THE ARBITRATION PROCESS

(A chapter in a study now underway on the settlement of labor disputes in the United States)

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Arbitration, like mediation, involves outside intervention to aid or to supplement collective bargaining in the settlement of disputes. It is distinguished from mediation by the decisive nature of the process. Mediation assures no agreement; solutions, if achieved, result from decisions of the parties. Arbitration, on the other hand, requires the intervener to dictate the terms of a settlement which is binding on both sides. In this respect arbitration is not unlike, and is often referred to as, a judicial process. There are other elements, however, that cause it to be described as an extension of collective bargaining. Confusion in the employment of the terms "mediation" and "arbitration" stems in part from the loose terminology in the field of industrial relations and also from frequent merging of the functions in a single individual. Thus, in the garment industries impartial chairmen have traditionally acted in the role of mediators as well as arbitrators. The members of the National Defense Mediation Board in 1941, furthermore, had authority to issue public recommendations when they could not obtain an agreement, Professor George W. Taylor suggesting this as "first cousin" to arbitration.[1] The two processes are, however, clearly distinguishable.

The process may be subdivided into two distinct species: grievance arbitration and contract arbitration. The former is created by labor and management themselves as the terminal point in their grievance procedure and is a continuing function. It usually involves disputes over the interpretation and application of their agreement, alleged violations of it, and, occasionally, any controversy that arises during its life. Hence grievance arbitration is a supplement to collective bargaining. Contract arbitration, on

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1. Government Regulation of Industrial Relations (New York: Prentice-Hall, 1948), p. 103. William M. Leiserson, in remarking that there was no essential difference between this Board and the National War Labor Board, made the shrewd if somewhat inaccurate observation that, "one was a mediation board that arbitrated. The other is an arbitration board that mediates." New York Times, February 19, 1942.

the other hand, is usually employed to meet a particular situation. The arbitrator decides the terms of the contract, serving as a substitute for the bargaining process. This may be in the case of a first agreement, of the renewal of an old one, or under a wage reopening clause. Either variety may be required by law, although compulsory arbitration in this country has been confined to grievance cases on interstate railroads and airlines and to contract disputes in wartime and, in several states, in public utilities.[2]

Contract arbitration has been practiced in America since 1865, developing afterwards with the growth of unionism and the search for means to avoid work stoppages. Grievance arbitration emerged later, but has been more widely adopted. Professor Edwin E. Witte estimates that seventy percent of all labor-management agreements provide for the latter type.[3] Most industries limit their practice to grievance arbitration. A few industries, on the other hand, extensively employ contract arbitration as well, for example, street railways and full-fashioned hosiery.

Terms designating the person or persons rendering final and binding awards sometimes, but not always, signify the nature of the proceeding.[4] While the designation "arbitrator" - rarely "arbiter" - normally includes all

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2. Discussion in the present chapter is limited to voluntary arbitration. See Chapter XI for an examination of compulsory arbitration.
3. "In this country the first known instance of voluntary arbitration occurred in 1865 in a dispute involving the iron puddlers at Pittsburgh." Following the railroad strike of 1877 and throughout the rest of the century public interest in arbitration increased and seventeen states passed laws establishing boards of arbitration. The Future of Labor Arbitration - A Challenge (First Annual Meeting of the National Academy of Arbitrators, Chicago, January 16, 1948), 4, 9.
4. As expressed at a meeting of arbitrators, the variance with which parties view the process "is implicit in the range of titles conferred on the 'judge,' - 'Mr. Commissioner,' 'Mr. Examiner,' 'Your Honor,' 'Doctor,' 'Professor,' 'Mister,' or 'Hey you!.'" Report of Committee on Ethics (National Academy of Arbitrators, Washington, January 15, 1949). The titles peculiar to arbitration may also cause confusion, as in the instance when an error by Western Union caused a telegram to be delivered to an irate union official signed with the designation "Imperial Chairman" rather than "Impartial Chairman."

categories, it sometimes, when preceded by "temporary" or "ad hoc," indicates a person appointed to decide a particular dispute, or, when prefixed by "permanent," refers to a person assigned a continuing responsibility under a contract for its duration. Government-sponsored arbitration is usually under the jurisdiction of a "board," the title specifying the name of the agency, such as the National War Labor Board or the National Railroad Adjustment Board. Some states as well - Connecticut, Massachusetts, New Hampshire, Maine, and Oklahoma - have permanent "arbitration boards" responsible for appointing arbitrators when requested by both the employer and the union. These agencies may or may not themselves serve as arbitrators in specific types of disputes. A third type of "arbitration board" is that established voluntarily by employers and unions, either for an individual establishment or for an industry, usually to handle grievance cases but sometimes to consider contract disputes.

Permanent grievance arbitrators appointed by the parties under a contract are frequently referred to as "umpires," in such industries, for example, as automobiles, rubber and shipbuilding. The term "impartial chairman," in general use in the needle trades since 1910, does not refer to his responsibilities as chairman of an official body or organization, rather describing his function, which is to preside over the collective bargaining agreement and its observance by both parties. This function frequently includes informal mediation.[5]

The term "referee" is sometimes used to designate the person to whom a dispute is submitted. As the word implies, this usually signifies an action by a court or other agency in referring a case to an individual to obtain a report and findings of fact on the basis of which the appointing agency can

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5. William E. Simkin and Van Dusen Kennedy, Arbitration of Grievances (Division of Labor Standards, Bulletin No. 82, 1946), p. 5. See also Theodore W. Kheel, How to Arbitrate a Labor Dispute (New York: Prentice-Hall, 1946), pp. 9-11.

make a decision or for the referee himself to render an award. The National Railroad Adjustment Board designates the arbitrators that participate in its procedures by this title.

Functions of Arbitration

Arbitration, as noted above, contains within itself self-contradictory characteristics. Professor John T. Dunlop has observed that,

> There are two cliches on the arbitration process. Each has a measure of validity but neither by itself is an adequate description of arbitration. These statements are: (a) arbitration is an extension of collective bargaining, and (b) arbitration is a judicial process. Each statement has an important measure of truth....Voluntary arbitration as a judicial process could not long survive and yield substantially different results than the parties could bargain or force on the other side by economic power. Arbitration could not long endure, on the other hand, which simply mirrored current relative economic power without reference to the merits of the case as adjudicated by standards....Arbitration is a flexible process which is necessarily shaped by the parties. The form of arbitration adopted by the parties will significantly determine the relative proportions of 'collective bargaining' and 'judicial process' in a particular case.[6]

Hence the agreement to arbitrate usually contains some understanding, implied or explicit, on whether the procedure shall resemble a court proceeding or extended negotiations.

