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Negotiating in Anticipation of Arbitration: Some Guideposts for the Initiated

Roger I. Abrams*

Participants in the collective bargaining process view the successful negotiation of an agreement as the welcome end to what may have been an unpleasant ordeal. More often than not, however, in order to reach agreement the participants have based their agreement on vague promises offered in the heat of negotiations. Thus, the collective agreement may be only the beginning of more problems once later disputes reveal its inadequacies. Professor Abrams observes that collective bargaining is not a finite but a continuing process. In recognition of this, he offers several guideposts that negotiators should heed to ensure that the agreements they reach are complete, embody the intent of the parties, and will serve as an adequate reference for resolving future disputes.

INTRODUCTION:

PERSPECTIVES ON BARGAINING AND ARBITRATION

COLLECTIVE BARGAINING¹ is not a single event. The process is “continuous as the stars that shine,”² although one might suggest there is many a cloudy night. Collective bargaining

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This comment is based upon an address to the Cleveland Labor Conference on September 22, 1978.

1. The term “collective bargaining” is generally attributed to Beatrice Potter Webb, who introduced it in 1891. B. POTTER, *THE CO-OPERATIVE MOVEMENT IN GREAT BRITAIN 216-17* (1891), noted in R. RICHARDSON, *COLLECTIVE BARGAINING BY OBJECTIVES* 91 n.1 (1977). In a later work Beatrice and Sidney Webb described the metamorphosis of individual bargaining into collective bargaining:

[I]f a group of workmen concert together, and send representatives to conduct the bargaining on behalf of the whole body, the position at once changes. Instead of the employer making a series of separate contracts with isolated individuals, he meets with a collective will, and settles, in a single agreement, the principles upon which, for the time being, all workmen of a particular group, or class, or grade, will be engaged.

S. WEBB & B. WEBB, *INDUSTRIAL DEMOCRACY* 173 (1902), noted in R. RICHARDSON, *COLLECTIVE BARGAINING BY OBJECTIVES* 91 n.2 (1977).

2. W. WORDSWORTH, “Daffodills,” in 3 *WORDSWORTH’S POETICAL WORKS* 6 (W. Knight ed. 1883).

is a process for bringing order to the workplace.³ It is the counterpoint to the "free play of economic forces"—the strike.⁴ The strike is avoided or ended by using the rituals of the bargaining table.⁵ Although the parties call a temporary truce by executing an agreement, both sides contemplate renewed skirmishes in the form of grievances during the term of the agreement. In order to steer these disputes into peaceful channels of resolution, labor and management have traditionally, and now almost universally,⁶ created mandatory machinery for grievance resolution.

A grievance filed claiming a misapplication of a contract provision is not an aberration;⁷ it is a continuation of the collective bargaining process.⁸ While the negotiators of the agreement may not have foreseen the particulars of a dispute, they no doubt did foresee that some disputes would arise. Every contract has room for interpretation in its application.⁹

When parties negotiate a collective bargaining agreement, they are often conscious of precisely what is left unsaid and what is left ambiguous. Deliberate omissions and ambiguities are often necessary to facilitate agreement. They enable the parties to subjec-

3. There are, of course, other modes of establishing the terms and conditions of employment. For example, unilateral determination by the employer is an alternative mechanism used in free market economies. In the United States the growth of labor unions has collectivized the economic power of the individual employee, challenging the basic assumptions of the entrepreneurial prerogative and requiring a rethinking of national policy "to bring some order out of the industrial chaos." *Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 251 (1970). The accommodation reached between the conflicting interests of organized labor and management sanctioned collective bargaining as the preferred mechanism for ordering the industrial establishment.

4. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

5. See generally C. STEVENS, *STRATEGY AND COLLECTIVE BARGAINING NEGOTIATION* (1963); R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

6. A survey of major collective bargaining agreements conducted by the Bureau of National Affairs indicates that 96% of the sample contracts contain arbitration procedures and 98% contain grievance procedures. 2 *COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS* (BNA) 51:1, :6 (1975).

7. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955); see Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601 (1956).

8. "The grievance [and arbitration] procedure is, in other words, a part of the continuous collective bargaining process." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

9. Shulman, *supra* note 7, at 1004-05. As a result, interim adjustments in the parties' relationship—the fine-tuning of the agreement—are made on a case-by-case basis during the term of the agreement through the use of the grievance and arbitration system.

tively read the written words of the contract as expressing what they would like to find in the agreement. The parties are content to leave for another day the resolution of disputes which may or may not arise, finding mutual refuge in ambiguity.¹⁰ They postpone the resolution of minor disputes which undoubtedly will arise, but over which they are not yet ready to breach the industrial peace.¹¹ Customary practice contemplates the postponement of much dispute resolution, but this strategy does not mean that the parties should bargain without full consciousness that what they do now in drafting their agreement will control how those later arising disputes will be resolved in arbitration. Recognition of collective bargaining as a continuing process mandates that the parties negotiate their agreement in anticipation of arbitration.

Collective bargaining is a purposive endeavor, designed to re-adjust the objective evidence of the terms and conditions of employment. Around the bargaining table, parties deal with problems that arose under the expiring contract and reset their bargain of compensation for work performed.¹² But the parties should also view the process as facilitating the resolution of future disputes by the parties' appointed arbitrator. Thus, the process itself is *retrospective* since it addresses prior problems, *concurrent* since it sets the employment bargain, and *prospective* since it provides guidance for the resolution of future disputes. Of course, the deal struck across the bargaining table should certainly reflect each side's best attempt to reach a settlement of present issues, accommodating their then current disparate interests. Substantively, each side should strive to obtain the best deal with which it can live. But each party should be aware that the final product—the collective bargaining agreement—has future, and not merely current, impact on dispute resolution.¹³

It is the purpose of this comment to set forth guideposts for

10. *Id.* at 1004.

