighing the evidence." The lawyer does not know, however, exactly what weight the arbitrator will give to it. The lawyer, of course, cannot antagonize him, nor can he alienate the other side. An admonition to the lawyer is to lean over backwards at all times. Arbitration should be kept as informal procedurally as possible.

It is my opinion that lawyers have a role to play in cases involving interpretations and applications of contracts. This is particularly true if the arbitrator himself happens to be a lawyer, since the argument then may be based upon precedent. I would say that attorneys are not needed as a rule in contract term cases. Men trained in industrial relations are as competent. The large employer with an industrial relations staff has no need for an attorney in such cases. On the other hand, there are employers who lack these facilities for whom the lawyer can prove helpful.

When a lawyer is approached for an arbitration case he must first determine whether the case is suited to arbitration. Has collective bargaining been exhausted? And, is it a good case? Once arbitration begins there is need for a carefully drawn submission agreement, a stipulation as to the issues that will be presented. Its importance is twofold: (1) It assures the parties that they understand exactly what their differences are. Quite often in drafting they find that they are not in disagreement upon the issue they plan to arbitrate. (2) The submission agreement limits the jurisdiction of the arbitrator, a very important consideration. The lawyer's skill can often be helpful in gaining both these ends.

Then comes the key question of the choice of an arbitrator. Lawyers often find published awards helpful here. From them it is possible to determine whether the man whose name has been suggested is acceptable. No one should seek more than an honest, intelligent, and impartial man.

The next step is the preparation of the case. Here the lawyer should anticipate the other side and so prepare offensively. The emphasis, however, should be on basic factual evidence. Epithets and personalities have no part in arbitration. Do not stress rules of evidence, particularly if the other side is not represented by counsel. Witnesses should be interviewed in advance and not be met for the first time on the stand. There should be a theory for the presentation of the case, but it should be kept elastic since unanticipated developments can disrupt a rigid presentation.

MATHEW TOBRINER

Formal arbitration may be broken down into three aspects. First, it may be employed to solve an impasse between management and union in the formulation of a contract. The second is the interpretation of an existing agreement. A third and little-considered phase is the use of arbitration in the settlement of interunion rivalries, so-called jurisdictional disputes. I shall hazard a glance at each of these phases, looking at the developing field of labor relations to see which may expand, which may contract; and I shall do something a lawyer should not do: prophesy and predict.

The first type occurs chiefly during an expansionist period of unionism. During the thirties when unions were on the march there were many disputes over wages, hours, and working conditions with resultant arbitrations. Indeed, one can conceive of the War Labor Board as a kind of national arbitrator that in an expansionist period functioned to determine labor's share in a rising economy. I think two factors probably will operate to curtail this type in the future: (1) Economic conditions are no longer rising and I believe the main union drive will be to retain present wage levels and obtain "fringe" benefits. (2) Organizational drives into new territories have somewhat slackened.

What of the second? Formal grievance arbitration seems to be used in inverse proportion to the maturity of the parties to the bargaining relationship. A more mature attitude on the part of management leading to more cordial relations may mean a decrease in the use of this kind of arbitration. This operates according to a type of Gresham's Law.

Turning then to the third phase, I believe that this field for arbitration may increase. I hardly need emphasize that jurisdictional strife is a very old and tough problem. If we enter a depression it may lead to an increase in these disputes. With fewer jobs there will be a more determined effort by crafts and unions to hold onto existing jobs. Although the incidence of these disputes is exaggerated, I believe unions have committed an error to permit them at all. If unions do not settle them, there should be an alternative procedure. One, in fact, is suggested in the Administration's proposed labor relations bill, namely, arbitration. Although this is a new field there is no reason why the arbitral process cannot be applied to it. If it does develop, I hope that lawyers can be of some service in its ultimate solution.

J. STUART NEARY

It is said that there was a time when lawyers were statesmen, while today they have become hirelings. Regardless of whether this is true or not, I think that there is an important lession to be learned. The majority of the people regard lawyers as hirelings—people hired to do a given job for one of the parties.

I think, on the other hand, it is important that attorneys consider themselves members of a profession which requires a great deal more than loyalty as an employee to the client's desires, whether right or wrong. A lawyer is not engaged in an adversary proceeding to make his client's case but to present it. The cases are already made. In industrial relations a lawyer has an important job as counsel and must oftentimes have the courage to say to his client: "You are wrong." Therefore I think an attorney in arbitration must first assume the role of analyst, of adviser, of counsel.

