Arbitration Institute

March 1-5, 1971 — Berkeley, California

AFL-CIO LABOR STUDIES CENTER
Washington, D.C.

in cooperation with

CENTER FOR LABOR RESEARCH AND EDUCATION
University of California, Berkeley

Arbitration Institute

MARCH 1-5, 1971

BERKELEY, CALIFORNIA

AFL-CIO LABOR STUDIES CENTER
Washington, D.C.

in cooperation with

CENTER FOR LABOR RESEARCH AND EDUCATION
University of California, Berkeley

TABLE OF CONTENTS

ARBITRATION TECHNIQUES

THE MEANING OF ARBITRATION

Arbitration is third-party settlement of disputes between individuals or parties outside a court of law. Labor arbitration most commonly is used to settle disputes between parties to a labor agreement as to its application or interpretation. Since such arbitration consists of determining the rights of a party to an agreement, it is referred to as a "rights" dispute or commonly as "grievance arbitration". This is the focus of this program.

A second type of arbitration is called an "interest" dispute. It involves the determination of the interests of the parties, as distinct from their rights under an existing agreement. It applies to a determination by an arbitrator or arbitration board of the terms and conditions of a new or renegotiated labor agreement. This type of arbitration is rarely used in labor relations in this country, although it is used in some situations (including the IBEW, in the construction industry and sometimes in public utilities) as an alternative to a strike over a new agreement.

Labor arbitration is an extension of the process of collective bargaining but differs from other aspects of bargaining in one crucial respect: the parties have ceased to negotiate with each other and are trying to convince an arbitrator that their case should be upheld. In this sense, it is sometimes called a judicial proceeding since the arbitrator must judge the case before him. Other arbitrators, however, shun the word "judicial" as an inadequate description of the arbitrator's function. To them, the arbitrator is more than a judge since he must occasionally fill in the cracks of the labor agreement, and in this capacity he is "legislating" or setting up his own rules which he believes to be consistent with the labor agreement and the plant practices. Sometimes he constructs these rules from general industrial relations practices.

The way an arbitrator views a case depends in part on his personal philosophy of arbitration and in part on his relationship to the parties. The arbitrator who is called in for a single case (ad hoc arbitrator) is inclined to be a judge in most cases. The permanent umpire who handles most or all of the cases for a company and union is inclined to be more than a judge. But these generalizations have their exceptions and should not be taken literally.

Distinction from mediation, conciliation, and fact-finding. Arbitration results in a decision, which the parties have agreed in advance to accept. (The occasions when the parties may try to upset an award will be discussed later). Mediation and conciliation are efforts by a third-party to bring the parties to an agreement on their own. The mediator or conciliator has no power to enforce a settlement, since the parties have made no prior agreement to accept his conclusion. Fact-finding is merely an effort to obtain and point out the key facts in a dispute. Even when a fact-finding board makes recommendations, these carry no great force beyond the persuasiveness and the power of public opinion which they generate.

Voluntary and compulsory arbitration. Almost all arbitration in this country is of a voluntary kind. This means that the parties voluntarily accept it, either as a general means of settling all disputes under an agreement or as a means of settling a particular dispute. Sometimes the term mandatory arbitration is used to describe the situations where the parties have agreed in advance that they will arbitrate disputes, to distinguish from agreements that they may (or may not) do so. Compulsory arbitration is rare; it imposes the process on the parties as a matter of law or decree. Usually it is associated with industries where the right to strike is curtailed by law, as in public utilities or railroads in some instances.

THE ARBITRATION CLAUSE

The authority for arbitration is the clause in the labor agreement setting forth the circumstances under which it will be used and the procedure that will be followed. The following elements are common in arbitration clauses, although some of them are omitted where the parties see fit to do so.

Element	Example of language
1. Prerequisites to invoking the arbitration clause	"Any grievance which remains unsettled after having been fully processed pursuant to the grievance procedure..."
2. Its scope	"and which involves either (a) the interpretation or application of a provision of this Agreement, or (b) a disciplinary penalty (including discharge)... alleged to have been imposed without just cause" (some agreements make an exception to arbitration of production standards)
3. Scope of arbitrator's authority	"The arbitrator shall not have the power to add to, subtract from or modify any of the terms of this agreement, or any agreement supplementary thereto, nor to pass upon any controversy arising from any demand to increase or decrease wage rates, except as provided in Article X of this agreement."
4. Method of initiating arbitration	"If a grievance is not settled in the fourth step, either party may submit the dispute to arbitration..."
5. Time limits	--on initiating arbitration "Within 30 days of the date of receipt of a written answer in step four of the grievance procedure." --on selecting an arbitrator "If the parties cannot agree on a third member within 20 days of the reference to arbitration, then the Union shall have the right to apply to the American Arbitration Association to appoint the third member."

6. Composition of arbitration board	An arbitrator will be agreed upon by the two bargaining committees. The arbitration board will be composed of one member appointed by the Company, one member appointed by the Union, and one member agreed upon by the parties.
7. Method of selection of the arbitrator	The usual methods are to strive first for agreement and then in case of a deadlock to ask the American Arbitration Association or the Federal Mediation and Conciliation Service for a name or a panel. A final selection is then made.
8. Procedural rules to be followed	The arbitration shall be conducted under the rules of the American Arbitration Association.
9. Status of arbitrator's award	The arbitrator's award shall be final and binding on both parties. Any award of the arbitrator may be modified or rejected by mutual written agreement of both parties. Each case shall be considered on its merits and the collective agreement shall constitute the basis upon which decisions shall be rendered. No decision shall be used as a precedent for any subsequent case.
10. Costs of arbitration	The parties shall share equally the arbitrator's fee, the cost of a hearing room, and the cost of a shorthand report, if requested by the arbitrator. All other expenses shall be paid by the party incurring them.

ARBITRABILITY AND SCOPE

A. What the Contract Says

1. Definition of dispute in arbitration clause

   e.g. "All disputes"
   "Interpretation and application of Agreement"
   Specific exclusion of subjects

2. Is the definition of abritrability contained in the definition of a grievance?

   e.g. "Grievances which cannot be settled"

3. Are the powers of the arbitrator specifically limited?

   e.g. "The arbitrator shall not have the power to add to or modify the terms of the agreement."

4. Other clauses affecting arbitrability

   a. Management rights clause

      1. How much does it exclude from the contract?

      2. Does it exclude from management rights anything mentioned in the contract?

         e.g. "except as otherwise dealt with in the agreement"

   b. Union recognition clause

      e.g. "Recognized for wages, hours, and conditions of employment"

5. Time-tables

   Has the issue been processed within the time limits?

6. Procedural steps --

   Have they been followed?

B. Measuring the issue against the scope

1. Is the subject mentioned in the contract?

   e.g. vacations, seniority, etc.

2. If not:

   a. Is there a past practice clause, and is this event a deviation from past practice?

   b. Does it involve law? (Does the contract require adherence to laws)

   c. Does it involve "discrimination"? (Is there a contract clause on this subject)

   d. Does it involve fair treatment, union relations, or personal relations? (If so, how do you justify its inclusion)

C. Case Studies

Contract Clauses:

RECOGNITION:

"The corporation recognizes the XYZ Union as the exclusive representative of the production and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment."

GRIEVANCE PROCEDURE:

"Any employee having a grievance must first take the grievance up with the foreman within five days of its occurrence. If it is not adjusted within five days thereafter, it shall be reduced to writing and taken up by the floor steward and the foreman. If it is then not settled, it may be submitted to the Plant Supervisor within five working days, who shall then discuss it with the Union Business Agent."

ARBITRATION:

"Any matter concerning the interpretation or application of any terms of this agreement which are not settled by the grievance procedure may be submitted to arbitration within 10 working days after the final step in the grievance procedure to an arbitrator designated by the Federal Mediation and Conciliation Service. The arbitrator shall not have the right to add to or modify the agreement in any manner."

MANAGEMENT PREROGATIVES:

"The management of the Company and the direction of its working forces, including the right to hire, transfer, promote, demote, discipline establish reasonable rules of conduct, or discharge for cause, to increase or decrease the working force as necessary, or to make work

assignments is vested solely in the Company, provided that this will not be used for purposes of discrimination against any member of the Union, and subject to the terms and conditions of this agreement."

D. Are the following issues arbitrable? Why?

One: It is claimed by 3 workers that their corner of the shop is unbearably hot. All attempts to ventilate by opening windows have little or no effect. It would be very expensive to move them because of waste of space and heavy machinery installations. The small electric fans which have been set up around the area have hardly any effect. The workers are demanding a huge exhaust fan.

Two: The Employer says that a group of workers is conspiring to cut down output. He has issued warnings and has now applied for arbitration.

Three: The work in the plant is slow. The Employer puts everybody on a four-day week. There is a plant-wide seniority clause. The Union says that the senior people should be kept on a full week, and the union people laid off accordingly. The plant is situated far from the place where most people live, and commuter tickets are bought for 30-day periods regardless of the number of rides.

Four: The plant has a maintenance department which has been doing most of the inside painting and minor repairs. The employer closes down during a two-week vacation period and calls in outside union painters to repaint the inside walls. The Union claims that two maintenance men have been deprived of two weeks' work.

Five: A man was fired on March 15th because of alleged inefficiency. He reacted with disgust and told the boss he had no right to fire him, then left the premises. After going out to look for work, he found he could not get another job. On April 15th, he showed up in the Union Hall and said he wanted to have the discharge arbitrated. The Business Agent went to the employer the next day. The boss said it was too late to discuss it and would not take it up.

Six: The Union objects to the elimination of one man from a work crew.

Source: Sam Kagel, Anatomy of a Labor Arbitration, BNA, 1961, Chapters I and II

PREPARATION FOR ARBITRATION

I. Affecting the arbitrator

A. The arbitrator

1. Must be able to "see" the place
2. Must be made to "know" the job
3. Must be able to "feel" the emotions
4. Must understand the source of authority
5. Must know the past practices
6. Must know the intent of the parties
7. Must know the "expectations"

B. The arbitrator may be affected by "non-logical" influences

1. Consciousness of what will help labor relations
2. Consciousness of bargaining strength of parties
3. Consciousness of kind of relationship (e.g., armed truce, cooperative)
4. General "market" conditions (e.g., unemployment)

II. What is the source of authority?

A. Explicit contract clause

1. Interpretation
2. Application
3. Silence or ambiguity but nevertheless applicable

B. Equity

1. Fairness)
2. Justice) e.g., "unjustly dealt
3. Reasonable expectation) with"
4. Past customs)

III. Organizing the presentation

A. Outline the attack on paper

1. The problem
2. Exactly what happened
3. Evidence and testimony needed for support
4. Witnesses available
5. Visual material needed

B. Write a working brief

1. The problem
2. The issue

3. Facts which are conceded and which the other side is likely to concede.
4. What happened?

    a. Cast of characters
    b. Scene
    c. Props
    d. Description of job or jobs
    e. Action, reaction

5. Source of authority
6. What the other side is likely to say

    a. Identify, examine, and evaluate opposition's arguments and facts
    b. Establish effective answers
        b.a. How they may hurt relations
        b.b. How they may hurt company, union
        b.c. Why they are inaccurate or improper

7. Preparation of witnesses

    a. It is proper and necessary to interview witnesses in advance
    b. It is proper to inform witnesses in advance what questions will be asked
    c. Tell them to be brief, nontechnical, not to argue the case, and to interrupt their answers when there are objections
    d. Plan your questions according to what they have to offer
    e. Anticipate possible cross-examination by preparing re-direct questions or anticipating employer positions by first questions
    f. Witness is to admit fact of advance conference if asked

8. Prepare visual material

    a. Charts, graphs, models or mock-ups (large enough to be exhibited and seen by everybody)
    b. Arrange for easel or blackboard

IV. <u>Dry Run</u>

A. Assign company role to man who is to be spokesman
B. Assign opposition role to expert needler

C. Arbitrator's role (for presiding) to one not on "inside" of facts
D. Jury for evaluation
E. Use evaluation to correct presentation

V. Preparation for intragroup communications at hearing

A. Single spokesman or division of presentation among single spokesmen
B. Arrange to sit together for easy communication
C. Use method of passing notes to spokesman - but don't overdo it
D. Recess may be asked for consultation, but not frequently
E. Assign one associate to take full notes
F. If hearing lasts more than one day, evaluation and planning at end of each day

VI. Decorum

A. Conviction but cordiality
B. Questions to witnesses explicit but not leading (however, bear in mind that the arbitrator will allow liberal latitude on hearsay, etc.)
C. Don't interrupt proceedings by remarks, etc.
D. Cross-examination may be pointed but confined to statements already made and should not be repetitive

VII. Prepare summation

A. Be ready to include all possible points brought out in your behalf
B. Prepare responses to all points which may be brought out by opposition
C. Repeat facts of case
D. Repeat explicitly, request for remedy

VIII. General criteria

A. Avoid the "litigious attitude" (the contest "to win")

1. Show the consciousness of long-run factors

a. Precedents for future
b. Nonencouragement of unreasonable grievances
c. Improvement of relationship with employer
d. Unwillingness to hurt others by helping one
e. Consciousness of the need to avoid antagonisms within employee organization

IX. Post-hearing brief or memorandum

A. May be desirable as part of arbitrator education, or to clarify aspects of the case
B. Usually simultaneous mailing within a set number of days with copy to opposition
C. If use rebuttal (best to avoid because of delays) specify number of days after brief simultaneously mailed
D. Some considerations in preparing post-hearing briefs:

1. Make it short (on a single issue, four or five double-space pages should be enough)
2. Refer to facts disclosed at hearing (can not introduce "new evidence")
3. Emphasize remedy

X. Arbitration of contract terms

A. The arbitrator needs information of commonly expected standards:

1. Prevailing conditions in industry
2. Prevailing conditions in communities
3. Prevailing conditions for comparable jobs
4. The conditions which this union has established elsewhere
5. Changes in the cost-of-living
6. "Pattern"
7. Living standards - minumum progressive
8. Employer's competitive problem and ability to pay
9. Nature of work (hazard, seasonality)
10. Productivity
11. Expectations of employees and strength behind it

Source: Sam Kagel, Anatomy of a Labor Arbitration, Chapters III-VII.

ARBITRATION ANALYSIS FORM

Summarize issue (if discipline case, include both accusation against employee and disciplinary action by employer).

_____

_____

_____

_____

_____

Remedy sought

_____

_____

_____

Points on which union and management probably can agree:

1._____ 5._____

2._____ 6._____

3._____ 7._____

4._____ 8._____

Provisions in agreement union will rely upon:

1.

2.

3.

Provisions in agreement management will rely upon:

1.

2.

3.

Company version of facts:

_____

_____

_____

Union version of facts:

_____

_____

_____

Union arguments:

1._____

2._____

3._____

4._____

Management arguments:

1._____

2._____

3._____

4._____

Support Needed

Exhibits

_____

_____

_____

Witnesses

_____

_____

_____

One-side exhibit

Notes on presentation of case

GUIDE FOR PLANNING TO USE WITNESSES

For Union

Name	Expected to establish	Planned (or probable cross-exam) questions

For Company

Name

THE PRE-HEARING BRIEF

Purpose of the pre-hearing brief.

A. A written means of narrating your case as a self-reminder of all the elements necessary in it.

B. A speech prompter from which to read all or portions of your case in making either your preliminary statement or your summation, or both.

C. As a document to be submitted in advance to the arbitrator.

Limitations of pre-hearing brief.

A. Other side may object to its submission as a document (arbitrator may rule out, or permit both to submit).

B. It may become too rigid a statement of your case, not allowing you to adapt for unexpected angles which come up during the hearing.

Elements of a good pre-hearing brief.

A. Form *

1. statement of the issue
2. background of the issue
3. definition and description of terms, machines, jobs, place
4. citing of pertinent contract clauses
5. recitation of events from your point of view
6. argument (so labeled)

B. Style *

short sentences, simple words, non-legal terminology

C. Facts *

1. what happened
2. who saw it
3. when and where
4. relation to past
5. contract clauses
6. rights based on contract, practices, general standards of fairness

Note:

The items marked * apply, but there should be included references to evidence at the hearing as both support for your position and refutation of your opponent's position.

PROCEDURES -- AT THE HEARING

Usual Procedures

1. Oath of Arbitrator (considered waived if not requested).
2. Definition of the issues (writing of submission agreement).
3. Stipulation of agreed upon facts.
4. Agreement on order of presentation, or stipulation by arbitrator of order of presentation.

(Stenographer will ordinarily be provided only if requested and arrangements made for paying expenses.)

5. Opening statement --

   This is usually a brief introductory statement by each side including definition of the issues, statement on facts upon which parties agree, contract clauses which are pertinent, and brief listing of main arguments.

   Note on order of presentation -- the initiating party usually leads off in both the introductory statement and the presentation of its case. This is usually the Union, because it has raised the grievance. However, in discharge and discipline cases, the arbitrator frequently asks the Employer to start off, because it is he who has made the change in the status quo by his action against the Employee.

6. Presentation of case by initiating party.

   a. Direct examination of witnesses, subject to cross examination

      Witnesses may be sworn individually, notified generally that they are under oath or testify without oath. It may give emphasis when needed to request that witnesses (or a particular witness) be sworn.

   b. Presentation of information, exhibits, data (these are usually acceptable if they have some general pertinence to the case and will help the arbitrator to understand it).

7. Presentation of case by opposing party.
8. Questions by arbitrator, if he desires
9. Summation

   The spokesman for both sides may be permitted to sum

up. Usually the order is reversed from that which was used in the opening statements.

10. Visit to the plant

The arbitrator may desire to inspect the site of the issue.

