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Final Position Arbitration and Intertemporal Compromise
L'arbitrage des propositions finales et les compromis annuels

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Résumé de l'article

La plus récente critique de l'arbitrage des propositions finales, exposée par Swimmer, allègue que les arbitres, au lieu de recourir à une solution de compromis au cours d'une ronde de négociations font des compromis entre deux ou plusieurs rondes de négociations. En d'autres termes, étant donné qu'ils sont forcés par le système de choisir l'offre finale de l'employeur ou celle du syndicat dans chaque ronde de négociations, leur choix « saute » d'une partie à l'autre d'une ronde de négociations à l'autre. Si ce qui précède est vrai, il nous faut considérer cette façon d'agir comme si les arbitres cherchaient à atténuer l'effet d'aliénation et à s'assurer la probabilité d'être choisis de nouveau à l'avenir. Pour justifier son opinion, Swimmer se fonde sur l'expérience de l'université de l'Alberta où, pendant trois années consécutives, on a eu recours à l'arbitrage des propositions finales pour résoudre un conflit relatif à l'ajustement des traitements en regard de la hausse du coût de la vie. À l'appui de l'hypothèse de Swimmer, les décisions arbitrales ont ainsi « sauté » de la position d'une partie à celle de l'autre partie d'une ronde de négociations à l'autre. S'appuyant sur ces trois observations, Swimmer tire la conclusion que de telles situations se produisant, il peut s'ensuivre une interprétation fausse des avantages de l'arbitrage des propositions finales.

Le but de l'article précédent est de soumettre cette hypothèse de Swimmer à une investigation plus approfondie tirée de l'expérience de l'arbitrage des propositions finales dans le domaine du baseball professionnel. Les statistiques permettent d'en arriver aux conclusions suivantes :

1° La démonstration tirée du baseball ne semble pas indiquer une forte probabilité que l'on recourra à l'arbitrage des propositions finales dans les rondes suivantes de négociation après qu'on a utilisé ce mécanisme une première fois. Six joueurs seulement (dont cinq faisaient partie des Athlétiques d'Oakland) sur vingt-huit qui avaient choisi ce mécanisme d'arbitrage en 1974 y ont eu recours de nouveau en 1975. Les vingt-deux autres (soit neuf qui avaient eu gain de cause en 1974 et treize qui avaient été déboutés) furent en mesure de conclure un accord en 1975. Ces statistiques indiquent que l'arbitrage des propositions finales n'a pas eu un effet « narcotique » sur les négociations dans le baseball professionnel.

2° En outre, la conception de Swimmer selon laquelle la partie perdante dans une année donnée sera celle qui recherchera l'arbitrage à la ronde suivante n'a que peude valeur dans le baseball professionnel. Même si l'une et l'autre parties pouvaient recourir à l'arbitrage, dans chacun des cas, c'est le joueur qui a exercé cette option. Il faut se rappeler que cinq des six joueurs qui ont eu recours à l'arbitrage deux fois n'avaient pas eu gain de cause en 1974. Ainsi, à l'exception d'un cas, ce fut la partie qui avait eu gain l'année précédente qui a choisi de recourir de nouveau à l'arbitrage.

3° L'effet de « saut » s'est produit pour cinq des six joueurs qui avaient opté pour l'arbitrage à la fois en 1974 et en 1975. Cependant, l'étude des données permet de se rendre compte que les arbitres ont fondé leur décision sur l'offre finale la plus raisonnable et non de façon à mitiger l'aliénation des parties et à maximaliser leurs chances d'être choisis de nouveau comme arbitres dans l'avenir.

4° L'expérience de l'Université de l'Alberta peut être considérée comme un exemple du fonctionnement heureux du mécanisme de l'arbitrage des propositions finales. Même si on a eu recours à ce processus pendant trois années consécutives, le but principal qui est de forcer les parties à faire des compromis, fut bien servi. Les deux parties ont présenté des réclamations sérieuses et l'arbitre a pénalisé la partie qui s'était montrée le moins raisonnable en optant pour la proposition finale de l'autre partie.