In this analysis, however, one must guard against an unrealistic conception of the nature of the judicial process. Although courts are often assumed to determine right and wrong on the basis of facts in relation to clearly defined standards, judges, in fact, often render decisions in accordance with their own predilections or expediency. As Mr. Justice Holmes pointed out, "the very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."[7] Judge Jerome N. Frank has carried this argument further

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6. Twin City Rapid Transit Company and Amalgamated Association of Street, Electric Railway and Motor Coach Employees, 10 LA 589.
7. The Common Law, in The Mind and Faith of Justice Holmes (Max Lerner, ed.; Boston: Little Brown, 1943), p. 54.

to justify this judicial flexibility.

> Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident; it is of immense social value....
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> The judge, at his best, is an arbitrator, a sound man who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case.[8]

Hence one may conclude that the distinction between "judicial" and "collective bargaining" arbitration in result is composed in equal part of shadow and substance.

Persons using arbitration must first determine what they want to obtain from the process. Arbitration can be successful only if there is a meeting of minds at the outset on the principles under which the proceedings are conducted. It is often suggested that the contract or the submission agreement is sufficient to bind the arbitrator in the way that the judge is bound by the law. The history of relations between the parties, the method of selecting the arbitrator, the type of procedure adopted,[9] and the appointment of a particular arbitrator, however, all have a bearing on the principles followed and guide the arbitrator in determining his conduct. Such mechanical devices as the keeping of a stenographic record, the swearing of witnesses, the use of legal rules of evidence, and the limiting of permissable argument also govern the proceedings and reveal the parties' concept of the arbitration function.

Arbitration of grievances is essentially a mutually accepted process of obtaining an authoritative interpretation of the contract without resorting

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8. Law and the Modern Mind (New York: Brentanos, 1930), pp. 6-7, 157.
9. Dunlop observed: "The choice of a single arbitrator also tends to promote the judicial features of arbitration. The choice of a three-man board, with the necessity of a majority vote to secure an award, tends relatively to emphasize the 'extension of collective bargaining' character of arbitration." Op. cit., p. 589.

to court action. Even before the Taft-Hartley Act most states empowered their courts to interpret and enforce collectively bargained agreements. The fact that this remedy was infrequently employed may have stemmed in part from unfamiliarity. More important, however, was the time-consuming nature of the process itself and especially "the complete unsuitability of orthodox legal procedures" which made both employers and unions reluctant to seek court relief.[10] The parties to labor contracts, unlike other contractors, "live together" after the judge has ruled. Hence there is the risk that the victor in the proceeding may suffer greater loss through impairment of a harmonious working relationship by the fact of having gone to court. The authors of the Labor-Management Relations Act, however, desiring to assure judicial relief, wrote into the statute a specific provision for court review of charges by either party of contract violation.[11] There is no evidence that this provision has been invoked generally by representatives of either management or labor.[12] Thus, arbitration has supplanted litigation in the settlement of questions of interpretation or application of contracts. It assures continuous operations during the life of an agreement, disposing of grievances which might have a disrupting effect in an expeditious and equitable manner. This is particularly true in those industries where the system is well established, where both management and labor have developed a mutual understanding of and respect for the process.

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10. Jesse Freidin, "The Public Interest in Labor Dispute Settlement," Law and Contemporary Problems, XII (Spring 1947), 379-80.
11. Sec. 301(a) provides that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Public Law 101, 80th Congress.
12. There are no available statistics on this point. Experience under similar state statutes, however, is conclusive. C. M. Updegraff and W. P. McCoy note that they "are practically never used in labor arbitrations." Arbitration of Labor Disputes (New York: Commerce Clearing House, 1946), p. 125.

Arbitration has also performed a notable service in avoiding strikes and lockouts in several industries where it has been widely employed in contract disputes. Even in those states without laws requiring arbitration in public utility industries, the parties have frequently accepted it to avoid an interruption of vital community services. The Amalgamated Association of Street, Electric Railway and Motor Coach Employees, the dominant union in the local transit industry, refuses to authorize a strike under most of its contracts unless the employer has rejected its proposal to submit the dispute to final and binding arbitration. Arbitration and the related function of fact-finding have proved successful in preventing strikes in the railroad industry.[13] Even in some industries which have a much less immediate effect on the public health and welfare contract arbitration has virtually replaced economic action as a means of dispute settlement. Textiles and the garment trades have been notable in this respect. Each year when contracts expire in these industries, employers and unions either reach agreement unaided or submit their differences to arbitration with little or no publicity.

In some contract disputes, as well as in a large number of grievance cases, the arbitrator's principal function is to permit one or both disputants to "save face."[14] Even if both parties discount the final decision in advance, they may find it expedient for internal political or other reasons to have the arbitrator order a course of action rather than to reach a settlement by themselves. This might occur, for example, in a case involving the discharge of an employee. Management, on the one hand, might feel it necessary in principle

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13. See Chapter V.
14. With his customary humor and sagacity Professor Harry Shulman referred to this element in the following manner: "Each side expressed surprise at the position taken by the other at the hearing and each states its belief that the submission was in large part a matter of face saving for the other. The inference is tempting that, while the parties disagree as to its identity, they were in accord that some face needed saving and that the Umpire's face was expendable for that purpose." Opinions of the Umpire, Ford Motor Co. and UAW, CIO, March 8, 1948, Case No. 5202.

to uphold the foreman's action in discharging a worker rather than agree to an equitable settlement by transferring the worker to another job. It might be feasible, on the other hand, for the employer to accept the decision of an arbitrator that the foreman improperly discharged the employee. Similarly, unions may find it impractical if not politically impossible to agree that a worker is properly discharged even though the merits of the case are clear.[15] In such situations the arbitrator is expected to make unpopular decisions. Some authorities, unlike Shulman, feel it a misuse of arbitration for either party to submit a case that does not involve a bona fide dispute in order to transfer the burden of decision from themselves to the arbitrator. Whatever the merits of this opinion, the practice is common wherever arbitration is used.

Finally, should the arbitrator not only render an award in terms of established standards but also take into consideration the effects of his decision on the continuing relationships between the parties? Assume, for example, a discharge case with contract equities on both sides. The worker, however, has alienated the employer and his fellow-employees, poisoning the whole relationship. Should the arbitrator permit the latter factor to influence his judgment? The dual responsibility of the impartial chairman is clear, but not so that of the ad hoc arbitrator. Proponents of strictly judicial arbitration argue that he should not allow such questions to color his award except insofar as they derive from the language of the contract or submission agreement. As will be shown in the discussion which follows, equally reputable authorities with much force urge a broader view of the responsibilities of the arbitrator.

