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SAM KAGEL, Chairman

Preparing and Presenting Arbitration Cases

Selected Addresses from the 1954 Conference on Arbitration & Labor Relations

INSTITUTE OF INDUSTRIAL RELATIONS
University of California · Berkeley, California
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FOREWORD

The Institute of Industrial Relations conducted a conference on Arbitration and Labor Relations at San Francisco on February 11, 1954, in collaboration with the American Arbitration Association and the University's School of Business Administration. Other cooperating groups were the California Metal Trades Association, Distributors Association of Northern California, San Francisco Labor Council, San Francisco CIO Council, Conference of Junior Bar Members and National Academy of Arbitrators.

An important part of the conference consisted of a series of addresses dealing with the arbitration of labor disputes. These addresses were given by Roland C. Davis, Maurice I. Gershenson, John B. Lauritzen, J. Noble Braden, and the present writer. Sam Kagel served as chairman for this phase of the program.

Subsequently numerous attorneys and management and union officials have requested us to make these addresses available. Believing that they will be helpful in understanding arbitration as a part of the collective bargaining system and in preparing and presenting cases in arbitration proceedings, we are glad to comply with these requests.

ARTHUR M. ROSS, Director,
Institute of Industrial Relations
University of California, Berkeley

PREPARATION AND PRESENTATION OF ARBITRATION CASES

Introduction

Sam Kagel, Attorney at Law
San Francisco

This pamphlet is a collection of speeches, made by the participants on a panel dealing with the preparation and presentation of arbitration cases. The panel discussion took place in San Francisco on February 11, 1954.

The papers contained herein are illustrative of maturing techniques in the field of arbitration. Practice and improvement of these techniques has been a continuous process.

The mere enunciation of "principles" by labor and management is not enough to fix the course of industrial relations. The techniques used in the field of collective bargaining determine which principles will be recognized or accepted in particular instances.

The presentations contained in this pamphlet are therefore important. It will be noted that the panel directed its discussions primarily to the problems of preparing and presenting arbitration cases. Arbitration is only one of the techniques used in the process of collective bargaining. That is, in appropriate instances, it is one of the methods by which differences between management and labor may be settled. To know, therefore, how to properly prepare and present an arbitration case is of the utmost importance.

The following remarks of four experts in the field constitute a valuable contribution to our knowledge of arbitration procedure.

WHAT THE ARBITRATOR NEEDS FROM THE PARTIES

Arthur M. Ross
Director of the Institute of Industrial Relations
University of California, Berkeley

Basically the arbitrator needs only two things from the parties, but he needs those two very badly. First, he must know what is expected of him. Second, he must have the evidence on which a sound decision can be based. All the procedures and formalities of arbitration are designed to give the arbitrator those basic requirements.

The arbitrator learns what is expected of him through the medium of the submission agreement. This is always the most important document in the case. The arbitrator's jurisdiction is dependent upon the submission agreement. His powers are created by it; his powers are limited by it. He is in every sense of the word a creature of the submission agreement. The most important part of the submission agreement is the stipulation of precise questions to be answered.

The submission agreement is too important to be left to a verbal understanding or hastily drawn up without reflection. An arbitrator has a right to expect and a duty to require a carefully constructed, written submission agreement. Frequently, at the outset of a hearing, the arbitrator asks, "Gentlemen, where is your submission agreement?" The parties reply, "We know what we disagree about." Sometimes the arbitrator proceeds on that basis, and discovers, when it is too late to prevent difficulties, that they don't agree on the scope of their disagreement. After a long hearing on the merits of a classification grievance, it develops that the union expects to present evidence about retroactive pay. The employer takes the position that retroactive pay is not in the picture and is not to be arbitrated. This is a most embarrassing position for all concerned.

I recall a series of about eleven grievances which I heard in the East some years ago. At the beginning of the hearing the parties assured me there was no need for a

submission agreement. When the eleven grievances had been heard the union said, "We will now present our testimony on the Jones grievance." The employer broke in heatedly, "Wait a minute! The Jones grievance isn't ready for arbitration." And they were off to the races in a discussion on whether the Jones grievance had been properly filed, had gone through the grievance procedure, had been certified for arbitration, and so on. At that point I made up my mind that a written submission agreement is essential before the merits are considered.

If the parties are uncertain how to draft a workable submission of the issues, they may secure the arbitrator's assistance at the outset of the hearing. If worst comes to worst, and they are unable to agree on a definition of the issues, they can instruct the arbitrator to perform this task.

Furthermore, the arbitrator and the parties must be sure that the statement of the issue in the submission agreement is one which will really terminate the dispute. Where the issue is stated faultily, the arbitrator might answer the question and still not settle the controversy. For example, the following statement of an issue seems logical at first blush: "Would the employer have paid double time for work performed on Sunday, February 7?" Suppose the arbitrator accepts the question. He conducts a hearing. He concludes that the employer wasn't required to pay double time, but should have paid time-and-a-half. The real issue, it develops, is whether any overtime premium was chargeable; and if so, whether it was time-and-a-half or double time.

It is fundamental that the award can't exceed the terms of reference. The arbitrator can't answer a question which wasn't submitted to him. Otherwise the award could be overturned in the courts. Therefore, if the arbitrator should decide that the employer shouldn't have paid double time, but should have paid time-and-a-half, he would exceed his jurisdiction. Doubtless this seems highly technical, but many courts would overturn such an award.

The question could have been stated: "What was the proper basis of pay for work performed on Sunday, February 7?" Or the parties might have asked, "Were the employees properly compensated for work performed on February 7; and if not, what amounts are owing under Article 7, Section 2 of the Agreement?"

An experienced arbitrator will look over the question submitted to him and if it appears to be a faulty statement of the issue, he has a responsibility to advise the parties of that fact. If it develops during the hearing that the issue was improperly submitted, he will advise the parties of that. They will doubtless wish to amend the submission agreement by joint consent, since, after all, they have an interest in securing a final determination of the issue.

Now I come to the second question. What evidence does the arbitrator need?

To answer that question you have to put yourself in the place of the arbitrator. In marshaling evidence and preparing witnesses you must ask yourself, "How will he decide this dispute? What standards or principles or criteria will he use? What do I have to show in order to make out a case before him?"

At this point I am dealing with evidence not from the standpoint of admissibility but from the standpoint of persuasiveness. Regardless of whether the arbitrator is liberal or strict on questions of admissibility, he must be persuaded of the justice of the case. A record must be built which will stand by itself.

The arbitrator's decision is based on the record. It is not based on his expert knowledge, even if he has a little. It is not based on any independent studies made on his own initiative when the hearing is concluded. It is not based upon his theories of sound human relations or good personnel administration. It is based upon the record which he receives. And if the party doesn't produce the evidence, he won't get the decision.

As a matter of fact, the submission agreement often recites that the arbitrator's decision must be based upon the record. This goes without saying, even if not specified by the parties. It is true that participants normally select an arbitrator who has some expert knowledge of industrial relations. However, their reason for doing so should not be misconceived. They don't select an expert because they want him to resort to his own knowledge as a substitute for evidence. They select him because he is qualified to evaluate the evidence which they themselves produce.

In discussing specific types of evidence a basic distinction has to be made between grievance arbitration and contract arbitration. Grievance arbitration is vastly more common, although cases dealing with new contract terms are perhaps more important individually. My colleagues on this panel -- Mr. Gershenson, Mr. Lauritzen and Mr. Davis -- will touch upon the presentation and preparation of evidence in contract arbitration--particularly wage cases--where statistical data are especially important. I am going to restrict myself to certain types of evidence which are generally of significance in grievance cases.