11. *Id.*

12. The compensation bargain comes in various forms. Wages and salary have increasingly been supplemented by fringe benefits of various kinds, including life and medical insurance, dental plans, disability insurance, pensions, severance pay, supplemental unemployment benefits, and legal services plans. For general theories of wage determination by collective negotiation, see E. BURTT, JR., *LABOR MARKETS, UNIONS, AND GOVERNMENT POLICIES* (1963); J. CROSS, *THE ECONOMICS OF BARGAINING* (1969); J. DUNLOP, *WAGE DETERMINATION UNDER TRADE UNIONS* (1950).

13. In bargaining a compensation package, both sides, of course, focus on the future, as well as the current, economic costs imposed by the collective agreement. Viewing arbitration as "part and parcel of the collective bargaining process itself," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960), means that the costs involved

both union and management representatives to be followed at the bargaining table to insure that an arbitrator resolves their future disputes consistent with their intentions and expectations.¹⁴ The experienced bargainer will find little that is startling in these guideposts. They do, however, integrate collective bargaining and arbitration and focus on each as part of a single, continuing process.

In general, negotiating in anticipation of arbitration is just good bargaining. Parties who do bargain in anticipation of arbitration will strive for clarity in their draftsmanship; they will deal with foreseeable disputes; they will complete their agreement by including all the necessary prerequisites to its administration. They will define certain terms to specify their intentions. They will recognize the implications of bargaining over what might be termed "clauses without boundaries." Finally, they will delineate the scope of the arbitrator's power and establish procedures for its use.¹⁵ By following these guideposts, parties can control their own creation—the arbitration tribunal—so that decisions reached by arbitrators are consistent with how the parties would have decided a dispute had they been forced to come to a final and binding resolution themselves.¹⁶

at the bargaining table are not limited merely to deferred compensation but also include the risk of unfavorable arbitral outcomes in future disputes.

It is impossible to know how much attention the parties actually give to the impact of their written bargain on the arbitration process. Undoubtedly, a significant prior arbitration decision which did not meet the legitimate expectations of one of the parties would encourage reformation of the relevant collective bargaining provisions at the next round of negotiations. On the whole, however, even an experienced negotiator is compelled by the dynamics of bargaining to seek a present accommodation without focusing on the imponderables of future disputes.

14. The process of labor arbitration discussed here is often referred to as grievance or rights arbitration, as distinguished from the comparatively little-used process of interest arbitration. The former involves an adjudicative process for resolving disputes which arise under a collective agreement, R. GORMAN, *BASIC TEXT ON LABOR LAW* 388-90 (1976), while the latter involves a legislative process whereby the arbitrator determines what shall be the terms or conditions of employment for the parties. *Id.* at 573-74. Bargaining in anticipation of the interest arbitration has been ably discussed elsewhere. See J. STERN, C. REHMUS, J. LOEWENBERG, H. KASPER, & B. DENNIS, *FINAL-OFFER ARBITRATION* (1975).

15. Bargaining strategy and tactics are outside the scope of this comment, but there are many useful sources in the area. *E.g.*, C. KARRASS, *GIVE AND TAKE: THE COMPLETE GUIDE TO NEGOTIATING STRATEGIES AND TACTICS* (1974); B. MORSE, *HOW TO NEGOTIATE THE LABOR AGREEMENT* (1966); E. PETERS, *STRATEGY AND TACTICS IN LABOR NEGOTIATIONS* (1955).

16. An arbitrator's interpretation of the parties' agreement will in most instances constitute a final and binding resolution of a disputed matter. Except in the most unusual cases, however, the language agreed to by the parties will not have contemplated the precise factual setting of a particular dispute. The arbitrator's resolution of the matter may

I. GUIDEPOSTS FOR NEGOTIATING IN ANTICIPATION OF ARBITRATION

A. *Clarity in Draftsmanship*

Defective draftsmanship hinders the arbitrator's decisionmaking and creates significant uncertainties for the parties. Any number of situations cause poor draftsmanship. The parties may have known with certainty what they agreed to when they drafted the clause, but they may have expressed it in language that suggests other reasonable interpretations. They may have used words which made sense at 2 o'clock in the morning but at sunrise would challenge the language of the Jabberwocky.¹⁷ A provision may be the product of a series of negotiations over many years. Tacking on a final sentence may have been easier than rewriting a complete provision, but it may present a substantive thought that is inconsistent with the rest of the provision.¹⁸ The parties may have attached an entirely new clause to a contract with other clauses speaking to the same, similar, or related issues.¹⁹

Arbitral jurisprudence does provide generally accepted rules of construction to deal with these problems.²⁰ One example is the

therefore be seen as his attempt to determine, based on the evidence the parties present to him, how they would have decided the dispute.

A useful model of the arbitrator as "contract reader" was recently presented by Dean Theodore St. Antoine. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977). He suggests that the arbitrator sits as a "joint alter ego" to strike a supplemental bargain between the parties. To serve in this role, the arbitrator must resolve a dispute as he determines the parties would have resolved it.

17. Arbitrator Harry Platt in *Evening News Ass'n v. Detroit Paper Handlers and Plate Handlers Union No. 10*, 50 Lab. Arb. 239 (1968), was faced with the task of interpreting a contract provision which he characterized as "hardly a model of clarity." *Id.* at 245.

Not infrequently, words or phrases are unthinkingly included which, if construed according to their literal meaning would produce results in opposition to the main purpose and object of a provision. . . . In such a case, there can be no doubt as to the right of an interpreter to modify and mitigate—in effect excise—the unpremeditated, unintended language in order to prevent an absurd result and to give effect to the true intention of the parties.

Id.

18. See, e.g., *Rangaire, Inc. v. International Union of Operating Eng'rs Local 382*, 66 Lab. Arb. 755 (1976) (Woodward, Arb.).

19. For example, a clause on seniority may make that criterion applicable to the scheduling of vacations, while a later-negotiated clause on vacations may specify that the employer will consider the interests and desires of employees in arranging their vacation schedules. Although there is no irreconcilable conflict between the two provisions—the employer might schedule in accordance with employee desires as long as seniority is equal—the parties have not fit the contractual puzzle pieces together. Instead, they have merely laid them out for arrangement by the arbitrator.

20. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 298 (3d ed. 1973).

rule which provides that the clause or provision last negotiated takes precedence.²¹ Yet an arbitrator relying on that rule may not be recognizing the parties' intention. Moreover, applying one provision over another in resolving a dispute violates the rule of construction that the arbitrator must read the agreement as a whole.²² Rules of construction are rarely, if ever, written into collective agreements. The arbitrator's use of rules of construction adds a gloss to the parties' contract upon which they undoubtedly did not focus. While use of such rules is intended to repair the faulty expressions of the parties' bargain, reliance on these rules is a poor substitute for clarity in draftsmanship.

Parties should strive in their negotiations to set forth clearly and simply their substantive agreement.²³ This guidepost is easy to posit but much more difficult to follow. First, crystal-clear language may be unacceptable to a party who wishes to leave an issue unresolved. When the bargain is set out with particularity, each side knows what it has gained and what it has lost. Although each side may be willing to discuss a subject and even include some vague compromise in the agreement, an unequivocal statement concerning that subject may be unacceptable.²⁴ Second, the pressure of an imminent or present strike may make perfect expression a worthy but unattainable goal. Finally, the parties may lack the skill and experience to clarify their expression.

21. Consider also a clause specifically addressing the disputed issue and a clause more generally applicable. In such a case, another handy maxim of contract interpretation—the specific governs over the general—will be applied by the arbitrator. *Id.* at 311.

22. See F. ELKOURI & E. ELKOURI, *supra* note 20, at 307–08. The great weakness in any notion of generally accepted rules of construction of contract language is the propensity for conflict between rules, or the existence of rules, which diametrically oppose one another. As the late Lon Fuller pointed out:

[T]hese principles tend to come in off-setting pairs. One can find a maxim according to which when you say “trees” you must mean shrubs also, shrubs being so much like trees. By another maxim one can argue that when you say “trees” you must mean to exclude shrubs because if you have meant shrubs you would have said so; shrubs being so much like trees, and so naturally suggested by them you couldn't have forgotten about them when you said “trees” and stopped.

Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 6.

23. The draftsmanship guidepost is particularly appropriate for anticipating what are called “contract interpretation” cases. Discharge and discipline cases generally involve only the contract requirement that the employer's action be based upon “just cause.” Such a requirement is difficult, though not impossible, to draft poorly.

24. Of course, even a general discussion of the issue in the agreement may be unacceptable. Under §§ 8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act, parties must bargain in good faith over “wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1976); see R. GORMAN, *supra* note 14, at 399–495.

Bargaining in anticipation of arbitration does *not* mean that vague, generalized language must be avoided at all costs. To the contrary, such language may be essential to accommodate conflicting interests. What the guidepost of simple, clear language does suggest is that where the parties have in fact reached a precise agreement, they should strive to word their settlement clearly enough to express their agreement and avoid misinterpretation.²⁵ When the parties use ambiguous language to settle a contract, they should use it as a matter of conscious choice. Employing generalized language to postpone disputes is appropriate so long as the parties recognize that imprecision generates grievances and leaves to the arbitrator the ultimate power to divine what the parties intended by their imperfect statement. If parties consciously obfuscate and avoid precision in their agreement, the arbitrator's later interpretation is, at best, an educated guess as to the parties' intent.²⁶ Consider, for example, a most helpful word used in resolving negotiation problems—"reasonable"—as in "the Company will make *reasonable* efforts to" Parties employ the word to deal with allocating overtime,²⁷ scheduling vacations,²⁸ or avoiding subcontracting.²⁹ They use the word to characterize those rules which management may promulgate.³⁰ But in invoking this magical incantation of reasonableness the parties are bestowing upon the arbitrator the authority to determine what the parties meant when they said reasonable.³¹ The immediate costs

25. The techniques of clear, precise draftsmanship are ably discussed in L. MARCEAU, *DRAFTING A UNION CONTRACT* (1965).

26. Although a cost-benefit analysis could prove helpful in deciding whether to use ambiguous language to settle the agreement, such an analysis would be difficult to carry out. Management can calculate the cost of a strike in terms of lost production, good will, and the like, while the union can estimate the cost in terms of lost employee wages. But it may be impossible to determine the likelihood of a breakdown in negotiations over a particular matter, except perhaps on compensation issues. And even then, it is difficult to predict whether a dispute will arise over a particular matter during the term of the agreement and, if one does, whether it will be resolved privately through the grievance procedure before arbitration. After that, the imponderables of the arbitration process itself must be factored into the analysis. One must admit that, while the risk of using ambiguous provisions is there, its dimensions are uncertain.

27. *See, e.g.*, *Olin Corp. v. International Chem. Workers Local 692*, 70-2 Lab. Arb. Awards ¶ 8504 (1970) (Uible, Arb.).

28. *See, e.g.*, *Falstaff Brewing Corp. v. International Union of United Brewery Workers Local 130*, 64-2 Lab. Arb. Awards ¶ 8674 (1964) (Singletary, Arb.).

29. *See, e.g.*, *Ingersoll-Rand Co. v. USW Local 5503*, 64-2 Lab. Arb. Awards ¶ 8654 (1964) (Scheiber, Arb.).

30. *See, e.g.*, *Mobil Chem. Co. v. International Bhd. of Teamsters Local 308*, 70-2 Lab. Arb. Awards ¶ 8578 (1970) (Williams, Arb.).

31. The arbitrator naturally will look to the prior practice of the parties to delineate

of failing to reach agreement absent the use of the magic word "reasonable" are clear; the future costs in terms of an arbitrator's decision are uncertain. The tradeoff may be patently efficient, but there is a tradeoff.

On the other hand, there is no excuse for imprecise language in a situation where the parties have in fact reached a definite agreement. Take as an example the work requirements in a typical paid holiday clause.³² The parties have included in their agreement the following old chestnut:

An employee will not be paid for the holiday if he does not work the day before or the day after the holiday.