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15. The "saving face" function, of course, extends as well to contract arbitration. Thomas Kennedy states that the impartial chairmanship in the hosiery industry "provided both parties with a 'whipping-boy' to whom they could shift some of the onus of adjustments necessitated by the general wage cuts, which both parties recognized as inevitable." Effective Labor Arbitration (Philadelphia: Pennsylvania Press, 1948), p. 25.

Mediation in Arbitration

One of the most controverted questions on the arbitration process is whether the arbitrator should attempt to reconcile the differences between the parties rather than render an award, a problem with several facets. Should the arbitrator prior to hearing attempt to perfect the submission agreement by discussions with the parties if he feels that it is deficient? Should the mechanics of the hearing be arranged to encourage informality or the atmosphere of a court proceeding? Should the arbitrator bind himself with the strict language of the contract even if it leads to obviously impractical results? May he hold informal conferences with the parties to feel out the flexibility in their positions or refer the issue back to them for further negotiations? Should he be permitted to look outside of the formal record for information before making his award? May he discuss his decision with the parties separately after arriving at a decision but before rendering the award? Answers to these and similar questions reveal a general attitude toward the arbitration process. Since arbitration involves both judicial and collective bargaining elements, the answers can be determined only in a particular context. In submitting a dispute to arbitration and in establishing procedures employer and union must decide upon the principles they wish to follow. This, in turn, determines the relative importance of the judicial as against the bargaining factors in the procedures they adopt. Often, however, they reach a decision by chance rather than as a conscious choice.

The American Arbitration Association is the most influential exponent of strict construction in labor arbitration. J. Noble Braden, its Tribunal Vice-President, has said, "the American Arbitration Association has from its inception been the strongest advocate of the development of arbitration in all fields - a judicial process. Its publications...present almost

incontestable evidence for arbitration as a judicial process."[16] Senator Wayne Morse, himself an outstanding arbitrator, has stanchly advocated this viewpoint. "The arbitrator sits as a private judge, called upon to determine the legal rights and economic interests of the parties, as those rights and interests are proved by the records made by the parties themselves. The principle of compromise has absolutely no place in arbitration hearings."[17]

A number of prominent arbitrators, lawyers and economists, on the other hand, urge a more flexible procedure in labor arbitration. Shulman, for example, takes this position in the following language:

> Unlike litigants in a court, the parties in a collective labor agreement must continue to live with each other both during the dispute and thereafter. While they are antagonists in some respects, they are also participants in a joint enterprise with mutual problems and interests. The smooth and successful operation of the enterprise is important to the welfare of both....A labor dispute submitted to arbitration is a mutual problem which affects the future relations of the parties and the smooth operation of their enterprise. The objective of the parties, notwithstanding their contention in advocacy, must be, not to win the immediate contentions, but to achieve the best solution of the problem under the circumstances. An apparent victory, if it does not achieve such a solution, may boomerang into an actual defeat. An award which does not solve the problem and with which the parties must nevertheless live, may become an additional irritant rather than a cure.[18]

In a survey of the opinions of arbitrators, most of whom were lawyers, Professor Lois MacDonald found that a majority looked with some concern on a

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16. "Problems in Labor Arbitration," The Missouri Law Review, XIII (April 1948), 149. The AAA "Code of Ethics," subtitled "Some Basic Principles of Right Conduct," provides: "The office is of a judicial nature, for the Arbitrator is chosen to determine the respective claims of the parties by making a just and final award. In the performance of his duties, the Arbitrator remains independent and impartial, acts within the powers bestowed upon him, is responsible for the conduct of the proceeding, offers a fair hearing and receives evidence - all acts of high judicial importance." The Code goes on to say that the Arbitrator should not "consider it any reflection upon his office" if during the course of the proceeding the parties arrive at a settlement of their differences. "His only responsibility is to avoid having any personal part in arranging a settlement, for he is a judge and not a compromiser." The Arbitration Journal, I (Sumner 1946), 1-2.
17. "The Scope of Arbitration in Labor Disputes," Commonwealth Review (March 1941), 6. See also Harold W. Davey, "Hazards in Labor Arbitration," Industrial and Labor Relations Review, I (April 1948), 393.
18. Opinions of the Umpire, op. cit., preface.

strictly legal approach. She reported that "it is felt /by arbitrators/ that in most instances lawyers are too legalistic in their thinking and tend to overlook the spirit of the agreement and the dynamics of labor relations."[19]

The position of the American Arbitration Association fails to cover all types of situations or to take into consideration the realities of many disputes. The failing is more serious in contract arbitration than in grievance arbitration. In the former, since there are no external standards aside from those imposed by the arbitrator, the parties themselves must resolve the issue in preparing a submission agreement, in determining the procedures, and in selecting an arbitrator. In grievance arbitration, by contrast, the language of the contract and, in many instances, precedents established by previous awards under the same agreement limit his discretion. Even in such situations, however, there are often compelling reasons for the arbitrator to guide himself by the bargaining realities as well as by contract limitations. Wirtz, for example, urges

> making the contract perhaps only part of the background of the private administrative procedure rather than permitting it to be the exclusively controlling consideration. If the parties can find a mutually satisfactory basis for realizing a particular problem, it would be obviously unfortunate if anything in the contract should be considered a bar to settlement on that basis....
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> /The contract/ approach is, or may be in a good many cases, a very serious mistake. It means deciding a case in what is virtually a vacuum. It is not the way that the parties themselves would settle the problem if it could be done by negotiation and bargaining.[20]

In those industries where the impartial chairman handles all differences arising under the agreement he clearly has a responsibility going beyond the judicial interpretation of contract language. That this is the intent of

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19. "The Selection and Tenure of Arbitrators in Labor Disputes," Proceedings, New York University First Annual Conference on Labor, 1948, 180. See also Herman A. Gray, ibid., 199; W. Willard Wirtz, "The Administration of Collective Bargaining Agreements," New York State School of Industrial and Labor Relations (No. 61, mimeo.), pp. 6, 12; Simkin and Kennedy, op. cit., p. 13; Neil W. Chamberlain, "Collective Bargaining and the Concept of Contract," Columbia Law Review, XLVIII (September 1948), 840.
20. Loc. cit., pp. 6, 12.