11. Subsequent opportunity for information

The arbitrator may ask the parties to come back prepared to provide additional data or argument.

12. Post-hearing briefs --

At the request of one or both of the parties, or on the instruction of the arbitrator, briefs may be provided, either by simultaneous presentation within a stated number of days, or by exchange and rebuttal.

Some Guides to Techniques

1. The single spokesman.

(Communication by notes, or through caucus on request for recess)

2. The introductory statement

a. It is an intention of proof, not testimony ("we intend to show"). (It is proper to caution the arbitrator against the use by your opponent of a tone of fact or proof in his statement.)

b. It should be short.

c. It should help to explain facts to which the arbitrator needs introduction, to help put the dispute in an understandable setting.

3. Questioning of witnesses

a. Establish the witness' identity and, if necessary, his competence.

b. Bring him to the facts as quickly as possible.

c. Do not testify for him.

d. Anticipate by your direct questions some doubts that may be raised in cross examination.

e. You may re-examine him after cross examination to clear up or answer questions raised in cross examination.

f. Ask him only about that which is needed.

g. Ask him only what he saw, heard, or knows.

Note:

Much more leeway is allowed in an arbitration hearing than in court proceeding in allowing "hearsay" testimony or in "irrelevant" material, but the general guides are:

1. Does it make a contribution of an impartial nature to the arbitrator's knowledge?

2. Does it bear on the subject pretty closely?

3. Will the arbitrator be able to assign a weight to it in keeping with its worth as something seen, heard, or known?

The arbitrator will let something in frequently, to which he will give little or no value in making his judgment, hearing it "for what it may be worth". This allows some opportunities for getting in non-probative statements which may nevertheless have some passing effect. BUT REMEMBER, YOUR OPPONENT CAN PLAY THAT GAME TOO. YOU MAY WISH TO SETTLE FOR RESTRAINING YOURSELF AND YOUR ADVERSARY.

4. Cross-examination

a. In general, ask only about that which has been testified to in direct examination.

b. Some vigor, repetition and persistence by the questioners are tolerated in cross-examination.

c. Don't ask a question on cross-examination unless you know what answer the witness must give and are prepared to prove that a contrary answer is a lie.

5. Decorum

a. Firm conviction but polite manner.

b. Improper: coaching, signaling, outbursts, rejoinders..

Source: Sam Kagel, Anatomy of Labor Arbitration, Chapters VII, VIII, and X

STANDARDS APPLIED BY ARBITRATORS

The tests used by arbitrators will be discussed under three headings: standards based on the contract itself; standards going beyond the contract; and some special considerations.

The primary goal of the arbitrator is to carry out the intent of the parties. To do this, he looks to contract language but not necessarily in a completely literal way. He tries to determine what the words of the agreement mean to those who used them, realizing that reducing an agreement to writing sometimes introduces a distortion or change in the original intention.

1. STANDARDS BASED ON CONTRACT LANGUAGE

Language which is"clear and unambiguous" - Even when the parties themselves disagree on what contract language means, the arbitrator may find it to be clear and definite. Interested parties are inclined to make a clause mean what they want it to mean. The arbitrator brings a certain amount of objectivity to the process.

Specific versus general language - Where contract language is specific in some respects, it will normally be held to supersede another, more general clause.

Example: Management shall "continue to make reasonable provisions for the safety and health of its employees".

Wearing apparel and other equipment necessary to properly protect employees from injury shall be provided by management in accordance with practices now prevailing...or as such practices may be improved from time to time by management."

How would you expect an arbitrator to rule on a case asking that rain clothes be provided certain employees, if this had not been done before?

To express one thing is to exclude another - To mention one item of a group or class of items, and not to mention others, is construed to mean that the others were meant to be excluded.

Example: "Shift workers will be given 20 minutes from their regular shift for eating lunch, at the convenience of management."

Could day workers claim the same privilege?

Words will be judged by their context - The meaning of words or phrases will be judged by the context in which they appear.

Example: "Holiday pay of 8 hours plus time worked at the applicable rate will be paid for holidays worked." Section on "Holidays Worked".

"To be eligible for holiday pay, an employee must work the day before and the day after a holiday." Section on "Holidays Not Worked."

A worker was absent the day before a holiday, but worked 8 hours on the holiday. The company said he was ineligible for holiday pay. How would you argue the case?

Agreement to be construed as a whole - Arbitrators normally will hold that all parts of the contract have some meaning, or the parties would not have included them in the agreement.

Normal and technical usage - Words and phrases will be given their popularly-accepted meaning in preference to some special meaning which one of the parties may try to give them. Arbitrators will take the meaning customary in labor relations.

Example: Vacation pay was based on "average earnings". An employee worked on two types of jobs. The employee based vacation pay on his average earnings on the lower-rated job, on which he worked 80% of the time.

How would you rule and why?

2. STANDARDS GOING BEYOND THE CONTRACT

Intent of the parties - Where the contract is not a sufficient guide, the arbitrator will look beyond it to see if he can determine the intent of the parties.

Contract negotiations - The history of negotiations, as evidenced by minutes or records, is important. The arbitrator may rely on oral evidence, if he is convinced of its accuracy.

No consideration to compromise offers - Offers made in negotiations leading up to arbitration will not be considered in arbitration. It is recognized that parties will make offers, looking towards a settlement, that might be less than they consider to be their strict contractual rights. (Here, however, it must be determined that it is a compromise offer and not an admission that the case is really based on considerations other than those put forward in negotiations).

Custom and past practice - "What the parties do under a collective agreement might be even more important than what they say in it." The general rules on past practice are these:

1. Past practice will normally not be considered if the language is "clear and unambiguous" (although some arbitrations make exceptions to this).

2. It must be "mutual" and be shown that both parties have accepted it.

   -- Continued failure to object to a practice is sometimes held to make it "mutual".

   -- Sometimes it is held that failure to object to a practice is merely ignorance of contractual rights and does not constitute acceptance.

3. It must be of sufficient generality and duration to imply acceptance.

   -- It is frequently difficult to prove this.

Industry practice - When practice in a particular plant does not provide a sufficient guide, an arbitrator will sometimes look to practice in other plants of the same company or other plants in the same industry. This would be especially true of these cases:

-- where the practice was found in other plants of the same company under the same clause.

-- where the same agreement was entered into by one employer with several unions.

-- where the same agreement was entered into by several employers with one union.

Rarely is general industry practice taken into account, since a practice in one industry might be meaningless in another.

3. SOME SPECIAL CONSIDERATIONS

Interpretation in the light of the law. When two interpertation are possible, one making the agreement lawful and the other making it unlawful, the former may be used on the presumption that the parties intended to have a valid contract.

Example: If one interpretation would put the parties in violation of the Fair Labor Standards (Wage and Hour) Act, it is likely to be avoided if another interpretation is possible.

Reason and equity. Where language is ambiguous, arbitrators usually will strive to apply it in a manner that is reasonable and equitable to both parties. As one arbitrator put it: the arbitrator should "look at the language in the light of experience and choose that course which does the least violence to the judgment of a reasonable man". Whether both parties will concur in this "judgment" is dubious.

Avoiding harsh, absurd, or nonsensical results. When one interpretation would bring just and reasonable results and another would lead to harsh, absurd, or nonsensical results, the former will be used.

> Example: An interpretation was rejected that would have granted reporting pay under one clause and rejected it under another.

Forfeitures or penalties. Both arbitrators and courts are reluctant to assess a penalty or forfeiture if another interpretation is reasonably possible.

> Example: A clause requiring back pay for a worker unjustly discharged was interpreted not to require back pay where an employee suffered no loss of earnings while off the payroll of the company. (Outside earnings and unemployment compensation is commonly deducted from back pay awards.)

> On the other hand many arbitrators are inclined to rule that some "remedy" (including back pay, and even interest in some cases) is appropriate in certain types of cases. The question of remedies is one of the most controversial for arbitrators, unions and employers.

Experience and training of negotiators. Arbitrators are less inclined to apply a strict construction of contract language where the negotiators are inexperienced. The assumption is that the rules and practices were better understood by the parties than the words by which they tried to express such practices. This liberal attitude would not be taken with experienced negotiators who were known to have scrutinized the language closely.

Interpretation against party selecting the language. When no other rule or standard applies, arbitrators sometimes will rule against the party which drafted the language. The reason is that the drafting party can more easily prevent doubts as to its meaning.

Source: Frank Elkouri, How Arbitration Works, Bureau of National Affairs

HANDLING PROBLEMS OF EVIDENCE

Arbitrators are not bound by legal rules of evidence in most arbitration proceedings. The exceptions are when a statute or special arbitration agreement so provides. Most arbitration cases are much more informal than courtroom procedures, and designedly so, inasmuch as arbitration grows out of collective bargaining and assumes a continuing relationship between the parties.

The purpose of arbitration is to seek out the facts in a case and to have a decision rendered. The application of technical rules of evidence might make it appear that all the facts are not being taken into account. For these reasons, arbitrators are permitted (and sometimes required) to accept or listen to all evidence which a party believes to be pertinent. An arbitrary refusal to accept all relevant evidence is grounds for vacating an award. On the other hand arbitrators may rule in the hearing, or in the decision against the propriety of certain evidence.

Arbitrators may not subpoena evidence nor may they compel the testimony of witnesses. (Again, arbitration under a statute or a special agreement may provide differently.) Normally such power is not necessary since the arbitration is voluntary and the parties usually will provide what the arbitrator wants and needs. A failure to produce relevant evidence would naturally be taken into account by the arbitrator, to the disadvantage of the party failing to respond.

Weight and credibility. It is, of course, up to the arbitrator to decide what weight he will give to a piece of evidence and whether or to what extent he believes a particular witness. In making such a determination, arbitrators take into account these factors:

- -- whether or not statements "ring true"
- -- the conduct of the witness on the stand
- -- whether he speaks from first-hand knowledge or heresay
- -- his experience in the matter on which he is testifying
- -- inconsistencies in his testimony
- -- past record or personality

Not one of these factors by itself but all of them taken together determine how much weight or credibility an arbitrator gives to evidence or witnesses.

Kinds of Evidence

Heresay evidence. If a witness testifies as to what he did or saw, his testimony carries more weight than if he testified as to what somebody else told him.

Parol evidence. This pertains to word-of-mouth or verbal agreements. It is admissible only "for what it might be worth" which is usually little or nothing. It will not prevail against any written agreement. Sometimes the agreement will state specifically that verbal agreements that conflict with it are invalid.

Circumstantial evidence. Though not as strong as direct evidence, circumstantial evidence is acceptable and sometimes decisive in arbitration cases. The test is whether or not such evidence proves "beyond a reasonable doubt" that a worker actually performed an alleged act.

Some Procedural Protections

Though most kinds of evidence are admissible in arbitration proceedings, regardless of the weight that will be attached to them by the arbitrator, other kinds of evidence are not admissible or have protections that accompany their use. In addition, there are certain procedures that by common-law rules must be followed in arbitration proceedings. The most important of these are discussed below.

Right to cross-examination. An arbitrator will not accept evidence if it is submitted only on condition that the other party not be allowed to see it. The parties not only have the right to see evidence (exhibits) but also to cross-examine witnesses making allegations. Even new data submitted in post-hearing briefs can be grounds for demanding a further hearing.

Certain exceptions are made to this general right, as in admitting heresay evidence or affidavits from persons not present at the hearing. However, this deviation from normal procedures frequently results in the discounting of the weight of the evidence by the arbitrator.

Withholding evidence until hearing. In order to prepare a defense or rebuttal, parties must be given copies of all exhibits. There is also a strong convention against withholding previously-known evidence until the hearing. At the very least the spposing party may claim time to consider such new evidence. In some cases deliberate delay in withholding evidence will seriously damage the case of the party doing so. Sometimes the contract will say that the parties must reveal in grievance negotiations any evidence available to them at that time. The only exception that is generally recognized is where evidence has only recently come to the knowledge of one of the parties.

Improperly obtained evidence. Evidence obtained by illegal or unethical means, such as unauthorized locker searches or searches of personal belongings, may be refused by arbitrators. Another

example is entrapment, where a plan is pursued solely for the purpose of catching a person in a wrongful act.

Offers of compromise. Such offers made in negotiations may be received by arbitrators but if so, will usually be given little weight since they represent normal and desirable efforts to reach a settlement.

Outside testimony. Certain types of cases, such as incentive rate disputes, sometimes are helped by the testimony of outside persons. Generally arbitrators try to restrict testimony of outsiders (especially "character witnesses") or get the agreement of the parties to their appearance. On the other hand, of course, testimony by doctors or other expert witnesses, who have knowledge of conditions of witnesses or plant operations may be critical in certain types of cases.

Inspection by arbitrator. If both parties consent, the arbitrator may make personal investigation of cases. The most common use is for plant inspections. Sometimes the arbitrator himself will press for evidence of this sort.

Source: Boaz Siegel, Proving Your Arbitration Case, BNA, 1961

PROVING THE CASE

Proof in arbitration cases is generally a matter of common sense. There is no accepted standard of the "burden of proof" since it may differ depending on the nature of the issue, the contract language, or the habits and customs of the parties. Most arbitrators decide cases without ever stating who has the "burden of proof." Some exceptions will be discussed below.

Normally, the party initiating the arbitration case -- usually the union -- will present its evidence (or "go forward") first. However, sometimes this procedure will be reversed if the other party is in possession of the facts, as in a discharge case. This is supported by the usual objection to "proving a negative." A union can scarcely prove a man did not do something until it is known what he is alleged to have done. The order in which evidence is presented is not usually important, since both parties will have opportunity to present all of their evidence eventually.

The arbitrator normally will have in his own mind an idea of who must prove what in a case, and as the case progresses will make up his mind about the amount (quantum) of proof he will need to satisfy him.

Discharge and discipline cases. Here the burden of proof and the amount of proof an abritrator will require depend on the contract language and on the seriousness of the offense and how the parties have treated such offenses in the past.

-- If the contract has a broad management rights clause and a long and inclusive list of causes for discharge, the burden of proof may rest on the union.

-- If the contract says a worker may be fired only for "just and sufficient cause", the burden of proof normally will rest on the company.

Since discharge is the ultimate penalty management may impose on a worker, most arbitrators will make the company prove its case clearly, sometimes even "beyond a reasonable doubt" or with "clear and convincing evidence."

There are two points to be decided in discharge and discipline cases: first, the proof of wrongdoing; and secondly, the degree of penalty to be imposed if proof is established. Sometimes the contract or the arbitration submission will give the arbitrator no leeway in assessing the penalty. He merely decides guilt and the penalty follows automatically. Normally, arbitrators like to have the latitude to determine a proper penalty (or "remedy").

Seniority cases. Proof in seniority cases depends largely on the contract language and on the case to which seniority is being applied -- as, for example, promotions, demotions, or layoffs.

-- If the contract provides for straight seniority, the burden of proof is obviously on the employer if he wishes to by-pass the senior worker.

-- If the contract provides for seniority and "sufficient" ability, the employer must show that the worker does not have the "sufficient" capabilities for the job.

-- If the contract provides for seniority provided ability is "equal", the burden shifts to the union to show that ability actually is equal.

Sometimes if the contract is silent or vague, an arbitrator will shade his decision for the union if seniority is being applied to demotions or layoffs and will apply a stricter standard if seniority is being applied to promotions. This may reflect an application in the arbitrator's mind of the "burden of proof" idea.

Source: Boaz Siegel, Proving Your Arbitration Case. Also Problems of Proof in Labor Arbitration, 19th Annual Meeting National Academy of Arbitrators, BNA, 1967.

In interpreting the contract, the following factors should be considered:

1. The contract language

   a. Silence?

   b. Double meaning?

   c. Contradictory?

2. Arbitrability

   a. If the subject is not covered, does the contract permit arbitration, or is it a management prerogative?

3. If the language is unclear --

   a. What was the intent of the Parties

      --Witnesses of negotiation discussions
      --List of union or company demands submitted at negotiations
      --Comparison with past contracts
      --Settlement memoranda

   b. What has been past company practice?
      What has been industry practice?
      What is general practice?
      Does one way work a hardship, against another way?
      Does one way deprive worker of other contract rights?
      Does one way create grievances and tensions?

   c. Did either party permit an interpretation over a period of time without protest or appeal, and with full knowledge?

Summing Up--

Does the contract say anything on the subject?
What does it mean?
How was it interpreted in the past?
How do others interpret it?

CONTRACT APPLICATION

The following points should be considered whether or not the contract applies:

1. Contract authority

   a. Does it permit the employer to act?

   b. Does it permit the union to act

2. Specific contract clause

   a. Does it clearly cover the situation, or does it have to be "projected"?

   b. Is it general (e.g., "qualified", "just cause", "reasonable", "beyond his control", "fair opportunity"). (Establish a definition and support it.)

   c. Is it exact (e.g.,"10% above standard", or "after having received second warning for absences").

   (Show how the definition has not been satisfied, or that it includes the latitude you want.)

3. What happened

   a. Records, and how they should be interpreted

   b. Witnesses
      (The arbitrator may have a reservation about the testimony of Union activists or officers, as well as supervisory people who testify for the employer)

   c. What the other side will say, and how to rebut

   d. Visual material
      (e.g., floor plan, sample of work, photograph of scene.)

4. Testimony of experts

   e.g. Accountant, on the meaning of cost figures; physician, on physical ability; trade school representative, on journeyman qualifications; engineer, on time-and-motion study.

GUIDES TO THE USE OF PAST PRACTICE

In interpreting the wording, intent, and application of contractual provisions, arbitrators may be guided by past practice under the contract.

What is the Definition of a Past Practice?

One definition is that "A practice is a reasonable uniform response to a recurring situation over a substantial period of time, which has been recognized by the parties implicitly or explicitly, as the proper response".

