

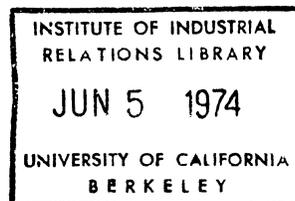
TRAINING NEUTRALS FOR DISPUTE SETTLEMENT.

A program for 1972-73 funded by the U. S. Department of Labor, Division of Public Employee Labor Relations and administered by the Institute of Industrial Relations, University of California, (Berkeley.)

Report of Program Activities and Program Progress for the  
Period of January 1, 1973 through March 31, 1973.

The third quarterly report of the program, Training Neutrals for Dispute Settlement, covers the following areas of program activity:

1. Organization of the Project
2. The Curriculum -- Classroom Training Phase
3. The Curriculum -- Counterpart Training Phase
4. Other Activities
5. Fourth Quarter Goals



1. Organization of the Project

The project continues to be organized in the same manner which was described in the second quarterly report. Adolph Koven, the Project Director, has concentrated his efforts on promoting the program and working out the details in establishing a referral mechanism. He will continue to do so. Pauline Fong, Assistant Director, continues to handle all the administrative aspects of the program. Howard Durham, Coordinator for Counterpart Training, has assumed the responsibilities for the supervision of the development of the students during their counterpart training experiences. The staff of the Institute of Industrial Relations, i.e., Don Vial, Betty Schneider,

Bruce Poyer, and Norman Amundson, and Robert Turner from the American Arbitration Association and the National Center for Dispute Settlement, have continued to contribute their efforts on behalf of this program.

## 2. The Curriculum -- Classroom Training Phase

The classroom training phase of the program was completed at the end of January. As indicated in the previous report, the January schedule was revised to concentrate more heavily on various dispute settlement techniques in labor relations cases. Consequently, the class was able to go into greater depth on topics such as arbitrability and evidence, factfinding, and mediation. We were most fortunate in being able to arrange for Dr. Robert Helsby, Chairman of the New York State Public Employment Relations Board to discuss his experience in New York. We were also fortunate in being able to schedule John Kagel, one of the architects of the new "med-arb" (mediation-arbitration) technique, to discuss his experience in the field. The class also engaged in a mock mediation session, which developed as an extension of a former experience with the mock collective bargaining game, "Settle or Strike." The impasse was mediated by Morris Sackman, from the Department of Labor, Division of Public Employee Labor Relations, and one of the authors of the game. The session was observed and evaluated by James Marshall, Director of Industrial Relations for Alameda County, and formerly a mediator with the California State Conciliation Service. The final classroom sessions were devoted to factfinding and public finance, concentrating on school and local government finance.

An evaluation of the adequacy of the curriculum design will have to await a later stage when the program trainees are conducting actual cases.

We will not really know until then how effectively we have prepared them to handle the foreseeable situations or how adequately we have trained them to respond to the unexpected events. Nevertheless, a few preliminary comments may be useful at this stage with respect to how the curriculum may be evaluated. It is important to stress that there are three basic parts to the entire curriculum: the classroom work, the counterpart training, and the mock cases. Each aspect of the curriculum serves its own purpose, but it is the overall impact of the three parts which must ultimately be evaluated for assessing the effectiveness of the program as a training program.

The classroom phase served two basic purposes: it was designed first to prepare the participants and to give them an introduction to the scope of the problems to be confronted as arbitrators or in other neutral roles. Secondly, it was designed to provide each trainee with a basic foundation of knowledge with respect to collective bargaining, laws and practices, public and private sector differences, arbitration procedures and techniques, mediation and factfinding methods and techniques, decision making and decision writing. This preparation and foundation was considered to be an essential prior step to participation and observation in actual cases with a counterpart.

The objectives of the counterpart training were several: (1) to reinforce the principles and general knowledge acquired in the classroom; (2) to illuminate these principles by understanding how they are applied to specific cases; (3) to extend the basic knowledge acquired by the addition of knowledge about specific parties, relationships, situations, industries, and problems; (4) to observe how a variety of styles of arbitration and approaches can be successful.

The third part of the curriculum, the conduct of mock arbitration hearings, has these objectives: (1) to reinforce what was learned in the classroom and from case observation; (2) to require the trainees to demonstrate their ability to use the knowledge they have acquired; (3) to expose the strengths and weaknesses of each trainees' knowledge and skills when put to actual use.