L'idée que les arbitres entretiennent certaines réserves relativement à l'efficacité de la formule de l'arbitrage des propositions finales ressort nettement de ce qui s'est écrit sur le sujet. Il semble que les arbitres préféreraient une formule qui puisse leur permettre de rendre une décision de compromis plutôt qu'une sentence où l'on peut les identifier à l'une ou à l'autre des parties. Compte tenu des contraintes qu'exerce sur eux la formule d'arbitrage des propositions finales, Swimmer en déduit que ce désir de ne pas s'aliéner les parties est atteint au moyen du compromis d'une ronde de négociations à l'autre, un phénomène qui ne pourrait qu'avoir pour effet de détourner de sa fin même la formule de l'arbitrage des propositions finales. Ce serait là en réalité un défaut qu'il importe d'évaluer sérieusement. Les résultats de l'étude précédente tendent à démontrer qu'il ne s'agit pas là d'un problème grave et que le régime d'arbitrage des propositions finales a atteint le but qu'on voulait lui voir atteindre, c'est-à-dire des ententes négociées sans qu'il soit besoin de recourir sans cesse à l'arbitrage.

Final Position Arbitration and Intertemporal Compromise

James B. Dworkin

This paper seeks to present further evidence from the realm of professional baseball in regard to Swimmer's criticism of final offer procecure.

Final position (offer) arbitration was originally proposed by Carl Stevens[1] as a conceptually attractive alternative to conventional arbitration. The latter process gives to the arbitrator the discretion to mold the binding award he/she thinks to be best on the issue(s) at impasse. The former requires an arbitrator to select without change, one of the final positions of the parties.

Conventional arbitration was initially hailed as a virtuous, almost ideal impasse resolution mechanism. Lately, however, it has been the subject of numerous criticisms, the most important one being that the mere availability of conventional arbitration will have a «chilling» effect on the bargaining process.[2] This implies that the incentives of the negotiators to bargain in good faith will be «chilled» in anticipation of having the dispute settled at arbitration. Moreover, once arbitration has been used, it will be turned to again and again as an easy, habit forming release from the duties of responsible bargaining.[3]

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* The author wishes to thank John Baum for his helpful comments on an earlier draft of this paper.

[1] Carl STEVENS, «Is Compulsory Arbitration Compatible with Bargaining?» *Industrial Relations*, V (February 1966), pp. 38-52.

[2] For an excellent review of the useful and dysfunctional dimensions of conventional arbitration, see Peter FEUILLE, *Final Offer Arbitration: Concepts, Developments, Techniques*, Chicago, International Personnel Management Association, 1975, pp. 6-12.

[3] Readers familiar with the literature will recognize the above as the classic statement of the «narcotic effect» of conventional compulsory arbitration on bargaining, attributed to former United States Secretary of Labor, W. Willard Wirtz. See

The proliferation of such criticism of the « chilling » or « narcotic » effect of conventional arbitration led some scholars to conclude that arbitration and bargaining were incompatible.[4] Final offer arbitration was suggested as the appropriate solution to the alleged detrimental effect(s) of conventional arbitration on bargaining.

The final offer technique, according to Stevens, would overcome the pernicious effects of conventional arbitration as it was,

> « ... a technique for imposing a cost of disagreement... to invoke the processes of concession and compromise which are an essential part of collective bargaining negotiations. »[5]

As of late, several studies have purported to assess the viability of the final offer technique and/or to measure its impact on bargaining *vis-à-vis* the impact of conventional arbitration.[6] On the whole, the reported results favor final offer arbitration as a procedure that is compatible with bargaining (i.e., it acts as a self-destruct mechanism) and that does encourage the parties to narrow their areas of disagreement so that the award of the arbitrator is necessarily a reasonable one. However, one should note that final offer arbitration is coming increasingly under review as having some defects of its own. For example, Feigenbaum concludes that while plausible in theory, final offer arbitration actually provides no greater positive inducement to the parties to negotiate in good faith than conventional interest arbitration. Furthermore, final offer arbitration awards are significantly

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James L. STERN, « Final Offer Arbitration — Initial Experience in Wisconsin, » *Monthly Labor Review,* XCVII, (September, 1974), pp. 39-43.

