

Some Basic Issues in Labour — Management Arbitration **L'arbitrage des différents patronaux-ouvriers**

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Article abstract

This article is an attempt at probing into the fundamentals of arbitration. It deals with the NATURE and SCOPE of the process of arbitration seen as an extension and an ingredient of collective bargaining, as well as a substitute for strike action. It also analyzes some of its essential PURPOSES, FUNCTIONS, and PREREQUISITES in a free society. It examines the MANAGEMENT-RIGHTS ISSUE in terms of the SPECIFIC FUNCTION OF MANAGEMENT. It then sets EQUITY and PAST PRACTICE against the language of the agreement. And finally, it briefly defines the ROLE OF THE ARBITRATOR and describes SOME RECURRENT DIFFICULTIES which threaten to bog the arbitration process.

Some Basic Issues in Labour — Management Arbitration

Roger Chartier

This article is an attempt at probing into the fundamentals of arbitration. It deals with the NATURE and SCOPE of the process of arbitration seen as an extension and an ingredient of collective bargaining, as well as a substitute for strike action. It also analyzes some of its essential PURPOSES, FUNCTIONS, and PREREQUISITES in a free society. It examines the MANAGEMENT-RIGHTS ISSUE in terms of the SPECIFIC FUNCTION OF MANAGEMENT. It then sets EQUITY and PAST PRACTICE against the language of the agreement. And finally, it briefly defines the ROLE OF THE ARBITRATOR and describes SOME RECURRENT DIFFICULTIES which threaten to bog the arbitration process.

At some risk of disparaging the rather young profession of arbitration, it may be said at the outset to an audience * of scholars and practitioners in the field of labour-management relations that humility and a profound sense of doubt should be the prime qualities of arbitrators. So much so that, paraphrasing French Premier Clémenceau's pronounce-

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* This article is an outgrowth of a lecture given on October 18, 1961, to a group of Industrial Relations specialists at a conference on industrial conciliation and arbitration organized by the School of Business Administration, Essex College, Assumption University of Windsor, Ontario. The text of the *Proceedings* of the Conference is available at the School.

ment on war, which according to him was much too serious a matter to be entrusted to generals, it might be stated, only half-facetiously, that arbitration (or at least some forms of it) is much too important a matter to be left in the hand of arbitrators (or at least many of them)!

In this paper, I shall be only little concerned with such formal matters as the virtues of a tripartite board *v.* an individual umpire, of permanent *v.* *ad hoc* arbitrators, and so on. These are just the icing on the cake. It is my purpose, rather, to probe deep into the cake of arbitration, to get at the very center of the process as an extension and an ingredient of collective bargaining and as a substitute for strike action on the part of the union.

Such a perspective on fundamentals will lead me to discuss the *nature* and *scope* of arbitration, some of its essential *purposes*, *functions* and *prerequisites* as a vital, terminal phase of collective bargaining in a free society. I shall then examine the *management-rights issue* in terms of the *specific function of management*. As a third set of problems, I will set *equity* and *past practice* against the language of the agreement. And finally, I shall say a few words on the *role of the arbitrator* and on some *recurrent difficulties* which show up in the arbitration process.

Before so doing however, I must admit to one big bias: that is, I very firmly believe in collective bargaining as a worthy and necessary institution in our industrial society; therefore, I believe in strong managements *and* powerful unions as equal partners in the process; and finally, I believe that in a free society it should behove the parties themselves, first and foremost, to develop and strengthen the framework of their relationships, *including* the arbitration process.

A. The Nature of Arbitration

What, then, is the nature of arbitration? It is a process which involves two parties in the submission of a dispute to a third, impartial party for final settlement. Arbitration, therefore, is distinguished from mediation by its *decisive* character; in this sense, at the very end of the process when the award is tendered, it is a judicial process which has a direct, although temporary, legal effect on the relations between the parties. This, however, does not preclude the fact, and I insist on this,

that arbitration in many of its elements is definitely an extension of collective bargaining.

The third party may be an individual (impartial arbitrator, umpire) or a board (usually made up of three members, two of which are representatives of the parties immediately concerned), appointed on a permanent or an *ad hoc* basis.

A distinction must be made here between *voluntary* arbitration, under which the parties have freely contracted to accept the decision of the arbitrator, and *compulsory* arbitration, in which a decision is arrived at by some government tribunal; in the first instance, arbitration is truly an *outgrowth* of collective bargaining; in the second, it is a *substitute* for collective bargaining. I hasten to state, here and now, that compulsion in this field is most repugnant in light of the basic tenets of a free society.

Those fundamentals are well known: the freedom of association and, as a corollary, the freedom of collective action, economic or other; the freedom of expression, which implies the freedom to dissent and to fight for one's differing values, notions, or objectives; the freedom of enterprise, upon which our economic system is built; the freedom of contract, which is at the very root of our free collective — bargaining system, and so on for all other relevant freedoms.

What does this all mean in practice? That in the field of industrial relations, it rests with unions and managements basically to shape the institution of collective bargaining, *including arbitration*. Government's main role in this field is to suggest frameworks, to provide services and to promote agreement *without compulsion*. State intervention here must be reduced to a minimum, and should be resorted to only when absolutely necessary to insure some sort of dynamic equality or equilibrium between the parties; at any rate, the burden of proof for legislative inroads on free collective bargaining should rest upon the State.

It is my contention that recently, in a number of Canadian provinces freedom and confidence in democratic values and processes have given way to extreme caution and even fear in the legal field of disputes settlement. Emergencies have set the pace for our conciliation and arbitration legislation and procedure, which today hardly fit reality and certainly do not correspond to our ideal of economic freedom of action for all.

ARBITRATION V. THE STRIKE

And the legislator's fear has a very definite object: the strike, with its *potential* economic losses, social disruptions and physical violence, with the noisy publicity that surrounds it, and so on.

1. And yet, we must all see the strike in proper perspective. First, it is only *one* of many expressions of conflict in industry; and it is not, by far, the costliest if we compare it to systematic slow-downs, sabotage, excessive turnover, absenteeism and lateness, grievances of all sorts, etc. This leads to another question: given the unavailability of conflict in industry, in one form or another, may not the strike be the least costly way of expressing and reducing it? Anyhow, an accountant's or a layman's evaluation of the cost of a strike is a very tricky business, which I have no mandate nor time to discuss here.

2. The second point I wish to stress is that the strike, in a society where lock-outs are not tactically useful or necessary nor socially acceptable and therefore are seldom resorted to, is the responsibility of *both* union and management, irrespective of the fact that it is the union which formally initiates the process.

3. Thirdly, an industrial world in which aggressive conflicts would be overtly non-existent because no union is there to provoke them or else the union is employer-dominated or relatively weak, or because the employer is dominated by the union, or because the parties are legally unable to bargain in full freedom, or finally because union-management collusion puts all the economic weight of bargaining on the consumer, such a world, I maintain, is not healthy, and retains a semblance of harmony at too high a price in a democracy.

4. A fourth point will deal with three specific functions of the strike, namely:

(1) As an *essential part of collective bargaining*: the strike as a statistical fact in this country is of very minor importance; and yet, strikes must occur once in a while if the *threat* of strike action is to be meaningful and effective. Without it, the parties would be dangerously complacent about their bargaining, and the union would be put from the start at such a disadvantage that well-balanced, genuine collective bargaining would not be possible.