Even within the field of grievance arbitration, it is difficult to generalize except to state that the basic problem is to interpret and apply a collective agreement which defines the relationship between the parties and regulates the terms of employment. Much depends upon the nature and circumstances of the particular case. There are four broad types of evidence, however, which might be emphasized, not with the thought of providing an exhaustive listing but because one or more of these four types are significant in practically every grievance arbitration.

By way of introducing this topic, I might quote a paragraph from one of the books of the American Arbitration Association:

> "A rather dangerous fallacy exists concerning the importance of evidence in an arbitration proceeding. It is frequently thought by both parties and counsel that because...technical rules of evidence do not apply and a proceeding is informal, there is little need for careful preparation of a case and for the orderly assembling of proofs and for their logical presentation. This attitude presents arbitrators with one of their gravest problems, namely, to decide a case on its merits when the merits lie with a badly prepared case as against one well presented. In such instances the weight of evidence may run one way and the equities another, solely because of the inadequate presentation of the proofs by a party. Many an arbitrator has been sorely troubled by a decision he has had to make because of the inadequacy of proofs on one side or the other."

In other words, do not be fooled by the seeming informality of an arbitration proceeding. Careful preparation is no less important than in a court of law.

I said a moment ago that I would stress four kinds of evidence. First, of course, the arbitrator wants all the material facts bearing upon the specific grievance. He needs facts even more than contentions and theories. Contentions masquerading in the guise of facts are not helpful. If the parties can agree on some or all of the facts in a dispute, a joint stipulation is generally worthwhile. This narrows the factual dispute down to the point of real disagreement, and makes it unnecessary to receive evidence concerning facts as to which there is no controversy. In some cases there is no factual disagreement at all; if a proper stipulation is drawn, the parties can proceed immediately to the question of interpreting and applying their agreement in the context of the given situation. In other cases, the dispute may be entirely factual. A worker is discharged for theft of company property, for example. The union will concede that if he actually stole the property, he should have been discharged. The employer will grant that if innocent, he should be reinstated.

The second type of evidence consists of the language of the collective agreement. In examination of the agreement, attention should not be limited to those provisions which are immediately in point and bear directly upon the issue. Very often related provisions are just as important. Frequently the agreement must be read and interpreted as a whole before appropriate meaning can be assigned to the primary provisions.

If a vacation dispute is submitted to arbitration, it may be a bad mistake to confine attention to the vacation clauses alone. Let us assume that the dispute involves the question of whether a particular group of employees is eligible for one week or two weeks of vacation. Possibly vacation eligibility provisions can be clarified by reference to seniority provisions. It is wise, therefore, to study the agreement as a whole.

Where the language of an agreement is clear and unambiguous, it speaks for itself. Sometimes, however, this is not the case. A third type of evidence then becomes important: the contractual intent of the parties as indicated by the bargaining history. Just as a statute is often interpreted through reference to its legislative history, the intention of the parties to a bargaining agreement is often shown by what they said and did during the negotiating period.

Although it is often difficult to produce solid evidence on this point, it may be possible to show the arbitrator what the parties were seeking to accomplish in adopting a particular provision.

It is often instructive to the arbitrator to know that alternative language proposed by one party or the other was rejected in the course of bargaining. Perhaps the alternative language can be differentiated from the language which was finally accepted. Similarly, it may be helpful to the arbitrator to know how and why any previous agreement was changed. What did the previous agreement say on the point? What does the present agreement say? How do they differ? These points may help the arbitrator determine what the parties sought to accomplish in their bargaining.

For example, let us assume that in 1948 the parties adopted a provision calling for straight time pay for six named holidays if not worked, and double time for such holidays if worked. In 1953 an auxiliary provision was adopted at the suggestion of management, providing that the employee will not receive holiday pay unless he works the day before and the day after the holiday. Then a dispute arises. A group of employees comes to work on December 31, 1953, works two hours, and then takes off for a premature New Years Eve celebration. Management declines to give the persons involved holiday pay for January 1st. A grievance is filed, and is carried to arbitration. The union interprets the eligibility provision as requiring that some work be performed on the day before the holiday, but not necessarily the entire eight-hour shift. The employer construes the clause as requiring that the entire shift be worked.

From a grammatical or linguistic standpoint, the clause is susceptible to either interpretation. It could sensibly mean that some work be performed, or that the entire shift be worked. In presenting the grievance to an arbitrator, therefore, it would be important for the parties to indicate what they sought to accomplish when the eligibility provision was incorporated into their agreement.

The fourth type of evidence to be enumerated here is evidence of the past practice of the parties in similar circumstances. That is, how the employer and the union themselves have judged and evaluated this kind of situation in the past. Naturally the arbitrator is desirous of

preserving continuity and respecting the past decisions of the parties, other things being equal. He will therefore give consideration to past practice if it is sanctioned by the agreement, or the agreement is ambiguous, or is not specific on the particular point in dispute.

I should like to conclude by commenting on the problem of admissibility of evidence. It is well known that strict rules of evidence are not ordinarily followed in arbitration practice. The reason being that the case is not tried before a lay jury which has to be protected against improper evidence. Presumably the arbitrator is qualified to distinguish between what is relevant and what is irrelevant.

This does not mean, however, that the arbitrator will necessarily accept any and all evidence proffered to him, no matter how pointless or lacking in probative value. If the evidence is flagrantly irrelevant, the arbitrator should exclude it if for no other purpose than to prevent cluttering the record and confusing the issue.

Objection to evidence on the ground of irrelevancy has a useful function even when the objection is overruled. The arbitrator's attention is called to the possible irrelevancy; he will then take a closer look at the evidence before giving it weight. Naturally, material found to be irrelevant, with or without objection from the other side, will not be given weight in the decision.

Hearsay evidence is sometimes accepted, but does not have the weight of direct evidence. Let us assume that a company witness testifies as follows: "Mr. Jones, our vice-president, negotiated this provision. He's back in Pittsburgh now and isn't available to testify, but he told me that Article 2, Paragraph B, means such-and-so." Even if full faith and credit is given to the good intentions of the witness, this statement cannot have the same weight as direct testimony from Jones. In the first place the witness may not have heard Jones accurately. Secondly, we can't be sure under what circumstances Jones made the statement. Was he joking or was he dead serious? Was it an offhand statement or was it said with great deliberation? Thirdly, the opposing party is not permitted to cross-examine Jones on what he meant when he made the statement.

Depositions have the same weakness. In a promotion case,

perhaps the union representative will bring in a deposition signed by 37 workers, alleging that the grievant is a top-notch master craftsman and a veritable genius with the tools of the trade. Obviously this can be given very little weight as evidence of competency and cannot substitute for direct proof.

Finally, a brief comment on the awards of other arbitrators, which are often introduced as evidence. I don't see how such previous awards could ever be binding. Unlike the Federal Judicial system, arbitration does not have the hierarchy which recognizes binding precedents. Moreover, every labor contract differs. Even a faultless interpretation of one contract cannot provide a safe guide to a proper interpretation of another contract. However, arbitration awards are sometimes helpful to the arbitrator by way of showing how other experienced men have reasoned about a particular set of facts. To this extent they may have some persuasive effect, assuming that the previous cases are in point.