[4] STEVENS, *op. cit.* pp. 38-52. Also see Herbert R. NORTHRUP, *Compulsory Arbitration and Governement Intervention in Labor Disputes,* Washington, D.C., Labor Policy Association, 1966, Chapters 11 and 12.

[5] STEVENS, *Ibid.,* p. 40.

[6] See, for example, James B. DWORKIN, « The Impact of Final Offer Interest Arbitration on Bargaining: The Case of Major League Baseball, » Paper to be presented at the Twenty-Ninth Annual Winter Meeting of the Industrial Relations Research Association, Atlantic City, New Jersey, September 16-18, 1976, pp. 1-15; Gary LONG and Peter FEUILLE « Final Offer Arbitration: 'Sudden Death' in Eugene, » *Industrial and Labor Relations Review,* XXVII (January, 1974), pp. 186-203; James L. STERN, *op. cit.,* pp. 39-43; James L. STERN, Charles M. REHMUS, J. Joseph LOEWENBERG, Hirschel KASPER and Barbara D. DENNIS, *Final Offer Arbitration: The Effects on Public Safety Employee Bargaining,* Lexington, Massachusetts, Lexington Books, 1975, 223 pp.; Charles M. REHMUS, « Is a 'Final Offer' Ever Final? » *Monthly Labor Review,* XCVII (September, 1974), pp. 43-45; Fred WITNEY, « Final Offer Arbitration: The Indianapolis Experience, » *Monthly Labor Review,* XCVI (May, 1973), pp. 20-25.

worse than conventional arbitration awards.[7] Many other similar defects are expounded by arbitrators themselves.[8]

Swimmer's criticism of the final offer technique is,

> « that in many situations final offer arbitration merely substitutes an intertemporal compromise for a static (one period) compromise. If the final step in the procedure is reached in one wage round, there is a strong probability that negotiations will go to the final step in subsequent wage rounds, with the arbitrator's selection flipping from one side to the other between wage rounds. The benefits of final-offer arbitration may be illusory. »[9]

The purpose of this paper is to provide the reader with some further evidence from the realm of professional baseball in regard to the latter criticism of the final offer procedure. It is hoped that these remarks will enable the reader to evaluate this assessment on its merits.

INTERTEMPORAL COMPROMISE: THE IDEA

The essential notion expounded by Swimmer is that arbitrators, constrained by the procedure to choose either the final position of management or labor in any one wage round, will replace their desire to effectuate a compromise solution in one wage round by compromising between wage rounds. If the above is indeed true, then we should observe a « flip-flop » phenomenon, where arbitrators' selections regularly change from one side to the other between wage rounds. To substantiate the existence of such a « flip-flop effect, » Swimmer provides evidence on the University of Alberta experience with three consecutive years of usage of final offer arbitration to resolve impasses over cost of living wage adjustments. In support of Swimmer's hypothesis, the awards handed down in these three rounds did flip from one side's position to the other between rounds.[10] Based on these three observations, Swimmer concludes that intertemporal compromises are occur-

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[7] Charles FEIGENBAUM, « Final Offer Arbitration: Better Theory Than Practice, » *Industrial Relations*, XIV (October, 1975), pp. 311-317. A good review of these and other criticisms of the final offer procedure can be found in Nels NELSON, « Final Offer Arbitration, » *The Arbitration Journal*, XXX (March, 1975), pp. 50-58; FEUILLE, *op. cit.* pp. 13-14 and Arnold ZACK, « Final Offer Arbitration — Panacea or Pandora's Box? » *New York Law Forum*, Winter 1974, pp. 567-585.

[8] WITNEY, *op. cit.*, pp. 20-25.

[9] Gene SWIMMER, « Final Position Arbitration and Intertemporal Compromise: The University of Alberta Compromise, » *Relations Industrielles*, XXX (July, 1975), pp. 533-536.

