# ARBITRATION AND ARBITRATORS UNDER PENSION PLANS

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# ARBITRATION AND ARBITRATORS UNDER PENSION PLANS

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In line with its objective of improving understanding of labor relations, the Labor-Management Institute will from time to time make available in mimeograph form articles which will serve to shed some light in this field.

In a book review, Professor Clark Kerr says: "The arbitration of industrial disputes may well wither away, and the two decades from 1935 to 1955 may turn out to have been its heyday. In the early days of belligerency, the parties, unaware or unmindful of the cost, often prefer to fight out each primary and secondary dispute. Subsequently, particularly in the settlement of secondary disputes, they turn to arbitration as a lesser evil. Then, as relations become better established, contracts and practices clarified, and personal relationships improved, utilization of arbitration becomes less and less constant. Many exceptions to this life history of the arbitration process exist, but the central tendency seems clear."

This may be so and labor arbitration may soon become a subject only for the Economic Historian. But, at least, in one area of labor-management relations, I see challenging vistas which will call, increasingly for the experienced, understanding, clear-eyed arbitrator. This is the new horizon of employee benefit programs.

In the few minutes alloted to me, I want to explore with you a few facets of the fascinating subject of pensions which might be of interest to the professional arbitrator.

## AREAS FOR COLLECTIVE BARGAINING

First, a caveat! It seems to me, that as arbitrators we should sharply distinguish between the separate domains of collective bargaining and arbitration in the pension field. As arbitrators we risk our reputations if we allow ourselves to be drawn into the struggle of the type of plan. The type of plan which an employer and his union adopts is the most important decision about pensions that they will make. It is a complex field requiring careful, detailed and lengthy study of each industrial situation. To

solve the problem requires not one specialist but a team working over a reasonable length of time and mixing their knowledge with faith and prayer. There is the primary need for an economic study of the individual employer's business history and his potential future. Then this portrait founded on the wavering rocks of probabilities and predictions must be projected against the future of the particular industry. This difficult analysis must be supplemented by an actuarial study to catch the impact of mortality, turnover rates in employment and interest trends. Then we need a concomitant legal study to guarantee sound legal instruments and freedom from tax complications. Even after all this study, the alternative is not a simple one. It is a grab bag of possibilities. Shall it be a group annuity--a pension trust--a group permanent plan? Or shall it be a deposit administration scheme or perhaps group life or paid up units of group life which can be translated into pensions at retirement age by utilizing their reserve values for life incomes? Then there is the whole cluster of trusteed plans. There are four variations in this group which have been popular. There is the straight trust fund vehicle under which all contributions and benefits are handled exclusively by the Employer, Employee and Trustee. Then we can have a trust fund with the option to purchase deferred or immediate insurance company annuity contract. This form is the same as the first except that, as part of the investment prerogative, the trustee may invest in insurance company contracts to provide part or all of the benefits. There is the type of trust fund which requires an annuity purchase at retirement, unlike the discretion found in the previous trust arrangement. The trustee must purchase for all retiring employees as they come up, an immediate annuity policy to carry out the benefit commitments of the plan. The trustee administers the funds before retirement, the insurance company

administers the funds after retirement. Finally, among the four most popular trust plans, there is the combination trust fund arrangement.

Under this plan, part of an employee's benefit is to be provided from the trustee's accumulation and part from a supplementary insurance company contract, (e.g. whole life individual policies or group permanent certificates) whose age 65 cash value, augmented by the accumulation in the trust fund, is convertible, into an immediate annuity form.

Even this isn't all. How about a union-management welfare fund like the miners or the International Brotherhood of Electrical Workers? Each of these proposals has its violent and vociferous advocates.

## AREAS FOR ARBITRATION

Once a plan is adopted there remain many controversial problems. Some of these are death benefits, disability benefits, vesting rights, eligibility rights, reserve underfunding and overfunding.

If we eschew these difficult questions we do not close the door to arbitration opportunities. For there will be a host of issues once a plan has been inaugurated. Without exhausting all of the contingencies here are a few areas of potential friction where arbitration may serve effectively.