Before submitting other arbitration awards, however, it is necessary to make sure that the cases <u>are</u> in point. More often than not, the arbitrator finds that such awards deal with a slightly different problem and are of little assistance in solving the problem at hand. In fact, there is some danger of the party proving just the opposite of what he seeks to prove.

This has been a brief summary of what the arbitrator wants from the parties. Mr. Lauritzen and Mr. Davis will elaborate on what the parties want from the arbitrator.

THE PREPARATION OF ARBITRATION CASES

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Three questions might logically be taken into consideration before commencing preparation of an arbitration case. First, the client should ask, "Is an attorney necessary in this case?" If the case involves the construction of a contract there is good reason to engage an attorney, a person supposedly specially trained in the field of contract construction.

Second, once the client has decided that a lawyer is necessary, I would make this suggestion: if you have an arbitration case, it must be important; and if you are going into arbitration, go first class. I'm not talking about fees. I am talking about the preparation of the case. A client might say, "We shouldn't have a transcript because that will cost money," or "We don't want you to come down to the plant because that will involve traveling expenses," or "Let's not have any photostats made because that is another expense." But if it isn't possible to go into arbitration well prepared, the best advice I can give is, don't go.

Third, is arbitration really necessary? There is nothing that will take the place of an agreement reached between the parties themselves. The arbitrator can bring the parties together by making an award, but, commonly, one side will remain dissatisfied.

For example, several years ago I was called to give advice to a large association. The East Bay Labor Council was, at the time, considering a strike sanction in regard to my client. There was doubt among representatives of the association as to what course to take, whether they had a case and whether it would be wise to go to arbitration. I suggested accepting an invitation to a meeting with the Labor Council. At the meeting, I discovered that my clients were speaking a little prematurely, that they had never actually negotiated. I expressed this view at the meeting, negotiations were resumed and one hour or so later we had complete agreement on a contract.

It is of extreme importance to realize when arbitration is unnecessary. By continuing to bargain, fees and expenses can be saved and a situation can be created whereby the parties themselves have settled their own differences. If a client goes through an arbitration, knowing that he doesn't have a case, he merely puts the other side to unnecessary expense and, by doing that, undermines what should be a good personal relationship.

We can now turn to consideration of the actual preparation of a case. There are, of course, two types of arbitration. One involves interpretation of a contract, as in a grievance case. The other I call the creative type, an arbitration that leads to creation of a contract or provisions in a contract. The method of preparation in either case is similar, only requiring different emphases. It is <u>how</u> one prepares that varies.

When a case is built, each step should be received as an essential and integral part of an overall picture. If a certain step doesn't relate directly to the issue at hand, then it should be discarded. In the end, the arbiter should recieve a complete and well-rounded view of each party's case.

For this reason I usually insist upon making a visit to the plant involved. I don't think this is done enough. The plant should be seen even when the arbitration seems simple.

A case is about to come up involving a discharge. Apparently the fellows were working one morning, they got mad, threw their tools down and walked out of the plant. That is a simple situation, but still, I would like to see the physical premises. They didn't punch time cards as they went out. Was the clock available to them, or did they just pass by it as they walked out? Little elements arise that prove valuable on unanticipated matters that arise during an arbitration case. If you have a complete picture, you will be better able to prepare the fundamentals of your case. You want to understand what you are talking about. The physical description is the best way to understand.

Now let's consider the submission agreement. First of all, the minds of the parties should meet on the issue, and the issue should be carefully drawn, for it determines the limit and the area of the dispute. Occasionally when minds have not

met on exactly what the dispute is, it is possible to encourage a renewal of collective bargaining.

If you are not going to have a lawyer it is advisable to consult one at least on the matter of the submission agreement. The submission agreement, of course, limits the jurisdiction of the arbiter. I am of the school which thinks that the submission agreement should be carefully and precisely drawn, with the idea of limiting the jurisdiction of the arbiter, and preventing divergence from the case at issue.

It is also important to consider the order of proof. Many years ago when Roland Davis and I were starting out, we would argue on and on about the order of proof. Now when we go into a case and Ro is representing the union, one of us will start, and after the third surrebuttal we agree to quit. But often in an arbitration case you will find your opponent prepared to argue indefinitely. For this reason, it is well to consider the order of proof in advance.

The submission agreement should include a statement that the award is final and binding. It is not necessary under the law, but it is nice to have it in there so that you don't have to look up the law and quote the statute.

You should also in the submission agreement agree on your costs, that they be prorated, and how they will be borne. Fifty-fifty is customary, each side bearing its own costs.

And then, of course, you agree upon the arbitrator, which I will touch on later.

Now, there are times when you can't agree upon a submission agreement. The issues are so great that one side says, "This is the issue," and the other side says, "This is the issue." Of course, you should have a submission agreement prior to going into the arbitration. But if this is not possible, then it is necessary for both parties to draft what they believe to be the issues. This is the first thing to be put in the record. The arbiter will then have to determine who is right.

Regarding the choice of an arbiter, there is only one rule. You are only entitled to an honest, intelligent and experienced man, nothing more. You are not entitled to anyone who favors your side. You are not entitled to anyone who is prejudiced. All you are entitled to is one who will call the shots as he sees them after you present them. A client might say, "Well,

he used to represent management," or "He used to represent the unions." Forget it - all you want is a man up there who will call the shots. If you have a case he will decide in your favor, and if you don't, he won't. That is all you are entitled to.

The choice of the arbiter depends on the type of case. If you have a special industry case, involving the matter of engineering facilities and engineering know-how, you may want an engineer. On the matter of contract interpretation you may want a lawyer.

You dismiss an arbiter not because he is prejudiced. You dismiss him because his approach is contrary to the manner in which you present your case.

Several years ago I was engaged in an arbitration in the transit industry. The arbiter had been picked, and he seemed to me to be a very able arbiter. I went over every arbitration award relating to the transit industry for two reasons: (1) I wanted to find out the common approach to the presentation of an arbitration involving the transit industry, and (2) I wanted to find out certain things about key material. Then I wanted particularly to see whether this arbiter had ever been involved in a transit case, and lo and behold, he had.

My next job was to analyze his thinking on the approach to that transit case. I could have just read the arbitration award, but to be a little safe I wrote to the transit company and asked them to send me the transcript and all the exhibits. I read them rather carefully merely for the purpose of finding out the type of man to whom I was going to have to present my case and the type of thing with which he might be impressed.

The matter of prior awards will help in determining an arbiter. Labor Arbitration Awards have an index with reference to awards handed down. By reading these a knowledge can be gained of the feel of that arbiter and what seems to him to be important in the way of an issue. Is he a cost of living man? Is he a going-rate man? Is he a cluster man? If he is a going-rate man, what does he use, national, local?

There is one fundamental rule in preparation, and it is very fundamental. That is, be thorough and be imaginative. Thoroughness is a virtue you must have, both for the preparation of your case and also for the preparation of the case you may have to meet. You must be imaginative to help create the type

of picture you want to paint, and imaginative in attempting to meet the case that will be presented by your opponent.

You start out to resolve a theory. You weigh your facts very carefully. You must be careful in determining this theory and you want to analyze yourself and analyze your facts and analyze the possible theory of the other side.

Having resolved the theory, you have to start figuring out what you are going to fit into that theory. One thing is the matter of past practices in amending the contract. I am assuming that you have analyzed and understand fully the contract in which you are involved. Then ask, are there past practices which have amended or changed that contract? These you must study. If there are any, you must prepare them to use in your favor or to meet in your proof.