[10] SWIMMER, *Ibid.*, p. 534-536.

ing and that the supposed benefits of final offer arbitration may be misconstrued.

INTERTEMPORAL COMPROMISE: THE EVIDENCE

In order to more fully explore the hypothesis of intertemporal compromise, it is possible to review the experience of professional baseball with final offer arbitration.[11] The crucial questions raised by Swimmer which will be commented upon are:

1. Is there a strong probability that arbitration will be used in subsequent wage rounds after the procedure is used initially?
2. Does the «flip-flop effect» occur, and if so, is it because of reasons suggested by Swimmer or because arbitrators are choosing the most reasonable final position presented to them? and
3. Does the University of Alberta experience provide evidence to suggest that the benefits of final offer arbitration are illusory?

The suggestion by Swimmer that an initial resort to final offer arbitration implies «... a strong probability that negotiations will go to the final step in subsequent wage rounds,[12]» in essence, hypothesizes a strong «narcotic» or «chilling» effect on bargaining of the final offer arbitration procedure. As reported earlier, one of the key perceived defects with conventional arbitration which led to the proposal of the final offer technique, was this deleterious effect on the bargaining process. Swimmer argues that the same defect applies in the case of final offer arbitration. Assuming that negotiated settlements are highly preferable to agreements imposed by a third party, what additional evidence can the data from professional baseball's experience with final offer arbitration provide?[13]

The data show that approximately 500 players were eligible to make use of final offer arbitration in 1974 and again in 1975. Only four

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[11] Additionally, one could review the experiences of three public sector labor relations systems in the United States with the use of final offer arbitration (specifically, Eugene, Oregon: Michigan and Wisconsin). However, these systems have been studied and reported in the literature (see the citations in footnote number 6) and thus will not be addressed in the body of this paper.

[12] SWIMMER, *op. cit.*, p. 534.

[13] Professional baseball's salary arbitration system has been described elsewhere. See DWORKIN, *op. cit.*

percent of the eligible pool were actually involved in arbitration proceedings in these two years. Twenty-eight awards were made in 1974 and only fourteen were rendered in 1975. More importantly, only six of the twenty-eight players who used arbitration in 1974 chose to re-use arbitration in 1975.[14]

At this point, it is informative to delve deeper into the central theme of Swimmer's comment (i.e., the existence of the «flip-flop effect») by analyzing the cases of the six players who made use of arbitration in both 1974 and 1975. Table I presents data relevant to

TABLE 1

Arbitration and Intertemporal Compromise

*Player**	*Year*	*Previous Year's Salary*	*Final Demand*	*Final Offer*	*Arbitration Award*
Fingers	1974	48,000	65,000	55,000	65,000
Holtzman	1974	66,500	93,000	80,000	93,000
Bando	1974	60,000	100,000	75,000	100,000
Braun	1974	18,000	31,000	25,000	31,000
Jackson	1974	75,000	135,000	100,000	135,000
Kubiak	1974	30,000	42,500	37,000	37,000
Fingers	1975	65,000	89,000	75,000	89,000
Holtzman	1975	93,000	112,000	93,000	93,000
Bando	1975	100,000	125,000	100,000	100,000
Braun	1975	31,000	41,000	36,000	36,000
Jackson	1975	135,000	168,500	140,000	140,000
Kubiak	1975	37,000	47,500	42,000	47,500

* Note that Fingers and Holtzman are pitchers and that Bando, Braun, Jackson and Kubiak are non-pitchers.

Sources: New York Times, March 3, 1974; *Business Week,* March 23, 1974; *U.S. News and World Report,* March 24, 1975; *Sports Illustrated,* April 7, 1975.

these six players. These data reveal that only one player (Fingers) was able to win his case at arbitration in two consecutive years. All other 1974 winners (Holtzman, Bando, Braun and Jackson) were losers in 1975. Additionally, the only player of these six to lose at arbitration in 1974 (Kubiak) was able to win at arbitration in the following year.