(2) A second function of the strike is to *reduce industrial tensions* by airing grievances, suggesting improvements and establishing a new « order » on grounds which be more acceptable to the parties.

« Peace at any price » may actually be at too high a price. Conflict often leads to a redefinition of rights and responsibilities, in view of environmental changes or the relative strenght of the parties... Challenges and disagreements are dynamic in their effect, and just possibly constructive... »¹

(3) A third and final function of the strike which I want to underline is that it acts as *a symbol of freedom and independence* in a democratic society. The very fact that it occurs occasionally or that it can happen is a clear indication of the vitality of a society and of the liberty therein. One might point out that here is an economically and socially expensive symbol; and yet, the alternative to it is totalitarianism. The strike is in some sense a tribute to the dynamic and constructive character of the modes of thought, customs, and legislations which permit it. It bears witness to the freedom of a group of workers who, refusing their employer's terms, collectively refuse him their labour; it also testifies to the employer's freedom to provoke more or less directly a test of strenght with the union representing his employees.

Is freedom at that price really such an expensive gadget? I would suggest that we all be very careful not to destroy it completely in our well-meaning efforts to eradicate some of its most obvious drawbacks and liabilities. I believe that there really comes a time when a society has to decide whether it wants to live free or intends to live scared. This may be such a time. As for myself, I am firmly convinced that it is better to give freedom a maximum of chance and to run the risk of some inconvenience and misuse than to make the *sure mistake*, from the start, of accepting as a guide a fear which is totally unworthy of men who are supposed to be the embodiment of a genuine democracy.

This, I suppose, indicates clearly enough why I am against compulsory arbitration. It would really be too simple to support it by resorting to the following line or argument: « Failure by unions and companies in basic industries to settle fundamental issues ultimately results in strikes or lockouts. This amounts to industrial warfare, with the public caught in the middle. If the public is injured, it has the right to intervene. And once the public (or government) steps in, it is obliged to

(1) WILBERT E. MOORE. « The Nature of Industrial Conflict », *Industrial Conflict and Dispute Settlement*, Proceedings of the Seventh Annual Conference. Montreal: McGill University Industrial Relations Centre, 1955, p. 11.

end the conflict, resolve the basic issues, and provide for a settlement in accord with the national interest »²

Against the *pros* of compulsory arbitration, the *cons* lean so heavily that just enumerating them in summary should suffice to indicate its unadvisability in the North-American context: it would short-circuit collective bargaining; it is inconsistent with our traditions of freedom; it would quickly become a political «football»; and finally, it would provoke prolonged litigation before the courts.

But enough of this. It is now time to turn to other facets of arbitration.

Another distinction must be made at the outset, this time between labour disputes and most other forms of litigation. In the former, decisions rendered concern not so much past behaviour as future relationships. It is important here to stress the *continuous* nature of labour — management relationships. In industry, once the award is tendered, the parties must still live together, for better or for worse; which is usually not the case for litigants in a court of law. Employers and employees remain just *that* before, during and after arbitration. True, they may have antagonistic objectives and activities; but they also participate in a common and permanent undertaking. Labour arbitration is eminently concerned with human relations, while commercial arbitration is more directly concerned with property disputes. Labour arbitration must aim at the development and maintenance of friendly, co-operative and efficient union-management relations over a period of years.

Furthermore, voluntary arbitration must be understood as a substitute for work stoppages over day-to-day disputes. This alone invites flexibility in the process shaped by the parties. And as John T. Dunlop puts it in one of his awards,

The form of arbitration adopted by the parties will significantly determine the relative proportions of «collective bargaining» and «judicial process» in a particular case.³

Both approaches, therefore, have a measure of validity, but in practice they are blended together with varying emphases, the mediation approach gaining ground when the relationships matures, and the legalistic viewpoint reigning supreme when the parties are at arm's length.

(2) *Industrial Relations News*, «Compulsory Arbitration: A Remedy for Industrial Strife?», Special Report, November 1959, p. 2.

(3) *Twin City Rapid Transit Company v. The Union*, 10 LA 589.

I am all in favor of the « extension-of-the-agreement » approach, which sees in the written agreement only a partial solution to day-to-day collective bargaining. Rigid contract enforcement fails to meet many issues and even provokes conflict. Contract drafters are no prophets, and at times the language of the contract is deliberately vague in order to avoid disputes at the time of signature. I find some comfort in my position after being reminded by Judge Jerome N. Frank, in his *Law and the Modern Mind*, that « much of the uncertainty of law is not an unfortunate accident; it is of immense social value » (p. 7); and « the judge, at his best, is an arbitrator, a sound man who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case » (p. 157). As George W. Taylor has stated:

The view that an arbitrator should decide every case without any attempt at mediation has two essential defects. It embodies some part of the fatalistic idea that labor and management differences are irreconcilable. In the second place, the parties know more about their affairs than any outsider. If the arbitrator can be a catalytic agent to bring about a meeting of minds, the strengths of all parties will be best utilized.⁴

B. The Scope of Arbitration

Let us now examine the potential scope of arbitration. Arbitration can be used at two phases or on two objects of the union-management relationship: first, at the contract-*negotiation* level; and second, at the contract-*interpretation* or -*application* level.

(1) *During negotiations*, which constitute the legislative phase of the collective-bargaining relationship, conflicts are likely to develop over matters not of rights (to be applied or interpreted or arbitrated), but of *interests* (to be compromised or bargained). Those interests, and disputes thereof, are usually both complex and economically important. In dealing with them, however, one is forced to realize how few and uncertain are the criteria now in use, let alone the so-called economic or technical « facts » which may be relevant. Such criteria are hard to define, to weigh and to rank, for even the best of economists or technicians.

(4) *Government Regulation of Industrial Relations*. New York: Prentice-Hall, 1948, p. 137, note 6.

a. Let us, for one moment, examine the problem of wage determination in industry, and especially in the individual firm. To solve the problem, Labor Economics does provide data (which are often conflicting) and suggests bases for comparisons. According to which principle, however, will one basis be preferred to another? What criteria shall be used? On what grounds can one determine scientifically — that is, with certainty — the optimum rate of the workers' economic demands, as well as the « fair » level of wages, salaries, and profits? Against what standard is it possible to gauge the « excesses » of union wage claims? What weight should be given to such factors as: the financial situation in the firm, the industry or the country; wage differentials between various firms in the same community or region, or else in different ones; differentials between industries; and so on? And finally, what importance should be attributed to indices like the Consumer Price Index and the Productivity Index? It is impossible to answer those questions, and dozens of others, with scientific accuracy.

Were such answers possible, on the other hand, the basic fact would remain that decisions and demands on economic matters by both parties are primarily *political* in nature. By « political » I mean prudential, institutional. Important economic decisions in industrial relations have strong political understones. For instance, the determination of an economically « fair » level of wages is not primarily a matter for a cold and unerring arithmetic; it is, first and foremost, an element and a sector of the general economic policy to which it is related and by which it is circumscribed and influenced.

« Now, in a free economy — and if we except sectors covered by decrees or minimum wage ordinances —, decision-making on wage levels is left in the hands of the parties themselves (management and labor, unionized or not), while government controls the other aspects of economic life (taxation, trade, customs duties, and so on). It follows that management and union people establish their respective wage policy, not knowing for sure how it fits in the overall economic policy. Pressure is then exerted on government officials with a view to gaining the insertion, in the general scheme, of such private wage policies. « What, then, is the function of Economics in such matters? The role of Economics consists in defining causes and in indicating and evaluating the consequences of a given economic decision which is strongly political in character. For an employer, the decision may bear on whether or not to expand; for a union, the dilemma may be expressed in terms

of whether the level of living should be raised by direct consumption or by the worker's participation in capital formation.