The lawyer should understand that collective bargaining is a relationship and that the grievance procedure is not a judicial proceeding. He should realize that the parties depend upon each other and upon the continuity of the relationship. He should recognize that continuance of the relationship is more important than winning a particular dispute.

Therefore the attorney should not advise his client to set up an argument which would have the effect of asking the arbitrator to declare the agreement invalid. The dispute can be resolved by termination of the relationship in warfare, by agreement, or by agreeing to abide by the arbitrary decision of a third party. Even if the arbitrator's decision is wrong it is better to have the matter decided than to permit the grievance to become a festering sore or to have it determined by a termination of the relationship.

A basic service of the lawyer is understanding analysis to decide whether there is a dispute and whether it should go to arbitration. He must therefore be objective. It may, for example, be wise to suggest a settlement. The client may not like it and it may take courage to tell him. Nevertheless, it is incumbent upon the lawyer to do so if he is to render a real service. We do that in our profession every day.

If there is a dispute that an arbitrator ought to decide, the job is simple. The lawyer must prepare and present evidence to determine factual issues and pertinent arguments. He will also narrow the possibility for the arbitrator to make a mistake.

To the extent that the attorney employs pettifogging for the purpose of confusion he renders his client a disservice. The rules of evidence and the technicalities of the law are means of bringing light and not of spreading confusion. It has been my experience, however, that laymen "sea lawyers" are often more apt to use legalisms mistakenly. No honest well-trained lawyer would do so. I do not defend the attorneys that do it, but those who judge the legal profession by the tactics of those few should rather condemn the individual lawyer.

JOHN COOPER

The ideal solution to this problem from the union's point of view would be to send all union representatives to law college. While we have had experience in using attorneys and non-attorneys, it is my judgment that legal training alone does not qualify a person to be counsel for either party in an arbitration. What, then, are the prerequisites necessary for counsel in an arbitration involving labor? Although legal education alone is not sufficient, I believe that the attorney has a head start. His talents as a trained advocate can be employed usefully by unions provided that he has otherwise prepared himself.

I would set up the following as necessary qualifications for counsel for a union:

1. A sympathetic identity with the aims and objectives of the union he represents.
2. An intimate knowledge of the industry covered by the union's jurisdiction as well as knowledge of each job and its relationship and importance to the industry.
3. A knowledge of management problems, operating costs, operational efficiency, as well as competitive conditions.
4. Specialized training in economics and research techniques and extensive labor relations experience.

These subjects are not adequately covered in the average law course. They are, however, essential in presenting an arbitration case in such a manner that an award can be intelligently made by the arbitrator, an award that the union and management can live and work with under the contract.

We, of course, favor arbitration as a means of finally settling interpretations of the terms of short-term contracts. It is important to bear in mind in setting up a grievance machinery, however, that the disputes must be settled expeditiously and without great expense. For example, a dispute arises as to a one week's vacation with pay. It is manifestly ridiculous to expect the union to go through an expensive process of arbitration costing hundreds of dollars to collect so small a sum. It would be simpler to pay for the vacation out of the union treasury.

ROBERT W. GILBERT

By virtue of education, by reason of independence in most instances from a particular industry or labor organization, attorneys should come equipped to the field of arbitration with a natural advantage. The fact of the matter is, however, that there exists among a large body of organized labor in this country, first, a prejudice against arbitration altogether and, second, a prejudice against attorneys. In many situations lawyers do not put the best interests of the parties, the preservation of the relationship, above their own desire for self-expression. As a result there has developed a certain amount of lack of confidence.

Arbitration must not become a system for litigating questions which pose stimulating intellectual problems and, at the same time, like the flowers that bloom in the spring, have nothing to do with the case. I feel that in this field the attorney must bring to the arbitration process a sympathetic understanding and must be familiar with the industry involved. Above all, he must bring a real ability to demonstrate selflessness and to concern himself with rendering genuine service to the parties involved.

I do not think there is any pat answer to the question as to whether in a particular arbitration it is better to have representation by counsel or by line people. That question is one that can best be answered by the attorney himself. I wish to stress that it is fundamental for him honestly to advise his client as to whether or not the matter is subject to arbitration, whether it should be arbitrated as a matter of law, whether it should be arbitrated as a matter of effective labor relations, and, finally, whether the presentation should be on a formal or an informal basis, with or without legal counsel. I have had experiences where I considered it more helpful to the union consulting me to advise them that they would be better off to present their own case.