the parties is shown by the history of these procedures in the garment trades. They stem from the famous "Protocol of Peace," in the formation and administration of which Mr. Justice Louis D. Brandeis participated. Article XVII of this Protocol, signed by the Cloak, Suit and Shirt Manufacturers' Protective Association and locals of the International Ladies Garment Workers Union on September 2, 1910, read:

> In the event of any dispute arising between the manufacturers and the unions, or between any members of the manufacturers and any members of the unions, there shall be no strike or lockout concerning such matters in controversy until full opportunity shall have been given for the submission of such matters to said Board of Arbitration, and in the event of a determination of said controversies by said Board of Arbitration, only in the event of a failure to accede to the determination of said Board.[21]

This document, in spite of vicissitudes, laid the groundwork for industrial peace in the garment trades. As Donald B. Robinson has said, the needle trades "mothered the conception" of impartial chairmen with intimate familiarity with the problems of the industry who could assure the fair and prompt adjustment of differences.[22]

The essence of this arrangement is that the chairman "is to preside over the collective bargaining agreement and its observance by both parties."[23] This function enables him to slip out of the robes of the judge into the garb of the mediator where that appears advisable.[24] This combination works to

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21. Julius Henry Cohen, Law and Order in Industry (New York: Macmillan, 1916), p. 247.
22. Spotlight on a Union (New York: Dial, 1948), p. 234. While it was not until the 1940s that management and labor adapted these procedures to other industries, persons familiar with impartial chairmanship arrangements have long felt that their experience could be widely utilized. Isaac Siegmeister, for example, the chairman of the millinery industry, has said that, "permanent impartial machinery will work in any field. I can't imagine any employer-employee relationship where an impartial chairman cannot serve a great purpose to the benefit of each side." Ibid., p. 240.
23. Simkin and Kennedy, op. cit., p. 5.
24. Kennedy reports: "In the full-fashioned hosiery industry, the Impartial Chairman has always acted as conciliator and mediator as well as arbitrator." He recalls that while this dual function has been criticized, Sidney and Beatrice Webb, after a study of labor arbitration in Great Britain, concluded that the success of the process was "far more due to these acts of conciliation than to any infallibility in...awards." Op. cit., p. 57.

the satisfaction of all concerned where permanent machinery exists and both sides develop confidence in the integrity and ability of the arbitrator as well as in the efficacy of the procedure.

The situation may differ, however, where temporary arbitrators make decisions in individual disputes. Unless the parties specifically agree to the contrary, the ad hoc arbitrator is under pressure to follow the language of the contract, to base his award solely on the evidence presented, and to disregard pragmatic solutions. In this manner the parties to an agreement are assured of its consistent application, permitting them to plan operations with some measure of security. They can thereby hedge against far-reaching effects of an arbitrator's bad judgment if he substitutes his own views for those they expressly agreed to in signing the contract. This represents one of the principal limitations of ad hoc arbitration. Even in such arrangements, however, he may and often should explore the prospect of adjustment, since, as Taylor has noted, "mediation in arbitration should not be dismissed as a possibility unless a contrary desire of one of the two parties to the dispute is explicitly expressed."[25]

The full benefits of arbitration flow only from a broad gauge conception of the process of which mediation is an integral element. A narrow legalistic approach inevitably produces restricted results. As Taylor has said,

> The view that an arbitrator should decide every case without any attempt at mediation has two essential defects. It embodies some part of the fatalistic idea that labor and management differences are irreconcilable. In the second place, the parties know more about their affairs than any outsider. If the arbitrator can be a catalytic agent to bring about a meeting of minds, the strengths of all parties will be best utilized.[26]

It should not go unnoted that one of the reasons for the objection to mediation is a misunderstanding of the mediation process. Arbitrators are

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25. Op. cit., p. 137, n. 6.
26. Ibid., p. 137, n. 6.

commended for "calling them as they see them" and excoriated for "splitting the difference." The view that mediation means to give half to one side and half to the other is, of course, unfounded. Hence the arbitrator who advises the parties that a decision based on contract language alone may lead to an unexpected and impractical result is not "compromising." Similarly, suggestions to the union and the employer that their arguments do not hold water or that they should work out a negotiated settlement may be less reprehensible than remaining aloof. To suggest a solution is an act of mediation but to ignore it may be an act of negligence. No matter how carefully a contract or a submission agreement is drafted, unforeseen difficulties will often develop. In such situations the arbitrator's ability to mediate is more important than his judicial competence.

No matter how compelling the logic of mediation in a dispute, the arbitrator inevitably runs a risk in attempting it, namely, failure. Unsuccessful mediation complicates his ultimate responsibility of rendering a decision and, of course, takes time. Hence he must tread warily during the negotiations, particularly to avoid commitments as to what he will decide if they break down. Such commitments, and the parties usually seek to extract them from him, can prove a source of embarrassment later and weaken his effectiveness as a mediator. He must, however, always recognize that he cannot destroy his paramount function as arbitrator.

The Significance of Precedents

Another and related question, almost as vigorously disputed as the role of mediation in arbitration, is the degree to which arbitrators should be restricted by prior decisions under the same or similar contracts. The arbitrator who mediates is less bound by precedent than one who views his functions more rigidly. As in the previous case, the significance attached to precedents must be related to the particular situation.

In the arbitration of grievances the presumption exists that the same question should receive the same answer. Grievance cases, however, seldom present identical facts and issues, often leading parties, particularly in ad hoc arbitration, to "shop around" in order to find a man whose decisions they like.[27] The arbitrator feels that inconsistency is an inevitable hazard if the parties fail to use a permanent umpire. He regards his forerunner's views as merely one consideration in rendering an award. As Saul Wallen has observed, "where a conflict in decisions results from a clear and supported conviction that the earlier decision does not reasonably resolve the issue, a given arbitrator need not abdicate to his predecessor that function of judgment for which he was engaged."[28] This is equally true where the proceeding is under a renewed contract in which the pertinent provision is unchanged from the old.