[14] DWORKIN, *op. cit.,* p. 5 lists seven different tests of the impact of final offer arbitration on bargaining. Space limitations preclude the enumeration of these here, but, suffice it to say that the evidence throughout suggests that the vast majority of salary negotiations in professional baseball are completed at the bargaining table and without the need for arbitration.

One is tempted to regard these observations as further evidence in support of Swimmer's notion of intertemporal compromise by arbitrators. However, the figures merit a closer look! The key question to answer is whether arbitrators make their decisions on the basis of the most reasonable final position or, as Swimmer suggests, to minimize the risk of alienating management, that is « ... making them 'losers' two years in a row, ... he would not have been considered again as an acceptable selection officer by the ASSUA.»[15] Tables II and III present performance data on the pitchers and non-pitchers who used arbitration

TABLE 2

Comparative Performance Statistics of Pitchers 1973-1974

	Games		*I.P.*		*E.R.A.*		*S.O.*		*Walks*		*W.L.P.*	
Player	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974
Fingers	62	76	127	119	1.91	2.65	110	95	39	29	.467	.643
Holtzman	40	39	297	255	2.97	3.07	157	117	66	51	.618	.528

Note: Games = Number of games appeared in;
I.P. = Total number of innings pitched;
E.R.A. = Earned run average (total earned runs/total innings pitched);
S.O. = Total number of strike outs;
Walks = Total number of walks; and
W.L.P. = Won-Lost percentage (total wins/total decisions).

Sources: *The Baseball Guide, The Baseball Encyclopedia,* and various issues of *The Sporting News.*

TABLE 3

Comparative Performance Statistics of Non-Pitchers 1973-1974

	B.A.		*H.R.*		*R.B.I.*		*Runs*		*Hits*		*FIE*	
Player	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974
Bando	.287	.243	29	22	98	103	97	84	170	121	.949	.946
Braun	.283	.280	6	8	42	40	46	53	102	127	.942	.953
Jackson	.293	.289	32	29	117	93	99	90	158	146	.971	.968
Kubiak	.220	.209	3	0	17	18	15	22	40	46	.974	.981

Note: *B.A.* = Batting Average;
H.R. = Home Runs;
R.B.I. = Runs Batted In;
Runs = Runs Scored;
Hits = Total Hits; and
FIE = Fielding Percentage.

Sources: Same as listed in Table II

[15] SWIMMER, *op. cit.*, p. 535.

twice, respectively.[16] While the small number of observations involved prevents the making of any strong conclusions, nevertheless, the data in these tables reveal some interesting facts.[17] First, for pitchers, the evidence across performance categories is mixed. On the whole, however, it seems reasonable to classify Fingers as having a «better» performance record in 1974 than in 1973 and to reach the opposite conclusion for Holtzman. For non-pitchers, the evidence is more straightforward. Each of the non-pitchers exhibited relatively worse performance in 1974 as compared with 1973, according to these crude measures. For example, Bando performed relatively worse in 1974 compared to 1973 in every category except one. Table IV presents evidence

TABLE 4

Evidence on the Reasonableness of the Final Positions of the Parties in 1975[1]

Player	*Final Demand 1974*	*Final Offer 1974*	*Evaluation of Performance in 1974 Relative to 1973*[2]	*Final Demand 1975*	*Final Offer 1975*
Fingers	35%*	14%	Better	37%*	15%
Hotzman	40 *	20 *	Worse	20 *	0 *
Bando	66 *	25 *	Worse	25 *	0 *
Braun	72 *	39	Worse	32	16 *
Jackson	80 *	33	Worse	25	4 *
Kubiak	41	12 *	Worse	27 *	12

* Arbitration Award

[1] All figures are expressed in terms of percentage of increase over salary received in the previous season.

[2] See Table II and III for details.

[16] For a list of the permissable arguments at the actual arbitration hearing, see *Basic Agreement Between the American League of Professional Baseball Clubs* and the *National League of Professional Baseball Clubs* and the *Major League Baseball Players Association,* Article V, Section D, part (10), p. 8. Individual player performance measures in the previous season are relied upon by both players and clubs in presenting their respective cases.