From the labor viewpoint, at least, part of the lack of confidence in attorneys stems from the fact that there is a belief on the part of many working people and union representatives that the attorney puts on his expressions merely as a matter of play-acting. They also feel that lawyers demonstrate insincerity after a battle in the arbitration session by playing golf together. Because of the long struggle for recognition many feel that this type of mutual respect, if carried too far, can result in insincerity. There have, of course, been notable examples of men who completely reversed positions. To the extent, however, that attorneys in arbitration generate an atmosphere of hostility to impress their clients with their animosity toward the other side, they sew seeds of destruction of their own usefulness.

I think that sympathetic understanding, objectivity, and a minimum of aloofness from the real interests of the parties involved are characteristics which are essential to the role of the attorney in arbitration.

THOMAS F. NEBLETT

Arbitration infers a continuing relationship. Divorce in labor relations has been proved to be thoroughly impractical. The relationship of the employer and the union representing employees is one which lives and will continue to live in a free democracy.

There are two general functions of arbitration: first, that process which prescribes a substantive relationship, which writes the agreement or provides the terms that the parties have not otherwise been able to agree upon; second, the interpretative arbitration, the grievance decision which gives meaning to the agreement, which puts meat upon the skeleton created by the agreement of the parties. I make the distinctions because the role of the lawyer differs slightly in each, although his functions in the main are the same.

The function of the lawyer is first to determine the facts, apply his counsel to his client, determine whther arbitration should be pursued

or a settlement be reached. Without entering at length into the qualifications of the attorney, my experience in arbitration has led me to believe that most lawyers are good representatives in spite of their training. In arbitration his role is the same as in any other partisan representation, namely, to present the case. It requires the art of telling a story, of persuading the arbitrator, and, perhaps, getting the other side to see his case. He must keep in mind that even if he wins it is essential to preserve the living collective relationship. I agree with Clinton Golden when he says that the best spokesmen in collective bargaining are salesmen. It might therefore be well for lawyers who enter the field to acquire some of the techniques and characteristics of salesmen.

One of the important things for the lawyer to remember in arbitration is that he is not there to apply old and clearly established rules so much as to create new ones to build the productive relationship. If bargaining is to become more useful, newer and better standards must constantly be devised. He must also bear in mind that the arbitration process is voluntary. There will be another opportunity to practice, therefore, only if the lawyer keeps the process acceptable. If it is made a disagreeable, technical obstacle course, no union or employer will want to run it again. Surely, there is an existing prejudice against lawyers in arbitration. The Raytheon Company and the AFL Electrical Workers, for example, provide in their contract that "no lawyer or legal adviser of either party may be designated as arbitrator nor be eligible to serve on any grievance committee." I believe, however, that this prejudice is breaking down.

Since arbitration is voluntary, there is no legislation, no code, no written law prescribing the role of the practitioner on the two essentials of a judicial decision: (1) objective standards for deciding a case, and (2) practice rules for presenting a case. It seems to me that the field is too elastic at this time to permit agreement on the first. Therefore I suggest that we continue to use the case by case approach in order to find our way through this rapidly expanding field. I think, however, that requirements for practice should be explored. I do not favor instituting contempt proceedings or sanctions, but I do recommend the exploration of a possible code. In that connection I call attention to the work of the National Academy of Arbitrators. They suggest that the basic standards of ethics of judges, foremost of which are honesty and impartiality, should be applied to arbitrators. The next recommendation is to partisan representatives and it stresses the need for flexibility, to avoid putting arbitration into a strait jacket, procedurally or otherwise. It would be a tragic blunder to formalize the arbitration process at the very moment when judges and lawyers are concerned with simplifying and humanizing the judicial process.

In conclusion, I call attention to a recent article by Professor W. Willard Wirtz in the *American Bar Association Journal.* He cautions that the lawyer may win his case and at the same time lose the basis for sound labor relations. The application of rigid rules, such as motions to dismiss, rules of evidence, and so on, are taboo, and he warns against the quicksands of technicality. He concludes that it may even be seriously questioned whether the basic approach of the adversary system does not place too great a strain on the continuing relationship.

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