The evaluation of the curriculum should look toward the effectiveness of the interaction of these several elements and should not be limited to the individual components. Ultimately, however, the validity of each of the elements and the validity of the combination, ordering, and sequence of the elements, in relation to the characteristics of this particular group of trainees must be judged by the success which the program trainees have in conducting their own cases.

### 3. The Curriculum -- Counterpart Training Phase

The counterpart training phase began in February. A number of the leading arbitrators in the area were first contacted by Lloyd Ulman, Director of the Institute of Industrial Relations, requesting their cooperation in serving as counterparts during this phase of the training program. Each arbitrator was subsequently visited personally by Howard Durham and/or Pauline Fong. We requested them to provide a variety of training opportunities; such as (1) permitting the trainees to attend and observe the hearings and subsequently reviewing and discussing the case with the counterpart; (2) allowing the trainees to actively assist in the conduct of the case; (3) allowing the trainee to review transcripts and exhibits and to assist or participate

in the decision phase of the case.

To date, we have had excellent participation from many of the busiest arbitrators in the area; our trainees have been on cases with Sam and John Kagel, Morris Myers, William Eaton, Wayne Kenaston, as well as Adolph Koven and Howard Durham. In addition, our trainee in the Los Angeles area has been working with Leo Kotin who is very active in Southern California.

We have had a variety of forms of participation. Some of the students preferred to concentrate for certain periods of time with a single arbitrator. Others have preferred to sample a continuing variety of cases with different arbitrators. One of our students, with an excellent background and knowledge of public school problems, was assigned to a school fact finding case which extended over a period of time. Because her background was known to the parties involved in the dispute, she was accepted as a full participating member in the case. Under the supervision of arbitrator Wayne Kenaston, she has assisted in the development and writing of the recommendations. In another case, in which Coordinator Howard Durham was the arbitrator, the trainee is writing the decision subsequent to the award which has been made. A number of students have had the opportunity to observe Sam or John Kagel apply their "med-arb" technique over an extended period in a complex situation involving one of the local hospitals. Some of the public sector cases have involved public jurisdictions such as county, a redevelopment agency, regional park district, local transit district, naval installation in issues such as unit determination, discipline, or discharge.

One of the difficulties in assigning cases has been that in most instances the arbitrators do not know what the nature of the case is beforehand. Some factors which are known in advance and have been involved in case

assignments are: the degree of formality of the case, presence or absence of a reporter, presence or absence of lawyer advocates presenting the cases, and consent of the parties. Nor has the case load per student been easy to distribute because of changes in scheduling when the parties settle cases beforehand or postpone them. In addition, the case loads of the arbitrators have varied, with some having cases out of town frequently, others having different degrees of success in obtaining consent of the parties or suitable cases for observation. The students have varied with respect to their availability from time to time, depending upon the pressures of their own work responsibilities.

At the suggestion of Samuel Holmes and Victor Van Bourg, who had jointly instructed the class during the first training phase, the entire class had the extraordinary opportunity of observing a case presented by Holmes and Van Bourg, before Project Director Koven as the arbitrator, at the Institute of Industrial Relations. Through the efforts of Holmes and Van Bourg, the consent of the parties to have their case heard before the entire class was arranged. The case involved the discharge of an employee and a challenge by management on the authority of the case to be heard. At the end of the hearing and after the departure of the parties in the dispute, Messrs. Holmes and Van Bourg discussed with the class and answered questions regarding their strategies, rationale, and actions during the hearing, their responses to unexpected developments, their decisions to press certain points and not others. The arbitrator and the opposing counsel discussed their interactions with each other during the hearing, and the need for the arbitrator to be sensitive to these interactions. This remarkable opportunity occurred as the result of the voluntary efforts of two of the leading management and union attorneys

in the Bay Area whose involvement in the program from the outset has been encouraged and highly valued. We believe it is this kind of support which we have been getting which will enable us to succeed in gaining acceptance for our trainees.

Under the guidance of Howard Durham, the trainees have prepared and engaged in eight mock arbitration hearings involving five different cases. Two of these cases were developed by Durham from his own experience; two others were developed by arbitrators Wayne Kenaston and Paul Cassady from their files, with the assistance of Norman Amundson and Howard Durham. The fifth case was prepared by Norman Amundson, who has had considerable experience in using mock arbitration as a means of training union representatives.