« Economic science, therefore, formulates hypotheses and accurately describes conjunctures. A given contingency must lead to a given set of hypotheses and to a choice between various alternatives; for hypothesis A, a given set of likely consequences will be described and weighed; and so on for hypotheses B, C, D . . .

« Now, the *selection* of probable hypotheses to be used as a basis for economic calculations is indeed a political act; for here the margin of indetermination is so wide that there can strictly be no questions of scientific accuracy and certainty. And one premise tinged with political elements will suffice to render the conclusion equally political, however rigorously scientific may be the logic which links them.

« It follows that the parties, and the parties alone, as *bargainers*, are entitled to turn hypotheses into reality. If, for instance, union and management choose mostly the *same* hypothesis-conjuncture, they will at times agree quickly on a given level of remuneration. If on the contrary, as is more often the case, they fail to agree on the definition of the economic contingency, economic science, though narrowing the field of potential divergences between them, will not succeed in reconciling their different points of view by authoritarian pronouncements.

b. « At the *technical* level, now, the preceding considerations are equally valid. For the technical is closely related to the social, the economic, and the political. It is the industrial engineer's challenge to work at the very junction of efficiency as defined by management and of the assent to be obtained from the personnel. He must always keep in mind that the changes he introduces in processes and instruments of production have a direct bearing, and often a very important one indeed, on the workers', problems, behaviour, and perspectives.

« Technological change, in fact, is not necessarily another word for progress. It cannot be judged and evaluated absolutely, as in a vacuum, but only in light of its human and social implications and in relation to the structures which are modified by it, to the gains and losses made by various individuals and social groups in the short and the long run. « The engineer, the technician may succeed in acquiring, often in spite of his temperament and training, an acute consciousness of the economic and social consequences of some of his decisions and inventions. However, it will not be his role, as a *technician*, to solve the problems of union-management relations in instance of technological change. As we

have seen, decision-making at that level is essentially political and institutional, which does not mean that it is necessarily rational in the engineer's book.

« Thus, the non-scientific character of the techniques involved and the political nature of decision-making in matters of economics and technology both prescribe a rejection of unilateral determinations in industrial relations. But there is a third consideration — a practical one, this time — which leads to the very same conclusions.

c. « The evolution of our industrial civilization toward ever more democratic forms, the slow creation of a new type of man richly endowed with more and more knowledge, general education, autonomy and consciousness, the new power of unions which is felt by both the employer and the lawmaker, and other developments of the same magnitude allow us to state that if industrial management, rejecting the need for consent, strongly insisted on preserving its « right » to unilateral decision making, arbitrary decisions thus arrived at would be made partly or totally impractical by a systematic blocking at all levels of execution. What then would happen to that efficiency, even management-defined, which is so rightly and so eagerly sought after? « Scientific data, however genuine, cannot bring about, *per se*, the consent of all productive agents at all levels of the business concern. Now, having in sight the highest regard for man-worker's dignity and liberty, how can one imagine an efficient production with out some form of common decision by *all* concerned, to work on certain terms determined in advance? The very notion of efficiency, in a work community, implies the sincere adhesion of free agents, the common acceptance of a job to be done in a given way by each member; and such an assent is not necessarily and primarily based on economic and technical data.

« It is obvious, then, in the present industrial context, that the glorified haggling which is collective bargaining cannot be ignored and cast aside; short-lived compromises have to be sought on the basis of the relative strength of the parties involved ». ⁵

Conflicts of interests, therefore, stem from the antagonism of two freedoms which, left undefined by law, may lay claim to total discretion. Such being the case, what outsider will pass final judgment on such matters? And with what criteria, what degree of certainty, what genuine

(5) ROGER CHARTIER. « Collective Bargaining and Management Rights », *Industrial Relations Review*, Vol. 15, No. 3, July 1960, pp. 309-311.

mandate from the parties? I believe that if an outsider does come into the picture at that phase of the relationship — in the public utilities field, for instance, which is outside the scope of this paper —, he must act very humbly, seeking the very mobile point of mutual acceptability at which the parties may finally agree. Binding awards here would certainly mean the quick whittling down of the parties' freedom and the heavy intervention of the State to determine wage and then price levels, and all other conditions of work. But let us examine now what happens to conflicts which develop while the collective contract is in force.

(2) *During the life of the agreement*, we have the *administrative* phase of the relationship between union and management. At that stage, we find expressions of conflict which are called *grievances*, or complaints. Grievance arbitration is the terminal point of the grievance procedure, as determined by statute or preferably by agreement between the parties themselves; this is a continuing function.

THE NATURE OF A GRIEVANCE

What, then, is a grievance? It is « a circumstance or state of things *felt* to be oppressive; something *real* or *supposed* which is considered a legitimate ground of complaint » (Oxford Universal Dictionary, 3d edition, 1955). In some sense, whether the wrong, injury or oppression be real or fancied is of little importance; for it the parties themselves do not reach agreement on the legitimacy of a grievance, an arbitrator will eventually have to distinguish reality from fancy. As a social fact, however, what is very important is that the grievance exists or is expressed. In the words of William I. Thomas, the American sociologist, « if men define situations as real, they are real in their consequences ».

The cause of a grievance, therefore, may be real or imaginary. But even an imaginary cause may point to some real source of dissatisfaction; and the fancied grievance is as real to the worker as the « legitimate » one. This is another way of saying that grievances seldom are what they seem. And it will be the arbitrator's consummate skill to discover, behind the official grievance, the core issue which cannot be left untouched and unresolved while the artificial « case » is « settled ».

A grievance, on the other hand, may be one of at least four different things:

- « 1. An all-out challenge to management and thus part of the harassing tactics of a conflict relationship wherein one issue is just as good as another to stir up a bit of trouble.
2. An act of union policies, and thereby a form of pre-election service to a particular member or group of members in the union.
3. A search for an answer, growing out of a genuine disagreement on the meaning of the contract language.
Or,
4. A protest against alleged injustice in the execution of managerial policy. » (John R. Coleman)

One more point about grievances is fundamental. There should be no concept of victor and vanquished, of hero and villain, in the minds of the parties appearing before the arbitrator. For the grievant complains that he has been deprived of a right which the employer has agreed to be his. If the grievant is right, the employer should hasten to make amends. If he is wrong, the employer should firmly deny the claim; because to grant it would be to prefer this employee and to accord him a level of treatment which would be unfair to all other employees.

No one should be surprised at the number of grievances which are formalized in the union-management relationship. Employer-employee, union-management relations constitute an intricate network of human interactions some of which are more or less harmonious, and some others, filled with friction, tension and discontent. Such an admixture should be no cause for scandal to anyone who is at all familiar with the nature of human beings as individuals or in groups. Indeed, conflict of some sort is the lot of mankind. It is everywhere to be found: within the tortured soul, within and between families, play-groups, neighbors, at school, within and between social economic and political groups, provinces, and nations.