This is an attempt to create a work eligibility requirement for a paid holiday.³³ The requirement is generally used to penalize an employee for stretching a holiday into a minivacation and to insure that a full complement of employees are at work on the days surrounding the holidays. But did the parties write into the contract the requirement they thought they had agreed to? For example, in 1978 the Fourth of July fell on a Tuesday. What happens if an employee works on the day before the holiday, Monday, July 3, but not on the day after, Wednesday, July 5? Does he get the holiday pay? One reading of the clause is that the employee will receive holiday pay if he works *either* the day before *or* the day after the holiday. The more probable interpretation, in light of the customary usage of eligibility requirements, is that he must work *both* days in order to qualify. Yet it is possible that the parties intended to prune the minivacation without eliminating the practice altogether. Such an intention would support the alternative reading that as long as *one* of the days was worked, the employee would qualify for the holiday pay.

The guidepost for clarity in draftsmanship offers a simple solution. Assuming that the parties intended the customary two-day

the scope of "reasonableness." See generally Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 MICH. L. REV. 1017 (1961). That practice, however, may not be clear. A recent addition of the term "reasonable" to the collective bargaining agreement may mean that the parties sought to alter the prior practice. In any case, the use of the term is not cost free.

32. A holiday clause typically specifies what days are to be considered holidays. In addition, the holiday clause generally addresses two separate issues: (1) payment for the holiday which is not worked and (2) premium pay for work done on the holiday. The holiday pay puzzle is discussed in a fascinating chapter on the semantics of contract language in P. PRASAW & E. PETERS, *ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS* 44-59 (1970).

33. Work eligibility requirements are found in 80% of holiday pay provisions. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 58:6 (1974).

pre- and post-holiday work requirement, they should have simply provided:

An employee will not be paid for the holiday unless he works both the day before and the day after the holiday.

Not all defects in draftsmanship are so easily avoided, but with some care the parties can minimize unintended ambiguities.

When the parties purposely agree to ambiguous language, they may be postponing strife now at the risk of a dispute later. The price paid may certainly be worth it. A dispute may never arise, or it may be resolved quickly in the grievance procedure. But using ambiguous language is not cost free. The parties should consciously appreciate the risk and not assume it inadvertently. When they reach a precise agreement, as they did in the holiday pay scenario, they should describe their bargain with care and clarity. When there is consensus, there is no reason to risk misinterpretation in arbitration.³⁴

B. *Incorporate Definitions*

Another guidepost for attaining clarity in the provisions of the agreement is the use of definitions of particular terms in the contract.³⁵ The very process of attempting to define terms will sharpen the focus of negotiating. Disagreement about the meaning of key terms may surface when it would otherwise lie dormant until unearthed by the arbitrator many months or years later.³⁶

Consider the definitions included in a recent collective bargaining agreement between the Painesville, Ohio Board of Education and the Painesville Education Association.³⁷ Article I,

34. In the holiday pay scenario, management would be needlessly accepting the risk of ambiguous draftsmanship, assuming the parties had intended to create the pre- and post-holiday work requirement. On the other hand, if the parties had sought merely to minimize the stretching of holidays, the union would be assuming the risk, especially in light of the customary industrial usage of pre- and post-holiday work requirements.

35. For suggestions in drafting definitional clauses, see L. MARCEAU, *supra* note 25, at 235-46.

36. The negotiation process involves certain rules or rituals—traditional behavior patterns that foreordain the creation of a written product which will generate later disputes. See C. STEVENS, *supra* note 5; R. WALTON & R. MCKERSIE, *supra* note 5. The dialectic of proposals and counterproposals followed by language revisions accommodating conflicting positions reflects the bargaining table's natural atmosphere of compromise. Shulman, *supra* note 7, at 1004. Modifying those behavior patterns by, for example, adding a drafting rule favoring definitional clauses where appropriate may assist the parties in illuminating what may otherwise be a shadowy statement of their mutual intentions.

37. These references are to the collective bargaining agreement that expired on September 1, 1978 [hereinafter cited as Painesville Contract]. Following expiration of the contract, negotiations between the parties reached impasse, precipitating a five-week strike.

Negotiation Procedure, defines what the parties mean by good faith bargaining³⁸—a conundrum that has puzzled the commentators, the Labor Board, and the courts for over forty years.³⁹ Article II, Grievance Procedure, includes six definitions. The most helpful one defines what counts as a day for grievance step time limits,⁴⁰ an unending source of problems for arbitrators ruling on procedural arbitrability.⁴¹ Article IV, Teaching Days and Hours, defines workday and distinguishes it from school day by separately defining the latter term.⁴² Article VI, Transfer and Vacations, defines transfer for the purposes of that article.⁴³ Article IX, Fringe Benefits, expressly defines retire for purposes of severance pay.⁴⁴ Article X, Absences and Leaves, defines meetings for pro-

The strike, which was unlawful under Ohio's Ferguson Act, OHIO REV. CODE ANN. §§ 4117.01-.05 (Page 1973), ended on November 3, 1978, when the teachers, under court order, voted to return to work. At this writing, a new collective bargaining agreement has not been executed. For a comprehensive discussion of negotiations in the public sector, see M. MOSKOW, J. LOEWENBERG & E. KOZIARA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (1970).

38. "Good Faith" means coming to the negotiating table with the intention of negotiating, not of dogmatically pursuing preconceived stands. Good faith requires that the Association and the Board be willing to react to each others [*sic*] proposals. If a proposal is unacceptable to one of the parties that party is obliged to give its reasons. Good faith requires both parties to recognize negotiations as a shared process. The obligation of the Board or its representatives and the Association or its representatives does not require either party to agree to a proposal or require the making of a concession.

Painesville Contract, *supra* note 37, Art. I, § 4.2(e).

39. See, e.g., NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961); Gross, Cullen, & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968); Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).

40. "'Days' shall mean actual working school days unless specified differently." Painesville Contract, *supra* note 37, Art. II, Pt. A, § 6.

41. See, e.g., E. C. Jones, Inc. v. International Ass'n of Machs. and Aerospace Workers Local 1471, 53 Lab. Arb. 1100 (1969) (Bell, Arb.).

42. "'Workday' means the time a teacher is required to be in the building. School day is the times students are required to be in the building." Painesville Contract, *supra* note 37, Art. IV, Pt. A.

43. "For purposes of this article, 'transfer' means reassigning a teacher to a different department, grade, or building." *Id.* Art. VI, Pt. E.