The reverse situation prevails under a permanent chairman or umpire where a "common law" of contract interpretation has developed. In these cases the parties expect the arbitration machinery to produce a system of what Professor Sumner H. Slichter has called "industrial jurisprudence."[29] While this establishes certain principles so rigidly that equities in a particular situation may be ignored, the positive benefits outweigh this defect. It not

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27. This difficulty has been pointed to as one of the principal drawbacks of ad hoc arbitration. David A. Wolff, umpire in the Detroit area, has summarized this problem as follows: "Precedents which can be relied on are seldom established. Repeated attempts are often made by one or the other of the parties to nullify the effect of a particular award by reframing the issue involved and having it passed on at subsequent arbitrations by another or other arbitrators....Further, the temptation to retry an issue with other arbitrators is always present." "An Advantageous Application of the Umpire System for Management and Labor Groups" (unpublished ms., 1947).
28. General Electric Company and United Electrical, Radio, and Machine Workers, 9 LA 757.
29. Kennedy, for example, reports that "in the hosiery industry the decisions of the Impartial Chairman, unless otherwise indicated, become precedents upon which future decisions will be based....The Impartial Chairman is clearly and purposely engaged in the creation of a system of 'industrial jurisprudence.'" Op. cit., p. 91.

only saves time and cost in the proceedings but also brings stability into the relationship, permitting the company and the union to plan their operations with assurance. The risk, however, is that precedent will become an end in itself. In the hosiery experience, for example, Kennedy notes that "it is consistency of the spirit and the intent of decisions which should be maintained" as distinguished from "a narrow legalistic interpretation" of the word "consistency."[30]

Precedents in contract arbitration present greater difficulties. The question usually arises over the wage issue, involving the extent to which the arbitrator should be bound by arbitration decisions or by negotiated agreements reached in related situations. Clearly, the safest procedure is for the parties to spell out in the submission agreement the standards the arbitrator will apply. Where such limitations are absent, there is no compulsion on him to do other than use his best judgment. It is customary, of course, even in "open-end" arbitration for the arbitrator to guide himself by the factors considered in collective bargaining and to attempt to arrive at the decision the parties would have reached if they had agreed. In giving weight, however, to such elements as wages paid in the same industry, changes in the cost of living, adjustments made in the same area, and the employer's ability to pay, the arbitrator is aided when the parties determine their relative importance in advance. Decisions of other arbitrators may also influence his judgment, but they should be controlling only when the employer and union so specify at the outset.

The Role of Government

Aside from the railroad industry, it is generally accepted that the federal government's role should be kept to a minimum; that "that government is best which governs least"; and that it is desirable for the parties

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30. Ibid., p. 94.

themselves to work out the procedures. This opinion prevails in the face of the common popular reaction in deadlocked negotiations that arbitration will prevent strikes. The question is frequently raised whether the government should not urge disputants to submit to voluntary arbitration when bargaining breaks down. When confronted with this problem, the authors of the Labor-Management Relations Act merely provided that,

> The settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to reach and maintain agreements concerning rates of pay, hours, and working conditions....

and that,

> If the Director [of the Federal Mediation and Conciliation Service] is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion....[31]

Whether these "other means" should or should not include arbitration is left entirely to the discretion of the Director. It is anomalous that an Act which intervenes so boldly in other aspects of collective bargaining approaches voluntary arbitration with such timidity.

At the time of the President's Labor-Management Conference in 1945 and again while Congress considered the Taft-Hartley bill some suggested that the government require management and labor, when entering into collective bargaining agreements, to include an arbitration clause in order to assure the final settlement of grievance cases. The Research and Policy Committee of the Committee for Economic Development, for example, specifically urged the enactment of such legislation.[32] In final form, however, the Act merely stated that,

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31. Secs. 201(b), 203(c), Public Law 101, 80th Congress. The Senate bill referred explicitly to voluntary arbitration with the government assuming up to $500 of the cost, a provision taken from the 1946 Case bill. The Conference Committee, however, struck out direct reference to arbitration. 80th Congress, 1st session, House of Representatives, Report No. 510, Labor-Management Relations Act, 1947, June 3, 1947, pp. 62-63.
32. "Collective Bargaining: How to Make It More Effective," A Statement on National Policy, February 1947.

> Certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision...for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.[33]

As distinguished from this general "hands off" policy, the Railway Labor Act both encourages contract arbitration and, in effect, requires the compulsory adjustment of grievance cases. In the former type the National Mediation Board must offer this recourse and elaborate procedures cover its employment.[34] The Act provides that grievance disputes may be appealed to the National Railroad Adjustment Board by petition of one or both of the parties. "This procedure has an element of compulsion about it, but is not compulsory arbitration. It offers a way to settle disputes and grievances, but it does not require the submission of disputes and grievances. It assures the appointment of a referee when the parties fail to select one."[35]

Historically the most important function of the government - federal, state, and local - in the arbitration of labor disputes has been to assist the parties in the selection of an arbitrator or arbitrators. After the representatives of the employer and the employees have agreed to submit their dispute to arbitration, they have the remaining and often difficult problem of agreeing upon a particular individual to perform this service. Since 1937, the American Arbitration Association, a private, nonprofit agency, has been available to appoint arbitrators as well as to perform procedural functions in the arbitration of labor disputes.[36] Where the parties do not agree on their own arbitrator and where the AAA is not used, they customarily request the

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33. Sec. 201(c), Public Law 101, 80th Congress.
34. John A. Lapp, Labor Arbitration (New York: National Foremen's Institute, 1942), pp. 19, 217-226. See Chapter V.
35. Ibid., pp. 20-21, 227-231. See Chapter XI.
36. Frances Kellor, American Arbitration (New York: Harper, 1948), p. 83.

assistance of one of several governmental agencies. The U. S. Department of Labor and, since August 1947, the Federal Mediation and Conciliation Service are the two principal federal bodies which have provided this service when parties in dispute file a joint request. This service grew rapidly after its inauguration in 1937, largely as a result of recommendations from staff conciliators. The labor departments or departments of industrial relations of most states perform a similar function. In some instances the practice is established by legislation, while in others the executive officials have assumed it as a proper responsibility of their office. Judges, governors, mayors, and other public officials as well occasionally receive requests to appoint arbitrators.[37] The American Arbitration Association and several of the governmental agencies merely submit a list of three, five, or seven names from which the parties select their arbitrator by alternately eliminating those for which each has the least preference. Under certain circumstances, for example, a joint request to do so, these agencies may actually appoint the individual who is to act as arbitrator. In either instance the parties merely seek the help of an agency whose integrity and impartiality are beyond question.

