ARBITRATION: UNDER MANAGEMENT'S CRITICAL EYE

by

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Preface

There are certain aspects involved in the writing of this paper which, I think, need be explained to the reader.

There are certain management criticisms of arbitration which were mentioned only in passing in this paper. These are of lesser consequence and are criticisms that are not representative of general management opinions. Or, if they are widely held, which seems unlikely, they are in my judgment, not worthy of lengthy discussion, particularly when other topics were so prominent. (I am speaking of management's concerns with cost problems, time lag problems, etc.) The writer exercised the necessary right of selection.

There are certain fallacies in some of the arguments presented by management. Unchallenged, they seem to dangle loosely in the air. But although responses to some of these arguments came immediately to mind, this writer let them remain silent because it was not the purpose of this paper to evaluate all management's criticisms. This writer does however agree with some of management's opinions and in some cases he added his own opinions as reinforcement.

Since this paper was to cover the fairly broad spectrum of management views, the most significant management concern, that of prerogatives, was

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dealt with in the framework of a number of concerns. The issue of management rights could have easily been the subject of the entire paper. It had to be limited to a few pages.

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Like any system which is not perfect, the process of arbitration is subject to criticism. Objections come from both labor and management, but due to its nature, arbitration comes under heavier critical fire from the management side. As one New York management attorney has said,

> Since the principal objective of collective bargaining is to extract more and more from management, a union loses nothing by invoking an arbitration proceeding. A victory adds to the bargained package and a defeat merely postpones the assertion of a claimed right to the next negotiations.[1]

Traditionally it was management which held the balance of power in industrial relations but this does not necessarily remain true for any given case. Collective bargaining inevitably increases the power of unions, vis a vis management. As Herbert Burstein suggests, arbitration, as an extension of collective bargaining, increases union strength. In an arbitration proceeding then, it is management which is on the defensive, or, as Dallas Jones and Russell Smith put it, "... they are usually on the receiving end of contract grievances."[2] Consequently, to the extent that management's power is

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1. Herbert Burstein, "Labor Arbitration--A Management View," New York University Conference on Labor, Thomas G. S. Christensen, ed., (New York: Matthew Bender Inc., 1963) p. 311.

2. Dallas L. Jones and Russell A. Smith, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report With Comments," Michigan Law Review, vol. 62, no. 7 (May 1964), p. 1146.

diminished through arbitration, that is approximately the extent to which it will criticize the process.

The arbitration process, which is relatively young, having had its beginnings around 1943,[3] has been growing in popularity since its inception.[4] Although it has always been important, the arbitration process rose to a new and controversial height with the advent of the famous 1960 "Trilogy."[5] It was then that the Supreme Court put arbitration forthwith into the hands of the arbitrators whom the Court lauded in the most glowing terms. With arbitration thus respectably thrust to the forefront of industrial relations it became exposed to a greater volume of criticism.

One significant management concern with arbitration is directed toward the opinions set forth by arbitrators. Most management officials will agree, and there is only a minimum of controversy on this issue, that opinions handed down by arbitrators are valuable tools, often as beneficial as the award itself, in MOST cases. The opinions can aid the relations of the parties and serve as guides for future negotiations. However, there are exceptions to this rule important enough to cause alarm in some management circles.

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3. R. W. Fleming, The Labor Arbitration Process: 1943-1963 (Urbana, Ill.: University of Illinois Institute of Labor and Industrial Relations, 1965), Bulletin 148, p. 1.

4. Ibid.

5. United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), United Steelworkers v. Enterprise Wheel and Car Co., 363 U.S. 593 (1960).

Arbitrators' opinions can readily cause future trouble if they are not formulated with extreme care. Arbitrators like to give free advice. The consequences of such a course of action become clear if we examine some cases. One arbitrator was called upon to decide what was apparently a simple case. The question was: did an employee who was absent the day before a holiday forfeit his holiday pay? The arbitrator could not contain his remarks to the straightforward aspects of the case. Rather, he went further and commented on the company's overall employee relations policy in spite of the fact that he had heard testimony relating only to the incident case. His award stated that the company need not grant holiday pay to the worker under these circumstances, but he went on to add that it would have been "better employee relations," for the company to have been more generous.[6]

Dicta of this sort can easily raise tempers and cause embarrassment, but it can have more deleterious effects as well. Even experienced arbitrators long familiar with the histories of the parties are not immune to errors of this type.[7] For example, we have the case of the worker transferred to a new location in a plant continuing to perform the same duties. But he was unsatisfied with the new conditions and he subsequently complained, citing his seniority as a bar to the transfer. The decision of the experienced arbitrator backed the stand taken by the company in that lateral transfers could be initiated without regard to length of service.