Next, there is the effect of other arbitration decisions. I am of the school which doesn't believe they have any force or effect whatsoever, and for these reasons:

Even those that may be in point I don't believe should have any force. An arbitration is an informal, human proceeding. A great deal depends upon the atmosphere in which it is presented, the man who presents it, the preparation that went into it and various other intangible matters which do not reflect in the award. It is a decision that was based upon a factual presentation of which we have no knowledge whatsoever. This is the general argument I make on the not-binding character or even non-influential character of prior arbitration decisions.

Of course, arbitration decisions involving your own clients are relevant and should be investigated and studied. You don't stop. You exhaust every possible source that might have some relevancy on the arbitration issue involved. The rules of evidence, of course, only apply generally in arbitrations. The reason you make an objection is to pinpoint the reason why the arbiter shouldn't give any weight to that particular piece of evidence.

Should you make an opening statement to the arbiter? Not necessarily. But certainly if you are going to be the affirmative party in the arbitration you should lay before the arbiter the subject of the arbitration, the physical conditions involved in the arbitration, and definitions of technical terms and

technical processes to be used. The only purpose of the opening statement is to educate the arbiter so that he will understand the presentation and the relevancy of your witnesses and your exhibits.

Should you prepare a pre-hearing brief? Well, there is argument both ways. I don't like pre-hearing briefs for one reason. Usually you will spend a great deal of time preparing a pre-hearing brief. When you get into the hearing, you will find there are a lot of things in the brief that you don't want and shouldn't have. So what I like best of all is to rely on the transcript, and present the case so that there will be a reliable transcript.

I can only highlight some of my ideas on the preparation and use of exhibits in an arbitration case. It is, of course, elementary that your exhibits should be fit and none contradictory of the other. These exhibits are some of the master strokes that you must use in the preparation of the picture you are attempting to create. When you have prepared your exhibits, analyze them carefully and be sure to plug any loopholes that may be left open.

Furthermore, in the preparation of exhibits you should be careful that you do not over-prepare. If one well-conceived exhibit will make the point, three or four are not necessary.

In the preparation of exhibits you should also anticipate the arguments of your opponent, and, if possible, have an exhibit ready which will meet such argument. For example, if you anticipate your opponent will prepare an exhibit showing high going rates in other industries, you should be prepared to meet that exhibit showing low going rates in other industries. From such exhibits you would argue if the facts substantiate your position. The best test is what the situation is in the particular industry that is the subject of the arbitration.

These exhibits you prepare must fit the story. Don't throw exhibits in just to put in an exhibit. You put in exhibits for the purpose of completing the picture. Be sure exhibits don't contradict each other. Don't over-prepare the case. Don't plug any weaknesses in exhibits. By that I mean, if a distinction is to be drawn, be sure it is a fair distinction. If it is not a fair distinction, make another exhibit to counteract the situation. If you are comparing human endeavor, it is unfair to compare a man's

efforts, when he has only been on the job a month, with one who has been on the job a year. You should have exhibits which are comparable.

Also, I like my exhibits in loose form so that as the case develops I can adjust my exhibits to the case. Quite often you may prepare exhibits which you should not use because of unanticipated developments. In other words, keep your exhibits in a flexible condition so they can be used when and if needed and can be discarded when not needed.

When you are preparing witnesses, don't just question the executive in charge of handling the arbitration. Get down to the foremen, the immediate supervisors of the people. You may find that they have a different story from the executives. When you get your witnesses, take the industrial relations director and the plant manager and all of those. But get down to bedrock too; find out how the others look at the story. Then, if you can, find those witnesses who have not been in an arbitration case and put them through your direct examination and a cross examination of the anticipated union case. Remember one rule of witnesses: you are never going to prove your case through cross examination of an adverse witness. You are going to prove your case through the preparation of your own witnesses.

As one of the other preliminaries you should study the bargaining history. That doesn't mean to just read all the contracts. It means not only reading the contracts, but understanding them and understanding why certain provisions were inserted.

Anticipate the case of the other side and prepare to meet it. You will know what the other side is thinking, because you will have gone back and studied the collective bargaining leading up to that arbitration. You will have to try to imagine and analyze what the exhibits of the other side will be -- maybe on productivity, maybe again on budgets. The other party may have up a suitcase full of budgets and say, "That's Exhibit 2." Be prepared for it.

THE USE OF STATISTICAL DATA IN ARBITRATION

Maurice I. Gershenson
Chief of the Division of Labor Statistics and Research
California Department of Industrial Relations

Statistical material can be of vital importance in arbitration. However, it has been my experience that such data are often incorrectly used. Also, many statistical presentations could be improved immeasurably by application of certain elementary principles

Although statistics are occasionally used in grievance arbitration, their greatest value is in the arbitration of contract terms. Therefore, I shall limit my remarks to use of statistics in this latter situation.

First there must be a clear statement of the issues. Unless these are well-defined, it is difficult to build a good statistical case. The proposals of both parties should be carefully analyzed. In developing the statistical material for an arbitration, it is important to collect data not only to support your own case but also to rebut that of the other side.

A "theory of the case" should be formulated in the light of the issues and the statistical exhibits prepared so that they point directly to the issues and support the theory.

Sources. It is extremely important that the persons preparing the case have a wide knowledge of sources of data. Too frequently important statistical information is overlooked to the detriment of the case.

Among the more important sources and publications are the reports of Federal and State government agencies. It is essential to know that in addition to the formal reports of some of these agencies it is possible to secure special tabulations on request. Private research agencies maintained by employer and union organizations, banks, trade associations and chambers of commerce are important sources of useful information.

Know what the data mean. Too frequently I have seen

statistics used in a manner which indicates the person presenting the data does not know what they mean.

The Consumer's Price Index is a simple example. The indexes are often presented in an arbitration to demonstrate that the cost of living in one city is higher (or lower) than in another. This is incorrect usage. The Consumer's Price Index cannot be used to measure inter-city differences in the cost of living; it can only be used to measure time-to-time changes in a particular city.

Another common error in the use of the Consumer's Price Index is to compute percentage change by subtracting one index from another. This demonstrates a lack of understanding of what an index is and, also, of how to compute percentage changes.

There has been great confusion concerning the distinction between wage rates and the statistics of average earnings, such as those published by the Bureau of Labor Statistics for the United States and by the Division of Labor Statistics, Department of Industrial Relations, for California.

In addition to misunderstandings of the different statistical series, there is confusion concerning various technical measures such as averages, interquartile range, standard deviation, etc. There is also a failure to consider comparability or lack of comparability of data.

Here is a case where an attorney's apparent ignorance of what his statistics meant adversely affected his arbitration case. As I recall it, it was some time in the period between 1936 and 1938 in a case involving bakers. The attorney for the employers brought in a time series of the average wage rate for bakers in the United States for a number of years just prior to the arbitration. The source given was the Monthly Labor Review, published by the United States Bureau of Labor Statistics. The exhibit showed an unbroken steady downward trend; the average for each year was successively smaller than that for the preceding year. The contention was made that the union's request for a wage increase should be denied because wages in this industry, as demonstrated by the exhibit, were declining.

The averages for each of the years were found to be correctly cited from the Monthly Labor Review. But what was ignored was that the average wage rate given for each year

was not comparable with that for any other year. The averages could not be strung together to form a continuous series because of this lack of comparability.