Thus, conflicts in the form of grievances are somewhat inescapable in an industrial democracy which is both tremendously complex and full of opportunities for shocks and divergences which can freely be expressed. Needs and desires are unlimited, while means of satisfying them are indeed limited. Reason is coloured and flavoured by intense emotions, which lead to divergent interpretations and evaluations of respective rights and duties.

Grievances, as I have pointed out, are significant well beyond their individual merits, especially when they pour in in flood-like fashion. They have often to be set against the general background of industrial relations in the plant, the firm, and even the province of the country. They are part of a complex total relationship and can be understood only if the whole is kept in sight. They are *one* symptom, among others, of the state of that whole relationship. Since many other factors interplay, it cannot therefore be argued that the presence (or absence, for that matter) of a mass of grievances is a clear indication of « poor » (or « good ») employer-employee or union-management relations. Indeed the expression at one point in time of a good number of grievances may be a healthy sign and have definitely positive functions (while in another context it may of course have disruptive features).

TWO TYPES OF GRIEVANCES

A grievance is a dispute arising between the parties during the life of the agreement. Is it therefore a dispute over *rights*? *Interests* disputes, as was already implied in our previous discussion, occur when the parties do not have a contractual or legal framework to dispose of them. *Rights* disputes, on the other hand, are conflicts regarding the interpretation or the application of an already-existing labour agreement or piece of legislation.

I its my contention that it is wrong, at least partly, to equate « grievances » with rights disputes only, and to limit interests disputes to the pre-contract phase, for all practical purposes. For it is already obvious to all here that any disputes arising while an agreement is in force cannot be dealt with, and dispose of, on the basis of clearly-predetermined rights explicitly defined in the contract. Such disputes, therefore, call much more for negotiation and conciliation or mediation than for binding arbitration. At any rate, those conflicts over interests arising during the life of an agreement deserve the same honest consideration and speedy treatment as disagreements which are dealt with prior to the signing of the contract.

This embryonic theory of continuous bargaining was put to the test in the 1957 agreement between ALCAN (Arvida) and the union of its hourly-paid employees after a protracted strike. (It was maintained in the 1960 agreement.) The agreement first acknowledges the distinction between « interests » and « rights » disputes, and then accepts *both* types of grievances as genuine matters for discussion and arbitration.

The grievances submitted to arbitration shall be divided into interests and rights disputes. The parties shall attempt to come to an understanding as to the nature of the grievance. To determine whether the grievance is «arbitrable» and whether it is an interests or a rights dispute. If an understanding is reached, the grievance shall be submitted to the Arbitrator having jurisdiction who shall study the merits of the case. If no understanding is reached, the grievance shall be submitted to the Arbitrator of the rights disputes, who shall decide, in the first place, whether or not the grievance is «arbitrable» and/or is within his jurisdiction (article 129b).

«The distinction is clear enough. There shall be a rights dispute over «any alleged violation or misinterpretation of the provisions of this Agreement» or «a decision taken by the Company relative to working conditions set forth in this Agreement», and an interests dispute over «a change by the Company in a working condition not set forth in this Agreement» (article 125). Two different panels of arbitrators are established according to the nature of the grievance. This insures flexibility and «safety valve». Stability, in turn, is assured by the agreement that, whatever the type of dispute, «the arbitration decision is final and is binding upon the parties» (article 129h) and «no strike... and no lock-out shall take place during the life of this Agreement» (articles 12 and 13). Should the parties be unhappy about an award, they may always question it and resume negotiation over it when the current contract is terminated.

«The above procedure is a far cry from the «stick-to-the-agreement» attitude which forbids the arbitrator to add to or modify in any way the agreement. It takes account of *every* interaction interchange between workers, union and management representatives arising out of discontent in the work relationship. It recognizes the fact that a grievance spring from a strong sense of personal wrong seeking expression and relief regardless of the agreement, and that it might be unwise to choke off a grievance because it does not come under any section of a given agreement.

«Most management people, in raising the «arbitrability» issue before a board or an umpire, may fear that too much laxity in this respect will make the collective agreement next to meaningless, and that disorder, unpredictability and unstability will follow. They are afraid that agreeing to the discussion and arbitration of *all* grievances will be the thin end of the wedge for a union eager to «explode» ever more management prerogatives and to have its say on ever more issues in the collective bargaining process, thus modifying the power relation

between the two groups. Deep down, we usually find change-seeking facing change-opposing.

« The issue will eventually be solved, in each collective bargaining situation, by the parties themselves gaining maturity and mutual knowledge of and regard for each other. If union and management are constantly in a fighting mood and keep each other at arm's length, management will tend to have a rather restrictive view of grievances not related directly to the agreement fearing the union's systematic effort to undermine a contract provision. On the contrary, when the parties have reached a decent *modus vivendi*, management's attitude will be more liberal, more comprehensive; it will then more readily understand that, since the union lacks or sacrifices the right to strike during the life of the contract, it needs a recourse beyond the employer, i.e. arbitration, for any problem arising during the life of the agreement. For it is clear that no collective agreement, however accurately written, can account for all the relationship existing between the parties, nor can it foresee all occasions for frictions or discontent or answer in advance all questions. And, on the basis of the « safety-valve » theory, it may be better, in the long run, to solve all types of grievances as they are expressed, rather than allowing them to boil till the next negotiations, while in the meantime production is hampered and ill-feelings become widespread. This, of course, is for management to evaluate. »⁶

As for myself, I believe that this disposes properly of the thorny issue of *arbitrability*, which is doomed to extinction as the parties mature, as management ceases to fear the union's tactic of attempting to gain through arbitration what it is unable to get by economic strength during negotiations, and as it is realized that by sacrificing or losing the strike weapon (in a social and economic context where the lock-out is unrealistic and unnecessary as a weapon), the union deserves in return the right to express *any* type of grievances as they develop during the life of the agreement.

As new jobs, new job assignments, new departments, and so on, are created, it would be improper to use the agreement as a brake or a handicap against consideration of the problem, especially when the end of the process is a binding award in both types of conflicts (interests or rights) which can always be questioned and annihilated during the following negotiations.

(6) ROGER CHARTIER, « Grievances and Third-Party Intervention », *Industrial Relations Review*, Vol. 15, No. 2, April 1960, pp. 196-197.

In view of the characteristics of arbitration (nature and scope), we are now in a position to succinctly state its most important purposes and functions.

C. The Purposes and Functions of Arbitration

Those purposes and functions may be expressed as follows:

1. It interprets the contract (whenever there be grounds for such an interpretation) and applies the agreement, thus determining how a given decision made by either party fits into the pattern of rights for both as incorporated in the labor agreement.
2. It mediates, and then decides, disputes over interests which arise during the life of the agreement.
3. It provides a peaceful and orderly way handling disputes, as a substitute for strike or lock-out action. As Ralph Seward so ably puts it:

Arbitration is only a minor phase of labor relations and a still minor phase of civilized life. Yet, I submit that as a process it stands in the main stream of man's historical effort to bring reason to bear upon the solution of his problems. It represents a stage in his long effort to create methods of settling disputes that will reflect the basic values and ends of the disputants; that are based upon the search for truth rather than upon the assertion of power; that may take disputes which are in themselves divisive and hence a source of weakness and through their resolution make them a source of unity and strength. ⁷

Thus, the arbitration process is a part of a system of industrial self-government; it acts as a safety valve for difficult complaints in a highly emotional field and is in agreed-upon substitute of reason for work stoppages and resort to economic force during the contract period.