The government's role in the arbitration process arises as well with respect to the cost of these proceedings. In many industries with established machinery this question is not at issue since the practice of sharing expenses jointly has developed over a period of years. Referee costs of the National Railroad Adjustment Board, however, are borne by the government, and there is a widespread feeling, particularly among union representatives but including many small employers and some public officials, that this policy should apply

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37. The federal government appoints by far the largest number of arbitrators. A Bureau of Labor Statistics survey of 205 agreements in 1946 revealed that 122 provided for appointment by the U. S. Conciliation Service, 40 by the AAA, 19 by the War Labor Board, 10 by state agencies, and 14 by others. U. S. Conciliation Service, Weekly Newsletter, October 18, 1946, pp. 160-161.

to other industries.[38] The principal arguments for government financed arbitration are that it will help to avoid strikes and lockouts by making machinery readily available; that some unions and companies are either so small or impoverished that they cannot afford this added expense; that if costs are paid equally one side may take advantage of its stronger financial position to "arbitrate to death" the poorer party; that the government can establish orderly procedures on a continuing basis; and finally, that arbitration, as an extension of mediation, should be furnished on the same free terms. As against these arguments, the opponents of government financed arbitration point to the successful procedures privately worked out and jointly financed by management and labor, as in the needle trades. They also argue that self-reliance produces better relations, financial responsibility assuring substantial efforts to settle differences by collective bargaining rather than by relying on the "crutch" of arbitration. They contend, finally, that governmental intervention here leads inevitably to intrusion into other phases of collective bargaining and perhaps eventually to compulsory arbitration.

A further cost procedure experimented with in a limited number of instances is an agreement by the disputants that the arbitrator, in addition to rendering a decision, will assess costs between the parties. Thus expenses

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38. This question was raised but not answered definitively at the President's National Labor-Management Conference in the fall of 1945. Management representatives expressed the view that the duty of management and unions to work out solutions to their own problems included the payment of arbitration costs, while union officials were reluctant to accept this view. Public officials refrained on this, as on other substantive questions, from interjecting their attitudes into the debates. Senator Paul H. Douglas, who acted as an adviser to the Secretary of Labor, privately expressed the view that the government should furnish arbitration without cost to the parties. The Labor-Management Advisory Committee to the Conciliation Service, established pursuant to the recommendations of the Conference, unanimously recommended, however, that the government should not provide free arbitration. Since some labor representatives later raised determined objection to this recommendation, the government did pay arbitrators' fees and expenses under specified limited circumstances.

might be divided equally or unequally on the merits of the particular dispute. If the arbitrator felt that the dispute was submitted for frivolous reasons, he might charge the initiating party with the entire cost; or the loser might be required to assume the whole burden. This practice would serve to discourage the arbitration of disputes which should have been settled by negotiation. It also bears a resemblance to judicial procedures.[39]

The government, as well, through the judiciary sometimes intervenes to pass on the legality of awards and to enforce them. Jesse Freidin has stated that, "as part of a statutory system for settling disputes arbitration involves a division of functions between the arbitrator and the court. Not an equal division by any means - the arbitrator dealing with the substantive issues of the dispute - the court limited very severely to matters of procedure and jurisdiction."[40] Since labor arbitration is a substitute for judicial processes, it is only rarely that persons feel so outraged by the procedures or the decision to take the matter to court, while the latter have refrained from intervening except under compelling circumstances.[41] The limited grounds upon which an award may be impeached are the following:

1. Fraud on the part of the arbitrator;
2. Fraud or misconduct of the parties affecting the decision;

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39. The 1947 agreement between the Ex-cell-o Corporation and Local 49, UAW, CIO, for example, provides: "The administration fee and cost of arbitrator shall be borne by the losing party. The arbitrator in making the award shall stipulate which party is the loser." An arbitrator, Professor Z. C. Dickinson, appointed to decide a dispute over a discharged employee, remarked on the fact that twelve other discharges during the year were not taken to arbitration presumably because of this feature of the agreement.
40. "Legal Status of Arbitration," Proceedings, New York University First Annual Conference on Labor, 1948, pp. 233-34.
41. Intervention by a court to upset an arbitrator's award is exceptional. Freidin cites Matter of Herman, in which the New York Court of Appeals set an award aside because the arbitrator stated: "I have taken into consideration and analyzed the contracts of different manufacturers and have also made a personal investigation to ascertain what a fair rate of wages would be for this type of work." The court held that the arbitrator misbehaved in going outside the formal record of the case. Ibid., p. 235.

3. Gross unfairness in the conduct of the proceeding;
4. Want of jurisdiction in the arbitrator;
5. Violation of public policy; and
6. Want of entirety in the award.[42]

The courts will not review the merits of the controversy as submitted to the arbitrator and as ruled on in his award; they will, however, pass judgment on procedural matters.

Qualifications of the Arbitrator

Chief Justice Charles Evans Hughes has remarked that "the law is naught but words, save as the law is administered." Judges and the officers of administrative tribunals, he continued, should bring to their tasks "deliberation, fairness, conscientious appraisal of evidence, determination according to the facts, and the impartial application of the law."[43] The arbitration function, related to the judicial, calls for similar characteristics. They may be summarized as follows:

1. Fairness (impartiality) and conscientiousness;
2. Independence and immunity to pressure;
3. Intelligence and sound judgment;
4. Expert knowledge; and
5. Insight and understanding.[44]

Fairness, often called impartiality, combined with an attitude of high seriousness toward the task at hand must head the list. The arbitrator cannot permit personal, political, and financial - to say nothing of corrupt - considerations to influence his conduct. The standards of his profession are high and honorable and he bears the burden of comporting himself in accordance with them. Fairness, however, does not mean that he should have no ideas or predilections. "Such a man," Shulman has observed, "would probably be less than a moron." He must rather be "capable of, and have the habit of, divorcing

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42. Updegraff and McCoy, op. cit., pp. 126-27.
43. Address delivered at the Sixteenth Annual Conference of the American Law Institute, Washington, May 1938.
44. These categories parallel those of Simkin and Kennedy. Op. cit., p. 13.

his predilections from his judgments. He must recognize his function as that of an interpreter rather than law-maker."[45] Above all, as Simkin and Kennedy have noted, the arbitrator cannot be "uncertain of the right of employees to bargain collectively. A sincere belief in collective bargaining as a system is an absolute prerequisite."[46]

Independence and immunity to pressures are also essential characteristics and for this reason management and labor often seek an arbitrator who is not dependent on such work as a livelihood. Shulman has said, "his strength and independence vary with his self-reliance and may perhaps be enhanced by some economic security apart from his job as umpire."[47] Certainly, he should not please either or both sides at the price of compromising a decision. To prevent this, in fact, it has been suggested that arbitrators, like federal judges, be salaried government employees with tenure.[48] This is one reason why many management and labor people prefer permanent umpires to ad hoc arbitrators, although such arrangements only minimize and do not eradicate susceptibility to pressures. No mechanical arrangement, of course, will assure the quality of self-reliance necessary in arbitration.