The union brought in exhibits based upon statistics from the same source, the Monthly Labor Review, showing that during the period under review all wage changes in the industry had been upward; there had not been a single decrease and that a continuous index of wage rates for this industry published by the Bureau of Labor Statistics showed conclusively that the trend was sharply upward.

The employer's exhibit, showing a downward trend in wages based upon statistics which apparently were misunderstood, must have shattered the confidence of the arbitrator in all of the other exhibits presented by that side.

Methods of compilation and analysis. A knowledge of the methods of compiling and analyzing statistical data is imperative, in addition to knowing what the figures themselves mean. A simple example is afforded by that seemingly innocent term "the average." Too frequently the parties do not know that there are several types of averages -- the mean, the median, the mode; and they may fail to consider weighted vs. unweighted averages. These errors can make a far-reaching difference in a case.

There are many methodological considerations in connection with wage data. How were the figures compiled? Were job descriptions used in the collection of the data or merely job titles? What does the "interquartile range" mean? When should it be used and when avoided?

The problem of the base period comes up all the time. I am frequently asked "What is the correct base period or starting point?" There is no such thing as a correct starting point. In an arbitration the parties will each try to establish that base period which will be most favorable to their case. Arbitrators frequently like to go back to the last settlement, but this should not preclude those preparing cases from going back of this point if a logical presentation can be made.

There are many other technical problems of compilation and analysis, but I believe the few I have cited demonstrate my general point: it is important to know how the statistics used have been compiled.

Preparation of case. Explore all possibilities and review all data which may be helpful to the case. Try various series, ratios, combinations, etc. Use only such material as is relevant to the case. Be reconciled to the preparation of more statistical material than will be used in the actual presentation.

If it is necessary to collect original data such as wage rate information, earnings, hours worked, size of family, etc., be sure to use good techniques of collection to insure the highest degree of success in obtaining the information sought. There are a great many pitfalls in the collection of data, and it is a much more technical and difficult process than is generally believed.

One important "must" in the preparation of statistical material is absolute mathematical accuracy. Check your own figures carefully, and regularly check those presented by the other side. Sometimes a bad error in one exhibit can affect the acceptability of all others.

If one column in a statistical table is based on others, be sure to indicate clearly how the data were derived. It is not enough to say "It is clear from column 3 that..." It may not be clear at all.

Always show the source of the data. This will enhance the acceptability of the statistics, particularly if government figures are used.

Presentation of statistical data. A well-prepared case can be ruined by poor presentation. Statistical exhibits should be presented so that the facts are crystal clear to the arbitrator. This means simplicity of presentation.

A table with one or two columns of figures is more effective than a solid page of statistics that may bewilder the reader. A chart with one or two lines is much better than one with a maze of trends in which the reviewer can get lost. Table and chart titles should be simple and clear.

Charts can be very effective in demonstrating trends and comparisons. Optical illusions, however, should be avoided and the opponent's exhibits reviewed carefully to detect such illusions.

Every statistical exhibit should be accompanied by a statement pointing out the important facts portrayed. Prepare legible copies and have a sufficient number for all members of the board and for the opposing side.

One word of caution: do not fudge. Don't try to put over tricky statistics. I remember a case where such an attempt failed miserably. It was a case involving furniture workers. One of the attorneys brought in an exhibit which purported to give the national average wage for each of the occupational classifications in the industry. The average for each class was considerably under the corresponding rates in San Francisco.

When the source of the data and method of compilation were questioned, it was found that:

1. The attorney collected wage rate information only from such states as Alabama, Mississippi, South Carolina, etc. There were no rates from states in the northern part of the country.

2. For each occupational classification three averages were compiled -- the arithmetic mean, the median and the mode. For the final exhibit the average which was lowest was selected and presented as the average rate for the country as a whole.

Although this is an extreme case, it demonstrates the tricky and inconsistent statistics which should be avoided.

Care should be taken in preparing and presenting statistical exhibits for rebuttal. Make very clear the specific point or points the exhibit is intended to rebut.

I have been able to touch only superficially here a few of the aspects of this technical business of preparing and presenting statistical material for arbitrations. In conclusion, I want to urge all those who may become involved in arbitration proceedings and who do not have statistical experience to seek the assistance of technicians -- persons who are familiar with statistical and accounting data and techniques. It will pay dividends.

I believe that in the period ahead there will be increasing use of arbitration in the settlement of contract terms. Let us use competent techniques and we will have good arbitrations.

THE PRESENTATION OF ARBITRATION CASES

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My able friends on the panel have almost completely covered the subject at hand. However, I will take just a few moments to present briefly some of my ideas which don't agree entirely with everything that has been said so far on the points mentioned. Perhaps if I limit myself to some of these matters of difference, I will contribute something to your thinking on this subject of arbitration and the matter of the presentation of a case before an arbitrator.

First of all, I would like to mention these matters of relevancy, admissibility and objections to evidence. I think you will find my views on this subject a little more in conformity with the way a lawyer looks at it than otherwise.

I don't entirely agree, by any means, that there should be no objections to anything that comes into an arbitration proceeding. And I don't agree that there aren't things that are irrelevant. I believe that there should be limits placed upon arbitration hearings and what goes into the record.

I am reminded of an example of the kind of abuse of the arbitration process that can and should be controlled by timely objections and intelligent handling by the arbitrator. I recall very vividly complaints made by employer attorneys in the early days of arbitration in this area. The union was accused of not presenting its entire case in the opening presentation, holding back, or "sandbagging," as the phrase is. Now, it may be that this has been done in arbitration proceedings. I personally don't think it is right. I believe that if you are preparing your case and you have an affirmative case, your full case ought to go in. And unless the evidence that you put in during rebuttal is in fact rebuttal evidence, I think it is the function of the arbitrator to listen to objections and to rule out that

kind of evidence. Clearly, in arbitration as in other fields of human relations, there should be ground rules based on fairness and respect for the rights of the other fellow.

A great deal could also be done through objections to irrelevant material. It is not my desire to formalize arbitration procedure, but I think it could be expedited and made more orderly and understandable, both to the arbitrator and the parties concerned. It has been my experience that many things go into the record of arbitration proceedings that don't properly belong. They tend to confuse the arbitrator, and they extend the proceedings so that they become more expensive and more exhausting than they should be.

All of us in this field have had experience with cases that have taken days and weeks of hearings solely because one side or both, in an excess of zeal, poured into the record a mass of detail and irrelevancy from witness after witness and document after document. While it is true that an experienced and astute arbitrator may be able to sift the wheat from all this chaff, I strongly believe that the parties are entitled to have the record protected by a little judicious "sifting" as the case proceeds. Moreover, unless such abuses are curbed, I fear that the efficacy of the arbitration process itself as an expeditious, practical and inexpensive method of determining labor disputes could be seriously injured or destroyed.

I would now like to turn to rules of evidence. No matter how they may be looked upon by laymen, these rules are, nevertheless, the product of human experience; they were originally devised for the purpose of doing those things which I think should be done in arbitration proceedings.

For instance, there was some discussion earlier by members of the panel about so-called evidence concerning what went on in the negotiations for the collective bargaining agreement - that is, what one party said to the other on a particular subject.

I happen to be very much opposed to that kind of "evidence." I have learned, just as the lawyers who devised the rules of evidence learned, that the human memory is not always reliable. We tend to forget important things that were said, and we don't remember accurately what in fact was said. That is true enough when we are objective about a matter. But when

we are partisan, when we have an obvious bias concerning the particular issue at hand, it is very easy to remember things one wants to remember and to forget those that one would rather not remember. Now, I don't say it's deliberate. But it is only natural that things that are favorable stand out in the mind, and things that are unfavorable are pushed to the back.