4. It gives the employee an opportunity to voice his dissatisfaction without fear or hindrance; this corollary function is basic in a democracy.
5. It indirectly improves the efficiency of the firm by satisfying individual workers, by uncovering sources of friction before they have time to spread and to impair production.

(7) RALPH T. SEWARD, « Arbitration in the World Today », ch. IV of *The Profession of Labor Arbitration*. Washington: BNA, 1957, p. 66.

6. It slowly establishes the basis for an industrial jurisprudence. It would be interesting to find out to what extent awards are actually borrowed from past decisions (precedents) by arbitrators or judges, rather than stemming from the collective agreement itself. The parties may be wary of the trend toward this kind of (as yet) informal jurisprudence. It is nevertheless very real. Most arbitrators, although not strictly bound by precedent, are deeply influenced by past awards dealing with other union-management relationships; and when the same parties and the same clauses of an agreement are involved, they tend to be bound by past decisions unless there be evidence that these are patently in error. Of course, the parties themselves can jettison an award by mutually setting it aside immediately, by nullifying it at the end of their contract year, or by changing agreement provisions to make it clear that their common intent was not properly construed by the arbitrator. Arbitrators, on the other hand, should not consider themselves tied by previous awards having to do with other agreements, since their job is to interpret and apply the specific agreement provisions before them in the manner the parties intended, and not in the way other arbitrators found other parties to another agreement intended.

We have now described the various functions and purposes of arbitration after an examination of its nature and scope. It is now time for a discussion of some of its basic prerequisites.

D. One Basic Prerequisite of Arbitration: the Equality of the Parties

There is, furthermore, one basic prerequisite for a realistic use of the arbitration process: and that is the genuine, sincere recognition by the arbitrator of the *true equality and worth* of union and management within the collective bargaining relationship, an equality which is at the very root of the system and has served as a rationale for our labour legislators.

If the Company provides capital, buildings, equipment, raw materials and various skills in both the technical and the administrative fields, it is true that the Union provides the manpower without which no machine runs and no material is processed.

As Arthur Goldberg puts it:

Not only does management have the general right to manage the business, but many agreements provide that management has the exclusive right to direct working forces and usually to lay off, recall, discharge, hire, etc.

The right to direct... does not imply some right over and above labor's right. It is a recognition of the fact that somebody must be boss...

Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded it as is accorded management... The company directs and the union grieves when it objects... It is essential that arbitrators not give greater weight to the directing force than the objecting force... [so that] grievances [have] to be extra well-founded to justify interference with right to manage.⁸

Commenting on Goldberg's position, Professor Neil W. Chamberlain has this to say:

There is a sense in which management must be given preferential treatment because it is the initiator, if we are to have any rationality to organizational life. The man who has not only the power but also the duty of initiating action must be given the right of reasonable judgment. If... a member of management makes his decision and that decision is reasonable under the circumstances and under the terms of that agreement, that decision must be honored even though the union argues that he should have taken another course of action which might also be viewed as reasonable... Management requires initiative, and initiative requires discretion and exercise of judgment, and if that judgment is exercised fairly, it should be upheld even though the union — equally fairly — would have it otherwise...⁹

E. The Management-Rights Issue

How then, in such an equalitarian context, is to be understood the question of managerial rights? Here is, under a new name, a very old problem which goes back as far as the first exercise of authority and the first effort to question the basis for it and the « rights » of its holder, whether parent, master or employer.

Every time a union has attempted to initiate discussion with a reluctant management on any question (the 12-hour week, wages, pensions new technology, etc.), it has been welcomed with hostility. Each

(8) ARTHUR J. GOLDBERG. « Management's Reserved Rights: A Labor View », in *Management Rights and the Arbitration Process*, Jean T. McKelvey, ed. Washington: BNA, 1956, pp. 199ff.

(9) *Ibid.*, pp. 139-140.

time, it seemed that management people would rather go back to farming rather than to yield one inch; they would not tolerate any further invasion or erosion of their God-given (and later, property-given) « rights ». And yet, the whole history of collective bargaining bears witness to the fact that a dialogue has gradually linked (or opposed) management and union people on more and more questions, thus setting up new networks of relationships between the two parties.

Management's reaction, I hasten to say, is perfectly understandable. Who likes to see his authority questioned? Who will negotiate with alacrity when he can demand and order around? Is it not more comfortable to sit on one's authority, especially when the union which intends to question it apparently refuses to subscribe to management's values and aspirations and tends to frustrate the attainment of a management-defined efficiency which, quite reasonably, management views as a socially desirable goal? The fact that « efficiency » as such is a value which can be defined in as many ways as there are definers has little bearing on the point I am making.

What is new, however, is a phenomenon which Neil Chamberlain stresses quite deftly in some of his recent writings: for the first time, our society has given legal sanction and encouragement to those (union members) whose very function is to constantly challenge a vested (managerial) authority.

I believe that we might be more clearly into this complex problem if we talked in terms of *functions* rather than rights: for instance, discretion — that is, the ability to make independent choices — is a prime *function* of management; while protection — that is, the establishment of limits and guideposts for the exercise of management discretion — is a basic *function* of the union.

How does this work in practice? We might find it useful to go back to the distinction between the *legislative* and the *administrative* phases of collective bargaining in order to describe and assess management's attitudes and the union's positions on managerial prerogatives over the years ¹⁰

(10) For a detailed discussion of the management-rights and the specific-function-of-managements issues, see ROGER CHARTIER, « Collective Bargaining and Management Rights », *Industrial Relations Review*, Vol. 15, No. 3, July 1960, pp. 314-322.

F. Secondary Prerequisites for Successful Arbitration

As regards unions and management, an important condition for successful arbitration is that they understand the process and participate in it with both skill and restraint, bringing to it honesty, seriousness and hard work. In so doing, they will keep control over the process, as it should be: for the arbitrator should be the least important of the three parties concerned with arbitration. Under a voluntary system, it is the two parties who should determine the issues to be arbitrated, of their own free will; management and the union control the choice of the arbitrator and the rules (both substantive and formal) under which he is to operate. And finally, the two parties decide what action they will take on the award.

A second condition is that the parties agree on the area of arbitrability. I have already suggested with some emphasis that they would both gain by determining that *all* grievances will be arbitrable, whether they come or not under specific clauses of the labour agreement.

A third condition for success in arbitration is a clear understanding by the parties on the procedure to be followed: judicial, bargaining or a mixture of both.

A fourth condition is that the parties respect and trust both the integrity and the ability of their arbitrator.

A fifth condition is that the parties should not expect the impossible of arbitration, which is no cure-all and is never better than the bargaining relationship itself.

And finally:

Properly prepared presentations constitute a sixth condition for successful arbitration. Good cases are sometimes lost simply because the arbitrator is not given complete information or because the other side presents its poor case more adroitly. Too frequently the parties rely on the arbitrator to make a poor case good. Adequate preparation requires competent personnel, sufficient time, and careful study... Tricky and over-combative presentations, designed to win a case rather than to solve a problem, have no place in arbitration... Essential information [should not be] withheld.¹¹

(11) EDGAR L. WARREN and IRVING BERNSTEIN, «The Arbitration Process», *The Southern Economic Journal*, Vol. XVII, No. 1, July 1950, pp. 29-30. This article has inspired all Section G.

Another set of problems has to do with the relationship between the language of the collective labour agreement and the concept of equity.