The term practices, usually refers to local practices and working conditions which can vary considerably at different plants of the same company. They are often a customary way, not necessarily the best way of handling a given problem. A method of handling a problem cannot be considered a practice if it is only one of several ways of doing it.

The practice must be recurring and deal with the same type of situation. It must have existed over a substantial period of time. The lax enforcement of a rule may not constitute a valid practice since there may not be acceptance, either implicit or explicit. Lax enforcement might nonetheless by used in some cases to build proof of discriminatory or inequitable treatment.

Generally the burden of proof is on the union to show that the practice in fact does exist. This is frequently difficult to do, since the union may not have very complete records and the company is able to give evidence of different practice.

If the practice is unclear or conflicting the arbitrator is not likely to place much weight on it either way.

Of What Importance are Past Practices in Collective Bargaining?

Past practices have made the following contributions to the development of industrial self government.

1. It can be an aid to the interpretation of ambiguous contract language.

2. Even where contract language is clear an agreed practice may modify it.

3. Past practice is important in defining jobs and classification lines which may affect layoffs, wages and promotions.

4. Under some circumstances a long history of a practice indicates a mutual agreement even though the contract is silent.

5. A past practice is not binding and cannot be enforced when it is clearly contrary to the contract.

The validity of a past practice argument can only be determined by complete knowledge of the details of the individual agreement in effect in the plant or industry.

BRIEFS

Pre-hearing

Rare---written opening statement
Arbitrator doesn't have to take notes, gives full attention

Post-hearing - (Often unnecessary--only delay award)

When needed:
When Co. wants to submit one--it has that right
U. reps don't like to write--Co. lawyers do
When there is disagreement on facts--conflict of testimony
When case is complex or technical
When arbitrator is inexperienced
When his questions show confusion or that he has not grasped case
When there is no transcript (but usual when there is one)
When there is no written opening statement
When you want more time to prepare a strong argument

Contents:
The issue (or your version of what it should be)
The basic facts--support for contested ones--references to testimony
Quotations of relevant provisions of the agreement
Your contentions (arguments)
List them concisely and support
Most useful part to arbitrator
Most critical part to winning your case
(Note how arbitrator lists them in his opinion)
Rebut Co. contentions
Repeat any valid objections you raised at hearing
Cite cases
Only a few--too many give impression of weak case
Only if very relevant--others give impression grasping at straws
Best if you can site your own cases or arbitrator's
Best if you quote some of reasoning from opinion
Emphasize requested remedy
Give any relevant facts
Argue the remedy and any possible alternatives

Special Considerations:

May waive oral summation in case of briefs
But oral argument will give you a better chance to know Co. contentions and a chance to impress local committee.

A radical proposal

Some cases could be submitted by briefs only, without a hearing

When there is no disagreement on facts
When there is no need for witnesses and
When it is just a case of contract interpretation

SELECTING THE ARBITRATOR

How do you go about it?--the mechanics.

- Can you and the Company agree on one?
- Appointing agencies: AAA, FMCS, State Boards
  - Will send you a panel of 5 or 7
  - Composition of list--variety
- How you eliminate
  - AAA: delete and number
  - FMCS: alternate striking
- May ask for another list
- Direct designation

What are you looking for?

- Character
  - Integrity, fairness, firmness, self-confidence
- Ability
  - Understanding of the human factors
  - General knowledge of labor relations practices and terminology
  - Special knowledge: legal, work standards, incentives, testing, pensions, your industry (?), your plant
  - Experiences--depending on case

How do you find out?

- Appointing agencies
- Other union reps.
- Your international office
- His published cases (BNA, CCH, PH)
  - Not just which side he ruled for--read the whole case
  - Is it clear? Easy to understand?
  - Is his analysis well organized? Logical?
  - Does it reveal a good understanding?
  - If a compromise, is it the right decision or an effort to please both?
  - Does he stick to the case or add advise? Arbitrator or consultant?
  - Is it based on what agreement says or what he thinks it should say?

PROMOTIONS

Seniority - Ability Problems

1. What ability are we talking about -- the present ability of the worker to do the job at the present time -- the potential ability of the worker -- or what the job may potentially require?

Fruehauf Trailer Co., 11 LA 495; McLouth Steel Corp., 11 LA 805; North American Cement Corp., 11 LA 1109; Standard Forgings Corp., 15 LA 636; Illinois Malleable Iron Co., 16 LA 909; Universal Atlas Cement Co., 17 LA 755; Quaker Shipyard and Machine Co., 19 LA 882; Wagner Electric Corp., 20 LA 768; Pittsburgh Steel Co., 21 LA 565; John Deere Des Moines Works, 22 LA 274; Cameron Iron Works, Inc. 23 LA 51.

Pittsburgh Steel Co. (1953) 21 LA 565; McLouth Steel Corporation (1948) 11 LA 805. Realist Inc. 45 LA 444.

2. Does competence and ability mean the same thing?

Lebanon Steel Laundry 4 LA 94
Rudiger - Lane Co. (1948) 11 LA 567
Benjamin Electric Manufacturing Co. (1949) 13 LA 760
Rudiger - Lang Co. (1948) 11 LA 467; Fruehauf Trailer Co. (1949) 13 LA 163 ,
Illinois Malleable Iron Co. (1951) 16 LA 909
Seagrave Corp. (1951) 16 LA 410

3. What standards do arbitrators use in judging the criteria for determining ability?

Central Screw Co. 11, LA 108; Copco Steel and Engineering Co., 12 LA 6; Public Service Electric and Gas Co., 12 LA 317; Mole-Richardson Co., 12 LA 427; Worth Steel Co., 12 LA 931; Libby, McNeill and Libby, 14 LA 316; Allied Chemical and Dye Corp., 14 LA 548; Campbell Soup Co., 19 LA 1; International Harvester Co., 20 LA 460.
Bestwall Gypsum Co. 43 LA 475; Christy Vault Co., 42 LA 1093.

4. What is meant by "equal ability"?

Mole-Richardson Co. (1949) 12 LA 427; Combustion Engineering Co., Inc. (1953) 20 LA 416; Poloron Products of Pennsylvania, Inc., (1955) 23 LA 789. Wurlitzer Co., 41 LA 792.

E. I. DuPont De Nemours and Co. (1952) 18 LA 536; Southern Bell Telephone and Telegraph Co. (1951) 16 LA 1; Carnegie-Illinois Steel Corp. (U.S. Steel) (1946), Docket No. C1-31; Erie Mining Co., 49 LA 390; Detroit Gasket & Manufacturing Co., 50 LA 455. National Distillers Inc., 49 LA 918; Interlake Steel Corp., 46 LA 23.

5. Where the collective bargaining agreement requires a comparison of abilities among candidates for a particular job, how great a difference in productivity must be shown to indicate a clear difference in ability?

Worth Steel Co., 12 LA 931
United States Steel Corp., 22 LA 80
Goodyear Clearwater Mills, No. 2, 11 LA 419
Great Western Sugar Co., 41 LA 528

6. What weight should be given "experience" in measuring "ability"?

Copco Steel and Engineering Co., 12 LA 6; Thor Corp., 14 LA 512.

Goodyear Decatur Mills, 12 LA 682; U. S. Steel Corp., 22 LA 188; Poloron Products of Pennsylvania, Inc. 23 LA 789.

North American Aviation, Inc., 11 LA 312; Standard Forgings Corp., 15 LA 636.

Inland Steel Co., 16 LA 280; Seagrave Corp., 16 LA 410; Tin Processing Corp., 17 LA 193; Nickles Bakery, Inc., 17 LA 486; General Box Co., 48 LA 530. Reliance Universal Inc., 50 LA 397; Reliance Universal Inc., 50 LA 990; International Nickel Co., 45 LA 743.

7. What weight should be given to training and education:

Hershey Estates 23 LA 101
U. S. Steel Corporation, 22 LA 188.
Poloron Products of Pennsylvania, Inc., 23 LA 789
Lockheed-Georgia Co., 49 LA 603
Georgia Kraft Co. 47 LA 829;
Dempster Brox, Inc. 48 LA 777
Whirlpool Corp. 49 LA 529; De Kalb-Ogle Telephone Co., 50 LA 445;
Patapsco & Back Rivers R. R. Co., 43 LA 51

8. Is absenteeism and tardiness proper measure of ability:

Central Screw Co., 11 LA 108; Dow Chemical Co., 12 LA 1070;

Goodyear Clearwater Mills, No. 2, 11 LA 419; Allied Chemical and Dye Corp., 14 LA 548.

Goodyear Decatur Mills, 12 LA 682; Marlin-Rockwell Corp., 17 LA 254; Douglas Aircraft co., Inc. 23 LA 786.

9. Are discipline records -- or safety issues -- a method of determining relative ability?

U. S. Lime Corp. 23 LA 379; Copco Steel and Engineering Co., 13 LA 586.

Inland Steel Co., 16 LA 280; Bethlehem Steel Co., 48 LA 190; FMC Corp. 47 LA 823; Simling-Menke Co., 46 LA 523; Emhart Mfg. Co., 43 LA 946.

10. Do merit ratings indicate a worker's ability?

North American Aviation, Inc., 11 LA 312; Merrill-Stevens Drydock and Repair Co., 17 LA 516.
Bristol Steel and Iron Works 17 LA 263; Ohio Edison Co., 46 LA 801
International Minerals & Chemical Corp. 42 LA 47.

11. Is there a difference between a trial period and a training period?

Shore Metal Products Co. (1955) 24 LA 437; American Lava Corp. (1955) 24 LA 517; Linde Air Products Co. (1955) 25 LA 369; Great Atlantic and Pacific Tea Co. (1957) 28 LA 733; U. S. Pipe and Foundry Co. (1958) 30 LA 598. Wood Atlas Processing 46 LA 860.

International Harvester Co. (1950) 15 LA 587; Illinois Malleable Iron Co. (1951) 16 LA 909; Wagner Electric Corp. (1953) 20 LA 768; Great Atlantic and Pacific Tea Co. (1957) 28 LA 733.

12. Must the company give a man a trial period?

Tim Processing Corp. (1951) 17 La 193; U. S. Slicing Machine Co. (1954) 22 LA 53; Rome Grader Corp. (1953) 22 LA 167; Corn Products Refining Co. (1955) 25 LA 130; Dana Corp. (1956) 27 LA 203; Gorton-Pew Fisheries Co. Ltd. (1956) 27 LA 796; Great Atlantic and Pacific Tea Co. (1957) 28 LA 733; John Strange Paper Co. 43 LA 1184.

Gondert and Lunesch, Inc. (1949) 11 LA 1079.

Emmons Loom Harness Co. (1948) 11 LA 409; Autocar Co. (1952) 18 LA 300; Coca Cola Bottling Co. (1952) 18 LA 757; Day and Zimmerman, Inc. (1956) 27 LA 348; White Motor Co. (1957) 28 LA 823: Marathon Electric Manufacturing Corp. (1958) 31 LA 656. W. M. Chase Co. 48 LA 231

Seeger Refrigerator Co. (1951) 16 LA 525; Rome Grader Corp. (1953) 22 LA 167; Virginia-Carolina Chemical Corp. (1955) 24 LA 461; Allied Chemical Corp. 47 LA 554.

Emmons Loom Harness Co. (1950) 11 LA 409; United Rayon Mills (1950) 14 LA 241; Autocar Co. (1952) 18 LA 300; Wagner Electric Corp. (1953) 20 LA 768; Shore Metal Products Co. (1955) 24 LA 437; Curtis Companies, Inc. (1957) 29 LA 50; Cheney-Bigelow Wire Works Inc. 50 LA 1249.

Public Service Electric & Gas Co. (1949) 12 LA 317; Seagrave Corp. (1951) 16 LA 410; Tin Processing Corp. (1951) 17 LA 193; Nickles Bakery, Inc. (1951) 17 LA 486; Lukens Steel Co. (1951) 18 LA 41; Rome Grader Corp. (1953) 22 LA 167; Corn Products Refining Co. (1955) 25 LA 130; Linde Air Products Co. (1955) 25 LA 369; Gorton-Pew Fisheries Co., Ltd. (1956) 27 LA 796; Vulcan Mold & Iron Co. (1957) 29 LA 743; Allentown Portland Cement Co. (1958) 31 LA 47; [illegible]

13. What Constitutes a fair trial?

U. S. Slicing Machine Co. (1954) 22 LA 53; American Republic Corp. (1951) 16 LA 454; Seeger Refrigerator Co. (1951) 16 LA 525; Copco Steel and Engineering Co. (1949) 12 LA 6; Plastic Jewel Co., Inc. (1950) 14 LA 775; Rome Grader Corp. (1953) 22 LA 167; Smith-Scott Co., 48 LA 270. Montgomery Ward & Co. 48 LA 429; National Lead Co. 48 LA 405; Skenango Furnace Co. 46 LA 203.

Hayes Manufacturing Corp. (1950) 14 LA 970; White Motor Co. (1956) 26 LA 877; Mengel Co. (1956) 27 LA 722.

Lukens Steel Co. (1951) 18 LA 41.

Fitzgerald Mills Corp. (1949) 13 LA 418; U. S. Steel Corp. (1953) 20 LA 743; White Motor Co. (1956) 26 LA 877.

Fitzgerald Mills Corp. (1949) 13 LA 418; International Harvester Co. (1950) 15 LA 587; Dayton Malleable Iron Co. (1953) 21 LA 572; Bell Aircraft Co. (1955) 25 LA 618.

Promotions and Layoffs

The labor movement has emphasized the principle of seniority as an important basis for both promotions and layoffs. Its purpose was to provide an objective criteria for job changes rather than depending upon the whims and fancy of management.

The principle of seniority [illegible] gives preference and employment opportunities to the employees with the greater length of service. In at least one respect, collective bargaining provisions conferring seniority rights upon employees differ from other benefits conferred by the collective bargaining agreement. Under the seniority provisions, preference can only be conferred upon one employee, by an equivalent denial of benefits to another. Unlike demands for higher wages or improved working conditions, issues which benefit all bargaining unit employees, seniority provisions merely determine who among the bargaining unit employees gets the available opportunities. Seniority provisions do not create jobs, but merely allocate them.

One aspect of this problem is that frequently no agreement exists within a union as to what type of seniority plan should be negotiated, or even after the negotiation of specific seniority language in a collective bargaining agreement, how such language shall be interpreted and applied. Considerable friction can result within the union itself on these issues. Seniority issues may be passed on to arbitration because they are "too hot to handle" in earlier steps of the grievance procedure.

The Problems

How is the seniority unit to be defined? What constitutes a layoff or promotion? How is ability to be determined? In a plant merger, sale, or transfer, how are seniority units to be merged? How are seniority requirements squared with equal employment opportunity requirements?

Seniority lines may be drawn within a given department or job classification or within a given plant or throughout the company. The arbitrator is often asked to interprete from the language of the agreement over what span of jobs a given employee may exercise his seniority.

A further question is what specific service governs. The service taken into consideration may be time spent on a given job, in a given department, in a given line of jobs, in a given plant,or with a particular company.

Promotion opportunities are also not always easily defined. Do they refer to when an employee calls in sick (sickness of how long) or when a new job requires only three days of work, etc.? Or what is a layoff? Does a layoff result when no one is actually removed from the payroll?

How does ability fit into the scheme? Even after the person is to be provided the job by straight seniority must he have the ability to do the job? Should the person with superior ability receive the job?

Moreover, to what ability does the contract refer? Is it the present ability or the potential ability of the employee which is relevant? Ability to perform what range of duties of the job in question? If the job is expected to change in the future, may the company require an ability over and above that currently needed to carry out the present tasks of the job? What are proper criteria of ability? Even practical demonstrations, such as trial periods may result in questionable measurements of ability.

Merging of Seniority Units

Criteria for Merging Seniority Lists

A review of the reported arbitration and court decisions on the merging of company, plant and department seniority lists indicate that managements, unions, arbitrators, and judges have made use of a number of criteria. The most important of these criteria are:

1. the surviving-group principle;
2. the length-of-service principle;
3. the follow-the-work principle;
4. the absolute-rank principle;
5. the ratio-rank principle.

The Surviving-Group Principle

In some industries it is the accepted practice that, when one company purchases or acquires another company, the employees of the purchasing or acquiring company receive seniority preference over the employees of the purchased or acquired company.

In general the surviving-group principle has not been supported by arbitrators as an equitable and fair means of merging seniority lists.

In the Pan American World Airway case, arbitrator David Cole stated his opposition to the use of this criterion as follows:

> "When the operations of two airlines are combined it is because economics and flexibility are attained and because the CAB or the President thinks it is in the national interest that they should be. Whether one company or the other should continue, or whether a totally new company should be formed are decisions definitely not made with reference to the seniority rights of either group of employees. Financial or tax advantages, or perhaps legal considerations may be weighed, but so far as the employees are concerned it is sheer happenstance whether Company A or Company B survives in its original legal form. In view thereof, it seems highly undesirable that the future welfare of the employee population of two companies should hinge on the legal form the transaction may take. The substance of the combination of the two enterprises and the contributions made by each in the nature of jobs are of much more consequence and significance."

The Length-of-Service Principle

In many cases length of service is the only criterion which is employed when seniority lists are merged.

Length of service is an important criterion for merging seniority lists and plays a part in every such integration. In many cases it is the sole criterion employed. When so used it has the advantage of resulting in a merged list which is in harmony with the definition of seniority in most labor agreements. In general it is easy to apply, although difficulties may arise if the original lists have not been developed solely on the basis of length of service or if they have different definitions of length of service. However, the use of length of service is the sole criterion in cases where there is considerable difference in either the average length of service or the degree of employment in the two merging groups, can cause one group to gain a windfall in the form of increased value of seniority rights at the expense of the other group. In order to avoid the inequities in such cases, arbitrators and others have deviated from the length-of-service principle and given some weight to the follow-the-work principle and/or the ratio-rank principle.