Intelligence and sound judgment, troublesome though their measurement may be, are necessary qualities because issues are often complex and high stakes are involved. Further, as Shulman has stressed, not only they must be present, but the parties must also believe that the arbitrator possesses them. Sound judgment depends upon native intelligence and also upon training and experience, and it is their combination which is essential to successful arbitration.

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45. "The Role of the Impartial Umpire," in E. Wight Bakke and Clark Kerr, Unions, Management and the Public (New York: Harcourt, Brace, 1948), p.486.
46. Op. cit., p. 13.
47. Loc. cit., 486-87.
48. See, for example, Owen Fairweather and Lee C. Shaw, "Minimizing Disputes in Labor Contract Negotiations," Law and Contemporary Problems, XII (Spring 1947), 317.

The growing complexity of industrial disputes, impinging as they do on economics, statistics, accounting, engineering, psychology, government, and the law, requires that the arbitrator bring to their settlement a high degree of expert knowledge. Fairness, independence, and good judgment may of themselves produce sound awards in some cases, but would often prove inadequate. Technical problems involving, for example, job evaluation, interrelationships within a wage structure, and ability to pay, could easily overwhelm the novice. Hence unions and management increasingly rely upon professionals to perform the arbitration function for them. By the same token, the employment of ministers, judges, social workers, and other "men of good will" has fallen into disuse in recent years.[49] The arbitrator is now expected to be a trained expert on the myriad facets of labor-management problems.

Finally, the arbitrator must possess insight and human understanding for, "like all social institutions,...collective bargaining preeminently and basically involves people."[50] He should have the capacity to comprehend a dispute not merely in relation to the contract but also in terms of the people involved, their problems, interests, and feelings. The stress the parties lay on the judicial as contrasted with the bargaining element in arbitration, of course, directly influences the extent to which he can rely on this factor. If they insist on a legalistic approach his freedom to shape his decision by human needs is restricted (although he may perceive them), while the converse is equally true. By the same token, insight and understanding tend to gain greater scope in a mature relationship and under a permanent arbitration system.

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49. The difficulty of finding persons with the necessary knowledge who are at the same time acceptable has been indicated by Updegraff and McCoy. "Regardless of how fair, honest, or competent such men /social workers, ministers, lawyers who have represented industry or labor, or retired industrial relations managers/ may be, their backgrounds may be viewed by one party or the other as disqualifying them." Op. cit., p. 37.
50. Benjamin M. Selekman, Labor Relations and Human Relations (New York: McGraw-Hill, 1947), p. 9.

These, then, are objective standards that the public, the academician, and the arbitrator himself can apply to the selection of the man to preside over the procedure. It would indeed be naive, however, to conclude that unions and management applied them generally in practice. The primary objective of both sides is victory rather than abstract justice. Their power to name the arbitrator - so different from the judicial process - serves as a lever with which to attain this goal. Most crudely this takes shape in the "box score," a record of the number of times the arbitrator has decided for and against each side. It suffers the obvious deficiency of overlooking the fact that some companies and unions, General Motors, for example, prefer to concede a case prior to arbitration unless there is a reasonable prospect of winning. A more subtle method is to find a man who has already ruled on the same or a related point by consulting the published awards. Philosophies of arbitration, of course, wilt under this pressure. A shrewd union leader, for example, with a strong case on the contract, will prefer a legalistic arbitrator although he may in general believe in a flexible approach. In a weak wage case, by the same token, he may urge the naming of an inexperienced minister noted for an awareness of "human problems" despite a general preference for experts. Such expedients, to be sure, weaken arbitration as a judicial process and differentiate it sharply from the courts. One who strives to preserve its judicial character will excoriate these considerations and, perhaps, brand them as unethical. If he, however, recognizes that arbitration is an extension of bargaining, he realizes that such are the steady fare of negotiations and that moral judgments have no bearing. The prime concern is the resolution of the dispute; hence the ultimate responsibility is upon labor and management themselves. One serves to check the excesses of the other.

Conditions for Successful Arbitration

Of the three parties involved in an arbitration proceeding the arbitrator is the least important, or, as Simkin and Kennedy express it, "umpires only call the balls and strikes; they are not doing the pitching."[51] The parties in dispute determine the issues on which they cannot agree and whether they will permit a third person to decide them. They also control the selection of their arbitrator and lay down the rules under which he must operate. These rules often include, in addition to the procedures, the substantive matters which the arbitrator can or cannot take into consideration. Finally, the parties decide the action they will take on the award that has been rendered. In making these decisions management and labor form the framework within which the process is carried on and establish the conditions which make for successful or unsuccessful arbitration.[52]

Many hold the view that certain customary issues in labor-management disputes are not arbitrable, involving matters of principle that can be determined only by the parties. Such an issue is union security.[53] Even under the compulsions of war some representatives of management, for example, refused to allow the National War Labor Board to render a binding decision on this matter. In establishing grievance procedures employers frequently take the position that they will permit only certain types of questions, excluding, by

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51. Op. cit., p. 14.
52. The National Academy of Arbitrators, wrestling with the problem of ethics in arbitration cases, has noted: "The formulation of...standards of conduct for persons who appear before arbitrators is extremely difficult because there are no requirements for practice before arbitrators as before courts, no sanctions paralleling contempt of court or disbarment, and no commonly accepted standards for the presentation of arbitration cases." Report of Committee on Ethics (Washington: n.d., mimeo.), p. 12.
53. Only rarely and then under unusual circumstances does this issue go to arbitration. Examples of such cases are West Penn Power Co. and Utility Workers, 10 LA 166 and the captive mine case decided by John R. Steelman after the collapse of the Defense Mediation Board.

way of illustration, the right to introduce technological changes, to go to arbitration.[54] A condition for successful arbitration is, then, an understanding by the parties on the area of arbitrability. Although it may evolve with changing relationships, it is essential at all times that they mutually and clearly demarcate its borders. Where this is not explicit there is danger that an award will exceed the limits which one side feels are implicit in the agreement.[55]

A further condition for successful arbitration is a determination by the parties on the type of procedure - judicial or bargaining - which meets their particular needs. With a tripartite board, for example, if they decide that a majority vote is required to reach a verdict, they assure themselves of a measure of mediation. If, on the other hand, the public man has power to render an award alone, a judicial proceeding becomes possible. A decision as between a permanent and an ad hoc arbitrator has similar results. It is helpful to the arbitrator to know at the outset the latitude he may exercise procedurally.