For these reasons an arbitrator is likely to get a very unclear picture of what happened in negotiations held several years earlier - what was said on the particular subject, who said it and how it was said. I do think in this instance that the rules of evidence apply within reason to arbitration and that they play a very important and vital part in the promotion of the proper decisions in arbitrations.

I do not mean to say that there are no situations where testimony as to prior negotiations or past conduct is not material. Collective bargaining contracts being what they are, often contain vague, uncertain and ambiguous language from which it is impossible for an arbitrator to ascertain the true intent of the parties without extrinsic aids. In such cases the legal rules of evidence permit testimony and other evidence relevant to a proper interpretation of the contract, and this, of course, should also be permitted in arbitrations. It has been my experience, however, that there is a tendency in arbitration to take the easy way out, to permit such evidence when the language is not, in fact, ambiguous. It is my sincere belief that a greater service would be done for arbitration and collective bargaining in the long run if stricter rules of contract interpretation were applied in arbitrations.

Whether you have an attorney or a labor relations man preparing the case, make sure that the facts he presents are objective, neither irrelevant nor hearsay, nor in any other category of objectionable material which might result in erroneous arbitration decisions.

I think the matter of exhibits has been covered fairly well by the previous speakers, and I agree almost entirely with all that has been said. I would like to add this, however, about exhibits in arbitrations, particularly those in wage or contract arbitrations: it should be clearly understood that the exhibits themselves are in the nature of argument. In other words, you are presenting cost of living data, comparative wage figures or statements of

arbitrators and you are presenting these things for the purpose of arguing to the arbitrator that since these things are true, then it follows that something else is true. In other words, you hope to present a logical argument in the pure sense of the word. This is not evidence in the same way that oral testimony is. I certainly have no objection to this kind of evidence, even though it is not what a judge in court might think to be evidence. It is an important part of arbitration; its proper preparation and clear presentation are very important.

I advocate that in the presentation of an exhibit, particularly when there is any question about its meaning, there should be a discussion of the exhibit as it goes in. And I advocate further that the attorney, or the representative who is putting the case in, invite questions and discussion from the other side and questions from the arbitrator. In this way the record will show--and I agree with the other speakers that there should be a transcript in all arbitrations--a thorough discussion of the meaning, the intent, the hoped-for result and the purpose of the introduction of the exhibit. This is very important in helping the arbitrator to understand the case and in promoting the point you are attempting to establish.

Obviously issues and facts should be discussed with witnesses in advance so that they understand, first, their reason for testifying and, secondly, the facts of the case and the general procedure in an arbitration proceeding. As has already been mentioned, it is just as well not to rely on cross examination. No one has ever really proved his case through an adverse witness, although that is not to say that an adverse witness hasn't sometimes inadvertently proved the case for the other side. But, in most instances, an attempt to prove a case by an adverse witness will fail.

I would like to add a few remarks about some techniques I try to follow in presentation of a case. First of all, be careful about the "housekeeping" details. There is no better way to be helpful to the arbitrator and to make a clear record than to be sure that the little things are taken care of in the beginning and as you go along. Before you start your case, make sure the formal documents, with sufficient copies for the arbitrator, the reporter and the parties, are placed in the record. By formal documents, I mean the agreement or agreements under which the arbitration is proceeding, letters or other documents establishing the

appointment of the arbitrator, the appearances of the parties and all else necessary to "get the show on the road." These are all matters about which there is ordinarily no disagreement and they can usually be handled by joint exhibits or by stipulation in the record. As Arthur Ross has indicated, it is also well at this point to enter stipulations about as many material facts as possible about which there is no disagreement, thereby aiding the arbitrator and shortening and clarifying the record. These points may seem elementary, but it is my experience that they are nevertheless often neglected.

Now one further tip as to the presentation of a case, and John Lauritzen has touched on this in discussing preparation. In every case there is what I call a "key" point--a feature which distinguishes the case from all others and makes it stand out from the "run of the mill." It is your job to find that "key" and make it work for you. You build your case around it, and then you plug it for all it's worth throughout the presentation of the case. During the hearings you devote yourself to finding different and ingenious ways of presenting and emphasizing it. Don't let go of it until you are satisfied that you have done everything humanly possible to assure that the arbitrator understands your point and is impressed with it. Test my theory for yourselves by reviewing some arbitration cases with which you have had some experience. See if you don't agree that there was in each of these cases a crucial point upon which the entire case turned. Then if you aren't convinced, show the case to an experienced advocate or arbitrator in this field. I can almost guarantee that he will find it for you.

A final thing to emphasize is that this "key" is by no means always directly involved as a major issue of the arbitration. It may seem very minor and unimportant upon first examination. Often it is not apparent at all. But it always appears in the determination of the case and the trick is to find it in advance so that it will do you some good. The proper and competent handling of this "key" usually distinguishes the experienced and successful practitioner in labor arbitration from the less qualified.

In the matter of the visits to the plant, I agree with John Lauritzen. I still remember--perhaps he has forgotten--a case in the early days when equal pay for equal work was still an issue. John and I were representing opposite sides

in the case. My client, the union, thought that women employed in certain jobs should receive the same pay as the men employed in the same jobs. We went through several days of hearings in which it was vigorously argued by John that it was impossible for these women to do the same kind of work; this was heavy work; this was a man's work, and, therefore, women could not be doing the same job.

So we went out with the arbitrator and visited one of these places of employment where men and women were working together. The very first thing we saw as we walked in the door was a big, husky woman with a hundred pound sack over her shoulder, pushing a dolly with--I don't know how many--cartons on it. From then on out there wasn't any question about the outcome of the case!

I cannot close this discussion without indicating a difference I seem to have with some of my friends on the panel. This particular difference appears to be one of emphasis rather than in basic point of view. I refer to the matter of the use and value of other arbitration awards. I readily agree that awards are not binding upon an arbitrator unless, of course, they involve the same parties and the same issue. I think, however, because of this persuasive value as precedents, I would treat awards and opinions of arbitrators generally with a little more respect than has been indicated in the discussion thus far. Actually, I believe that past arbitration awards are valuable tools for both the parties and the arbitrator in a particular case for a number of reasons, some of which have already been mentioned. For instance, in wage and contract arbitrations the awards and opinions of other arbitrators can be helpful in considering and arriving at sound and tested wage-setting principles. I think it right that principles which have stood the test of time should receive recognition, without being slavishly followed. Then also, other wage arbitration awards made within the same general period and setting can be important as indicators of current economic trends and so-called wage patterns. I am sure that most arbitrators rely on these factors, whether they are aware of it or not, and I know that such considerations are important to the parties. Therefore, I see no harm and much good in their use.

With regard to grievance, or contract interpretation, arbitration, it seems to me that other arbitration awards are just as valuable, if not more so. Other awards show

the methods and approaches used by other arbitrators to solve similar problems, as well as often expounding general arbitration principles which have proven to be sound. Also, I take the view that the persuasive value of awards as precedents should be considerable. It is true that there is no appellate system in arbitration and that all arbitrators are on an equal footing. So are judges at the various judicial levels, yet they consistently show respect for each other's decisions unless they are demonstrably unsound. The ancient doctrine of "weight of authority" is commonplace to all lawyers and is carefully considered by the courts. I see no reason why the "weight of authority" principle is not entitled to consideration in the field of arbitration.