44. For purposes of this section, an employee shall be deemed to 'retire' if: (1) the employee becomes eligible for receipt of benefits from the State Teacher's Retirement System at the time the employee terminates employment with the Painesville Township Schools, or (2) the employee leaves the teaching profession when his or her employment with the Painesville Township Schools terminates, has ten years of service and is fifty-five years of age or older.

Id. Art. IX, Pt. D, §§ 1-2.

fessional in-service training.⁴⁵ This unusual elaboration of definitions, while not obviating all contract interpretation disputes during the term of the agreement,⁴⁶ certainly minimizes the hazards of ambiguity.

Consider another example. A machine breaks down, and the four persons who work the machine and who have high seniority are sent home, missing a number of hours of work as a result. The collective agreement provides that layoffs shall be by seniority. Is this a layoff? Should seniority have been followed?⁴⁷ If the parties have defined the term "layoff" in their contract, or more particularly defined a layoff where seniority must be followed, the definition will guide the arbitrator to a result that is consistent with the parties' expressed intention. The broad statement that layoffs shall be by seniority delegates to the arbitrator the power

45. "Meetings that are for the expressed purpose of increasing the effectiveness of the teacher (employee) within the realm of his/her field of contractual responsibility as evidenced by the submission of a program of subject content of the meeting to be attended." *Id.* Art. X, Pt. E.

46. During the term of the Painesville agreement a dispute arose concerning the timing of payment to teachers during December. *Painesville Township Bd. of Educ. v. Painesville Township Educ. Ass'n*, 78-2 LAB. ARB. AWARDS (CCH) ¶ 8366 (1978) (Abrams, Arb.). The Education Association contended that the second December payment had to be made on the last workday in December before the Christmas recess (December 21, 1977), and that, therefore, the Board of Education violated the agreement by dating the checks, distributed before the recess, December 30. The Board of Education relied on the "plain and clear" language of Article VIII, Section B: "[T]eachers shall be paid on a semimonthly . . . basis with the fifteenth day and the thirtieth day of each month designated as payment dates—except when the day falls on a week-end or holiday in which case payment will be made on the last workday preceding such. . ." Since December 30, the contractually designated payment date, was not a holiday and did not fall on a weekend, payment was appropriately made on that date.

This writer was appointed to arbitrate the dispute. In resolving the dispute, the parties' expertise in defining terms throughout the agreement was most relevant:

The Association and the Board, although bargaining their first comprehensive agreement, obviously used care and skill in their draftsmanship. Throughout the Agreement terms are defined, rights and duties are specified with preciseness and procedures are delineated. In selecting the term "holiday," the parties have employed a word with an ordinary, natural and definite meaning. It is that meaning which controls the outcome of this case.

Id. at 4738. Thus, in the absence of supportive past practice or bargaining history, the grievance was denied. It may seem ironic that a party's expertise in draftsmanship can return to haunt that party in arbitration, but the definitional provisions in the contract undoubtedly benefited both parties in administering the agreement throughout its term.

47. *Compare* *Corhart Refractories Co. v. United Brick and Clay Workers Local 782*, 47 Lab. Arb. 645 (1966) (McCoy, Arb.) with *American Metal Prods. Co. v. UAW Local 1198*, 22 Lab. Arb. 181 (1954) (Marshall, Arb.). While the hypothetical in the text involves exposure to the company of only a few dollars, the effect of seniority applicability on managerial decisionmaking can be extensive. See S. SLICHTER, J. HEALY, & E. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* (1960).

to decide whether this interruption of work was a layoff requiring use of the seniority criterion. Even if the parties cannot agree during negotiations on the definition of a layoff, by focusing on the meaning of the term in the context of various fact situations when employees lose work time, they have given some guidance for resolution of the later dispute through the arbitrator's use of their bargaining history.⁴⁸

While most collective agreements do give the arbitrator a point of reference for interpreting terms, the adoption of definitions can facilitate his decisionmaking process.⁴⁹ The use of definitions maximizes the probability that the document will be easily read and applied by the arbitrator.⁵⁰

C. *Dealing With the Foreseeable*

It is rare indeed that a dispute arises in the industrial arena which has not arisen in some form, at some time, somewhere else. All disputes are, given optimal prevision, foreseeable. Some disputes are more likely to occur than others, but a person trained in industrial relations can predict with some degree of accuracy the likelihood of a dispute of a certain nature arising during the term of an agreement.⁵¹ The parties should negotiate in anticipation of

48. See, e.g., Warner & Swazey Co., 47 Lab. Arb. 438, 440 (1966) (Teple, Arb.).

49. Even where the parties have included definitional provisions, an arbitrator must guard against what Lon Fuller termed "inept literalness" in applying the contract definitions. Fuller tells the story of

the innocent who asked why a player was permitted to continue in the baseball game after an umpire had told him he was out He simply did not understand the game.

Labor relations have today become a highly complicated and technical field. This field involves complex procedures that vary from industry to industry, from plant to plant, from department to department. It has developed its own vocabulary. Though the terms of this vocabulary often seem simple and familiar, their true meaning can be understood only when they are seen as parts of a larger system of practice, just as the umpire's "You're out!" can only be fully understood by one who knows the objectives, the rules and the practices of baseball.

Fuller, *supra* note 22, at 11.

50. Other such rules for the negotiation process are discussed in R. WALTON & R. MCKERSIE, *supra* note 5. Negotiators should not overlook ministerial conventions of contract drafting, such as adding a table of contents and an index. Lawyers who serve as negotiators should also resist the regrettable tendency to use legal jargon in drafting the document since, in large measure, it will be administered by nonlawyers. Achieving clarity in exposition does not require importing legal phrases and syntax into the industrial compact.

51. Dean Schulman's caveat is worth emphasizing, however: "No matter how much time is allowed for the negotiation, there is never time enough to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up." Schulman, *supra* note 7, at 1004.

arbitration and should actively consider in formulating their proposals those issues which probably will arise during the term of the agreement.