G. Equity, Fairness and 'Good Conscience' v. the Letter of the Agreement

Article 24 of Quebec's *Trade Dispute Act* draws attention to the arbitrator's responsibility of deciding issues « in equity and good conscience ». And not infrequently arbitrators are asked by one of the parties to be « fair » and « equitable » while the other strongly protests by brandishing the letter of the agreement. I have even seen the same management and the same union people completely reverse their stand on this issue before the same arbitrator and on the same morning! This is no ground for scandal, as we have seen in view of the political nature of the parties' actions and devisions.

However, some principles are at stake here which may be worth expressing and exploring. The law (whether it be a general law or the « law » of the parties which is spelled out in the collective labour agreement) is man-made, and thus fallible and often inadequate. This is where equity may be allowed or feel compelled to complement the law, acting as a form of natural justice and good old common sense whenever the law is either silent or ambiguous.

This formula, however rigid, seems to me to be more valid than the statement according to which arbitrators not only may, but must in principle discard a clear meaning of an agreement in order to be « equitable » and to act with a « good conscience ». Equity, as such, should never have primacy over the law, should never counteract it, should never create it offhand; it is there to supplement and to clarify the law, to make it more flexible and less rigorous, to protect individuals against frauds, errors and legalistic subtleties when those individuals' rights are unquestionable.

In this sense, equity is an objective guidepost, an external element of justice. Good conscience, on the other hand, is a rather subjective notion which is likely to vary with the individual arbitrators.

It is a reasonable assumption that 'good conscience' imposes on the members [of the Arbitration Board] the responsibility of honesty and integrity. 'Equity' is not so simple to determine... [It] must be defined in relation to the general circumstances of the parties to

the dispute. If we assume a situation in which there is no union contract, a council [or board] would have to accept equity to mean justice in relation to the prevailing circumstances involving the employer and the employees. The presence of a union contract does not alter this principle, but it does establish mutually determined definitions of some of the relevant circumstances. Where a dispute is concerned with specific clauses of the agreement, the council must assume that the application of those clauses as intended by the parties is their mutual and precise definition of equity for the rights established in the clause. It would, therefore, be wholly improper for the council to determine the issues and render an award which was inconsistent with the mutual definition of the circumstances involved.¹²

In other words, resorting to equity for an arbitrator cannot mean that he will reject the plain language of an agreement and the circumstances surrounding the parties in favor of his individual fancies or his personal conceptions of what should be an equitable organization of social and economic relationships.

The preceding line of argument, however, does not overlook the fact, which must be realistically acknowledged, that no collective agreement, however skilfully drafted, is capable of encompassing all existent relationships between the parties and of foreseeing all occasions of frictions in order to eliminate them or to answer in advance every possible question. This leads us directly to a discussion of « past practices » in relation to the letter of a labor agreement.

H. The Language of the Agreement v. Past Practice

Here is a thorny question indeed for the arbitrator: what weight is he going to give to the uses of the past as established for a number of years by either or both parties, when such past practices run counter to the language of the labour agreement? The easy way out, of course, would be to answer that the arbitrator must act in such cases according to the express wishes of the parties. But what if, as usually is the case, the parties are dead set against each other on such a matter, management customarily insisting that the letter be totally respected while the union generally has a stake in expanding the scope of the agreement?

While my bent is by no means legalistic, I as an arbitrator am inclined to show much regard for the labour agreement as it stands in writing, *provided that agreement be clear*. I had once to decide a case

(12) Professor H.D. Woods from McGill University's Industrial Relations Centre, Award No. 1102, Quebec Department of Labour's *Bulletin*, p. 2 (September 13, 1957), Dominion Oilcloth and Linoleum Co., Ltd., and Le Syndicat national des Travailleurs du Linoleum de Montréal, Inc.

in which the grievants were fourteen millwrights who, for thirteen years, had worked in a chemicals plant on a continuous-operation schedule, seven days a week, on two locked shifts. For all those years, they had been paid time-and-a-half on Sunday; on that pay basis, however, they received neither the Sunday premium, nor the shift premium, nor the locked-shift premium, which anyway amounted to less than straight time and a half.

The language of the agreement was unambiguously to the effect that the fourteen millwrights, for all those years, had been paid on a wrong basis for Sunday and holiday work: they should have been granted the three less interesting premium, and not the time-and-a-half premium. The Company admitted that during thirteen years it had made a mistake which had benefited the millwrights; now, it had decided unilaterally to go back to the agreement, which was indeed a very fine thing to do for all concerned! The Union, as can be expected, insisted on the compelling character of the past practice and on the normal expectations that the millwrights had built around it.

Here, then, you have a clear-cut case of past practice which is pitted against the very clear language of a given clause of the labor agreement. How would you have ruled in this instance? There is no doubt that *all* human relationships are influenced to quite an extent by past usage. In the arbitration field, things would be relatively easy for the arbitrator if he were allowed more « flexibility » and imposed less faithfulness to logic and consistency, or rather as much flexibility as the parties, who often shift from the « letter-of-the agreement » line to the « past-practice » argument according to the needs of the moment and in order to win a skirmish, at the risk of losing the war of sound labour relations.

In my mind, the collective labour agreement, as such, is more compelling and more sacred to the arbitrator than past practice, simply because it is more formal, more complete and more precise (since it is *written*), and more easy of access, acknowledgement and evaluation than most past practices. The agreement stands as the official law of the parties.

Of course, I repeat that once the agreement has been signed, it cannot provide an account of the whole of the relationship existing between the parties. So that the total relationship creates obligations

beyond the agreement. This is another way of saying that the parties' relationship is made up, not only of the written, express agreement, but also of a multitude of less formal understandings which make for fluidity and harmony in labour-management relations, and without which such relations would quickly enter a dead end. And it may be further argued that both parties are entitled to some amount of stability and protection from unbargained changes.

And yet if a « common law » of arbitration did develop beyond the language of the agreement and came to have precedence of the clear letter of the agreement, there would be great danger, I think, that either the employer or the union fear to relax the strict requirements of the contract or depart from it to cope with a practical situation, wondering whether it will not be confronted some day, before an arbitrator, with past-practice evidence which would take precedence over the clear meaning of the language.

In the above-described case, and rather unhappily, I ruled that since the letter of the agreement and the past practice were *equally* clear, the former should have primacy over the latter, since it represented more solemnly and more formally the will of both parties. But I hastened to add that, should the agreement be silent or ambiguous, a clear-cut usage will win over it. Should both the agreement and the consistent past practice be more or less equally ambiguous, the agreement alone will be retained.

Up to this day, I have wondered whether I had not been too legalistic about that matter, having in mind the following decision by the U. S. National War Labor Board (*Nineteen-Hundred Corporation*, 12 W Lr 417, 418 [1943]):

The employee's conception of his wage or salary quite naturally and properly arises not only from the obligatory practice of the employer, but from the latter's voluntary acts as well. The employee's expectations are strengthened by repetition of the voluntary act and... [to] the extent that the employer by repeated voluntary action has raised the reasonable expectations of his employee, he has fettered his own discretion.