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6. T. R. Brooks, "Arbitration Opinions Stir Controversy," Dun's Review and Modern Industry, vol. 84, no. 3, (September 1964), p. 49.

7. Ibid.

The worker lost his case. But the arbitrator was not content to let the award and its relevant opinion stand alone. Instead, he suggested that the parties in the future consider raising the wage rate for the job in question in the new location.

Management was outraged, and argued that two wage rates for the same job would upset the entire company wage structure. Nevertheless, the union grabbed the issue and pursued it with fervor. When negotiation time arrived the company was forced to make a concession on another issue lest they be forced to accept the union demand for this pay hike. This would never have happened had it not been for the arbitrator's gratuitous advice.[8]

There is a further objection to arbitrators' opinions. That is, that,

> Sometimes an opinion is no more than a sounding board for the ego of the arbitrator instead of a carefully reasoned statement as to why a given award is made.[9]

All this is not to say that management rejects the use of opinions at all times, or wants all opinions to be stated narrowly. Rather, as the Arbitration Association Journal has pointed out, the objection is that,

> ... by incautious phrasing or thoughtless advice, for which no real foundation was laid in the form of testimony...(the arbitrator) antagonizes both parties and disturbs settled relationships.[10]

A second major management criticism of arbitration concerns remedies prescribed by arbitrators. This opinion is expressed by management's most prolific critic of arbitration, F. A. O'Connell, Director of Industrial Relations for the Olin Mathieson Chemical Corporation in New York City.

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8. Ibid.

9. Ibid.

10. Ibid.

Says O'Connell,

> I do not agree...that pay is the great unguent for each and every management sin of omission or commission, deliberate or accidental, great or small.[11]

O'Connell finds that arbitrators are very anxious to produce equitable decisions. In light of this he asks them to consider carefully their decisions that allot pay for time not worked. He feels that this is not always an equitable solution. O'Connell makes clear that his objection to back pay does not apply to wrongfully discharged or suspended workers. His objection does apply however to back pay for the man who should have been assigned to work someone else did, or the man who was accidently skipped when overtime was allocated. Distributing back pay to men who should have been assigned to work someone else did

> is particularly galling to management since it invariably rests upon a finding--wholly unwarranted ...--that under the recognition clause, this or that work "belongs" to this or that classification of employee. It doesn't bother me when such awards are rendered against employers who (like those in the construction or theatrical industries) have expressly agreed to union jurisdiction over the work and employee jurisdiction over the job. But if an arbitrator is finding work jurisdiction in the recognition clause, he has done enough damage for that day, and he should be content to order that employer to observe the jurisdiction from that day forward. That will be tough enough to digest.[12]

If indeed a man were deprived of overtime work and it was found that the misassignment was willful or repeated, or otherwise indicated a deliberate attempt to violate the contract, an employer should be expected to

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11. F. A. O'Connell, "Arbitration Procedure and Practice: Management Viewpoint," New York University Conference on Labor, Thomas G. S. Christensen, ed., (New York: M. Bender Inc. 1962) p. 339.

12. Ibid., p. 340.

pay twice for the work. If however the misassignment was accidental and a purely and obviously innocuous error, the remedy should simply be to give the man a future turn without extracting money from management for work that was never performed.[13]

O'Connell takes further exception to the remedies imposed by arbitrators in the area of the reinstatement of the discharged employee. Arbitrators will sometimes reinstate a discharged employee, basing the decision on

> some extraneous factor like the number of his dependents. To the extent that such a factor is relevant, the company ought to have considered it (and in my experience almost invariably does) before imposing the discharge penalty. Accordingly, it is not part of the arbitrator's function to do so.[14]

Rather surprisingly, few readily obtainable management criticisms of the arbitration process are directed ad hominem. In fact, this writer could find only one source which included criticisms by management directly finding fault with arbitrators as individuals. It is true that Dallas Jones and Russell Smith, in their survey of management and labor opinions of arbitration, say that, "Almost without exception our respondents take the view that the arbitration process would be improved if arbitrators were more competent."[15] But this statement is not borne out by the overwhelming bulk of the literature. If indeed this is true, then these opinions of the parties are privately held opinions. To be sure, practitioners, particularly those representing management, are suspicious of arbitrators on certain grounds (to be cited below) but these suspicions cannot be transmuted into indictments of incompetence.