First, arbitration may be called upon to solve the vexing dilemma: should John Jones be retired? Some pressure has been directed toward the elimination of the element of compulsory retirement in pension plans and the substitution of a flexible retirement age formula. This has within it the seeds of continuous conflict. The broad framework of disagreement is found in the probability that in times of depression there will be the tendency to retire as early as possible and get the steady retirement income. In times of full employment and high living costs, retirement probably will be resisted by the employee.

The employer, unfortunately, may have diametrically opposite objectives. At depression time when retirements will be accelerated, the employer can least afford the costs of earlier retirement. In the flush period, such as the present, the employer faces the spectre of rapidly mounting costs. He looks to labor efficiency, among other techniques, to cap the upward cost spiral. But if the older employee resists retirement, the employer may face the loss of efficiency which he highly desires. In fact, when the plan was established it may have been the hope of the employer to avoid this very loss of efficiency through the retention of the older employee on the payroll. I can visualize some interesting excursions into geriatrics for the arbitrator as he turns his incisive mind to this problem. You have a tremendous challenge here. Frequent and acrimonious grievances over the retirement date for employees can seriously impair the effectiveness of pension plans.

A corollary of this first area is the disability provision which is another prong in the union-employee benefit drive. In the Inland Steel case, as you recall, the union proposals included a disability provision for total and permanent disability of $150 a month. If such a provision is loosely administered, it could saddle the employer with exceedingly high costs (viz. experience of the life insurance companies during the depression.) I look for an area of conflict here and arbitration can help resolve it. Here you will have to become orientated to the reliability of medical testimony. To those of you who have dealt with medical testimony at any length, there comes the shocking realization of much medicine is an art and how little it is a science.

A third segment of activity for the arbitrator is in the investment philosophy of trusteed plans. I can envision a number of conflicts. What rate of interest shall we aim for? Shall we invest any of the funds in the employer's notes, stocks or bonds? Shall we confine the investment portfolio to bonds, stocks? What formula shall be applied for the spacing of maturities; for the timing of investment purchases? Personally, I would hesitate to operate in this field without some sort of a hold harmless agreement. Investment problems confound the investment expert. A decision by the arbitrator favoring one philosophy over another may bring disaster to the fund.

A fourth field of dispute for the arbitrator is found in the occasional manifestation in pension plans that if it is for the best interests of the employee, he might be given his pension in a discounted lump sum instead of the installment benefit. The scope of the problem can be gauged by observation of the discounted lump sum award difficulties that arise in workmens' compensation cases.

A fifth vista for the arbitrator will be in the definition of earnings for the purpose of determining contributions and benefits. We know the troubles that beset the Bureau of Internal Revenue and the wages and hour division in the particularization of this concept. Similar difficulties should encumber the pension plan administration. For example, are incentive bonuses part of the pension wage structure and how about down time and grievance time paid union stewards?

A sixth tract of conflict that may require the clearing solvent of arbitration lies in the present tendency to negotiate pension plans for a period of five years. What happens to the employee who has been retired during

this period of the plan, if at the end of the period the plan is not renewed or materially changed? Is there any obligation to continue the pension to this individual? In connection with the pension agreement, there is the further tendency to write a separate collective bargaining contract for the employee benefit phase of the labor bargain. Are both instruments, i.e. the pension agreement and the regular union contract, part and parcel of the same contract and to be interpreted as one contract? Suppose there is an inadvertent latent or patent conflict between the agreements?

As a result of the Inland Steel case, some contracts, e.g. the one between Thomas A. Edison, Inc. and the Electrical Workers provide that the "company agrees to bargain on its pension plan to the extent that the law may require". Do you visualize arbitrational possibilities in this type of agreement?

Finally, in the calculation of the employment tenure, are vacations, leaves of absence, strike time, plant shut-down periods counted?

I have tried in a very brief, sketchy fashion to read the future of arbitration in the field of pension. You have a magnificent opportunity and responsibility to make this socially desirable vehicle work. I know that you will successfully meet the challenge.

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Footnote: Most cases to date have dealt with two major issues: (1) whether a plan should be installed or modified; (2) whether a compulsory retirement policy violates a collective bargaining contract.