May I, before leaving this baby to your good care, add the following *caveat*: Consistency, as I have used the term for a past practice, should not be confused with uniformity. As Ben Aaron ably puts it, « a consistency of purpose and method may well produce a diversity in results

stemming from differences between individual personalities and situations. »¹³

I. The Role of the Arbitrator

Let us now turn to the arbitrator, whose role we shall try very briefly to define. What will he be: a judge, a mediator, a scapegoat or a face-saver? The most basic answer to such a question is that the arbitrator should be what both parties agree generally, or in specific cases, that he should be; *they* are the masters of the arbitration process, they make the rules and the arbitrator should follow them faithfully. Very often, however, the parties do not agree (especially in specific cases) on the role they would rather have the arbitrator assume, the union usually insisting on the « bargaining » or compromise approach and management stressing the need for a judicial outlook. Whenever this occurs, the arbitrator may follow one basic rule: if he is dealing with *interests* disputes (*before* or *after* the agreement is signed), he should not be shy with mediation; if, on the other hand, he is concerned with *rights* disputes, he should be as judicial as the cases warrant. In both types of grievances, of course, the end result of his endeavour (that is, the award) will have a judicial character, since it is decisive and binding upon both parties.

The arbitrator must realize at the outset that « institutional politics » will at times make him a scapegoat and require that he act as a face-saver.

Even if both [parties] discount the decision in advance, they may find it expedient for political reasons to have the arbitrator issue an order rather than reach a settlement themselves. This might occur, for example, in the case of a discharged employee. The employer might feel it necessary in principle to uphold a foreman's action in discharging; he could, however, accept the reverse decision of an arbitrator. Similarly, unions may find it politically impossible to agree that a worker is properly discharged even though the merits are clear.¹⁴

In such situations, the unpopular decisions are left to the arbitrator's care. This practice is rather common, even though it entails risks for the arbitration process since, for people like Harry Shulman, they constitute a misuse of the process, which is brought to bear on a dispute that is not truly *bona fide*.

(13) BENJAMIN AARON, « The Uses of the Past in Arbitration », *Arbitration Today*, edited by Jean T. McKelvey. Washington: BNA, 1955, pp. 1-12.

(14) EDGAR L. WARREN and IRVING BERNSTEIN. *Op. cit.*, p. 20.

The arbitrator must always be aware that as such he is acting for the parties themselves, and not directly for a vague common good or a salesman of pet notions and normative ideas. He must constantly have in mind that his authority (albeit temporary) and responsibility (although limited) are in some sense awful: for there are often much money involved, many employees concerned, and touchy relationships which he is able to influence in a very personal and direct way, either to maintain or to upset a very delicate power balance between the parties.

A bad contract is unlikely to produce good grievance handling. The grievance machinery can scarcely be expected to do what contract negotiations failed to do. The arbitrator must realize that an undue load is placed upon that machinery if the contract signing was a mere illusion of agreement, the prelude to the act of stretching words far enough to gain through interpretation what the opposing party was unwilling to give in more explicit form.

The arbitrator must know that, speaking generally, unions have more to gain from the mediation approach than from the adjudication approach. Even in grievance arbitration, mediation is sometimes exploited to good effect by the permanent (rather than the *ad hoc*) arbitrator, who has the confidence of the parties, is familiar with the management and union people directly involved and has a continuing interest in the quality and the solidity of the relationship. There are, of course, issues which are not amenable to mediation: the arbitrator should detect them and act accordingly.

No matter how compelling the logic of mediation, the arbitrator inevitably runs a risk in attempting it, namely, failure. Unsuccessful mediation complicates his ultimate responsibility of rendering a decision and takes time. He must tread warily particularly to avoid commitments as to what he will decide if negotiations break down. Such commitments — the parties usually seek to extract them — weaken his effectiveness and can prove embarrassing. If mediation is attempted, the arbitrator must be careful lest he destroy his paramount function as arbitrator.¹⁵

One final point concerning the arbitrator's role has been made strongly and repeatedly by Ralph Seward, the famous American arbitrator: that is, the arbitrators *have* to deal with the *implicitations* of the

(15) IRVING BERNSTEIN, «Arbitration», ch. 23 of *Industrial Conflict*, edited by Arthur Kornhauser, Robert Dubin and Arthur M. Ross. New York: McGraw-Hill, 1954, p. 312.

agreement which can properly be drawn when its language is inadequate; umpires *must* attempt to arbitrate, not in the light of pure theory (whether residual or contract, as we have seen) as an answer to all problems, but in terms of the reasonable expectations of the bargaining parties. They must balance implications about the functions of an *efficient* management against implications about the functions of a *job-security-minded* union membership; reasoning in terms of values and emotions, they must put in some sort of unstable equilibrium *ability* as defined by management and seniority as sought by the union; *incentives* as established by the former and *sweat-system* reactions as expressed by the latter; « scientific management » as boasted by managers and « fraud » as called by union leaders; and so on!

This does not mean that the arbitrator should the letter of the agreement or superimpose his own views of what is good and right on those of the parties, but rather that he must interpret the agreement according to his own judgment in an attempt to bridge the gap between the language of the contract and the life of the plant before him. In this respect, the parties must be willing to help the arbitrator by clearly expressing their views of the present necessities of the problems at hand and of the importance of the assumptions for which they are arguing. They would not help by retreating into the realm of abstract principles and arguing theories (however logically valid) which leave the arbitrator half-way in-between, without any guiding light from the parties with regard to the problems under scrutiny.

As a final endeavour, let us now briefly examine some recurrent problems associated with the process of arbitration.

J. Some Recurrent Problems of Arbitration as a Process

The matter of *delays* is ever-present and ever-painful in the process of arbitration, which should ideally be fluid and expeditious. Many elements may explain delays: tripartitism, vagueness of arbitration clauses, slow choice of arbitrator (by insistence on « name » arbitrators), busy schedule of parties' representatives, poor preparation and presentation of cases, insistence on lengthy briefs and numerous dissenting opinions and witnesses, and so on and so forth. The problem of delays is of course associated, as far as form is concerned, with that of « creeping *legalism* » with its array of pre-and post-hearing briefs, swearing in, latin phrases, fancy rules of evidence, arguments on arbitrability,

involved arbitration stipulations, stenographic records, examination, cross-examination, re-examination and re-cross-examination, objection to witness, exceptions for the record, rebuttal and sur-rebuttal briefs, motion to reopen the hearing, and what have you! Lawyers, on the other hand, could perform a valuable function in arbitration if their role (which is to enlighten, not to block) were properly assumed; for they are trained to marshal facts, to present arguments and to see through phony evidence. The problem, however, is that too many of them (and others who are not lawyers!) have instilled into the arbitration process the techniques and procedures which are well suited to court litigation between parties which are destined to sever their relationship when they walk out of the courtroom, but which are glaringly out of place in solving the problems of parties to a labour agreement, who must continue to live together after arbitration is over.

Any lengthy procedure, therefore, defeats the purpose of the grievance mechanism at the highest echelon, since speed is one of the dominant benefits which should be gained and is customarily sought when arbitration is resorted to. Again, it should not be forgotten that the parties, while waiting for a decision, have to live in common and work together in a very close relationship. If the award is too slow to come, employees and foremen brood and fight, become restless and discontented; supervisors hesitate before deciding anything, so that much-needed decisions or changes are postponed; other related controversies are generated and take the blind alley; witnesses to the grievance cases leave the Company or lose their memory; problems of back pay arise; and much money is spent on just waiting it out . . .

One easy way to avoid so much delaying which, in the long run, injures both parties, is to take advantage of the legislation and to settle grievances according to *private* procedure.