[17] It should be noted that while the total number of final offer arbitration cases in professional baseball is small (n = 42), other studies of the final offer technique in other labor relations systems have proceeded with even fewer observations. For example, Swimmer's work is based on three observations, while Long and Feuille have nine observations for their study of the final offer system in Eugene, Oregon. Likewise, studies of final offer arbitration in both Michigan and Wisconsin are made based on fewer total awards than those handed down in professional baseball. Thus, the findings of this study are based on the most extensive experience to date with the use of final offer arbitration.

to compare these measures of overall performance with «reasonableness» of the final demands and offers submitted at arbitration in 1975. The most interesting finding is that in every case, the final positions of the parties in 1975 were more reasonable compared with the 1974 final positions, based upon performance changes. For example, Reggie Jackson clearly had a poorer season in 1974 as compared to 1973. At arbitration, this performance difference was reflected both in his final salary demand (25 percent as compared to 80 percent) and in the Club's final salary offer (4 percent as compared to 33 percent). The overall indication is that arbitrators had to choose between two final positions, each of which was more moderate than in the previous season.

Finally, a few comments are in order regarding the University of Alberta's experience with final offer arbitration. While it is true that the awards «flip-flopped» for three years, it is certainly not clear that this occurence was based on a desire to compromise on the part of the arbitrators involved. One might just as easily argue that in each case, the arbitrator chose the most reasonable of the final positions presented to him. In fact, the data tend to bear out this alternate explanation. It seems that in 1971, even though the cost of living rose 4.5 percent, the arbitrator chose the more reasonable final position of the Board of Governors.[18] The 1972 award, favoring the ASSUA, similarly seems to reflect the more reasonable of the final positions. The Association's demand of 5.3 percent reflected an increase equal to the cost of living increase. One could argue that, having fallen behind in the previous year, the Association could rightly demand to catch-up for the previous year's deficit as well as to be compensated for this year's cost of living increases. Viewed in this light and against the Board of Governors final offer of 4 percent (which would represent yet a second net decrease in purchasing power in as many years), did the arbitrator really invoke an intertemporal compromise, or was the most reasonable final position chosen? One could likewise argue that, based upon the critical financial situation facing the University in the following year, the arbitrator again chose the more reasonable of the final positions in the 1973 round. More importantly, in each of the wage rounds, the arbitrator was forced to choose the most reasonable of two quite moderate positions. In no

[18] SWIMMER, *op. cit.*, p. 534, reports that in 1971, the parties were originally able to negotiate a 4.5% increase, subject to the receipt of a provincial grant to the University which was close to a mutually agreed upon projection. When the Alberta grand feel short, the previous agreement was nullified and negotiations resumed. The Board of Governors reduced their offer to an increase of 3.14%, based on this unforeseen fiscal crisis.

instance was there any indication of the failure of the final offer procedure to produce genuinely reasonable final offers and demands. The essential notion is that the data are subject to several interpretations, only one of which is consistent with Swimmer's hypothesis. The weight of evidence from this study favors the conclusion that arbitrators make their decisions based upon the most reasonable final position put before them.

CONCLUSIONS

As more and more public and private sector labor relations systems in Canada and the United States experiment with various types of impasse resolution mechanisms such as final offer arbitration, it is imperative that these techniques be criticized and evaluated as public policy alternatives. Final offer arbitration, although still in its infancy, seems to be an attractive alternative. Knowing how it is designed to work, several researchers have focused on selected experiences and outcomes under assorted final offer procedures to evaluate how the concept has worked in practice. One such assessment by Swimmer[19] has prompted a new criticism of the final offer technique, namely, that it tempts arbitrators to compromise over time and thus encourages the party that lost at arbitration in the previous round to re-use arbitration in the next round in the hope of winning. This sort of intertemporal compromise with its associated flipping of awards from one side to the other between wage rounds implies that final offer arbitration does not increase the likelihood of real collective bargaining and in fact may increase the prevalence of arbitrated settlements when compared to conventional compulsory arbitration. In order to better evaluate the above criticisms, this study has attempted to provide further evidence from the realm of professional baseball and to re-evaluate the University of Alberta experience with the final offer procedure. The major findings of this study are as follows:

1. The available evidence from baseball does not seem to suggest a strong probability that final offer arbitration will be used in subsequent wage rounds after the procedure has been used initially. Only six players (five of whom were members of the Oakland Athletics Professional Baseball Club) out of twenty-eight who used arbitration in 1974 made use of the process again in 1975. The other twenty-players (nine who had

[19] SWIMMER, *op. cit.*, pp. 533-536.

won their cases in 1974 and thirteen who had lost) were able to reach negotiated wage settlements in 1975. These figures suggest that final offer arbitration does not have a «narcotic» effect on bargaining in professional baseball;

2. In addition, Swimmer's notion that the losing party in any particular year will be the one to seek arbitration in the next round has little support in the case of professional baseball. Even though either side may choose to invoke arbitration, in every case it was the player who exercised this option. Recall that five out of the six players who made use of arbitration twice won their cases in the year 1974. Thus, except for one case, it was the party who had won at arbitration in the previous year who actually chose to go to arbitration again;

3. The «flip-flop effect» did occur for five out of the six players who made use of arbitration in both 1974 and 1975. However, the performance data provided suggests that arbitrators made their decisions based upon the most reasonable final position put before them and not to minimize alienation of the parties or maximize the probability of being selected as an arbitrator in the future; and

4. The University of Alberta experience itself is viewed as an example of the successful functioning of the final offer procedure. Even though the process was used for three consecutive years, the overall purpose of forcing the parties themselves to compromise was served. Both sides made reasonable demands and the arbitrator penalized the side which was least reasonable by selecting the final position of the other party.

The notion that arbitrators have some reservations about the efficacy of the final offer process is clearly demonstrated in the literature.[20] It seems likely that arbitrators would prefer a process which allows them to render a compromise award over one where awards can easily be identified with one side or the other.[21] Given the static

[20] For example, see Joseph R. GRODIN, «Either-or Arbitration for Public Employee Disputes,» *Industrial Relations,* XI (May, 1972), pp. 260-266 and WITNEY, *op. cit.*, pp. 20-25.

[21] See Byron E. CALAME, «Best Offer Arbitration's Critics,» *Wall Street Journal,* June 14, 1972, editorial.

constraints imposed upon them by the final offer system, it is postulated by Swimmer that this desire not to alienate the participants is effectuated through intertemporal compromise, a phenomenon which would certainly defeat the very purpose for which final offer arbitration was created. This is a serious potential defect which merits close evaluation. The results of this study indicate that intertemporal compromise is not a major problem and that the final offer procedure has successfully achieved the goal it was designed to accomplish, agreements being reached at the bargaining table and without the need for arbitration.

L'arbitrage des propositions finales et les compromis annuels

La plus récente critique de l'arbitrage des propositions finales, exposée par Swimmer, allègue que les arbitres, au lieu de recourir à une solution de compromis au cours d'une ronde de négociations font des compromis entre deux ou plusieurs rondes de négociations. En d'autres termes, étant donné qu'ils sont forcés par le système de choisir l'offre finale de l'employeur ou celle du syndicat dans chaque ronde de négociations, leur choix «saute» d'une partie à l'autre d'une ronde de négociations à l'autre. Si ce qui précède est vrai, il nous faut considérer cette façon d'agir comme si les arbitres cherchaient à atténuer l'effet d'aliénation et à s'assurer la probabilité d'être choisis de nouveau à l'avenir. Pour justifier son opinion, Swimmer se fonde sur l'expérience de l'université de l'Alberta où, pendant trois années consécutives, on a eu recours à l'arbitrage des propositions finales pour résoudre un conflit relatif à l'ajustement des traitements en regard de la hausse du coût de la vie. À l'appui de l'hypothèse de Swimmer, les décisions arbitrales ont ainsi «sauté» de la position d'une partie à celle de l'autre partie d'une ronde de négociations à l'autre. S'appuyant sur ces trois observations, Swimmer tire la conclusion que de telles situations se produisant, il peut s'ensuivre une interprétation fausse des avantages de l'arbitrage des propositions finales.