Subcontracting provides a perfect example of a foreseeable dispute.⁵² A company that is part of an industry where subcontracting is common will foreseeably contract out during the term of an agreement. Before a union raises the subcontracting issue at the bargaining table, it should consider the various aspects of the issue and the possible techniques for limiting management's prerogative. Should prior notice of subcontracting be given to the union?⁵³ Must the company use its present employees to do the work if they can?⁵⁴ What types of subcontracting are covered by the clause? What considerations should motivate a decision to subcontract?⁵⁵ Should there be any exceptions for emergencies?⁵⁶

Something less than a comprehensive proposal may be advisable, however. The union may choose not to address the matter at

52. Subcontracting clauses are quite common in collective bargaining agreements. The Bureau of National Affairs survey of major collective bargaining agreements reports that 44% of the sample contracts mention subcontracting. While only 2% of these contracts prohibit all contracting out of bargaining-unit work to independent contractors, most provide for some form of limitation on its use by management. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 65:2 (1978).

53. It is understood by both parties that for the Company to satisfy the demands of its customers and to successfully operate the business, contracting and/or subcontracting of work is necessary from time to time.

. . . .
The Company agrees to give the Union reasonable advance notification of work it contracts out.

Contract between National Cash Register Co. and International Association of Machinists, *quoted in id.* at 65:181-82 (1975).

54. "The Union agrees that the Company may, within its exclusive discretion, engage contractors for all construction operations, including installation, replacement and reconstruction of plant, equipment, and productive facilities. The Company will endeavor to utilize its own employees in such situations when practical." *Id.*

55. The Company agrees that it will not subcontract work customarily performed by the Company in its own plants and with employees in the bargaining unit unless it is more economical to do so due to inadequate facilities and equipment or lack of materials and skills necessary to meet competition, or unless such work cannot be performed by the Company as expeditiously as required in order to meet customer delivery demands.

Contract between Capitol Manufacturing Co. and International Association of Machinists, *quoted in id.* at 65:182.

56. Before an outside contractor is brought into the plant, the designated Union representative will be given as much advance notice as possible in writing but in any event at least twenty-four (24) hours before the start of any work In an emergency, a Union Committeeman or Steward will be notified orally before the outside contractor starts to work and such oral notice will be followed by notice in writing.

Contract between Dana Corp. and United Auto Workers, *quoted in id.* at 65:184.

the bargaining table, thereby allowing an arbitrator to resolve a dispute over subcontracting which might never arise.⁵⁷ A conscious decision by a negotiator not to discuss a matter is certainly appropriate. What the guidepost of dealing with foreseeable disputes at the bargaining table does suggest is that, in deciding not to confront and resolve the various facets of an issue such as subcontracting, another tradeoff is made. At the very least, the decision whether to raise and resolve an issue must be based not only on how its addition to the bargaining agenda will affect the process of negotiation but also on how the absence or presence of a full contract clause will affect the continuation of the bargaining process in the forum of arbitration.⁵⁸

A union, reviewing the list of subissues involved in subcontracting and concerned about the prospect of losing unit jobs through subcontracting, would be wise to consider embodying a limitation on subcontracting in its agreement with management. In the absence of a contractual restriction, it is unlikely that an arbitrator will censure limited subcontracting that is motivated by business considerations.⁵⁹ If a union is to restrict subcontracting, it must do so expressly through the negotiation process.⁶⁰ Prior to bargaining it must consider trends in the industry, prior practices of the employer, and the potential attractiveness to the employer

57. A union decision not to confront the subcontracting issue in negotiations may preordain a future union loss in an arbitration concerning this issue. See note 59 *infra* and accompanying text. On the other hand, if the union proposes restrictions on management's prerogative to subcontract and fails to obtain a contract provision containing such a limitation, an arbitrator might rely on the failed attempt as evidence that the parties agreed that no restrictions be imposed on subcontracting. Such reliance on an unadopted proposal is inappropriate. As Arbitrator Russell A. Smith said in *Allis-Chalmers Mfg. Co. v. UAW Local 248*, 39 Lab. Arb. 1213 (1962): "[I]t would be unrealistic to interpret futile bargaining efforts as meaning the parties were in agreement that the Agreement implies no restriction at all. Parties frequently try to solidify through bargaining a position which they could otherwise take, or to broaden rights which otherwise might arguably exist." *Id.* at 1218. In the same decision, Smith sanctions management subcontracting taken in "good faith" in the absence of contractual restriction. *Id.* at 1219-20.

58. Management has traditionally been weak in preparing for negotiations, content to rely on its ability to say no to union proposals. Negotiating in anticipation of arbitration, however, counsels an active preparation of counterproposals, together with the marshalling of statistical and other support for management's bargaining stance. See, e.g., M. RYDER, C. REHMUS, & S. COHEN, *MANAGEMENT PREPARATION FOR COLLECTIVE BARGAINING* (1966). In the subcontracting situation, management should be prepared with counterproposals addressing any possible language the union might proffer.

59. See, e.g., *Shenango Valley Water Co. v. Utility Workers Local 285*, 53 Lab. Arb. 741, 744-45 (1969) (McDermott, Arb.).

60. If the union wants to participate in the decision to subcontract, it must affirmatively seek that right in negotiations. The arbitrator will not construct a union right to participate out of whole cloth.

of contracting out. If the union concludes that subcontracting is foreseeable and will have a detrimental impact on the unit, it must address the issue at the bargaining table.⁶¹ The union cannot legitimately anticipate that the arbitrator, in a subsequent subcontracting dispute, will rescue the union from its failure to deal with the matter in negotiations.