These mock hearings have enabled the students to analyze the cases from the viewpoints of all the participants. In preparing the cases, the trainees have had to analyze the merits and weaknesses of both sides of the case, have learned how to handle and introduce evidence, to construct a case, to examine witnesses, and, in the role of arbitrator, have learned the difficulties involved in maintaining control over the proceedings, while respecting the rights of the parties. Finally, the arbitrators have had to write and defend their decisions before the critical comments of their colleagues and instructors.

(One of the additional benefits gained from preparing for these cases has been an increased power of observation by trainees at hearings with arbitrators.) The format for these cases has been as follows: On a Monday evening session, the group is briefed by the person who developed the case, given general background information about the case, the parties, circumstances, history of the parties, and how the actual hearing went. In some

instances, additional instructions or information may be given to one or other of the parties to reflect their position. Roles have been assigned to insure rotation of parts prepared and played by each trainee. The groups have four days to prepare their case, which is heard the following Saturday.

The arbitrators who prepared the case for the class attend the actual mock hearings and observe the presentation of the case. At the end of the hearing, the arbitrator discusses the case with the groups, reviews their actions, strategies, theories, arguments, methods, and compares their presentation with the way the original case was heard. Trainees are free to ask questions of the arbitrator. In addition, Coordinator Howard Durham observes all the trainees and offers his criticisms and suggestions. Project staff Norman Amundson, Pauline Fong, and frequently, Robert Turner, attend and assist at these sessions.

The trainees who serve as the arbitrators at these mock hearings then have two to three weeks to study the case and write their decision. At the subsequent Monday evening session, their decisions are reviewed, analyzed, and criticized by their colleagues, the arbitrator who prepared the case, and by Howard Durham.

In general, the mock arbitration cases have proved to be quite useful to the trainees. We have experimented with a number of procedures and can offer the following recommendations for making such mock cases useful as training devices:

1. The best cases for mock hearings are those in which the facts are reasonably clear and straightforward, for example, where there are many exhibits and documents. This prevents the role players from creating a wholly new case to which the opposing side has no option but to also invent facts. This also

prevents situations where the credibility of the witness is the key issue. Although witness credibility is often a decisive factor in an actual case, such a case does not lend itself to mock training purposes.

2. Having the arbitrator who heard the original case be present adds considerable insight to the case, since it provides a standard of reference and a comparison, and makes the cases seem to be more realistic.
3. The trainees are more responsive and more observant when they are participants in a case than when they are simply observers.
4. It is not necessary to give the transcript of the case to the participants, if sufficient facts are presented to them.
5. Trainees profit from a briefing about some of the general practices and details of industries and occupations with which they are not familiar in order to be able to develop and present the cases for the parties realistically.

One of the difficulties encountered in discouraging the role players from inventing facts that were not presented at the original hearing is that one or both parties in the original dispute may not necessarily have presented the best possible case for their side. Another theory of the case may have led to a different presentation of facts. Without having all of the possible facts that would be available in an actual situation, the mock cases cannot explore fully alternative presentations of a case. Within these constraints, however, quite a number of issues can be posed for resolution, which make the use of mock hearings effective as a training device.

The cases which have been developed and used, together with the decisions rendered by the trainee arbitrators, are enclosed with this report.

#### 4. Other Activities

##### A. Special Sessions

In addition to the class sessions, we have scheduled two special sessions

during this period of time, in order to continue to expose our trainees to the practitioners in the field and to encourage support for the program by bringing visitors in to meet the trainees. One special session featured local arbitrator William Eaton who spoke about his experience in becoming an arbitrator and some of the cases he has handled. The second special session featured William Allender, Regional Director of the American Arbitration Association, who spoke about the work of the AAA and some of the ways in which new neutrals can gain exposure and experience. In response to suggestions from the trainees and ways in which AAA, as a sponsoring agency, could support the program, Mr. Allender kindly promised to find ways to help this group achieve the needed acceptability for success.