The parties themselves should, if possible, select their arbitrator. It has already been noted that it is as necessary for the disputants to have

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54. The usual corollary is that the excluded category consists of "strike issues"; that is, that a strike is permitted if necessary to resolve a controversy over them. Under the General Motors-UAW contract, for example, there are areas within which "legal" strikes may occur. In spite of the no-strike clause in the 1947 agreement, Mr. L. G. Seaton, the Corporation's Director of Industrial Relations, stated: "There are two areas where the union can authorize a strike. One is how much money we pay for a job not covered by the wage agreement, and the second is equally fundamental, how much work do we get for the money." Minutes of First Session, Third Conference for College and University Educators (General Motors Corporation, June 16, 1947).

55. Representatives of labor and management at the National Labor-Management Conference concurred that "before voluntary arbitration is agreed upon as a means of settling unsettled issues, the parties themselves should agree on the precise issues, the terms of submission, and the principles or factors by which the arbitrator shall be governed." The President's National Labor-Management Conference, November 5-30, 1945 (Washington: Division of Labor Standards, 1946), p. 46.

confidence in the integrity and ability of the arbitrator as it is for him to possess these qualities. High qualifications are of no avail if either side feels that he lacks them. To foster this confidence to the greatest possible degree the Federal Mediation and Conciliation Service and the American Arbitration Association do not normally appoint an arbitrator but merely give the parties a panel of names to select from. Arbitrators, furthermore, customarily withdraw from proceedings if they see signs of lack of confidence on the part of either of the participants.

Properly prepared presentations are also essential to successful arbitration. Good cases are sometimes lost simply because the arbitrator is not given complete information or because the other side presents its poor case more adroitly. Adequate preparation requires competent personnel, sufficient time, and careful study, the last, where possible, with first-hand sources. This may involve consultation with statisticians, lawyers, or other experts, although evidence is not lacking that such "outsiders" frequently make poor presentations simply because they have not lived with the problems. Too frequently the parties rely on the arbitrator to make a poor case good with sad results to themselves.

Finally, unions and management cannot expect the impossible of the arbitration process. Neither, by way of illustration, can ask an arbitrator to engage in collusion or fraud. If they agree to use him to render a decision affirming their own covert agreement in order to save their faces, they should have his approval in advance. They should not, furthermore, risk destruction of a grievance umpire's usefulness by employing him to arbitrate a contract dispute. They cannot ask him to overstep his authority or to violate a contract. The parties should not, for example, expect him to assume jurisdiction over a case where he clearly has none, nor should they ask him to render a decision, no matter how persuasive the facts, explicitly defying the language of the agreement. Labor and management must, in other words, recognize that arbitration is not a cure-all but, in fact, has serious limitations.

Limitations on the Arbitration Process

The prevailing concepts of union and management sovereignty fix the parties' attitudes on arbitration and impose fundamental limitations on the process. At the President's National Labor-Management Conference in the fall of 1945 the conferees failed to reach any agreement on the exclusive functions and responsibilities of management as distinguished from those of unions.[56] This disagreement severely delimits the area within which the process can function. Only disputes which do not invade the expressed sovereignty of either party are susceptible of settlement by arbitration. It is not possible to define the zone of arbitrability since it varies with the sovereignty concepts of particular bargaining relationships. In some industries, for example, the needle trades, the area is as wide as either side wishes to make it and relatively few questions arise over the arbitrability of particular issues. In other industries, automobiles, by way of illustration, the jurisdiction of the umpire has been sharply limited.

In some industries where the bargaining area has expanded furthest there has been an apparent atrophy of arbitration. Mature relationships, as witnessed in the needle trades and the Pacific Coast pulp and paper industry, have often led to a disuse of arbitration. Although the machinery continues to exist, relatively few disputes reach this stage.[57] This may be partly due to the fact that precedents for most disputes already exist, but even more important to the eagerness of both sides to "work things out" themselves. The arbitrator, in other words, has attained full success when he has worked himself out of a job.

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56. See statement of Committee II, "Management's Right to Manage," op. cit., pp. 51-60.
57. Clark Kerr and Roger Randall report that although many grievances have arisen in the West Coast pulp and paper industry since 1934 only two cases have been submitted to arbitration. Causes of Industrial Peace under Collective Bargaining, Case Study No. 1 (Washington: National Planning Association, 1948), p. 2.

As distinguished from these cases of atrophy, overreliance on arbitration severely strains the process. Arbitration should not be used to replace collective bargaining.[58] This criticism has frequently been leveled at the grievance procedures under the Railway Labor Act as well as at proposals for inclusive government tribunals to settle disputes. The fact remains, however, that where one side feels that it can gain more through arbitration than through bargaining it will endeavor to force a dispute into arbitration. Arbitrators in such cases sometimes urge a resumption of negotiations or mediate themselves.

Arbitration, as Slichter has said of collective bargaining, may become "a method of protecting the old against the new, of retarding technological change, and of protecting vested interests in obsolete methods."[59] Arbitrators rarely feel that they have either the moral or legal authority to initiate new practices or policies, and, conversely, unions and management are reluctant to confer such powers upon them. Hence their decisions, almost necessarily, are based on what has been done previously either by the parties themselves or by employers and unions similarly situated. Precedents and "patterns" become increasingly important. New and bold solutions consequently are almost invariably found in bargaining rather than through arbitration.

Another limitation arises from the belief that there is a dearth of competent and impartial arbitrators.[60] This criticism has been directed partly at arbitrators and partly at agencies which select them. Although incompetents have sometimes been employed and good men have made poor decisions, most

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58. Mr. Hawley Simpson, counsel for many employers in the transit industry, has said that in that industry arbitration has not been used "as an adjunct to negotiations, but as an impediment....Negotiations are a farce, merely marking time until the union decides to ask for arbitration." Daily Labor Report (Washington: Bureau of National Affairs, November 16, 1948), p. BB-11.
59. "The Changing Character of American Industrial Relations," American Economic Review, XXIX (supp., March 1939), p. 122.
60. See Fairweather and Shaw, op. cit., p. 317 and Davey, op. cit., p. 392.

arbitrators bring ability and fairness to their tasks. In the heat of a dispute, however, adversaries are inclined to attribute defeat to the ignorance or partiality of the arbitrator rather than to the weakness of their case.

Finally, it must be emphasized that arbitration is neither adaptable to all situations nor can it be relied on to settle all disputes. There is a tendency for the uninformed public to overestimate the potentialities of the process and to urge it as a solution in crises. Third persons, however, seldom understand the issues as clearly as the disputants and their decisions are rarely as satisfactory as those which have been arrived at by direct negotiation.