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13. Ibid.

14. Ibid.

15. Jones and Smith, op. cit..

One suspicion of arbitrators that seems to have some basis in fact is found in the following statement from one of the respondents in the Jones-Smith survey.

> Arbitration is a business. If an arbitrator decides too many cases in favor of either party, he will be put out of business. This factor must affect an arbitrator's decision.[16]

This opinion is reinforced by a statement made by a New York management attorney in a personal interview with this writer. He cited a hypothetical example of an arbitrator being called in on a case involving a local of a national union and a small company. If the arbitrator's decision satisfies the union, his chances of being acceptable to them in the future is good. If his decision satisfies the company, his chances of being acceptable to them in the future are good. But the national union has many arbitration cases while the small company has few. If the arbitrator is at all interested in making a living, as well we might expect him to be, his conscientiousness notwithstanding, he is likely to rule for the union, or split his decision to satisfy the union whenever remotely possible.[17]

Management is particularly concerned with the methods used by arbitrators to interpret contract clauses and terms in the course of arriving at decisions. One of the most frequently mentioned of all management objections to the arbitration process is that arbitrators overstep the bounds of mere interpretation of the facts at hand and add ideas that never, in fact, existed. And the Supreme Court apparently encourages this, indirectly at least, because it subscribes to the doctrine that arbitrators should

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16. Ibid., pp. 1146-1147.

17. Statement of Lawrence Millman, Esq., December 28, 1965, personal interview, Woodmere, New York.

"fill in the gaps" in the contracts. This was one of the ideas brought forth from the opinions in the 1960 "Trilogy." In this vein, arbitration critic and management stalwart F. A. O'Connell has said,

> The trouble is that many arbitrators abetted by some unfortunate court decisions are making arbitration a legislative function rather than the essentially judicial process that it should be. Under the guise of settling grievances, arbitration is being used to supply contract terms instead of just to interpret them...Many arbitrators now are busy putting things into contracts that are not there, either in fact or by implication. Today they talk too much about what they like to call "therapeutic values," while they completely ignore what the contract really says.[18]

Management would like to have a general idea of what an arbitration decision is going to be. They would like a decision to fall into what James C. Phelps, Assistant to the Vice President of Bethlehem Steel, has called the "area of predictability." Too often, observes management, arbitration decisions do not fall within any area of predictability because,

> ...an arbitrator substitutes his own judgment for that of the parties--as in his definition of just cause. An arbitrator may be convinced that a management action, not specifically inconsistent with the agreement is arbitrary, unfair, or causes unreasonable hardship to employees. It is then that arbitrators seem to have the greatest difficulty in keeping their own hands off the reins of management. In this field, the personal views of the arbitrators rather than what the parties wrote into their contract are often decisive.[19]

Management representative Jesse Freidin echoes the "O'Connell-Phelps opinions. Says Freidin,

> Criticism comes, when the arbitrator chooses (as some do) to think of [arbitration] as a vehicle to carry forward

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18. Daily Labor Report, 49, March 11, 1964 (Washington: Bureau of National Affairs), pp. A 5-6.

19. James C. Phelps, "Management's Reserved Rights: An Industry View," Management Rights and the Arbitration Process, Jean T. McKelvey, ed., (Washington: Bureau of National Affairs 1956), pp. 104-105.