« By setting up private arbitration mechanisms, the parties would be able, in most situations:

« 1.—To beat the statutory procedure by a solid margin, *time-wise*. A panel of arbitrators could be included in the agreement (rather than only one arbitrator) so that there always be one available. The incumbent would know that he has to hasten, that no « cooling-off » concept is relevant at that point. In this respect, one arbitrator is better than

a tripartite board with voting representation from both union and management. One advantage of the tripartite board is of course that the parties before it feel more confident that their viewpoints will be represented fully at two levels rather than one before reaching the impartial arbitrator's ears; they may also believe that they exercise a greater amount of control over the arbitration procedure. However, in grievance arbitration, one may rightly wonder whether a three-man board is not a bit redundant and clumsy, and whether the slight advantage previously described is not deeply buried under a number of obvious disadvantages, namely: the conflict of roles within the parties' representatives on the board; the concomitant waste of time involved in appointing the members and getting them together repeatedly for hearings and deliberations, made twice or thrice more lengthy because of oft useless discussions and expositions; the money spent for nothing in unproductive « show » by poor actors; the temptation by the parties' representatives on the board to attempt to win the skirmish at all costs, on a score-keeping basis; and so on.

« 2.—To get more informed arbitrators having greater respect for their mandate. This will be more so if the arbitrator is hired on a *permanent* rather than an *ad hoc* basis. In the *ad hoc* hypothesis, each party will soon exhaust its lists of acceptable nominees, since there is a constant tendency to systematically black-ball the designees of the other party and to gain an advantage in the choice of the arbitrators. The permanent arbitrator, on the contrary, is the mutually-chosen, yet free « employee » of both parties; and the value for him of stability compensates by a wide margin the danger that he gather around himself « vested interests ». He can be carefully selected by both parties for competence and integrity, with no politics as under-currents. He serves long enough to get to know the parties well, and to understand their contract problems and the economics of the industry; his awards will be more consistent, as a rule, and also more expeditious. He will be quicker to sense the *true* assignment given to him by the parties, to visualize the bounds of his authority and the boundaries of his award: in some instances, he will understand that the parties do expect him *not* to function in a judicial capacity, but rather in a political capacity (*e.g.*, when several grievances are arbitrated at one time, and harmony requires somewhat a spilt down the middle!). Lest this statement be an object of scandal, I hasten to point out that, in grievance arbitration, both the « mediation » and the « judicial » aspects are ever present. In our regular courts of justice, many judges feel the need to hold conferences in

their chambers between representatives of disputants to *mediate* a settlement of *legal* claims; which in no way relieves them of the obligation to decide the case later on, however reluctantly and humbly!

3.—To better define the relevant issues to qualified arbitrators, to agree on some minimal standards to be applied, and to present more seriously a more solid case, based on confidence in the competence and integrity of the umpire.

4.—To refrain as much as possible from using arbitrators in a partisan and disrespectful fashion, as one would act with an enemy, an « alien », or from using the arbitration as a contest to be won at all costs or as a tactical weapon related to a major « war » between the parties.

5.—To avoid seeing in arbitration some kind of a panacea or a scapegoat in all disputes, which would justify loose discussions and little effort at the plant level to settle grievances before they reach important proportions.

6.—To refrain from using arbitration as a face-saving mechanism in so many situations that the efficiency of the procedure is thereby impaired.»¹⁶

Another recurrent problem is posed by either party (usually management) resorting to briefs from, or appeals to, the *courts* to block or change the effects of a given arbitration award. Such a systematic use of the courts, to my mind, is as a rule dangerous and unnecessary, because of the very nature of the institution which arbitration is supposed to serve. For one thing, the parties have their own appeal for grievances at their next negotiations. Moreover, grievance arbitration is conducted within the boundaries of a labour contract: therefore, issues are usually not of such magnitude that the very existence of company or union be at stake; a bad decision may be lived with till negotiations are resumed. And finally, the parties insist on, and should get, a speedy disposition of such matters for reasons which have been sufficiently described in the above paragraphs. Appeals even from obviously faulty awards mean multi-step arbitration and delays.

(16) ROGER CHARTIER. « Grievances and Third-Party Intervention », *Industrial Relations Review*, Vol. 15, No. 2, April 1960, pp. 200-201.

CONCLUSION

This is the end of a rather lengthy incursion into the nature and scope of arbitration as a process. We have examined some of its essential prerequisites, and its main functions and purposes as a vital, terminal phase of collective bargaining in a free society. This has led us to a detailed appraisal of the management-rights issue in terms of the specific function of management, which is bargain-balancing rather than decision-making. Later, we have set the notions of equity and past practice against the language of the collective labour agreement. And finally, I have given some « pointers » on the ideal role of the arbitrator and on the pitfalls of delays and undue legalism.

My I conclude by a strong insistence on the danger of too great a reliance by the parties on arbitration as a panacea for solving all their problems. If union and management are to remain free within the framework of the law in this democratic society of ours, they cannot afford to thus waive their responsibilities. They must remain, as much as possible, the masters of the arbitration process. And all of us, observers or practitioners of the field of industrial relations, must constantly explore with a fresh look the many new avenues which now open up for a free and more efficient arbitration process delivered from the shackles of residual-rights and other theories and geared to the realities of twentieth-century, forward-looking collective bargaining.

L'ARBITRAGE DES DIFFÉRENTS PATRONAUX-OUVRIERS

L'auteur, dans un article fouillé, va au coeur même de l'arbitrage. Il y voit à la fois un prolongement de la négociation collective et l'un de ses éléments essentiels, qui se substitue au recours à la grève ou bloque son utilisation, selon les cas.

Dans cette perspective, l'auteur examine les éléments fondamentaux de l'arbitrage. Il analyse la nature et le champ de ce procédé, les facteurs essentiels qui lui sont prérequis, les buts et les fonctions qui font souvent de l'arbitrage le terme final de la négociation collective dans une société libre. Il en découle un examen des problèmes que posent les droits de la gérance dans ce contexte. L'auteur évalue également la lettre de la convention et le rôle des règles d'équité et des pratiques en usage. Enfin, il définit le rôle de l'arbitre et examine quelques-unes des difficultés techniques qui se soulèvent lors des divers arbitrages.

La négociation collective est une institution désirable et nécessaire pour nos structures industrielles et pour la société elle-même. Elle requiert dès lors que les

parties en présence, les syndicats et les gérants d'entreprise soient dans une situation forte et se considèrent comme de véritables égaux lors de la négociation et de l'arbitrage. Dans une société libre, les parties elles-mêmes devraient s'attacher surtout à développer et à renforcer leur système de relations, y compris l'arbitrage.

Une mise en garde s'impose: il serait dangereux pour les parties d'exagérer l'importance de l'arbitrage au point de le considérer comme la panacée de tous leurs problèmes. Si les syndicats et les gérants veulent demeurer des agents libres à l'intérieur des cadres de la loi, dans notre société démocratique, ils ne peuvent abdiquer leurs responsabilités. Ils doivent demeurer, dans la mesure du possible, maîtres du processus d'arbitrage. En outre, il convient d'examiner avec un regard neuf les nouvelles voies susceptibles de faire de l'arbitrage un processus plus libre, plus efficace. L'arbitrage doit se débarrasser des chaînes que lui imposent la notion de droits résiduaire et les autres notions qui y sont reliées. Il doit s'axer sur les réalités du vingtième siècle, sur un système progressif de négociation collective.

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