The Follow-the-Work Principle

When a company is merged with another company or when plants of departments within a company are consolidated, the workers may be given the opportunity to follow the work with the seniority rights to such work protected.

The percentage of the total work brought to the merger by each of the groups is further complicated by whether one should consider the past work, the present work or the future work. The representatives of the employees of a successful firm which merges with a failing firm may argue that if the consolidation had not taken place, eventually there would have been no work at the failing firm and, therefore, its employees have no right to anything but the bottom of the seniority list. On theother hand the representatives of the employees of the failing firm may argue that as a result of the merger the future prospects of the consolidated company are much brighter than was the case for either of the companies if they had gone it alone.

The follow-the-work principle is recognized as a means of preventing windfalls in the value of seniority rights to the employees of one group at the expense of the employees of the other group, resulting solely from consolidation of companies, plants, or departments. For this reason it has been written into some union constitutions and some labor agreements. Even where it is not a part of the union constitution or the labor agreement, managements, unions, arbitrators and judges have given weight to it in order to avoid gross inequities. In some cases, however, it is quite difficult to determine the percentage of the work in the consolidation which each group brings to it. This is especially true if one is concerned with future as well as present work.

The Absolute-Rank Principle

It is possible, of course, to integrate seniority lists solely on the basis of absolute rank: the two employees who were first on the two original lists can be given the third and fourth places, and so on. The rationale behind the use of this method is that it places the emphasis on the most important aspect of a seniority list and that as a result, under certain conditions, it prevents windfalls to some employees and losses to other employees which flow from a merger of lists when the length-of-service criteria is used as the sole basis for integration.

Rank is more important than length of service in a seniority list and as a result, if lists are merged solely on the basis of length of service windfalls may occur for some employees at the expense of others. In consolidations where the seniority lists to be merged are equal in size, the use of the absolute-rank principle may eliminate such windfalls and preserve the original seniority values of the employees. However, where the groups to be merged are different in size, as they usually are, the use of this principle may result in inequities as serious as the inequities caused by the use of the length-of-service principle. For this reason, when managements, unions, and arbitrators have wanted to give weight to the rank factor they have made use of the ratio-rank principle instead of the absolute-rank principle.

The Ratio-Rank Principle

Integration of two seniority lists may be accomplished also by establishing a ratio from the number of employees in each of the two groups to be merged and assigning the places on the new seniority list according to this ratio. Thus, if seniority list A has 200 employees and seniority list B has only 100 employees, the ratio is two to one. Therefore, of the first three places on the new seniority list, two are allocated to the first employee on the B list; then places 3, 4, and 5 on the new list are allocated to the third and fourth men to the A list and to the second man on the B list; and so on, until all the A and B employees are placed on the new list.

The use of the ratio-rank principle results in the preservation of the relative rank of the employees in the merged seniority list. Since rank is very important in determining seniority value, it is an important criterion in cases where the average length-of-service or length-of-service structures of the original seniority lists are quite different. In such cases the ratio-rank principle may be used to eliminate or to decrease the windfalls to some employees and losses to other employees which would result from use of the length-of-service principle as the sole criterion. Its advantage as compared with the absolute-rank principle is that whereas the latter is effective in eliminating windfalls and losses only when the sizes of the two groups to be merged are equal, the ratio-rank principle can bring about these results regardless of the difference in the size of the two groups. Two difficulties arise in the application of this principle: (1) the merged seniority list which results is not according to length of service which contradicts the usual definition of seniority and (2) several employees may have equal rights to the same place on the merged list. Arbitrators have tended to use this criterion as a means of modifying the length-of-service principle rather than as the sole basis for integrating seniority lists.

Seniority - Discrimination

U. S. COURT IN NORTH CAROLINA FINDS TITLE VII VIOLATION AT TOBACCO FIRM

In a class action under Title VII of the 1964 Civil Rights Act against P. Lorillard Company and the Tobacco Workers union, U. S. District Court Judge Eugene A. Gordon finds that the departmental seniority system maintained by company and union constitutes a continuing discrimination against affected employees and an unlawful employment practice in violation of Section 703(a) and (c) of the Act. Judge Gordon says an order will be entered to enjoin the discriminatory practices and to provide relief in the nature of back pay.

The affected class of employees in this Title VII suit are Negroes presently employed by Lorillard who were hired into various departments of the Greensboro, N. C., tobacco plant between the opening of the plant in 1956 and May 31, 1962. The defendants, in addition to the employing company, are the Tobacco Workers International Union and Local Union No. 371.

Noted in the court's findings of fact is that in the early years of the Greensboro operation, Lorillard relied for recruiting and hiring of employees on the North Carolina Employment Service offices in Greensboro. At that time the Service maintained one office primarily for Negroes and one primarily to serve whites. The company is described as having instructed the Service to refer Negro applicants for certain jobs and departments and to refer white applicants for other jobs and departments. Another finding is that the company's discriminatory hiring policy continued until the summer of 1962. The seniority system found discriminatory carried over into the present labor contract.

Local 317 organized both black and white workers and at the outset, the local had a black vice president and two of the seven members of the first negotiating committee were black. Local 317 represents all employees of the plant and the court says there is no question that Negroes comprise a minority of the members. The local union adopted a departmental seniority system although field representatives from the parent union favored plant-wide seniority. Under the seniority system in the 1957 contract at the Greensboro plant, promotions, layoffs, cutbacks and recall right were determined on the basis of departmental seniority, job seniority, and sex.

The union's 1962 agreement abolished job seniority and the prohibition on transfers between departments. It permitted employees to bid for vacancies on the basis of their departmental seniority. The 1965 contract eliminated job allocation on the basis of sex. The 1968 contract, running through to March 1, 1971, continued provisions for allocation of jobs on the basis of departmental seniority, although the company had proposed in the negotiations that after 30 days on the job, employees be entitled to exercise full seniority for all purposes and not be limited to service within a department. Local 317 rejected the proposed 1968 agreement containing the Lorillard proposal.

The district court's findings of fact set forth the racially discriminating effects continuing from the departmental seniority system, in conjunction with the firm's initial discriminatory hiring policy. And the court also explains that the parent Tobacco Workers union has taken no affirmative steps to advocate plant-wide seniority to eliminate discriminatory departmental seniority.

Judge Gordon's discussion refers to the present effect of the departmental seniority system and adds: "Persuasive and controlling authority correctly has termed such practice unlawful when applied to an individual's employment status because of race, color, religion, sex, or national origin."

After citing some of the provisions of Title VII, Judge Gordon remarks:

"Prerequisites to a given seniority or merit system meeting standards of the Act, as set forth in Section 2000e-2(h), are proper answers to the questions: (1) Is this system bona fide? (2) Is it the result of an intention to discriminate?

"To be a bona fide system within the meaning of the Act, the system must serve a valid business purpose. Two lines of thought appear to have advanced with respect to the meaning of business purpose or business necessity and what values courts should ascribe to those words in determining whether a given employment practice is unlawful or not.

"As applied to these facts, the argument most in keeping with the primary policy of Title VII of the Civil Rights Act of 1964 reasons as follows: If a seniority or merit system perpetuates the effects of prior discrimination, irrespective of whatever business purposes are served, it cannot be allowed to stand. In other words, a valid business purpose can offer no absolution to an employer or a labor organization who is acting in discriminatory fashion. Where effects of discrimination are present, the system cannot be regarded as bona fide. Griggs v. Duke Power.

"The second argument reasons that 'business necessity' is an element to be balanced against the anti-value of discrimination or its continuing effects. If the business necessity is somehow vital to the operation of a particular industry, and if, in the Court's opinion, it outweighs whatever vestiges of discrimination are thereby maintained, it may be considered bona fide.

"The departmental seniority system here in question does serve a valid business purpose in that a shorter period of training could reasonably be anticipated for persons familiar with operations of their own department. Even so, it must be held an unlawful employment practice. This system as maintained by the present (as well as the former) collective bargaining agreement carries forward, in perpetuation, consequences of racial discrimination from the past.

"Even if rules in accord with the second argument mentioned above were to be adopted and applied, it is further found that the business purposes served by the seniority system in this case are not so important as to override the ill effects thereby prepetuated. By neither standard is this system bona fide.

"If, however, for the purposes of argument only, the system were bona fide in all in all respects, it would still be violative of the Act--failing to meet the second part of the statutory requirement. The parties defendant, acting with intimate knowledge of the full effect which departmental seniority had upon past hiring practices, cannot be said to have not intended the result."

(From BNA Daily Labor Report, March 17, 1970)

STANDARDS WHICH MAY BE UTILIZED BY AN ARBITRATOR IN DISCIPLINARY CASES

The issue before the arbitrator frequently requires findings in respect to the existence or non-existence of "just cause" for discipline, including discharge. Few union-management agreements contain a definition of "just cause". Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company--e.g., by reinstating a discharged employee without back pay.

The Questions

1. Did the Company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

   A. Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

   B. There must have been actual oral or written communication of the rules and penalties to the employee.

   C. A finding of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

D. Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company's business?

A. If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

A. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

B. The company's investigation must normally be made BEFORE its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

C. There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for lost time.

D. The Company's investigation must include an inquiry into possible justification for alleged rule violation.

4. Was the Company's investigation conducted fairly and objectively?

A. At said investigation the management official may be both "prosecutor" and "judge", but he may not also be a witness against the employee.

B. It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

C. In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just an an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

A. It is not required that the evidence be preponderant, conclusive or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy.

B. The management judge should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

A. A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

B. If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

A. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offense a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good", a "fair", or a "bad" record. Reasonable judgment thereon must be used.)

B. An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

C. Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Why arbitrators reinstate discharged employees

Mitigating circumstances or uneven application of rules are most frequent reasons for overturn of management decisions

MORRIS STONE

WHEN A LABOR ARBITRATOR reverses a company's decision to discharge or suspend an employee for misconduct, is it because the evidence against the man was weak, or because the arbitrator found fault with management's administration of industrial justice?

These were among the questions dealt with recently in an American Arbitration Association study of 391 discharge and discipline cases in which the company's decision was reversed or softened. (See table 1.) All the arbitration decisions included in the study were published in the 10-year period ending June 1969 in AAA's monthly award reporting service, *Summary of Labor Arbitration Awards*.[1]

Mitigating circumstances

The most frequent single reason given by arbitrators for reinstating discharged employees or for reducing the duration of disciplinary suspensions was that, in view of the grievant's generally satisfactory record and the likelihood that he had "learned his lesson," he was deserving of a second chance. This category covered 107 cases, or 27 percent of the total.

Typical was the case of an employee fired for using offensive language toward a member of supervision and walking away from his place of work in the course of an argument over whether an employee who was not in the bargaining unit could do certain work.

Reducing the discharge to a 10-week suspension, the arbitrator explained that the grievant had been a "fairly competent" worker for 8 years and had committed no previous offenses that called for punishment, that the incident giving rise to the discharge was "one isolated, emotional outburst" that lasted only 5 minutes, and that the discharged worker was in a department where "improper language" was not only common, but commonly employed by the supervisor.

Inconsistent enforcement of rules

The next most frequent reason arbitrators found for not upholding disciplinary actions was that companies themselves were inconsistent in enforcement of rules. In 77 cases (about 19 percent of the total) it was found that companies had frequently overlooked similar violations, encouraging the belief among employees that they could disobey the rules without risking penalties.

Arbitrators voiced strong criticism of personnel practices characterized by laxness over long periods of time until one hapless individual was discharged as an "example" to others.

Grievants and unions often accuse management of showing personal bias against the disciplined employee, but among the 77 cases in this category there were only two in which arbitrators found evidence to support this charge. Most often, the inconsistent enforcement of rules comes about haphazardly, perhaps out of thoughtless or indiscriminate "leniency" on the part of firstline supervision, rather than as a result of deliberate intention to "get" an individual.

Making the punishment fit the crime

How to make the punishment fit the crime is a perennial problem in every system of justice and law enforcement, and industrial discipline is not an exception.

Some companies try to achieve evenhanded administration of discipline by announcing in ad-

---

Morris Stone is Editorial Director of the American Arbitration Association.

vance precisely what penalty will follow violation of a particular rule. Others prefer to improvise, assigning whatever penalty seems right in the individual case, after the infraction occurs.

Apparently, neither system is foolproof. Arbitrators found in 56 cases (14 percent of the total) that the punishment was too harsh, either in terms of the company's own standards or in terms of industrial practice generally.

One difficulty with the schedule of penalties is that employees have a way of committing faults which do not quite fit published schedules. When

Table 1. Reasons given by arbitrators for reversing management

Reason	Number of cases	Example [1]
The evidence supported the charge, but there were mitigating circumstances.	77	The grievant was discharged for striking another employee with his fist. The arbitrator reinstated him without back pay on the basis of evidence that the grievant had been provoked by a racial slur.
Evidence did not support the charge of wrongdoing	52	An employee was discharged for stealing a tool. The evidence showed that he was 1 of 3 who had access to it, but it did not prove conclusively that the grievant, and no other individual, committed the theft.
Inconsistent enforcement of rules	38	The evidence convinced the arbitrator that the company had often overlooked violation of the rule which is now being enforced by discipline.
The rule itself was reasonable, but its application in this case was not.	30	The rule required employees to work overtime when requested. The grievant refused because of family business which the arbitrator believed was really urgent. In other words, the company should have accepted his excuse.
The grievant did not know he was risking a penalty by his action	28	In an argument over a work assignment, the foreman told the grievant to "do the work or go home." The arbitrator was convinced that, in walking out, the grievant believed he was merely accepting an option offered him and that no further discipline would follow.
Management was partly at fault in the incident	27	The grievant used intemperate language in an argument with a foreman, but the foreman had permitted the argument to go on, and had himself used disrespectful language in addressing the grievant.
The penalty was excessive in terms of the company's discipline policy.	25	Although the company normally warned an employee the first time he punched his time clock before the bell sounded, a particular employee was suspended for a day for that offense, without first having been warned.
The grievant was punished under the wrong rule or schedule of penalties.	20	The grievant was discharged for "dishonesty," in that he filed a false entry of piece work performed. The arbitrator said that, at most, he could have been punished under a rule forbidding half-finished work to be reported for pay purposes.
Employees involved in the same incident were dealt with differently without a satisfactory explanation of the difference.	18	Three employees failed to return from lunch. One was a skilled worker, whose presence was urgently needed, but the others could be spared. The company suspended the first for 2 days, and merely warned the others. The arbitrator did not agree that degrees of fault could be related to the employer's need of production.
Punishment was for a reason the arbitrator thought was beyond management's authority to discipline.	14	An employee was discharged following his arrest and conviction for drunken brawling. The arbitrator believed that as this was an off-the-job offense and not work-connected, and as it did not cause loss of time from work, management had no right to discipline him.
Management committed procedural errors prejudicing the grievant's rights.	13	Although the union contract said a discharged employee must be given a statement of the charge against him, the grievant was given no such statement until 10 days after the discharge. The notice was 7 days late.
The penalty seemed excessive in terms of customary penalties in industry.	11	A 1-month suspension was given an employee for the first offense of using abusive language toward a supervisor. The arbitrator thought this too harsh, and reduced the suspension to 1 week. As the company had no established policy in this respect, the arbitrator's criterion was the standards in industry generally.
Union stewards or officers were disciplined for actions in connection with their official union business.	9	A steward violated his foreman's instructions to remain at his place of work, and later convinced the arbitrator that the order was unlawful and that he was urgently needed elsewhere to prevent an illegal walkout.
Retroactive application of new rule, or insufficient publicity about a rule.	9	A driver was fired for picking up a hitchhiker. The evidence showed that there were no signs up in the garage or the cab of the truck warning drivers not to take riders. The grievant said he was not aware of the rule, and the arbitrator believed him.
General standards of judicial process were violated	7	The grievant was first suspended for 3 days. But on the 2d day, management reviewed the record and decided to discharge him. This was held to be "double jeopardy"—two punishments for one offense.
The grievant was substantially guilty, but the arbitrator thought he was entitled to another chance because of special circumstances.	4	The grievant had long and satisfactory service, and was within a year or two of having a vested pension plan. The arbitrator believed he had "learned his lesson."
The rule which the grievant had violated was inherently unreasonable.	4	Discharge of an employee under a rule stating that a man and wife may not be employed on the same shift. The arbitrator believed there was no valid reason for that rule.
The evidence of wrongdoing was held inadmissible by the arbitrator.	3	Some of the evidence produced at the arbitration hearing was not known to the company at the time of the discharge. Without this evidence, the grievant was perhaps deserving of some discipline, but not discharge. The arbitrator said the case had to be judged on the basis of facts known to the company at the time of discharge.
The company had shown personal bias or discrimination against the grievant.	2	A searching investigation of the grievant's employment application was undertaken, although no such inquiry was made with respect to any other employee. He was subsequently discharged for falsification of his application.

[1] The example is representative of the group. No implication is intended that the cases so classified resembled the example in detail.

SOURCE: 391 cases reported in American Arbitration Association's "Summary of Labor Arbitration Awards," April 1959 through June 1969.

an employee failed to return from lunch, was he merely an absentee for the half day and therefore deserving of a written warning under the company's rules, or was he guilty of walking off the job, a more serious offense in the rule book?

When an employee absented himself from work after asking for the day off and being refused, was he merely an absentee or was he insubordinate?

Twenty times, among the 56 cases in which the penalties imposed by management were deemed excessively harsh, the arbitrators differed with management as to which of the published rules the grievant had violated.