Let me give one concrete example of what I mean. The question of subcontracting work covered by a union contract has troubled some of my clients recently. Unions, when they make a contract, traditionally feel that they are covering the work as well as the people who perform that work. Yet surprisingly few union contracts say this in so many words. The question then is, will an arbitrator prohibit the practice of subcontracting such work in the absence of a specific contractual prohibition? The answer is, if you examine available awards, that some will, but most will not for fairly sound reasons not necessary to mention here. The point is that the "weight of authority" seems to be against such a proposition. I am sure that any sensible employer representative would be quick to point this out in any arbitration on the subject. I am also convinced that any sensible arbitrator would consider this point highly persuasive, again whether he realized it or not. If this is so, then why not recognize the part that precedents play in arbitration, so that everybody knows the rules and nobody can claim surprise? I, of course, know about the holes in this argument such as the lack of availability of other awards, sketchy reporting and publishing and so on, but I maintain these are defects in mechanics, not in principle.

I have only hit a few high spots in this talk on presentation of arbitration cases, but I have attempted to fill in the gaps which remained. I believe all the important points relative to an arbitration proceeding have now been covered. What you have heard cannot be a real substitute for experience, but, perhaps, it will be of aid in future cases.

RECURRING PROBLEMS IN GRIEVANCE ARBITRATION

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This subject of arbitration, of course, is of terrific importance, because it is the answer to warfare. This is true whether it is arbitration in industrial relations, union and management relations or in the international sphere. At the very end maybe I will say a word or two about the international implication of arbitration. But my subject is grievance arbitration or recurring problems in grievance arbitration.

Now, what is arbitration? Before you can start talking about problems, you have to know what your subject is and what the definition of your process is. Arbitration is the voluntary submission of a dispute by the parties to a disinterested person for final determination. I would emphasize that it is voluntary and it is an adjudication and a final determination.

I think I should also make clear that there are two fields for arbitration. There is the arbitration of contract terms, generally known as the arbitration of interest. This field has not grown the way grievance arbitration has, but it is expanding, and in the last several years there have been any number of arbitrations on contract terms.

Of course nobody who knows the field feels that arbitration is the answer or the substitute for collective bargaining. It isn't. But where collective bargaining fails, where you cannot mediate the dispute, then certainly voluntary arbitration is a better process to use than the strike or the lockout.

We are dealing this afternoon with the arbitration of rights, those agreed-upon terms in a contract which one side or the other feels have been violated. Of course, every good collective bargaining agreement has its grievance procedure. And in 90-odd per cent of the contracts in the United States today, there are about 100,000 of them

altogether, there is a provision as the last step in the grievance procedure, or the step after the last step in the grievance procedure, for the use of arbitration.

Now, what are the recurring problems in arbitration procedure? Back in 1948 I wrote a paper on this subject for the Monthly Law Review. In 1951 I delivered a paper at Yale on the same subject. I have looked over those papers. In the last three years we have had these conferences at the universities all over the country. We have sent out questionnaires to find out what the problems are. I refer you to my paper of '48 and tell you that the same problems are being discussed today as were discussed at that time, and, of course, were discussed years before that.

First, of course, there is the problem of what kind of arbitration clause you should use. Should you use a limited clause whereby you restrict the use of arbitration to certain definite things in the contract, or should you use a wide clause and let everything be arbitrated? That of course depends upon the relationship between union and management. But history shows this: that the use of a wide arbitration clause frequently results in no arbitration at all. Because while at the beginning a great many disputes will be brought to arbitration, after a time, if the relationship improves, there will be no arbitrations.

My authority for that, if you want one, is the report on the Hickey-Freeman case which was published by the National Planning Association in the Ways to Industrial Peace pamphlet. They had I don't know how many arbitrations in the first several years of their contract, but in the last 19 years they have had no arbitrations at all. The relationship has so built up that they don't need to bring in any outsider to solve their problems; they solve their problems themselves.

So, therefore, I naturally believe that you should have a fairly wide arbitration clause. Here again it depends on whether union and management have made up their minds to get along together and to try to work out the thing on a peaceful basis, or whether there is a sort of underneath warfare. Good relations call for a wide-open clause.

Now, a question arises with regard to what kind of an arbitrator you want. Do you want a permanent arbitrator? Do you prefer to have ad hoc arbitrators? Do you want

some sort of joint board with an impartial chairman?

Here again it depends upon the labor-management relationship. Possibly you ought to have an impartial chairman, a man who will not only arbitrate, but possibly negotiate and mediate between the groups. If you have a large corporation, like Ford, Chrysler or General Motors, maybe you want a permanent arbitrator. There are arguments both ways.

Dave Cole, who spoke here last year on emergency disputes, was talking to me the other day about his recent experience at International Harvester. He succumbed to persuasion and took the impartial chairmanship there. They had had five, I think, in the previous 18 months or two years. He is disturbed over the fact that everything goes to arbitration. Everything. They don't seem to be able to get disputes settled down the line at all. Cole hopes to reach a place where he can persuade the union and the management there to stop arbitrating. He is hoping they will get to the stage where they can settle their grievances and won't need an arbitrator.

Of course, General Motors was disturbed by that same thing some years ago, but they evolved a more satisfactory process. They now screen the grievances in one area through a committee in a different area before going to arbitration. By screening through detached persons they are able to dispose of most of their grievances. Dave Alexander, their permanent arbitrator, now does probably 10 per cent of the total cases that were processed several years ago under the other arbitrators. The disinterested screening by persons in the other region shows the company when there is no reason for going ahead with a dispute.

Chrysler also has a very tight system. David Wolfe, their arbitrator, renders fewer decisions because of the screening process used in their grievance procedure.

The advantages of the permanent arbitrator may be that he is a man familiar with both sides. He knows the problems, he doesn't need to be educated and, therefore, will proceed possibly more economically than the ad hoc arbitrator. On the other hand, there are many instances where the presence of a permanent arbitrator means that far too many disputes are referred to him. The attitude is, this man gets $20,000 a year for arbitrating, so why the devil don't we make him work? Nicholas Kelly, the general counsel of Chrysler,

opposed having a permanent arbitrator because he said it meant people below would start passing the buck. He said, "The best labor relations will result if the boys down below settle their own grievances." They finally did get a permanent arbitrator but he is restricted in what he does.

The permanent arbitrator may, therefore, bring about more disputes. Also, you have a union man and a management man who both want to save face. They might know that they ought to surrender on a grievance, but they won't want to do it. If they do the labor relations man may catch the devil from the board of directors and the president and the union man may be voted out at the next election. So, they let the permanent arbitrator make the decision.

Now, I would like to go on to the ad hoc process. If you are selecting an arbitrator under the Arbitration Association system, an attempt is made to give the names of persons desirable for the particular kind of dispute. If you notice, I said, "that particular kind of dispute." If you have a straight grievance on a seniority provision, you may want a different type of arbitrator than you would want on a job evaluation or work assignment case. We try to submit the list to suit the case. You have a wide choice. You can get engineers, clergymen, lawyers, economists; you can get anything you want on that list of arbitrators, men whose experience and background presumably will give them the judgment to use in deciding the issues. That is one of the advantages of ad hoc.

Another advantage of the ad hoc process is, of course, that you only pay the man when you use him. You don't have to pay him by the year, and if you never use him, it costs you nothing. If you use him, you pay him a per diem for his services as arbitrator and you are through when he is through.