Consider again the holiday pay issue. It is clearly foreseeable that in administering a holiday provision a series of problems may arise. Assume that the contract simply lists those days which are to be observed as holidays and provides for pay equivalent to regular workday earnings. Is holiday pay due the employee who is on vacation the week of a holiday? What if the employee is on a regular day off? Is pay due if the holiday falls on a weekend? Of course, the arbitrator faced with any of the above scenarios is equipped with a bag of arbitral tricks. For instance, where the contract is silent on these matters and prior practice is not helpful,⁶² an arbitrator's source for reconstructing the parties' intent is the accepted conception of the purpose of a holiday provision. Generally, paid holidays are considered a fringe benefit and part of the compensation package.⁶³ Since arbitrators usually apply a presumption against forfeiture of a benefit,⁶⁴ an employee should be entitled to holiday pay when the holiday falls during a vacation, on a regular day off, or on a weekend. There is, however, a contrary—and perhaps outdated—concept of holiday pay as preventing a loss in weekly take-home pay whenever management decides to close its business for the holiday.⁶⁵ Under this construction, and in the absence of a contrary practice, the employee would not get holiday pay when the event falls during a vacation, on his day off, or on a weekend. His paycheck would remain level.

Have the parties agreed which purpose their holiday pay provision serves? Of course not. Parties rarely agree on philosophies;

61. See generally W. ATHERTON, *THEORY OF UNION BARGAINING GOALS* (1973).

62. It must be acknowledged that past practice is generally helpful in resolving these types of disputes. Contracts have long contained holiday provisions, and it is unlikely that a particular dispute of this nature will be arising for the first time. But under a first contract between the parties or where the past practice is not clearly established, the arbitrator may be left unguided by the parties.

63. See *Bradlees Family Circle Stores v. International Jewelry Workers Local 225*, 66-3 Lab. Arb. Awards ¶ 8890, at 6092 (1966) (House, Arb.).

64. F. ELKOURI & E. ELKOURI, *supra* note 20, at 312.

65. *Quaker Oats Co. v. International Chem. Workers Local 397*, 65-1 Lab. Arb. Awards ¶ 8367, at 4343 (1965) (Tatum, Arb.).

they only agree on words used in their industrial context.⁶⁶ The arbitrator's use of one formula or the other will be necessary to resolve the dispute. He probably will grant the pay under an anti-forfeiture-of-benefit theory. But he has the prerogative to come out the other way if the parties have failed to deal with that issue. When faced with contract language on point, however, the arbitrator's duty is to read and apply the provision.⁶⁷

The constraints of the negotiation process—particularly the costs of disagreement—obviously make dealing with foreseeable disputes but one of a number of important bargaining goals. In the final analysis, the success of the parties in dealing with the foreseeable is limited by the human constraints on the process of the private ordering of an industrial relationship.⁶⁸ Even the most comprehensive of collective agreements contains ample room for interpretation by an arbitrator. As is true in much of industrial life, the need to accommodate pervades the atmosphere of the negotiations. Necessarily, much must be left to future resolution in

66. The industrial context is, of course, of paramount importance. "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . ." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.).

67. This is not to suggest that when arbitrators are left to their own devices, they do a poor job. Most arbitrators skillfully reach a resolution that meets the legitimate expectations of the parties. Restricting the scope of the arbitrator's decisionmaking power by including a precise standard in the agreement merely ensures that the outcome in arbitration is the *parties'* outcome and not the independent decision of the neutral third party.

68. Marceau lists seven traits of the ideal contract drafter:

1. Ability to absorb facts. Every drafting assignment requires the rapid acquisition of new information.
2. A passion for exactness. The draftsman must be what less precise people would disparagingly call a mouse tracker, willing to spend hours on the placement of a punctuation mark.
3. Ability to systematize. He can arrange a miscellany of separate rules into a consistent and logical structure.
4. Ability to put himself in the position of the reader.
5. Inventiveness. He is able to suggest new approaches, or new names for old approaches.
6. Energy. Any lethargy or indolence is fatal.
7. Persistence. He makes his point again and again to one person after another . . .

Marceau admits that "no one is born with all these qualities." If such a person existed, he would be a "curious, energetic, brilliant and opinionated introvert." L. MARCEAU, *supra* note 25, at 3.

Moreover, exploring every corner of every issue lest silence ring loudly in arbitration is an academic pipe dream. For example, there are numerous other holiday pay issues that the parties have not addressed, such as inclusion of customary overtime pay in the holiday pay amount, management's right to schedule work on a holiday, and service requirements for holiday pay eligibility.

the grievance and arbitration machinery. The objective of the guidepost of dealing with the foreseeable is to suggest that a part of the bargaining function is to appreciate those situations where the written product of the parties' negotiations may be applied. It is difficult to contemplate experienced bargainers doing otherwise.

D. *Finish the Agreement*

As a corollary to dealing with foreseeable problems, the parties should, at the very least, finish what they have started. For example, a cost of living allowance provision which does not indicate what adjustment in the wage rate results from what point change in which price index is not finished. An incomplete cost of living provision is troubling. Prior practice may be nonexistent if the parties have only recently added the benefit to the agreement. When faced with an incomplete cost of living clause, the arbitrator may just throw up his hands and conclude that he cannot interpret and apply the provision.

Consider the problem Arbitrator Arthur Ross faced in the *California Tile Contractors Case* in 1955.⁶⁹ He was asked to decide how the wage adjustment formula included in the agreement should be applied. He found no clear indication of the base point from which changes in the cost of living were to be computed, no definition of the relationship between the amount of the wage adjustment and the degree of change in the Consumer Price Index, and no clarity as to the timing of any adjustment. The clause was, in his words, "a model of ambiguity"⁷⁰ and could not be applied.⁷¹ The negotiated wage adjustment formula was, in fact, a classic example of an agreement that was not finished.

E. *Caution: Clauses Without Boundaries*

There are a variety of clauses in a typical collective bargaining agreement which can be characterized as explosive. They are "clauses without boundaries," clauses which may generate numerous disputes without giving specific guidance to an arbitrator trying to resolve them. An example of such a provision is a past practices clause—one which states that all existing practices and

69. *Tile Contractors' Ass'n of N. Cal. v. Tile Layers Local 19*, 25 Lab. Arb. 9 (1955) (Ross, Arb.).

70. *Id.* at 11.