Suspicion is not evidence

The rules of evidence in arbitration are not as strict as in courts of law, but arbitral awards are nevertheless based upon facts and evidence. Failure to realize that, when a man's job is at stake, a strong suspicion is no substitute for solid documentation resulted in 52 reversals of discipline (13 percent of the 391 cases in this study).

In one plant, for instance, someone had thrown an explosive device into a group of fellow employees, causing an injury to one of them. It seemed strange to management that all of the workers who might have thrown the missile except one immediately rushed to the scene. The one man who was seemingly lacking in curiosity must have done the mischief, management thought.

Maybe so, and maybe not, ruled the arbitrator. "To uphold the discharge penalty requires clear and substantial evidence that the grievant was the guilty party," he wrote. "Although the circumstances indicate that the explosive device was probably thrown near the injured employee by someone who might very well have been the grievant, there is some possibility that he did not commit the act. As long as such a possibility exists, it is difficult to uphold the company's action on the basis of the circumstantial evidence presented."

Due process and industrial justice

Prison gates sometimes swing open for guilty persons whose constitutional rights were violated. So do occasional employees escape punishment because general standards of due process were not observed. In some instances, particularly where union contracts are very strict in the matter of back pay for improperly discharged employees, the guilty employees even enjoy the "unjust enrichment" of wages for their idle time.

In 23 cases management committed procedural faults serious enough to prejudice the rights of grievants to a defense. In several, contractual requirements that the union be notified formally of the discipline had been overlooked. In others, stewards had not been permitted to attend the meetings where the grievants were questioned about their misbehavior. And in one case, the union persuaded the arbitrator that the grievant had been subjected to "double jeopardy." He had first been suspended for his offense. Later, upper echelons of management reviewed his history and decided that nothing short of the ultimate penalty of discharge would be appropriate. The arbitrator reduced the dismissal to a suspension again, pointing out that a different result would have followed if the company had suspended the man "pending further determination," and had then ordered the dismissal. In that event, it would have remained one penalty for one offense.

It is of course true that arbitration is less formal than litigation, and that arbitrators will often accept evidence in a form that would be excluded by judges. But this does not mean that any evidence at all will be admissible. In three cases, employers relied entirely upon a line of argument the arbitrators held irrelevant. For that reason, the companies lost the decisions.

The clearest example involved a discharge which the company feared would not stand up in arbitration. When the grievance was filed, management tried to bolster its case by investigating the grievant's employment application. There they found many outright misrepresentations on matters which, if the truth had been known at the time, would have barred employment in the first place. All the evidence—the incident giving rise to the discharge and the original falsification—was put before the arbitrator. But he refused to accept anything that had to do with the employment application. A discharge must stand or fall, he said, on the basis of facts known to the company at the time the penalty was invoked.

Substantive errors

Not all managerial errors, of course, were merely procedural. Twenty-seven times among the 391 cases, management's fault lay in contributing to the incident for which the grievant was disciplined.

Thus, although the evidence was clear that an employee had used intolerable language in addressing his foreman, he was reinstated because the foreman had not been blameless in his own choice of language. In several cases, the fault with managerial personnel lay in not deterring violations when they had the opportunity to do so.

The employee in one of these cases had telephoned the personnel office to ask permission to stay out 1 day so that he might make some repairs to his home. He was reminded that his attendance record was poor, but was not specifically told that his absence for this reason would not be excused.

"In such circumstances, the grievant was justified in assuming that he could stay away from work to take care of his problem at home without fear of discipline," the arbitrator wrote. "It would have been another matter if he had received a direct communication from the company informing him that in view of all the circumstances he must report for work or take the consequences."

The limited reach of discipline

Years ago, employers would occasionally discharge employees for a variety of moral or other faults that had nothing in particular to do with the employer-employee relationship. Today, in establishments operating under collective bargaining agreements, it is generally understood that the employer's disciplinary reach extends only to activities that affect production.[2]

But there are borderline cases, and in the 391 studied, there were 18 in which management guessed wrong.

An interesting borderline case of this kind was one involving an employee who, preferring "not to get involved," told the police he knew nothing about the intruder in the plant they were looking for, although he had seen the man and could identify him. Later, he admitted to management that he had lied, and for that he was given an official reprimand—a form of punishment which the employer thought was quite mild under the circumstances.

Mild or not, the penalty was reversed by an arbitrator. Although the grievant's conduct deserves to be "condemned," the arbitrator wrote, what he did was a matter for "his conscience," not for discipline by his employer. "The disciplinary action applied by the company was *not* for not telling the truth to an agent of the company in a job-related situation, but was for not telling the truth to agents of the civil authorities in a matter not related to the performance of the employee's job. This action cannot be sustained." □

FOOTNOTES

[1] The research project was sponsored by the American Arbitration Association as part of its general program of making the insight of the labor-management arbitrator available to companies and unions. The statistical material and tabulations were compiled by Richard Gilbert, a recent graduate of New York State School of Industrial and Labor Relations at Cornell University.

[2] See Robert W. Fisher, "Arbitration of Discharges for Marginal Reasons," and John W. Leonard, "Discipline for Off-the-Job Activities," *Monthly Labor Review*, October 1968, pp. 3–5 and 5–11, respectively.

SUBCONTRACTING

1 - Definition

The issue of subcontracting has become one of the most complex problems in labor-management relations, particularly since the increase in technological change and automation.

Subcontracting or contracting out is the practice of an employer to hire an outside company to produce goods or to perform services which could be produced or performed by employees within the bargaining unit using the employer's equipment and facilities.

2 - The Problem

Basically there are three problems involved in a subcontracting issue:

(a) Efficiency of plant operations vs. job security of employees

At this point, two considerations clash: the desire of the employer to operate his plant at optimum economy and the desire of the union to protect the income and the jobs of their members.

(b) Union security and jurisdiction

The union position is that not only the jobs of its members are at stake but also the very survival of the union itself.

Because the union is the sole representative of all employees in the bargaining unit and work to be contracted out "belongs" in the bargaining unit, the union's jurisdiction may also be threatened. This union attitude is particularly strong where a union represents all types of employees in a plant --skilled as well as unskilled. Here two conflicts may develop -- jurisdictional disputes between two or more unions and dissension between organized and unorganized workers.

(c) Management rights

Many employers regard subcontracting solely a management decision, an unrestricted management prerogative, only a concern of efficient plant operation. These employers believe in the "reserved rights" contained in the management prerogative clause of the contract, which give the employer the unilateral right to manage his business except in areas where the contract expressly limits these rights.

Consequently, there is considerable opposition by management to negotiate specific contract clauses regulating subcontracting.

Those who believe in the "Reserved Rights" theory argue that subcontracting is excluded from the scope of collective bargaining and therefore, is a unilateral management function.

Others, including unions, many arbitrators and also many court decisions, contend that even in the absence of a subcontracting clause the contract limits the right of management to subcontract work inasmuch as such action may violate other clauses of the contract("Implied Limitations" theory).

Principally, it is these three problems with which arbitrators, NLRB and the courts deal in their decisions relating to subcontracting.

3 - Arbitration

When a contract contains a subcontracting clause, the arbitrator, of course, must base his decision on the meaning of such clause and, therefore, such cases pose no special problems. 1/

The difficulty arises where the contract is "silent" and does not contain a subcontracting clause.

When the first cases came to arbitration, management challenged the arbitrability of a subcontracting issue and based its position on the management rights clause in the contract. Management has the right to contract out work -- so management claimed -- because the parties would have expressly negotiated a clause in the contract if they wanted management to give up this right. Silence is consent to contract out work.

Against this management argument, unions have claimed that subcontracting is an arbitrable issue because unilateral subcontracting violates other specific contract clauses, for instance union recognition, wages, seniority, job classifications, etc.

Most arbitrators have never accepted the "reserved rights", allegedly contained in the management rights clause. They have found subcontracting cases arbitrable and have based their decisions on the merits of the case.

This practice was upheld by the courts. The U. S. Supreme Court has ruled in several cases that subcontracting is arbitrable even though the contract makes no direct reference to the issue, unless, of course, it is expressly excluded from arbitration.

1/ For selecting subcontracting provisions, see U. S. Department of Labor, Subcontracting, 1969 (Bulletin No. 1425-8)

In the Lincoln Mills case (1957) the U.S. Supreme Court declared that Federal courts should direct the parties to arbitrate where a contract contains both an arbitration clause and a no-strike clause. The agreement to arbitrate a grievance dispute is a quid pro quo for the agreement not to strike.

In 1960 in the "Trilogy" cases (3 Steel cases) the U.S. Supreme Court ruled that the courts can refuse to compel arbitration only if the contract expressly exempts an issue from arbitration.

Also in 1960 in the Warrior and Gulf case, the U.S. Supreme Court ruled that the courts had no business looking into the merits of an arbitration case. It was up to the arbitrator to interpret the contract.

Most arbitrators are now inclined to rule that an employer may unilaterally subcontract provided such action is in good faith and would not erode the contract.

Over the years arbitrators have developed specific criteria on which they base their decisions. An arbitrator would rule in support of the employer if he meets one or more of the following criteria. If the employer could not meet these criteria, the arbitrator's award would go to the union.1/

(1) Past Practice-- Whether the employer has subcontracted work in the past without objections from the union. (Tungsten Mining Corp., 19 L.A. 503 (1952); American Sugar and Refining Company, 37 L.A. 334 (1961)

(2) Economic Justification--Whether subcontracting is done for reasons such as economy, maintenance of secondary sources for production, augmenting the regular work force, plant security measures or any other sound business reason. (Amoskeag Mills, Inc., 8 L.A. 990 (1947); Black-Clawson Company, 34 L.A. 215 (1960)

(3) Effect on the Union--Whether the subcontracting is being used as a method of discriminating against the union or substantially prejudicing the status and integrity of the bargaining unit. (U.S. Potash Company, 37 L.A. 678 (1958)

(4) Effect on Unit Employees--Whether members of the union are discriminated against, displaced, laid-off, or deprived of jobs previously available to them, or lose regular or overtime earnings. (Bathlehem Steel Co., 30 L.A. 678 (1958)

1/ From Federal Mediation and Conciliation Service, Subcontracting, 1963, pp. 10-11

For additional arbitration cases see references in Sample Arbitration Case 4, (Section 3, p. 16 of Manual-- Bond Electrical Company vs. Local 222)

(5) Nature of Work Involved--Whether it is work which is normally done by unit employees or work which is frequently the subject of a subcontracting in the particular industry or work which is of a "marginal" or "incidental" nature. (Hershey Chocolate Corp., 28 L.A. 491 (1957); U.S. Steel Corporation, 37 L.A. 756 (1961)

(6) Availability of Properly Qualified Employees--Whether the skills possessed by members of the bargaining unit are sufficient. (Beaunit Mill, Inc., 37 L.A. 366 (1961)

(7) Availability of Equipment and Facilities--Whether necessary equipment and facilities are presently available or can be economically purchased. (Parke, Davis & Co., 26 L.A. 438 (1956)

(8) Regularity of Subcontracting--Whether the particular work is frequently or only intermittently subcontracted. (Curtiss-Wright Corp., 38 L.A. 924 (1962)

(9) Duration of Subcontracted Work--Whether the work is subcontracted for a temporary or limited period or for a permanent or indefinite period. (General Metals Corp., 25 L.A. 118 (1955); Cone Fishing Co., 16 L.A. 289 (1951)

(10) Unusual Circumstances Involved--Whether an emergency, "special" job, strike, or other unusual situation exists. (Texas Gas Transmission Corp., 27 L.A. 413 (1956); Owen-Coyne Fiber Glass Corp., 23 L.A. 603 (1954)

(11) History of Negotiations on the Right to Subcontract--Whether management's right to subcontract has been the subject of contract negotiations. (Pittsburgh Plate Glass Company, 38 L.A. 981; Active Metals, Inc., 38 L.A. 565)

4 - NLRB and Court Decisions

Before 1962 a subcontracting case rarely reached the NLRB. If not expressly dealt with in the contract, a subcontracting dispute was resolved through arbitration or strike in the absence of an arbitration clause.

In 1962 the NLRB ruled in two cases -- against the Town and Country Manufacturing Company and the Fibreboard Paper Products Corporation -- that subcontracting is a mandatory subject for collective bargaining. These rulings were upheld by the U.S. Supreme Court.

The meaning of these decisions is that the duty to bargain collectively requires management to serve notice to the union of its intent to contract out work and to discuss the subject of subcontracting with the union in good faith. Refusing to bargain, constitutes an unfair labor act and a violation of Section 8(a)(5) of the Taft-Hartley Act. If the company's action is also discriminatory, the union may ask for back pay and reemployment of the laid-off workers in accordance with Sections 8(a)(1) and 8(a)(3).

However, following the Fibreboard case, the NLRB and the courts have not always consistently decided that subcontracting is a mandatory subject for collective bargaining. Both -- NLRB and the courts -- have been ruling according to the merits of the individual case.

The NLRB has been basing its decisions on guidelines which -- by and large -- are similar to the reasons which govern the decisions of arbitrators.

In general these guidelines can be summed up as follows:

A company must bargain on the subject of subcontracting if subcontracting ---

a. Would be a departure from past practice
b. Would affect working conditions
c. Would eliminate jobs from the bargaining unit

If, in addition, the employer's action is discriminatory against the union or its members, he would also be in violation of Sections 8 (a)(1) and 8(a)(3) of the Taft-Hartley Act.

On the other side, unilateral subcontracting would not be a violation of Section 8 (a)(5) if ---

a. Subcontracting is in accordance with past practice (the union has not voiced objection in the past).
b. The union had an opportunity to bargain.
c. Subcontracting has no adverse effect on the employees or on the union.

EXCERPTS FROM THE LABOR-MANAGEMENT RELATIONS ACT, 1947, RELATING TO DUTY TO BARGAIN

Rights of Employees

Section 7

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

Unfair Labor Practices

Section 8 (a) Employer Unfair Labor Practices

It shall be an unfair practice for an employer---

"(1) Interference, restraint, or coercion. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(3) Discrimination. By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization---

"(5) Refusal to bargain. To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

Section 8 (d) Collective Bargaining Procedures

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification---

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expriation date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Representatives and Elections

Section 9

9 (a) Majority Representation; Individual Grievances Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sample Arbitration Case 1

Local 550 vs Acme Iron Works
(Proper Rate of Pay)

Factual Background

Jack Jones was in continuous employment with Acme Iron Works from June 24, 1949 to January 31, 1957, at which time he was granted a leave of absence to serve as a business representative of the Local Union. When Jones was last employed, he was classified as Chief Assembler and Welder. The wage rate then for Chief Assembler was $2.31 per hour, but under a system of "dual classifications" common in the plant at that time, he received $2.41 per hour in view of the fact that he performed the duties of both Chief Assembler and Welder (although the rate for Welder was only $1.76 per hour).

Subsequently, general wage increases were embodied in the plant's rates in 1957, 1958, 1959, 1960, 1962, and 1963, totaling $.53 per hour. This would have provided a rate of $2.94 for Mr. Jones by the time he returned to work on December 30, 1963. Under the agreement which became effective on April 20, 1962, all dual classifications were discontinued.

When Jones returned to work six years later, on December 30, 1963, he was assigned to the position of Chief Assembler. When he got his pay checks he discovered he was being paid $2.84 for his work as Chief Assembler rather than $2.94 as he thought appropriate. He, therefore, on January 20 filed a grievance asking for $.10 per hour increases retroactive to the day he recommenced work.

The grievance statement (timely filed):

> I returned from leave of absence on December 30, 1963. I should have returned at my former rate of pay but I am receiving $.10 per hour less. I request my rate be adjusted $.10 effective December 30, 1963.
>
> /s/ Jack Jones

The Company's reply:

> Jones' rate of pay when he began his leave of absence six years ago was based on a dual classification (Chief Assembler and Welder). The contract now calls for single classifications. Jones' present rate for the classification he is in meets contractual requirements.

The arbitration hearing takes place three months after the grievance was filed.

The Company considers six years leave of absence to be an exceedingly long period of time. During this period job requirements and job characteristics had changed. To pay Jones $.10 an hour above the Chief Assembler's rate might be regarded as unfair by others on the assembly line.

When Jones was serving as a business representative of the Union, he continued to do a little welding in his garage. He commented to friends that welding was like an avocation to him. When he returned to work as Chief Assembler, he did on occasion do some welding work. The Company maintains that Jones was really not supposed to do any welding after he returned to work. The Company also says he was specifically so informed of this after a short time.

When the dual classification was discontinued on April 20, 1962, by oral agreement all employees then at work who were receiving rates above the Agreement's rates for their particular classifications continued to be paid above the nominal rates, except for one person who was reduced to the nominal rate.

When Jones came back from his leave of absence on December 30, 1963, he was assigned to the position of Chief Assembler. Company representatives indicated, however, that there was really no need for more than a single Chief Assembler, and that it preferred to have the duties carried on by the person who had been performing them for some time, even though he was junior to Jones in seniority. Jones subsequently agreed to transfer to the maintenance department as of January 8, 1964, where the rate of pay was $2.77, but on the 9th changed his mind, after one of the maintenance employees objected on the grounds that the contract permits a transfer to a different occupational group only if an employee does not possess sufficient seniority to remain in his own occupational group. He then returned to his previous position.

Jones and Union members who worked near him will state that he was not told to stop the welding in his job as Chief Assembler until the case "went to arbitration".

When the dual rates were discontinued in 1962 no specific agreement was made regarding whether or not Jones' personalized differential should have been continued. Jones was not on payroll at the time the dual classifications were eliminated, and there was no specific understanding for him to receive a higher rate in case he should return to work.