Le but de l'article précédent est de soumettre cette hypothèse de Swimmer à une investigation plus approfondie tirée de l'expérience de l'arbitrage des propositions finales dans le domaine du baseball professionnel. Les statistiques permettent d'en arriver aux conclusions suivantes:

1° La démonstration tirée du baseball ne semble pas indiquer une forte probabilité que l'on recourra à l'arbitrage des propositions finales dans les rondes suivantes de négociation après qu'on a utilisé ce mécanisme une première fois. Six joueurs seulement (dont cinq faisaient partie des Athlétiques d'Oakland) sur vingt-huit qui avaient choisi ce mécanisme d'arbitrage en 1974 y ont eu recours de nouveau en 1975. Les vingt-deux autres (soit neuf qui avaient eu gain de cause en 1974 et treize qui avaient été déboutés) furent en mesure de conclure un accord en 1975. Ces statistiques indiquent que l'arbitrage des propositions finales n'a pas eu un effet «narcotique» sur les négociations dans le baseball professionnel.

2° En outre, la conception de Swimmer selon laquelle la partie perdante dans une année donnée sera celle qui recherchera l'arbitrage à la ronde suivante n'a que peu

de valeur dans le baseball professionnel. Même si l'une et l'autre parties pouvaient recourir à l'arbitrage, dans chacun des cas, c'est le joueur qui a exercé cette option. Il faut se rappeler que cinq des six joueurs qui ont eu recours à l'arbitrage deux fois n'avaient pas eu gain de cause en 1974. Ainsi, à l'exception d'un cas, ce fut la partie qui avait eu gain l'année précédente qui a choisi de recourir de nouveau à l'arbitrage.

3° L'effet de « saut » s'est produit pour cinq des six joueurs qui avaient opté pour l'arbitrage à la fois en 1974 et en 1975. Cependant, l'étude des données permet de se rendre compte que les arbitres ont fondé leur décision sur l'offre finale la plus raisonnable et non de façon à mitiger l'aliénation des parties et à maximaliser leurs chances d'être choisis de nouveau comme arbitres dans l'avenir.

4° L'expérience de l'Université de l'Alberta peut être considérée comme un exemple du fonctionnement heureux du mécanisme de l'arbitrage des propositions finales. Même si on a eu recours à ce processus pendant trois années consécutives, le but principal qui est de forcer les parties à faire des compromis, fut bien servi. Les deux parties ont présenté des réclamations sérieuses et l'arbitre a pénalisé la partie qui s'était montrée le moins raisonnable en optant pour la proposition finale de l'autre partie.

L'idée que les arbitres entretiennent certaines réserves relativement à l'efficacité de la formule de l'arbitrage des propositions finales ressort nettement de ce qui s'est écrit sur le sujet. Il semble que les arbitres préfèreraient une formule qui puisse leur permettre de rendre une décision de compromis plutôt qu'une sentence où l'on peut les identifier à l'une ou à l'autre des parties. Compte tenu des contraintes qu'exerce sur eux la formule d'arbitrage des propositions finales, Swimmer en déduit que ce désir de ne pas s'aliéner les parties est atteint au moyen du compromis d'une ronde de négociations à l'autre, un phénomène qui ne pourrait qu'avoir pour effet de détourner de sa fin même la formule de l'arbitrage des propositions finales. Ce serait là en réalité un défaut qu'il importe d'évaluer sérieusement. Les résultats de l'étude précédente tendent à démontrer qu'il ne s'agit pas là d'un problème grave et que le régime d'arbitrage des propositions finales a atteint le but qu'on voulait lui voir atteindre, c'est-à-dire des ententes négociées sans qu'il soit besoin de recourir sans cesse à l'arbitrage.