> his personal concept of cooperation. Where enforcement of the agreement yields a result that might jeopardize his idea of cooperative enterprise, he believes himself free to fashion a different result, subordinating the contract to dictates of what he conceives to be the necessities of a continuously working relationship.[20]

Alarmed management officials can do little about the aforementioned situation they find so abhorrent. Courts cannot review the merits of a case. Procedural questions are strictly in the hands of the arbitrator himself. Management can go to court if the arbitrator has exceeded his authority, but few arbitrators get careless enough to open themselves to such a charge. The National Labor Relations Board may review an arbitration decision but this is rare and is not an arena readily available to discontented management. As one lawyer wrote with resigned exasperation:

> ...(N)o accountability can be exacted of arbitrators because there is no doctrine of limited delegation and no requirement for concordance with carefully defined legislative standards, and the arbitrator is authorized to make the law as he progresses from case to case.[21]

Having arrived at the objection that criticizes arbitrators for supplying contract terms instead of narrowly interpreting them, we come to management's most violent and crucial criticism of the arbitration process. That is that arbitration is invading the realm of management's prerogatives and reducing its rights to manage. Management clings to the "residual

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20. Jesse Freidin, The Status and Expendability of the Labor Arbitrator (Washington: Bureau of National Affairs, 1950), Papers read at Third Annual Meeting of the National Academy of Arbitrators, p. 11.

21. Herbert Burstein, op. cit., p. 314.

rights theory" which states that

> All rights possessed by the employer before the collective bargaining contract are retained by the employer except those modified by the agreement...in the absence of contractual limitations, management has the unrestricted or the absolute right to manage.[22]

Arthur Goldberg, speaking for labor, disagrees with this theory. He would have us believe that this is a "chicken or egg" argument. Management didn't come first he says. Labor was alongside management all the way and there are no inherent rights that belong exclusively to management.[23] But Goldberg's view is, in reality, only an idealized image. It seems logical enough on the surface, but we must look deeper to find the fallacies that lie in his interpretation. Perhaps the best way to penetrate the facade is to focus on the key word, "initiative," emphasized by James C. Phelps in his defense of the management rights theory.[24] It was management that took the initiative, started the business, invested the capital, took the risk, assumed the responsibility. Management certainly could not get a business off the ground without labor, but it is still management which is responsible for the fate of the business through its deployment and use of that labor force. If a business fails, it is the management which assumes the responsibility. The burdens lie with management. Someone must be the boss and that someone is management. Logically it cannot be an effective boss without certain powers and rights.

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22. Walter L. Daykin, Arbitrators' Determination of Management's Right to Manage (Iowa City: Bureau of Labor and Management State University of Iowa, 1954), Research Series no. 6, p. 4.

23. Arthur Goldberg, "Management's Reserved Rights: A Labor View," Management Rights and the Arbitration Process, Jean T. McKelvey, ed., (Washington: BNA 1956), pp. 118-119.

24. James C. Phelps, op. cit., pp. 102-108.

The management rights arguments are not satisfactorily resolved in a short paragraph. The point is that management firmly believes that it has certain prerogatives and it just as firmly believes that to one degree or another, the arbitration process has been whittling away some of these prerogatives.

The actual degree to which management prerogatives have been reduced through arbitration varies depending upon who in management, or which scholar, is expressing the opinion. WHEN the opinion was expressed is also of relevant importance because opinions stated after 1960 (the year of the "Trilogy") are more likely to fulminate against the invasions of the arbitrators, than those stated before 1960.

In 1959, Lawrence Stessin, a professor of management at Long Island's Hofstra College presented in an article the idea that arbitrators will deny a management right only when that right is "abused."[25] The apparently unbiased view of Iowa's Walter Daykin, expressed in 1954, corroborates Stessin's evaluation. Says Daykin,

> ...while some modifications have been made in relation to management's right to manage, the employer still retains the powers to operate intelligently and efficiently. While management has certain exclusive powers to manage, these rights must be exercised fairly,...(not) in a discriminatory or arbitrary manner.[26]

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25. Lawrence Stessin, "Is the Arbitrator Management's Friend in Discipline Cases?" Monthly Labor Review, vol. 82, no. 4, (Ap. '59), p. 375.