When Jones was on leave of absence from the Company as business representative of the Union, he helped prepare an arbitration case against the Company. It was the only arbitration case in the history of the plant up to that time. The case involved the discharge of the entire night shift. The Company lost the case and was ordered to reinstate the employees with full pay for all time lost and since that time Jones has felt that as far as Company officials were concerned, there were hard feelings toward him personally.

The Company maintains that Mr. Will H. Dout, Plant Superintendent, told Jones that he was not to do any welding. He said he talked with Jones on this matter before Jones filed the grievance. Mr. Dout, however, has a busy schedule and will be unable to attend the arbitration hearing.

Jones takes his coffee with Mini Skirter, a young divorcee who works near the location where Jones works as Chief Assembler. It is rumored they are having an affair. Jones was not able to see Miss Skirter when he was in maintenance. Company officials have stated that they believe Jones' decision to leave the maintenance department in January was influenced by his relationship with Miss Skirter. Miss Skirter's ex-husband, Jerry, is a foreman at Iron Works and was on the management negotiating committee in 1962 when the dual classification was discontinued.

Union's Contention

The personalized wage differential Jones had prior to his leave of absence should be continued. Jones should be receiving the extra $.10 per hour differential.

Company's Contention

Jones is being paid the appropriate rate for Chief Assembler as stated in the contract.

Possibly Relevant Contract Clauses

a. Leave of Absence:

> Any employee who may become by election or otherwise an official of the Union, and having duties taking him from the employ of the Company, may be given a continuous leave, for the period of his term of office, but not to exceed one year's duration. Said employees will not lose their seniority provided a request for leave of absence be made prior to the expiration of the leave.

b. Seniority:

> (1) The general principles of seniority shall mean that the youngest employee in point of seniority shall be the first to be laid off in all cases when the working force is being curtailed and the reverse shall be used in recalling people to work who are on the eligible layoff list, provided that in both instances qualifications to perform the work shall be taken into consideration.
>
> (2) Plant Seniority shall be the employee's length of employment, including days off as defined in this Article, granted leaves of absences, absences due to compensable

injuries while in the employment of the Company and illnesses or non-occupational injuries which do not extend beyond six months or one-half of the attained plant seniority, whichever is greater.

c. Definition Clause (available work):

Available work whall mean that when an employee is transferred to other work as result of job curtailment or job elimination, such employee shall be permitted to exercise his full plant seniority. First in his occupational group, second in his department, and third elsewhere in the entire plant, providing he or she is capable of performing the work, without special training or instruction beyond normal operating procedures. All such jobs will be considered available work where employees are working with lesser seniority than the employee whose job has been eliminated or curtailed. Where more than one available job exists, in accordance with the above definition, the employee will be assigned the job most applicable and comparable in rate of pay. Where two or more jobs of equal pay status exists, under the above definition of available work, the transfer assignment shall then be at the discretion of management.

d. Definition Clause (occupational group):

Occupational group shall mean those jobs which are comparable in job content, rate of pay, and are within the same department and under the same foreman's supervision.

e. Seniority Termination:

Seniority of any employee will be broken if any employee:

1. Quits
2. Is discharged for just cause
3. Is habitually absent or is absent without notification in excess of (3) days
4. Does not report for work when recalled
5. Violates prescribed conditions of employment

f. Union Discrimination:

The employer will not, in any way, directly or indirectly, interfere with or discriminate against any employee because of his union activities or because of any statement or information given in the interest of said Union. The Union agrees that it will not solicit membership or otherwise engage in any union activities upon the premises during working hours, there being excepted herefrom, however, committee meetings and affairs arising between the Union and the Company that are provided under the terms and provisions of this contract.

g. Productive Group:

In the event there is no work in the classification which the employee holds, he shall be assigned to work in another classification where work is available. During the placement on other available work, the employee will continue to receive his regular rate of pay.

Whenever an employee earns a classification, he or she shall be entitled to retain this rate at all times when work is available, and is assigned to do this work.

h. Grievance Procedure (excerpts):

(32) Should grievances arise between the Company and the Union, or between the Company and any employee or employees, concerning the meaning or application of any of the provisions of this Agreement resulting from an alleged violation of this Agreement, there shall be no strike or lock-out on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

(39) Third Step (Arbitration). Within four (4) workdays from the date of the receipt by the Union of the Company's Second Step answer the Union may give written notice to the Branch Manager of intent to submit the grievance to an arbitrator for final determination.

(40) The parties shall endeavor to agree upon the selection of an arbitrator within ten (10) workdays of the receipt by the Company of the written notice of appeal, and if they do not select an arbitrator within such time, the Union may, within the three (3) workdays immediately following, request in writing, a list of at least five (5) arbitrators from the Federal Mediation and Conciliation Service. A copy of the request will be submitted simultaneously to the Company.

(45) The Arbitrator shall have only the functions set forth herein. His authority is confined to the interpretation and application of those limitations upon management functions in the form of rates of pay, wages, hours of work and other conditions of employment as set forth in the express terms of this Agreement.

(46) He shall have no power to establish or change provisions of this Agreement, or to establish or change the bargained wage rates. . .

(49) The decision of the Arbitrator shall be final and binding on the Company, the Union, its members, and the employee or employees involved. The Union will not encourage, give financial aid, or assistance to any of its members, in any appeal to any court or labor board from a decision of any arbitrator.

Sample Arbitration Case 2

**Local 4 vs Perry Warehousing Facilities,
a Division of Tastee Foods, Inc.
(Discharge)**

The Grievance Statement:

I was sent home Saturday night at 10:00 p.m. by Mike Gabriel and was discharged Monday evening by Dave Peters, Plant Manager. I feel that I was discharged unjustly and should be reinstated with full seniority rights and suffer no loss of pay. If I was to be discharged, I should have been paid in full Saturday night.

/s/ Charles Comer

The Company's Reply:

Mr. Comer was guilty of insubordination and the Company has a contractual right to discharge him.

Stipulation

The parties have stipulated that the questions submitted for decision by the Arbitrator are as follows:

> Was the discharge of Charles Comer unjust as set forth in the written grievance filed? If the discharge was unjust, what remedy?

Factual Background

The Company owns a large warehousing facility. The work consists largely in loading and unloading freight cars and moving foodstuffs between the cars or the dock and the storage rooms by clamp or forklift truck. The storage area is divided into two sections -- the "dry side" (used for canned goods), and the "frozen side", where the temperature fluctuates around zero. The aisles on the dry side are open to the loading dock, but those on the frozen side are shut off by doors that open when the driver pulls an overhead chain.

The grievant was first employed by the Company in April, 1967, as a Laborer (car loader). About six months later he was advanced to Forklift Driver. He worked the evening shift, starting at 6:30 p.m. During the regular workweek he drove on the dry side; but on Saturdays that side did not operate, so he worked his sixth day either as a car loader or as a driver on the frozen side.

On Saturday evening, February 17, the grievant arrived at the workplace at about 6:20 p.m. He told Foreman Wolfe that he wanted to work as a loader rather than drive the lift. Wolfe said he would see, but that he would probably need him to drive. A few minutes later Wolfe told him he would have to drive and held out his "pull sheets" or work orders. The grievant, instead of taking the sheets, told the Foreman he could wipe himself with them. The Foreman turned away and the grievant went into the cafeteria and talked with fellow employees for a few minutes until starting time. Then he clocked in, went to the Foreman and said, "Give me the papers," and went to work.

Some two hours later Foreman Gabriel saw the grievant drive his forklift frontward through one of the aisle doors, and reminded him of the rule that the trucks must be driven backward through the doors (so there will be no danger that they will hit and damage the doors before there is time for them to open). Grievant started to drive off without saying anything. The Foreman called after him to say that he was telling him this for his own good, since he might get discharged for it if he was seen by the manager. The grievant then drove away without comment.

About a half-hour later Foreman Gabriel was present when grievant drove up on a car with a pallet, on top of which were some twenty loose cases that had slid around into jumbled position. The Foreman told him that any loose cases were supposed to be neatly stacked so that they could be counted easily by the checker. Grievant insisted that the checker could count them as they were, and the Foreman told him to make sure in the future that they were in shape for easy counting.

The Foreman gave the following version of the ensuing remarks:

> Driver: You better get off my back.
> Foreman: I'm telling you the Company rules - the way we do things, and it has to be done that way.
> Driver: You'll either get off my back or I'll whip you.
> Foreman: If that's the way you feel about it, go ahead. There's nothing stopping you.
> Driver: Don't think it can't be done.
> Foreman: Well, let's go to the office.

The grievant gave a somewhat different account:

> Driver: God damn it, Mike, why don't you get off my back? Every day you got to get on somebody and just gnaw and gnaw. You can just get off my back. I'm tired of it.
> Foreman: What are you going to do about it?
> Driver: I can whip you.
> Foreman (removing coat): Come on, let's go, if you think you can whip me. Let's get it over with, if you think you're so hot.
> Driver (walking away toward rear of truck): (no response)
> Foreman: Let's go over to the office.

While they were waiting in the office for the Superintendent and the Union Steward, there was a brief conversation. According to the Foreman, the grievant said: "Don't look at me that way. Don't get it in your head that you can't be whipped, because I can damn sure do it. You're going to keep pushing me too far, and I'm going to do it." The grievant quotes himself as saying, "God damn, Mike, don't look at me that way. You know you can be whipped."

After the others arrived and the incident was discussed, grievant was told to check out and return for a conference with the Manager on Monday afternoon at which time he was discharged.

About six months earlier, a Union Steward almost got into a fight with a different foreman, for which he received a four-day suspension.

Grievant ordinarily works well on his job. On one occasion, however, he and another employee were threatening to fight. Grievant has always used profane language on the job. Futhermore, his supervisors contend they have always had difficulty talking with him rationally. The grievant, however, has had no reprimands or other disciplinary actions against his records.

The grievant said he did not like to drive the forklift in the freezers because it bothered the arthritis in his knees and ankles and caused him pain.

When the grievant had his first incident with Foreman Gabriel, he realized he was in the wrong aisle. Actually he backed out, and when he asked Gabriel (who was standing by) which door to go into, it was then that Gabriel said he was driving the forklift truck into the freezer the wrong way.

In the second incident with Gabriel, the grievant was aware of the location of the 20 cases on the pallet. Grievant maintains that he pushed the twenty cases near the center of the pallet so they would not fall off.

At the management hearing on Monday afternoon when the grievant was discharged, neither the incident with Wolfe, nor the incident involving improper driving of the forklift, was raised.

In the incident with Wolfe, grievant considered this kidding and is willing to testify that he and Wolfe were friends and often kidded in this fashion. Wolfe did not file a reprimand based on this incident.

The grievant had in the past talked with the Company doctor about his arthritis and says the doctor was "concerned about it." The grievant, however, did not make a formal request to be excused from working in the freezer storage room. Union witnesses believe that the grievant is more irritable when his arthritis bothers him.

Before Gabriel became Foreman, he was a checker. This was four years ago. At that time he threatened another foreman who told him how he should do his job.

The grievant has in the past mentioned to both Gabriel and Wolfe that his arthritis bothered him, especially during the winter months.

The forklift trucks are difficult to operate. One turns the steering wheel in the opposite direction from which one wishes to turn. There are two controls on the truck, one for the vertical movement of the forks and one for the angular movement. It is well known that working in cold environments does much to slow down a person's mental responses.

On the dry side of the warehouse where the grievant was used to driving, there are no doors on the storage rooms. Also the notice concerning the rule about driving backwards through the doors was posted only in the freezer warehouses and then only in one place, the bulletin board.

Six months after grievant first began working for Gabriel, he filed a grievance against Gabriel for improperly sending him to the freezer side and permitting a less senior man to perform his work. Grievant contends this man and Gabriel were good friends. The grievance was processed and Gabriel was prohibited from shifting grievant in this manner.

Bill Janner, a fork operator on the frozen side, is willing to testify that Gabriel was always telling people to do things that would irritate them into sassing back or smarting back to Gabriel.

Employees are willing to state that Gabriel boasted after the second incident with grievant that if any man wants a piece of my behind, it's here for him and he's welcome to try to get it.

There is no evidence that grievant sought other work from the time of discharge to the time of the arbitration hearing (a period of three months).

Union's Contention

The discharge was unjust.

Company's Contention

The discharge was just.

Possibly Relevant Contract Clause

(a) Discharge. The Company shall have the full right to hire, discharge, or discipline for just cause and shall have the full control and supervision over the operations, business and plant of the Company, subject only to the provisions of the Contract.

(b) Shop Rules. The Company shall have the right to establish, maintain, and enforce reasonable rules and regulations to assure orderly plant operations, it being understood and agreed that such rules and regulations shall not be inconsistent or in conflict with the provisions of this Agreement. The Company shall maintain on its bulletin boards and furnish the Union with a written or printed copy of all such rules and regulations and all changes therein.

(c) Work Assignments. It is recognized that from time to time it may be necessary for the Company to temporarily assign employees to a work operation other than that on which they are normally employed.

(d) Reporting Procedures. Any employee who is laid off, ill, or unable to report to work for appropriate reasons shall keep the Company advised, in writing, or his or her current status.

(e) New employees may be required, at the option of the Company, to take and pass a physical exam prior to the completion of the probationary period.

(f) Any employee may be required to take a physical examination if, in the opinion of the Management and Shop Committee, the employee's work is beyond his physical capacity or seriously detrimental to his health. If the employee's physical condition is inadequate for his job, every effort will be made by Management and the Shop Committee to find suitable work for him in the plant.

(g) Safety and Health. The parties hereto recognize the importance of safety provisions in the plants for the welfare of the employees and the protection of the Company's property. The Company agrees to make reasonable provisions for the safety and health of its employees during the hours of their employment.

Selected Citations of Arbitration Decisions in Discharge Cases

	Cumberland Chemical Corporation	44 LA 289 (1965)
	General Telephone Company	44 LA 499 (1965)
BNA	Forest City Foundries Company	44 LA 645 (1965)
	Paragon Bridge and Steel Company	43 LA 865 (1964)
	Ryan Aeronautical Company	39 LA 58 (1962)
	Aco Steel Products	61-1 ARB 8064 (1961)
	Minnesota Mining & Manufacturing	63-1 ARB 8257 (1963)
CCH	Allegheny Airlines, Inc.	67-1 ARB 8244 (1967)
	Continental Carbon Co.	67-1 ARB 8157 (1967)
	Naugatuck Chemical Division of U.S. Rubber	62-2 ARB 8498 (1962)

Sample Arbitration Case 3

Complete Products Corporation and Local 88
(Contract Interpretation)

The Grievance Statement

The Company did change the starting time and the quitting time of the first and second shift without mutual agreement between the Company and the Union, in which the Company is in violation of (Section 7, paragraph F). REQUEST FOR ADJUSTMENT: For the Company to cease taking the right to change the starting time and the quitting time of various shifts and to comply with Section 7, paragraph F.

Stipulation

The parties signed the following joint stipulation as to the issue to be arbitrated when they asked the Federal Mediation and Conciliation Service for a list of arbitrators:

> Did the Company violate Section 7, Paragraph F, in its occasional adjustment of working hours?

Factual Background

On Friday, May 20, 1966, the Company posted a notice that for the next two weeks it would be necessary for the first and second shifts to work two hours of overtime per day, to be accomplished by the day shift employees reporting early and the second shift employees remaining late.

Normally the Company operates with two shifts. The first begins at 7:30 a.m. and ends at 4:00 p.m. The second begins at 4:00 p.m. and ends at 12:30 a.m. A seasonal work peak normally occurs during the early summer. Thus there are likely to be at least one or two occasions annually when the Company asks the first shift to report two hours earlier and the second shift to continue two hours later, so that the work-day is extended from eight hours to ten hours. Overtime is paid for the two additional hours. Such changes in working time usually last a week or two.

Such a change was made by the Company in July, 1965, at which time the Union submitted a grievance claiming a lack of Union agreement to the change and an additional rest period. During the grievance procedure the Company adopted a new policy of introducing a five-minute paid break between the regular and the extra work periods, and the grievance was not carried to arbitration.

In the present situation the working time was similarly extended for two weeks. The five minute break was allowed. The Union was not consulted in advance, however, nor was its agreement to the change sought.

Past practice with respect to asking Union consent for other similar changes in working hours is neither clear nor uniform. The parties' contentions and proofs are not adequate for a conclusion.

Four hundred workers are employed by the Company. One hundred and sixty of these work the night shift. Most workers commute by automobile an average of 3.8 miles one way to the plant. A few travel by bus. Municipal bus service ceases at 2 a.m. During the summer months the sun rises between 5:30 a.m. and 7:30 a.m. It is dark at 5:30 a.m., however. Many of the employees have children who have to be in school at 8:00 a.m. The changes in shift were made on May 23, fourteen days before school was out.

The new plant manager has been with the Company for a period of six months. He gave a speech before the local Chamber of Commerce on March 10 in which he warned against "continuing Union infringement upon management prerogatives". He advocated taking " a hard line". For the last three months in the plant the number of grievance has increased ten percent.

When the Company made the shift changes in July, 1965, ten women reported late to work for at least three days or more during the two week period. Several of the women received disciplinary warnings as a result, and all filed grievances protesting the warnings. The grievances were all dropped, however, and one foreman overheard the Chief Shop Steward say that the Union dropped these grievances as a quid pro quo for the Company introducing the new policy of a five-minute paid break between the regular and extra work periods.

The Union has a contract with Smith Brothers Corporation which has a provision similar to the wording of Section 7 (F). The Union contends that Smith Brothers consults the Union in regard to changing of shift times and reaches agreement for such changes. The Company has talked with Smith Brothers on this matter and they contend they heard just the opposite.