Now, what are some other problems in arbitration? One of the recurring problems is cost. You will find this cost problem continually coming up. Arbitration costs too much. Many small employers complain about this. Many unions complain. I have had large employers say to me, "Well, the trouble with arbitration is that it doesn't cost enough. If you would only quadruple the fees and get these arbitrators to charge $500 a day, then that damn union wouldn't bring so many cases to arbitration." But the cost element is disturbing for other reasons.

Now, the parties control the costs. When they complain about an arbitrator taking too many days to hear a case and render his award, frequently the parties themselves are at fault. They come in with an inadequately prepared case. They start trying to convince each other during the arbitration proceeding, instead of trying to put the evidence before the arbitrator. And then, of course, there are areas where certain people have to make speeches, not for the arbitrator, but for the audience.

But the cost of arbitration depends upon the parties themselves. If cases are adequately prepared and exhibits photostated so everybody gets a copy, time will be saved and there will be speedy hearings with less cost.

Another element in arbitration cost is the taking of stenographic notes.

You hire stenographers and they turn out six hundred, a thousand or fifteen hundred pages of testimony -- and the stenographer gets more than the arbitrator does.

Maybe a month or so ago, I was attending the annual dinner of the New York County Lawyers' Association at the Waldorf. There were about, I think, 1800 lawyers and judges at that session. One of the principal speakers was Governor Thomas Dewey. In the course of his address he said, "I look around my library and I see these volumes on cases that I have tried. I get a thrill of pride. Here are these thousands of pages of testimony that have been produced in the cases which I have tried. But, then, I just wonder whether any of it was worthwhil He went on, "These long transcripts make beautiful volumes on my library shelves, but I wonder if the courts ever read those transcripts. I have a strong feeling that we ought to consider in New York City the system used in England, where the judge on the bench makes notes of the testimony as it is being introduced, and the appeal is on the judge's memorandum, not on a stenographic transcript."

How serious the Governor was in making that suggestion I do not know, but he did make the suggestion.

Along the same line there is this to consider: At the close of the proceeding, everything is fresh in the mind of the arbitrator. He knows the appearance of his witnesses; he can visualize the faces that testified to him. Then he is asked to wait while the stenographer gets out the record and some

briefs are prepared. But, the stenographer is very busy. There is another transcript ahead of yours. You are not paying spot delivery rates, you are paying the regular rates, and therefore must wait between a week and ten days.

Down in the Carolinas they tell me it takes almost four weeks to get the stenographic record. They use the court stenographers who are busy in the court and can't get to the arbitration transcript for some time.

Then there is the ten days required to prepare a brief. And sometimes if you have a distinguished counsel you have to have a reply brief -- another week. The arbitrator finally sits down to make his decision. He reads the demand for arbitration and the submission agreement and tries to recollect the testimony. He starts digging into the briefs, and the briefs refer to page so-and-so of the testimony. He goes back and forth. Then he reads a very significant line, but can't remember who said it. He can't quite picture the individual. Then he tries to figure out how much weight he can give that testimony.

Now, I know a man in New York who has been for twenty years the chairman of the negotiating committee of the Warehousemen and Moving Men Association, the employers. They get along well with the unions and many good contracts have been worked out. He went down to Maryland to serve as an arbitrator. At the end of an exhaustive day of hearing, counsel then said, "Mr. Arbitrator, we would like to submit briefs, but I have just been talking to the stenographer and it will be four weeks before he can get the record out, and then I would like two weeks."

"Four weeks! I'll forget what these people said."

"Well, we will have it on the record."

He said, "Never mind that. I am going to decide this issue going back on the train when I know who lied and who told the truth. I can remember that if I do it right away. But six or eight weeks from now I won't."

I just throw this out to you. You can consider it in any way you please.

The next problem is something I don't think you run into in California -- the challenging of arbitrability. A demand is made for arbitration, and then somebody says, "Well, that's

not within the scope of the arbitration agreement; that shouldn't be arbitrated." So, particularly in the East, the parties go into court and have the court rule as to whether the matter is arbitrable. Of course, the dispute is still in the plant, the ill-feeling is growing, but meanwhile there is argument on the technical proposition of whether or not that particular item is within the scope of the arbitration agreement. Wouldn't it be better to take that right to the arbitrator at once and get it over with and get rid of that growing ill-feeling and animosity in the plant?

One of the big companies in the East, Scoville Corporation of Connecticut, has now in its collective bargaining agreement this sort of provision: If either party believes the dispute is not within the scope of the arbitration agreement, that question shall be submitted to the arbitrator before he hears the grievance. In that way there is a quick determination of the problem.

Scoville has something else interesting in its contract. There is a provision that after the grievance procedure is finished the Connecticut State Mediation Board is brought in to mediate at the request of either party before going to arbitration.

I want to mention one more type of arbitration. That is the tripartite board, where each side appoints one person and the two agree upon the third. Way back in, I think it was, 1923 or 1924, Harlan Stone, then Dean of the American Law School and one of the founders of the American Arbitration Association, made this rather interesting and, I think, significant statement:

> "A serious impediment to successful arbitration has been the customary method of choosing arbitrators. The usual arbitration clause calls for the appointment of one arbitrator by each side to the controversy and the selection of a third arbitrator by the first two chosen. The practical effect of this procedure is the substitution of a board of negotiation for a judge or a body acting judicially. When one resorts to arbitration he has usually exhausted the possibilities of negotiation and he desires that his controversy be judicially passed upon. The appointment of new negotiators is likely to result only in an award which is a compromise disappointing to both sides with consequent distrust of arbitration as a method of settling controversies and dissatisfaction with

its results."

I think that that is a very excellent commentary on the tripartite board. Each side has appointed a salesman who is there to try to sell the third man a bill of goods when they go into executive session. And, unfortunately, those two salesmen will frequently postpone the executive session so they can get on the telephone and advise their principals of what is going on. This is certainly a betrayal of responsibility.

I would like to discuss another phase of this arbitration process which I think is of concern to you.

President Eisenhower, in addressing the AFL convention before he was elected, made this rather significant statement:

> "Our most miserable failures with collective bargaining in the past 50 years have come about when government has abandoned the role of referee and become a participant in the contest."

And he said a few other significant things. He said, "I stand for the simple, too-long neglected 'deal of voluntary arbitration. "

When David Cole was here last year on his emergency dispute talk, he said, "Keep the government out of these things." You can keep them out of these things by having voluntary arbitration, your own process. And by having voluntary arbitration, successful voluntary arbitration, the government then has no reason to intervene. They can intervene as mediators. Carl Schedler, Whit McCoy, Cyrus Ching, John Steelman and the others in that field do a grand job of mediation. They don't attempt to impose anything on you, but if you don't successfully settle your labor problems, then government has to impose, as the War Labor Board had to do during the War.

There is one other field of arbitration, which will take a minute, and that is the international field. We feel that this process of peaceful settlement of a dispute is most important in building good will. In 1952 nationals of 48 different countries submitted international trade disputes to the American Arbitration Association. This year we dropped back to 35 different countries within our tribunal. This peaceful settlement of disputes is going on throughout the world.

As we use arbitration here in our labor-management disputes,

and in commercial and international disputes, we demonstrate the way of peaceful settlement. As a result of this we are building a very firm foundation, or at least part of the foundation, for understanding and good will and, please God, some day universal peace.