As indicated above, management opinions seem to change after 1960. Myron L. Joseph writing in the Harvard Business Review in 1963, quotes Donald A. Crawford saying, "There is no true adherence by arbitrators to the reserved rights of management concept..."[27]

Indeed it appears that management's rights have been suffering since 1960. Before that date,

> The courts, sensitive to the ordinary rules of contract were disinclined to send cases to an arbitrator whose function under the contract was to interpret its provisions, when the union's claim was not grounded on any provision of the contract or, as was often the case if the claim did purport to be founded on the contract, no reasonable arbitrator could interpret the contract as the union wanted it read. In those situations, said the courts, there was nothing to interpret and arbitration was denied. Thus the courts threw up a protective screen against union attempts to gain substantive changes in the contract by way of the arbitration process.[28]

Since 1960 however, the "Trilogy" decisions, called "monuments of naiveté" by F. A. O'Connell, have changed the character of arbitration. It is no longer up to the courts to declare a union's claim for arbitration under a contract to be without merit. All a union has to say is that its claim does indeed rest upon the contract. This is enough in most cases to bring a union grievance before an arbitrator.[29] Let us reiterate what we mentioned

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27. Myron L. Joseph, "Protect Your Freedom to Subcontract," Harvard Business Review, (Jan.-Feb., 1963) p. 99.

28. F. A. O'Connell, What's Wrong With Labor Arbitration, (New York: National Association of Manufacturers) Monograph no. 364, pp. 2-3.

29. Ibid., p. 3.

earlier in discussing another management criticism of arbitration. That is, the Supreme Court sanctions the pressing of almost any claim. Justice Douglas said:

> The processing of even FRIVOLOUS (emphasis is O'Connell's) claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.[30]

The "Trilogy" decisions pose a further threat to management rights in arbitration by condoning an arbitrator's attempts to imply meanings from contracts (cited previously as a management complaint) and to construe their decisions so as to take into account the effect of the decisions on productivity, morale of the shop, and the relationship of the parties. This is more than an arbitrator is supposed to do, and it encourages

> arbitrators to continue down the erroneous path of dispensing free and easy "justice" according to their individual philosophies with little regard to the actual provisions of the agreement.[31]

All this represents a threat to management's unilateral actions because unions can now take issues they would surely never expect to win in collective bargaining and file them as a grievance confident that an arbitrator will take up the matter. With arbitrators taking liberties in interpretation, the unions have better than a fair chance of winning.[32]

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30. Justice Douglas, as quoted in O'Connell, ibid.

31. Ibid., p. 5.

32. Daily Labor Report, no. 229, November 24, 1964 (Washington: Bureau of National Affairs), p. D-4 (O'Connell).

In concluding a paper on management's criticisms of arbitration one is tempted to comment on the validity of the complaints registered. Making extensive value judgments at this juncture however, is inappropriate, but a few conclusions do come to mind. First, it is apparent that the nature of management criticisms before and after the 1960 "Trilogy" are in most respects, different. The management voices raised in criticism of arbitration today were silent before 1960, on the whole. There can be no question but that the "Trilogy" has raised some problems for management within the arbitration process in that matters may be brought to arbitration somewhat more readily, while arbitrators' decisions in these matters are reasoned within wider limits than in previous years.

A meticulous examination of the literature reveals that for all its complaints, management seems loath to cite examples of the abuses of the process causing it so much apparent hardship. The few vociferous management spokesmen write eloquently of the pitfalls of the arbitration process and warn their management brethren of the dangers to expect in the future. But they speak mainly in theoretical terms. Much, if not all of what they say seems eminently logical but the paucity of concrete examples cited as representative of the threats of arbitration leave one questioning the high degree of validity that a first impression of the reading affords the reader.

Most of management's criticisms are not peculiar to it alone. Its concern with time lag problems, procedural difficulties, scope of jurisdiction problems, competence of arbitrators, etc., are concerns of unions as well. Management's concern over its loss of prerogatives is the one area

of overriding importance where it stands alone in its criticisms.

Management's criticisms of arbitration are in substance the type of criticisms one would expect to be levelled at any system which is not perfect. The arbitration process is not immune to criticism, nor should it be, for there is indeed room for improvement. One healthy aspect of management criticism is that it usually contains suggestions for remedial action. But whether or not it proposes remedies, management, throughout its criticisms, is sure to insert a statement of its faith in the arbitration process as a valuable industrial relations tool, in spite of its faults. Until management mounts a concerted attack upon the arbitration process, (so far its attacks have been scattered and unorganized) and proposes an acceptable, workable alternative to arbitration (it has yet to seriously propose any alternatives), we may, with relative assurance, characterize management's criticisms as healthy and constructive.

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