Union's Contention

The Union contends that the temporary change in working hours could properly be made only after agreement with the Union. The Company, by its action, violated Section 7, paragraph F of the Agreement.

Company's Contention

The Company contends that the temporary scheduling of an additional two hours of work per day is merely the assignment of overtime and not a change in the starting or quitting time of the shift.

Possibly Relevant Contract Clauses

A. Hours of Employment

7(B) When two shifts are employed, a regular work-day for the first shift shall consist of eight (8) consecutive hours, exclusive of the lunch period from 11:30 a.m. to 12:00 noon, with pay for eight hours between 7:30 a.m. and 4:00 p.m., and a regular work-week for the first shift shall consist of forty (40) hours; a regular work-day for the second shift shall consist of eight (8) consecutive hours, exclusive of the lunch period from 8:00 p.m. to 8:30 p.m., with pay for eight hours between 4:00 p.m. and 12:30 a.m., and the regular work-week for the second shift shall consist of forty (40) hours.

7 (D) The second and third shifts respectively, (if any) shall immediately follow the preceding shift, except the first third shift of the week shall immediately procede (sic) the first first shift of the week.

7 (F) The starting time and quitting time of the various shifts, as herein provided for, may be changed from time to time by mutual agreement between the Company and the Union, provided further, that the Company in cases of emergency or in cases of unexpected production requirements may change the time of the lunch periods set forth in Sub-sections A, B, and C of this section to another period which shall not be more than one-half hour earlier or later than the lunch periods set forth in Sub-sections A,B, and C above.

7 (G) The foregoing provisions of this section describe the regular workday and regular work-week and are not intended to be construed as a guarantee of hours of work per day or per week, or days of work per week. The regular scheduled work-week for each employee shall begin with the starting of his or her regularly scheduled shift on Monday of each week as hereinabove set forth.

7 (H) The foregoing provisions of this section are not intended and shall not be construed as preventing overtime work,. . . When, in the opinion of the Company, it is necessary to work overtime, employees entitled to such work, as hereinabove provided, shall whenever practicable be given at least eight (8) hours advance notice thereof and, in the event such notice is given, the employee(s) shall be expected to work a reasonable amount of overtime except for good and sufficient cause. Employees shall not be compelled to (but, if requested to do so by the Company, may at their own discretion) work more than twelve (12) consecutive hours, inclusive of the lunch period, in any twenty-four (24) consecutive hour period or more than forty -eight (48) hours in any week, which shall be construed to mean Monday through Sunday.

B. Overtime Pay

8 (A) All work done by an employee before or after the regular work hours on any shift and all work done in excess of the regular work-day or regular work-week for any shift shall be paid for at the rate of one and one half times such employee's current regular straight-time hourly rate.

12 (B) Any employee who, by order of the Company, reports for work during the twelve (12) consecutive hours immediately following the regular quitting time of his or her regular shift shall, for all time worked during such twelve-hour period, be paid the applicable overtime rate thereof, or such employee shall receive four (4) hours pay at the applicable overtime rate, whichever is greater.

Suggested Arbitration Cases for Reference

Lauhoff Grain Co.	11 ALAA 716	62-2 ARB 8608
Owens-Corning Fiberglass Corp.		61-2 ARB 8371
National Elevator Manufacturing Industry, Inc.		64-1 ARB 8182
Pullman, Inc., Trailmobile Division		64-1 ARB 8132
Peter Eckrich and Sons, Inc.		61-3 ARB 8768
Gaffers and Sattler		66-2 ARB 8498

Sample Arbitration Case 4

Bond Electrical Company vs Local 222
(Contracting Out)

The Grievance Statement (dated July 18, 1968)

On July 15, 1968, the Company subcontracted with an outside firm for the painting of a large warehouse. This was done in violation of the contract. The Union asks that the Company cancel the subcontract and have the regular paint crew do the work.

Company Reply

The Union's grievance is denied. There is no provision in the contract as to subcontracting. This is a right inherent in management.

Factual Background

Bond Electrical Company employs six painters in its maintenance department during normal operations. They have been working a regular 40 - hour workweek. The Company for some time has been considering painting its large warehouse. This two story building is about 300 by 120 feet, made of steel and corrugated tin. The Company decided the painting would be done more efficiently and economically by an outside, non-union, painting firm. On July 15 the Company contracted with this firm to do the work. The Union upon receiving word of this, immediately filed a grievance (presented above).

The painters in the maintenance department have never painted large outside buildings of the plant. They have on occasion painted some outside trim, and small sheds. They have worked overtime on occasion. The subcontractor's employees do not belong to a union.

The Company is prepared to submit evidence of cost calculations and bids which will show that if it had not subcontracted the job, the costs would have been considerably higher ($1,500). Work by the contractor is scheduled to begin three days after the arbitration case hearing.

Summer is normally a slow time for maintenance painters, but they usually schedule their vacations then, and in any event are almost never laid off.

The current contract runs from April 1, 1968 to March 31, 1970. Subcontracting was not discussed during the negotiations.

Union's Contention

The painting of the warehouse should be done by employees within the bargaining unit.

Company's Contention

The Contract, including the management rights clause, gives the Company the right to subcontract the work.

Possibly Relevant Contract Clauses

a. Management Rights Clause

The management of the Company's plants, and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the Company. Subject to the provisions of this Agreement, the Company shall have the right to schedule and assign work to be performed, and the right to hire or rehire employees, promote, recall employees who are laid off, demote, suspend, discipline or discharge for proper cause, transfer or lay off employees because of lack of work or other legitimate reasons, it being understood, however, the Company shall not discharge or discipline the employee except for proper cause, or otherwise improperly discriminate against an employee.

b. Union Recognition Clause

The Company recognizes the Union as the exclusive representative and agent of all production and maintenance employees as defined in Section 1 hereof for the purposes of collective bargaining with respect to wages, hours of employment, and other conditions of employment

Section 1 (B) reads as follows:

"Maintenance employees" hereinabove referred to is intended to include employees of the Company engaged in the ordinary upkeep and repair of the Company's machinery and plants provided, however, major extensions, major repairs, major remodeling and installation of new machinery shall not be considered "maintenance" as that term is used herein.

c. Job Classification Clause

> Each employee shall be classified in accordance with that one of the hereinafter mentioned classifications which covers the class of work in which he or she is employed by the Company (the job title "Painter" is in the classification list and pays $3.40 per hour).

d. Union-Management Cooperation Clause

> The parties agree to cooperate in implementing the terms of this Agreement, in order that they may maintain harmonious relations, respect, and efficiency of operations.

e. Arbitration Clause

> . . . The Arbitrator shall have no authority to add to, subtract from, or amend any provision of this Agreement....

Suggested Arbitration Cases for Reference

(1) Upson Company CCH-LAA 68-1 ARB 8009. Under a contract containing no restriction on subcontracting, a company had the right to contract out bargaining unit work so long as its action was not arbitrary, discriminatory or unreasonable. Grievance denied.

(2) General Telephone Company CCH-LAA 68-1 ARB 8231. Burden of proof - availability; were employees available for such work. Case also refers to contracting out of maintenance work. Grievance denied.

(3) Celanese Fibers Company CCH-LAA 67-2 ARB 8427. Contract silence; there was nor contractual restriction on the company's right as to whom it would choose to perform available work; and the recognition clause did not give the union automatic jurisdiction over all work; also no evidence of bad faith existed. Grievance denied.

(4) Elwell-Parker Electric Company CCH-LAA 67-1 ARB 8132. Contract silent on subcontracting; no damage to employees who protested; work involved was small. Grievance denied.

(5) Ronson Corporation CCH-LAA 67-1 ARB 8208. Magnitude of job; disputed job was not the ordinary type of work over which unit employees had a claim. Grievance denied.

(6) Consolidated Aluminum Corporation CCH-LAA 66-3 ARB 8742. Contracting out maintenance work. Contract silence. Arbitrator presents 13 standards to be looked at: (1)whether the work was of the type customarily performed by bargaining unit employees, (2)the impact of the subcontracting upon them and their union, (3) the experience of the

men or their qualifications to perform the work in question, (4) the urgency of the work or the time limitations in which it must be performed, (5) whether any employees on layoff possessed the necessary ability to do the work and could have been readily recalled, (6) whether the company possessed the necessary equipment, tools, and facilities to do the work, (7) if so, whether it was reasonable to assign them to another use and not to the work in question, (8) the bargaining history of subcontracting, (9) prior instances of contracting out, (10) the motivation of the company in subcontracting the work, (11) whether the union was consulted beforehand, degree of supervision exercised by the company over the outside employees. (Marlin Volz, Arbitrator) Grievance denied.

(7) Matthiessen and Hegeler Zinc Co. CCH-LAA 66-2 ARB 8674. Question of whether work could be performed by bargaining unit personnel (contract was not silent however). Grievance sustained.

(8) Taylor Stone BNA 50 LA 208. The question of what constitutes "specialized" work is dealt with in

(9) U. S. Steel Corporation BNA 44 LA 940. Employer violated experimental agreement of subcontracting by subcontracting work of cleaning and painting temper mill since it does not appear that subcontracting was a "more reasonable course" than allowing bargaining unit maintenance employees to do the work. (1) Work required no special skills. (2) Outside contractor had never performed work. Grievance sustained.

(10) Fraser Nelson BNA 45 LA 177. Although grievance was sustained, arbitrator pointed out certain evidence did not support union's contention that seven employees possessed experience or qualifications to be considered "painters". Grievance sustained.

(11) Hughes Aircraft BNA 45 LA 184. Even rocognition and subcontracting clauses cannot be extended in this case to bar subcontracting of work where (1) decision to subcontract was in good faith, and (2) economic reasons existed. Grievance denied.

MANAGEMENT RIGHTS ISSUES IN ARBITRATION

by Eli Rock

(Outline of remarks Philadelphia Seminar January 1966)

1. General Comments

The question can best be approached by discussing first the basic place of the management rights clause in the average labor agreement.

Some companies - more of them in the past than at present - have taken the position that they do not want a management rights clause written into the contract. The rationale for this position is that management rights are so basic and so clearly understood by all concerned, that there is no need to spell them out in the labor agreement. Under this point of view, it is sometimes felt that if the rights are spelled out by contract language, an effort might be made to limit the company to the particular language, with undesirable effects in some instances. In effect, this point of view is that the management rights are clearly "implied," whether or not they are written in specifically.

Nevertheless, as of today, most labor agreements do have a management rights clause, and a typical one is that which is set forth, for example, in the United States Steel contract with the United Steelworkers of America.

> "The Company retains the exclusive rights to manage the business and plants and to direct the working forces. The Company, in the exercise of its rights, shall observe the provisions of this Agreement.
>
> "The rights to manage the business and plants and to direct the working forces include the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons."

II. The Effect of the Management Rights Clause

Whether the clause is written in or implied, clearly it must be regarded as qualified by the remainder of the contract. Some management clauses say the latter specifically, but even if they do not, it must nevertheless be regarded as the normal fact.

There is no problem where the remaining clauses of the contract are clear, in their limitation on the rights of management. For example, the average contract will say that employees should be laid off in accordance with seniority. In the absence of such a limitation, the company would be free to lay off irrespective of seniority. Where there are seniority clauses, however, none would deny that these limit the company's otherwise rights, and that the management clause is, therefore, qualified to that extent.

Where the problems arise is where the contract does not specifically deal with a limitation - as for example, in connection with the matter of subcontracting. Here the union will argue that it has an "implied" protection against certain types of subcontracting and that these implied rights of the union limit the company's management rights as much as such express clauses of the contract, as the seniority ones. Without this kind of an implied limitation, the argument runs, express clauses of the contract such as the seniority ones, the recognition clause, and the like could become meaningless. If a company could subcontract without any limitation whatsoever, it could even, for example, bring in a non-union subcontractor to perform the principal bargaining unit work, on the very premises of the company (to take an extreme case). Clearly, says the union, the latter was never intended and there must be an implied limitation against at least such an exercise of the management clause,

since the whole idea of any contract is that neither side will take any action to undermine or render useless the basic agreement itself.

On this issue regarding the union's claim of various implied limitations on the management clause, companies will usually enter a strong denial. Their point of view is that the management clause is at most limited only by the other "express" clauses of the agreement. As to all other matters which have not been expressly given away under the contract, runs the argument, the company retains "reserved rights"; or stated otherwise, the management clause reserves these rights for the company. Thus, says the company, it is free to subcontract in any way that it wishes, unless there is a clause in the agreement specifically limiting the right to subcontract. Thus the issue is joined.

III. More Specific Treatment of the Subcontracting Issue

In a broad sense the above controversy, i.e., the extent to which management rights are limited in specific situations, is present in almost any case that comes to arbitration. Nevertheless, the issue can be better understood by an examination in depth of several of the problem situations in which it most clearly arises. The subcontracting problem is one of the best examples of this type.

Where there is a specific contract clause on the question of subcontracting, this usually makes the problem an easier one for all concerned, though by no means always. Clearly, more unions, and more companies too, appear to be seeking and obtaining some type of specific language on the subcontracting problem. Nevertheless, a great many agreements still do not have it. One of the reasons for the latter may be the sometimes mutual recognition that the issue is so fraught with sensitivity and tension, on both sides, that it is best not to raise it in the atmosphere of a contract negotiation - that it is best to leave

the problem vague in the future, hoping that both parties will somehow be able to live with what has transpired in the past.

In any event, where there is no subcontracting clause in the agreement and where issues do arise which end in arbitration, various criteria have now been evolved for resolving the issues. Most arbitrators will look at specific cases and facts in terms of the following questions:

1. Is the work which has been subcontracted new work which has not been done previously by the bargaining unit?

2. Is it work for which the company does not have the requisite expertise and equipment to do properly?

3. Can the company show there are no people on layoff who could have done the work?

4. Even if the subcontractor is unionized, would it have been much more expensive for the company to have attempted to do the work itself?

5. Is the company acting in good faith and not using the subcontracting merely as a means of beating the union's wages and working conditions?

6. Is the subcontracting work temporary in nature (such as building a building or painting a roof) rather than a permanent arrangement?

Depending on the answers to the questions such as the above ones, the arbitrator may hold that the subcontracting does not undermine the recognition or seniority clauses of the contract, and that it is proper action by the company, permitted under the management clause. On the other hand, if there are men on layoff who could have done the work in question, or if the bargaining unit has done the work in the past thereby strengthening the union claim that it is bargaining unit work, or if it appears clear that the subcontracting is for the purpose of getting the work done at lower rates than the company has contracted

to pay its own employees, then an arbitrator might hold that the action represents a basic undermining of the labor agreement itself. Under these circumstances, the arbitrator might hold that there is an implied limitation on the company's management rights to subcontract, and that the company's action in the particular circumstances has run counter to that limitation.

IV. Work Assignment Disputes

The same basic issue is present in connection with work assignment issues. Companies will argue that the management rights clause gives the company unrestricted rights over work assignments, and that only an express limitation elsewhere in the contract can qualify the right. Again, the union will argue that unqualified management freedom in this area will make a mockery of the job security contemplated particularly by the seniority clauses. As in the case of the subcontracting issue, incidently, this issue also basically stems from a kind of jurisdiction consciousness by the union membership - i.e., "This is the work of my job or my unit, not the work of another unit in the plant or the work of some subcontractor who is outside the unit altogether."

The work assignment dispute arises in many, many forms, and only some of them can be described here. Generally, everyone will agree that people and work should be assigned according to job classifications - that a millwright should be assigned to the millwright classification - and that millwright work should be assigned to millwrights. But then the arguments begin. Normally, the jurisdictional lines will be tighter for the crafts than for the semi-craft or the production jobs. This distinction may be related to the fact that

the lines are easier to define in the case of the crafts and because higher-skilled men are more sensitive to their skills and job rights. Nevertheless, there are still all kinds of problems for skilled and semi-skilled alike, involving such questions as contract language, past practice, permanent or long-run crossing of classification lines vs. temporary or brief ones, the question of how or when a job changes so that the classification itself can change, the role and effect of the job description, etc.

Two separate skilled classifications may have shared in a particular type of duty in the past, and an issue may now arise if all of the members of one of the classifications have been laid off, so that the remaining classification becomes the exclusive custodian of the task. Or, the production people on a skeleton night shift may normally have been permitted to obtain their own tools and supplies from the storeroom, but this may not have been permitted on the day shift where a full-time storeroom or tool crib attendant may have been assigned; an issue may then arise as to whether, when a group of production people are called out on a Saturday, a storeroom attendant must also be called out to supply their tools and materials.

The issue may also involve the question of who will be assigned to a particular machine, <u>within</u> a classification. The practice or union desire may be that whenever that particular machine works, the man who normally works on it must be assigned, whether on week-days or on over-time. Or, there may be an entirely opposite practice; or no practice at all.

The issue may arise in connection with a new optical inspection instrument, where a plant has several classifications of inspectors. It will be evident to the several classifications that there will be

more future work for the group that is assigned the new instrument, and so there will be strivings, based on claimed precedents or prior experiences, to include the new instrument within one classification rather than another.

Or the issue may even arise in connection with particular orders, where both of the contending classificatiens or departments have the requisite skill, or where both sets of job descriptions contain language encompassing the type of work which is involved. But perhaps the company has assigned this particular type of order or the work of this particular customer to one classification or one department in the past, and it now seeks, for valid management reasons, to assign it to another classification or department. Or, a company may wish to abolish a job class, or to absorb one department into another; and all kinds of problems will flow from that also.