#### B. Promotion Activities

One of the major goals set for the program for this quarter was the launching of a major promotional effort on behalf of the trainees. This effort centers around a brochure which will be sent to those persons active in labor relations and community affairs where the services of a trained neutral are most likely to be needed and used. The basic design and copywriting work on the brochure is being done by Charlotte Wax, an artist and writer, whose qualifications and experience are submitted in the enclosed resume. Photographs of the trainees and project staff were taken at the mock hearing and at the Holmes-Van Bourg hearing attended by the entire class. The general cover design, layout and rough text have been developed. Work has also been progressing on compiling the mailing list of persons and organizations to whom the brochure will be sent.

We expect the mailing to reach between 5 and 7 thousand persons and organizations in California. In addition, we have been identifying a number of key parties in the Bay Area and in the State who will be personally visited by the Project Director, program staff, or Institute staff. William Allender, Regional Director of the American Arbitration Association, and Adolph Koven, the Project Director, are planning a meeting of the key labor lawyers in the Bay Area who do much of the selection of arbitrators for their companies or unions.

Following the special class session with Allender, our trainees were invited to a major AAA conference on arbitration in the public sector, which was attended by over 100 persons. The Assistant Project Director had the opportunity to describe the training program and to introduce the trainees to the conference attendees.

The Project Director has continued to work with local media personnel to develop in depth coverage of the program and the trainees. Subsequent to the January class session at which Dr. Robert Helsby, Director of the New York State PERB, met with the trainees, Dr. Helsby has arranged to have a portion of the 1973 annual meeting of the Association of Labor Mediation Agencies devoted to the Berkeley and UCLA training projects. Director Koven will attend that session, and if funds are available, some of our students can attend as well.

### C. Referral System

Another major activity for this quarter was the work done on creating a referral mechanism for this group of trainees. Because none of the individual sponsoring agencies or the Institute of Industrial Relations can serve as the referral agency for one exclusive group of arbitrators, we

have been working on developing a referral system that would be jointly sponsored and operated by the Institute, the State Conciliation Service, the American Arbitration Association, the National Center for Dispute Settlement, the local Chapter of the Industrial Relations Research Association, and possibly the Federal Mediation and Conciliation Service.

In addition to each individual agency taking steps to qualify our trainees for their regular lists and panels, these agencies would jointly sponsor and supervise a referral service that would be devoted to this group of trainees. The Institute, the San Francisco Bay Area Chapter of IRRA, and the State Conciliation Service have agreed on this procedure. The regional offices of the American Arbitration Association and the National Center for Dispute Settlement are also amenable. We also hope to be able to gain the support of the FMCS, despite earlier differences which resulted in less than their full involvement in the program.

We have also explored the possibility of using the Campus Placement Office as the means of handling the mechanical and logistical portions of the referral process, such as the phone calls, the scheduling of cases and contacting the parties, maintenance of files, etc.

The actual details, however, on how the referral service will operate will depend ultimately on the amount of funds available for this function in the post contract period. Although the Institute has a moral commitment to help the trainees gain acceptance during the post contract period, the formal operation of an ongoing referral system tailored to the growth of individual trainees and the group as a whole will require additional support

funds.

#### D. Program Visits

During this quarter two program visits were made by Department of Labor personnel. In January, Morris Sackman visited with the project staff and reviewed with them his observations and criticisms of the program. Mr. Sackman also met with the trainees and conducted the mock mediation session described earlier in this report. In addition, Mr. Sackman made a number of suggestions to the staff on the ways in which the mock arbitration cases could be developed for training purposes. Finally, the possibility of further funding for a follow-up program was discussed.

In March, Ray Gilbert and Marc Scheiber, also from the Division of Public Employee Relations, made a program visit. They had an opportunity to observe a Monday evening briefing session for a mock hearing and to listen to the trainees discuss the arbitrators' decisions from the previous cases. The project staff met with Gilbert and Schieber to discuss the program's organization, developments to date, the work on the brochure, and the prospects for additional funding for a follow-up program. (The outline of a follow-up proposal was drafted and submitted as requested by the Department of Labor.)

#### 5. Fourth Quarter Goals

The goals for the fourth and final quarter are essentially to bring the program and activities to a successful completion. The final work of training the program participants will be undertaken in this period. The brochure will be completed and distributed and personal visits made to ensure the opportunities for case work for the trainees. The alternative

referral systems which are possible with no additional funds or with the availability of additional funds will have to be worked out and established.

Enclosures

Curriculum Calendar

Mock Arbitration Cases and Decisions

Resume of Howard Durham

Resume of Charlotte Wax