The issue is, of course, more likely to arise where a plant has classification or departmental seniority, as opposed to plantwide seniority. The members of the particular classification or department which is claiming the work in dispute will point to the fact that their entire job security, and their position in the plant, can be completely undermined by a simple company action of transferring work from their department or classification to another department or classification. They will point out that as a result of this action, senior people will be laid off from their department or classification, whereas people with less seniority will continue to work in the department or classification to which the work has been transferred.

The answer can be advanced that this was the type of seniority structure which the union wanted, and that such results must

flow naturally from departmental or classification seniority; but it is, of course, a fact that many companies themselves resist plantwide seniority, because of considerations such as the greater number of of bumps which may take place on any kind of reduction in force, and many companies might hesitate to make the above argument for fear that it might lead to union pressure for plantwide seniority. The whole issue arises in endless forms and variations, and would appear to be limited only by man's imagination. Again and again, however, and whatever the form this type of issue raises, the basic conflict arises from the union's contention that the seniority and related clauses of the contract impliedly limit the company's management rights in the job or work assignment area; and always there is the company's countering and at least equally basic contention that it cannot operate in a frozen job environment, that it must be free to change jobs, assignments and departments as production and equipment changes. And here too, the companies will point to implied rights on their side, as well as to their explicit management rights under the agreement.

Arbitrators have had considerable difficulty in resolving this type of issue in many instances. Often they will tend to rely on the language of the job description, thus in effect removing the controversy to another arena of written language to be evaluated and interpreted. But this by no means furnishes a basic answer all the time, considering the fact that job descriptions are often unilaterally executed, considering the basic controversy as to whether a job description is intended to spell out jurisdiction or merely to furnish a basis for evaluating the job, and considering the fact that there

will often be a conflict as to the company's right and the circumstances under which it can or should amend the job description. A number of arbitrators have, whether or not they have so stated it in their decisions, adopted a general rule of "reason and practicality" in resolving this type of an issue. Does the company "have to" make the change, or does the company have a "good reason" for making the change, or do the company's needs appear to be minor in the particular circumstances, especially if measured against some real damage to individual senior employees who may be affected by the change? Where the latter type of approach is used, weight may also be given to the actual nature of the threat to the employee's security. If the company's action will hurt no one, or if the aggrieved classification or department is in actuality growing in size despite the transfer of the work, this may have an influence on the decision.

For the predictable future, however, it would appear that the uncertainty in connection with this general type of issue will continue, and that most arbitrators will still decide these questions on a case by case basis.

ARBITRATOR, LABOR BOARD, OR BOTH?

Arbitrators Approach the Problem of Dual Jurisdiction With the National Labor Relations Board

Jay W. Waks*

(Reproduced from Monthly Labor Review, December 1968)

It is an interesting fact--perhaps an anomaly--that at a time when many government agencies are criticized for enlarging the scope of their regulatory activities, at least one agency--the National Labor Relations Board--systematically surrenders part of its statutory jurisdiction to the private forum of arbitration.

This seeming forbearance arises because almost any grievance or dispute over the interpretation or application of a collective bargaining agreement falls within two possible jurisdictions. By stressing the contractual basis of the complaint, the grievance is within the authority of an arbitrator under the usual arbitration clause. But if the same grievances are pressed with an assertion that the employer was engaging in conduct proscribed by law, that grievance involves not just contractual rights, but statutory rights of employees and their union. The agency specifically authorized to decide statutory matters is the NLRB.

Exclusive Power

That the NLRB takes precedence as a matter of law has never been in real doubt. In NLRB v. Walt Disney Productions,[1] a Federal court of appeals stated that the Taft-Hartley Act "contemplates a continuing jurisdiction by the Board over employer-employee relations," and that the Board's exclusive power over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." The U.S. Supreme Court further clarified the relationship between the two forums of dispute-settlement in Carey v. Westinghouse Electric Corp.[2] 20 years later. There it was held that neither NLRB jurisdiction, nor the arbitrator's lack of authority to implead a union not a party to the case before him or to order an election--measures that might have to be taken before the controversy can be disposed of--was a bar to arbitration. On the other hand, the Court indicated that any decision the arbitrator reached that was contrary to the policies of the Board would be subject to reversal.

---

*Mr. Waks' full report, completed under the auspices of the American Arbitration Association, will appear in a forthcoming issue of the Association's publication, The Arbitration Journal.

It is clear, therefore, that it was in a sense a voluntary act of self-restraint when, in 1955, the Board promulgated what has come to be known as the Spielberg doctrine.[3] The Board ruled that although it had the authority to accept jurisdiction, it would not do so in any case decided by an arbitrator as long as three conditions were met: The arbitration proceeding appeared to have been fair and regular; the parties agreed to accept the award as final and binding; and the decision of the arbitrator was not "clearly repugnant" to the purposes and policies of the NLRB. Under this grant of authority, an employee held to have been justifiably discharged in an arbitration proceeding would not be permitted to relitigate his claim before the NLRB.

But the Spielberg doctrine did not of itself accomplish the Board's intention of deferring to arbitration. Often, the issue presented to arbitration focuses only on contractual aspects, and a reading of the arbitrator's opinion and award gives no assurance that any statutory aspects were considered and resolved. This led to a fourth proviso, expressed by the Board in the Raytheon case.[4] An award would be held conclusive only if the arbitrator did, in fact, deal with statutory rights of the parties.

Clearly, then, the finality of the arbitration award in "dual jurisdiction" cases depends on how the parties present the issues to the arbitrator. If they raise statutory, as well as contractual, matters, they make it possible for the arbitrator to dispose of all issues, and so meet the "Spielberg standards." If they argue only contractual questions, an award is not likely to show evidence of the disposition of statutory matters, unless the arbitrator believes it is his function to introduce the statutory aspect at his own initiative in the award or opinion in order to minimize the possibility of a rehearing before the NLRB.

Awards and Opinions

Because precise information on the extent of the dual jurisdiction problem and on the effect of the Spielberg doctrine upon arbitration has been lacking, the American Arbitration Association undertook a study of about 2,300 labor arbitration awards and opinions processed by the AAA and reported in the Association's Summary of Labor Arbitration Awards. These decisions were rendered over a 9-year period, from January 1959 through December 1967.

The nearly 2,300 cases yielded 338 that contained issues also within the NLRB's scope of activities. In other words, they could have been filed as unfair labor practice charges against company or union, jurisdictional dispute cases, or union security issues. Two-thirds of the dual-jurisdiction issues related to unfair labor practice charges against companies. Only 10 per cent of the issues involved charges against unions. This seeming preponderance on one side is understandable, for arbitration is largely a forum for appeal by employees or unions against managerial decisions, and in many instances arbitration is not available to management at all as the initiating party.

Archetypes

The 338 arbitration cases involving one or more statutory issues included 54 in which the presence of NLRB policies was in some manner acknowledged. Typical of cases in which NLRB precedents were recognized by both parties was S. Bent & Co. and United Furniture Workers.[5] The issue was whether two employees who resigned from the union during the interval between two contracts could be discharged at the union's instigation on the basis of a maintenance-of-membership clause in the new contract that was made retroactive to the expiration of the old. Arbitrator Thomas Kennedy acknowledged the relevance of NLRB decisions in similar cases, which both parties had cited, and he declared his intention of resolving the dispute as the NLRB would have done. He upheld the company's right to retain the two ex-union members in its employ:

> The arbitrator has made an extensive search of the NLRB and court decisions relative to this case. If there were doubt in his mind regarding the position of the Board and the courts on the issue he would decide the case entirely on the basis of the contract. In this instance, however, the position of the NLRB and the courts is clear. . . . If the arbitrator should rule in favor of the union, [the two employees] could have the decision set aside by the NLRB, in which case the union and the company would have to make these employees whole for any losses that they may have suffered as a result of enforcement of the arbitrator's decision. Where the public policy as interpreted by the NLRB and the courts is clear, the arbitrator is compelled to take it into account. To do otherwise would be to do a disservice to both parties. The arbitrator, therefore, must decide that [the two employees] are not subject to discharge for alleged failure to keep themselves in good standing in the union.

An example of a case in which, apparently, the arbitrator alone recognized NLRB implications was International Smelting and Refining Co. and United Steelworkers of America, Local 4985. The primary issue before Daniel Kornblum was the discharge of an employee for excessive garnishments. But a procedural question arose out of the employer's attempt to exclude the grievant from the arbitration hearing except during the time he was testifying because of a contract clause stating that witnesses at any step of the grievance procedure "shall appear separately and remain present solely to be heard as witnesses."

Mr. Kornblum saw three reasons why he could not exclude the grievant from the hearing. It was uncertain whether the contract's reference to grievance procedure was binding upon an impartial arbitrator. The exclusion of the grievant would be "tantamount to a denial of due process" and "akin to excluding a defendant in a criminal proceeding from his own trial." Under the Spielberg doctrine, the award might not be accepted as final by the NLRB.

Citing as his authority the Spielberg case, Mr. Kornblum wrote: "Such an exclusion would seemingly run counter to the proviso in Section 9 (a) of the Labor Management Relations Act, giving an 'individual employee' the

qualified right to present his own grievance to his employer. It is well known that the National Labor Relations Board will not honor arbitration awards where, among other things, it is convinced that the arbitration proceedings are not 'fair and regular' or the result is 'clearly repugnant to the purposes of the act.'"

Reluctant to Rule

Twenty-six of the 54 cases contained substantial discussion by the arbitrator of the problems presented by the existence of statutory as well as contractual issues. Fifteen of the cases occurred prior to the Supreme Court's decision in Carey v. Westinghouse Electric Corp.[6] and 11 after.[7]

Even before Carey, there seems to have been no doubt on the part of the arbitrators that arbitrable grievances do not become nonarbitrable merely because the issues were arguably within the jurisdiction of the NLRB. But until the Supreme Court's decision in the Carey case, arbitrators were reluctant to rule on the merits of cases where it was a certainty, not just a possibility, that the award would not bring the dispute to a final conclusion.

In 9 of the 26 cases containing substantial discussion of the dual jurisdiction question, employers asserted that the subject matter was within the jurisdiction of the NLRB; consequently, the arbitrator could not rule on the merits. In addition, there was one case where the employer did not contest arbitrability, but the arbitrator, at his own initiative, engaged in substantial discussion of the basis of his jurisdiction. In these 10 cases, the arbitrators generally held that the mere fact of dual jurisdiction was not sufficient reason to hold a grievance not arbitrable. But the arbitrator's lack of power to implead a union interested in the outcome but unwilling to participate did result in rejection of jurisdiction by the arbitrator. The only exception was in Westinghouse Electric Corp. and International Union of Electrical, Radio and Machine Workers.[8] The arbitrator made it clear that were it not for the direct order of the U.S. Supreme Court he would have decided the case as did the other arbitrators.

Except under unusual circumstances, arbitrators did not hesitate to undertake a review of the merits of dual-jurisdiction cases. Reviewing the merits, and particularly in awarding remedies, arbitrators have tended to be conservative in the sense that they have tried, wherever possible, to decide substantive issues as they believe the Board would have decided, and they have shunned unconventional remedies.

Arbitrators denied their own jurisdiction in 3 of the 26 "hard core" dual-jurisdiction cases, and there was an additional case in which only the issue of arbitrability was presented. Thus, there were 22 cases in which the arbitrators reached the merits. Of these, there were 19 in which the arbitrator discussed in some degree the attitude of the NLRB to the problems raised.

One conclusion to be drawn from the 22 cases is that arbitrators do hesitate to make more pronouncements on NLRB policy than are necessary. When they can dispose of a grievance on a contractual basis, they are inclined to do so and to treat statutory issues as irrelevancies. It is in those cases that one finds most of the dicta about arbitration and the NLRB being two separate forums, with the arbitrator's function being that of contract interpretation without regard to consequences if the same issue were brought to the Board. Moreover, in dual-jurisdiction cases, as in most others, arbitrators are conservative in fashioning remedies. A request that a contract be rescinded or that one of the parties be declared to have committed an unfair labor practice within the meaning of the National Labor Relations Act is likely to be rejected.

In some cases, it becomes unavoidable for the arbitrator to deal squarely with NLRB practices and principles. Disputes over application of union security clauses are one example. In such cases arbitrators are conservative in the sense that they do not seek to make new law. They apply the policies of the Board, as they understand them, and are inclined to do so even when their own inclinations would seem to be in another direction. Where Board policy is uncertain, of course, arbitrators have no choice but to use their own judgment, falling back on the often-stated position that arbitration and the NLRB are two separate forums, and that a dissatisfied party may seek his remedy in the public forum, if he wishes.

In general, therefore, it appears that while arbitrators occasionally indulge in dicta to the effect that they are unconcerned about the possibility of reversal by the NLRB, they take considerable care--by deciding on contractual grounds only, by shunning conflict with the NLRB, and by avoiding unconventional remedies--to avoid that contingency.

Conservative Outlook

For the most part, companies, unions and arbitrators take no special pains in the routine case to preclude the possibility that a party disappointed by the award will try to relitigate the issue before the NLRB. That some reference to NLRB policies was found in only 54 of the 338 cases where statutory questions could have been raised certainly suggests that parties to arbitration agreements are not thinking in terms of recourse to the public forum.

The NLRB's deference to arbitration for the resolution of conflicts that fall within the scope of arbitration clauses appears to be a sound policy in that it conforms to the preferences of the parties to collective bargaining agreements and results in decisions which are consistent with national policy, as expressed in rulings of the Board and of courts. Insofar as the public interest may be involved in the outcome of awards--and a public interest may be involved even if the case concerns a single individual whose statutory rights have been breached--there are adequate safeguards in the Spielberg standards themselves, and in the conservative outlook of arbitrators, exemplified by the cautious way they exercise the authority conferred upon them by the NLRB and the courts.

ON ARBITRATION AND THE BOARD

[Arbitrators and the Labor Board] are not wholly without guidelines. Essentially, we are trying to vindicate two separate interests. The first is to promote the voluntary resolution of disputes by the parties themselves; the second is to protect the rights of employees, unions, and employers under the National Labor Relations Act.

Each of these interests has express statutory endorsement. . .

. . . Congress did not say, as it might have said, that the method agreed upon by the parties themselves for the resolution of their disputes should be used to the exclusion of any other means. It said only that such a method would be "desirable." Similarly, Congress did not say, as it might have said, that the Board was directed to apply the unfair labor provisions of the act without regard to any other method of adjustment. It merely "empowered" the Board to do so.

. . . [We] might have wished for a more explicit directive. But . . . Congress recognized that there were competing interests that had to be balanced, and that complex and unforeseeable situations would arise which should best be left to a process that the Supreme Court has identified in a different frame of reference as "elucidating litigation."

That process is still going on. We do not have all the answers any more than Congress did, but in the crucible of case handling we are forging a doctrine. That doctrine, I firmly believe, will be better because it will have stood the test of actual experience and actual situations.

--Arnold Ordman,
General Counsel of the
National Labor Relations Board
at the University of Chicago,
June 1964

NOTES

1. NLRB v. Walt Disney Productions, 146 F. (2d) 44.

2. Carey v. Westinghouse Electric Corp., 375 U.S. 261.

3. Spielberg Manufacturing Co., 112 NLRB 1080 (1955).

4. Raytheon Co., 140 NLRB 883 (1963).

5. 18 AAA 21 (January 14, 1960).

6. 86 AAA 17. (December 10, 1965.)

7. As the Court's decision in Carey represented the most comprehensive and authoritative statement on issues about which lower courts (and arbitrators) were divided, a brief review of the holding may be helpful.

   The issue before the Court was whether a complaint by the International Union of Electrical, Radio and Machine Workers, AFL-CIO, that work belonging to a unit of production and maintenance workers was wrongfully given to an independent union of salaried employees was arbitrable, or whether the matter should be withheld from arbitration because questions of representation and other matters were involved that could be decided only by the NLRB. The New York Court of Appeals had agreed with management that the issues were not arbitrable, and the union appealed the holding to the Supreme Court.

   Writing for a 6-to-2 majority (Justice Goldberg did not participate), Justice Douglas stated that the union's grievance was arbitrable, notwithstanding the arbitrator's award "might not put an end to the dispute." He pointed out that "jurisdictional dispute" could have more than one meaning. It could signify a dispute over whether work was to be performed in one unit or in another, or over which union was to represent a group of employees.

   "However the dispute be considered," Justice Douglas concluded, "whether one involving work assignment or one concerning representation--we see no barrier to use of the arbitration procedure. If it is a work assignment dispute, arbitration conveniently fills the gap and avoids the necessity of a strike to bring the matter to the Board. If it is a representation matter, resort to arbitration may have a persuasive, curative effect even though one union is not a party."

   Justices Black and Clark dissented, expressing the view that it would be unfair to require Westinghouse to run the risk of an award which, if complied with, might subject it to unfair labor practice charges on the part of the independent union. Moreover, the dissenting justices held that the salaried employees would not be a party to the arbitration, but the award would place them at a disadvantage in subsequent NLRB proceedings, because of the Board's policy against upsetting arbitral awards under

most circumstances. This would cause the salaried employees' union's rights to be "sacrificed" for "policy considerations."

8. 79 AAA 9 (August 19, 1965). This case came to arbitration as a result of the Supreme Court ruling in Carey v. Westinghouse.

BOOKS ON ARBITRATION

Anatomy of a Labor Arbitration, by Sam Kagel, Washington, D.C., Bureau of National Affairs, Inc., 1961

Arbitration and Industrial Discipline, by Dallas L. Jones, University of Michigan, Ann Arbor, Michigan, 1961

How Arbitration Works, by Frank and Edna Elkouri, Washington, D.C., Bureau of National Affairs, Inc., 1960

The Labor Arbitration Process, by R. W. Fleming, University of Illinois Press, Urbana, 1965

Managerial Freedom and Job Security, by Morris Stone, Harper & Row, New York, 1961