71. By deciding that he could not decide the case, the arbitrator, in effect, upheld management's view of the issue. The example shows why it is important for a union that obtains a cost of living increase provision to make sure that the clause is complete.

working conditions are to be maintained. Such a provision carries explosive potentiality for both union and management since it embodies in the agreement an unbounded promise to maintain unnamed, unspecified practices. Certain aspects of management's mode of operation and unexpressed employee benefits may all thereby be writ in cement. In a sizable operation, neither management nor union can possibly have a comprehensive understanding of what practices and working conditions exist. When parties bargain in anticipation of arbitration, they should appreciate the implications of negotiating a clause without boundaries.

It is true, of course, that even in the absence of such a clause without boundaries, an arbitrator may still base his decision on unwritten but well-established practices in the workplace.⁷² What an open maintenance of working conditions clause does is simply to cut short the arbitrator's search. Practices and working conditions which exist at the creation of the document—at contract time—whether they are longstanding or not, are fixed and immutable.

As an alternative to a past practices clause without boundaries, the parties might attempt, where possible, to specify certain practices in the agreement.⁷³ Again, it may be impossible to embody the sum and substance of existing working conditions in any document. But nevertheless this process of particularization places on the table a statement of what practices the parties claim exist. One side's belief in the existence of a certain practice can be rebutted by the other side.⁷⁴ Or one side can agree to a clause without boundaries in exchange for a desired outcome on a different matter. It is the essence of this guidepost that the bargainer evaluate the tradeoff in full recognition that an undefined promise may later yield unwanted fruit in arbitration.

72. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-82 (1960):

Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement.

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.

73. See, e.g., *Latrobe Die Casting Co. v. UAW Local 1984*, 69 Lab. Arb. 678 (1977) (Altrock, Arb.).

74. There are risks to this approach toward the bargaining process. There is generally more than enough to talk about and negotiate across the bargaining table. If the parties attempt to write the perfect agreement, they may write no agreement at all.

F. *The Nature of the Process*

A final guidepost for negotiating in anticipation of arbitration focuses on the scope and nature of the arbitration process itself. There is no transcendent rule that an arbitrator must be given plenary power. The parties may write their own ticket.⁷⁵ They need not travel "coast-to-coast," if that is not their wish. In bargaining, the parties should decide whether they want to limit the scope of arbitral power and, if they do, they should clearly express their restricted grant of power.

Limitations on the scope of the arbitrator's power, which parties customarily impose, appear to be of little value. For example, there is little functional effect in limiting the arbitrator's jurisdiction to questions concerning the interpretation and application of the agreement. Arbitrators invariably will find substantively arbitrable disputes which raise issues implied in the contract's express provisions. Thus, the arbitrability of a subcontracting dispute, in the absence of a clause addressed to that issue, might be based on the presence of recognition, wage, and seniority clauses in the agreement that the arbitrator feels may be affected by management's contracting out.⁷⁶ Moreover, the customary prohibition that the arbitrator may not add to, subtract from, or otherwise modify the provisions of the agreement is a bar of clay.⁷⁷ The arbitrator merely reads the contract in a manner consistent with what he determines was the parties' intention.⁷⁸

A more successful approach to limiting the arbitrator's juris-

75. Arbitrators sometimes refer to themselves as the "creatures of the contract." While the phrase may be unseemly, it does project a message to the parties. As long as their process is fair to all parties concerned, including the grievant, the parties can design the arbitration scheme as they see fit. See Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231 (1977). The public sector law of a number of states prescribes arbitration procedure. See, e.g., 43 PA. CONS. STAT. ANN. § 215.1 (Purdon 1964). Federal law applicable to the private sector does not mandate a procedure, although it does provide that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1976).

76. *Allis-Chalmers Mfg. Co. v. UAW Local 248*, 39 Lab. Arb. 1213 (1962) (Smith, Arb.).

77. See *Local 77, Am. Fed'n of Musicians v. Philadelphia Orchestra Ass'n*, 252 F. Supp. 787 (E.D. Pa. 1966) (where an arbitrator interpreted a clause providing for transportation during orchestra tours as requiring travel by airplane when necessary, as the clause had been drafted at a time when air travel was not feasible for large groups) (enforcing 46 LAB. ARB. REP. (BNA) 513 (1966) (Gill, Arb.)).

78. An arbitrator is not adding to an agreement when he looks to past practices as a source for interpreting undoubtedly ambiguous contract provisions. See F. ELKOURI & E. ELKOURI, *supra* note 20, at 389-411.

diction is specifically to exclude certain matters from arbitration. The United Auto Workers, for example, have long had in their contracts an express exclusion of disputes concerning production standards.⁷⁹ They have decided that resolving certain industrial disputes is too important to be left to an arbitrator. Only a clear and specific exclusion from arbitration will suffice to defeat a court action to compel arbitration.⁸⁰ Effective bargaining to limit the scope of arbitration, therefore, requires an express statement of what matters lie beyond the arbitrator's jurisdiction.⁸¹

In addition to focusing on the scope of the arbitrator's jurisdiction, negotiators would do well to anticipate the procedures of arbitration.⁸² To insure an efficient resolution of disputes, the parties should specify how an arbitrator is to be selected, when the hearing is to be conducted, and when the award must be issued. Inordinate delay in rendering awards is antithetical to the goals of a process which is said to be "speedy."⁸³ The parties can control delay by specifying time limits in their arbitration provision and by selecting only that arbitrator who will abide by their timetable and not his own.⁸⁴

79. Any dispute concerning an increase in a production standard which has been increased after the date of this agreement, or any dispute concerning the addition of machines to an operation, which addition of machines does not conform to past practice and occurs after the date of this agreement, may be referred to the grievance procedure beginning with Step I, but shall not be subject to arbitration.

Contract between Caterpillar Tractor Co. and the United Auto Workers, (*quoted in* Local 751, UAW v. Caterpillar Tractor Co., 39 Lab. Arb. 534, 535 (1962) (Sembower, Arb.).

80. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960). Expressly excluding a matter from arbitration will also make unavailable an injunction against a strike over such a matter. *See* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). *See generally* Abrams, *The Labor Injunction and The Refusal to Cross Another Union's Picket Line*, 26 CASE W. RES. L. REV. 178 (1975). In some situations, sanctioning the exercise of economic power may be too high a price to pay for an effective exclusion.

A more limited variation of the express exclusion strategy involves the adoption by the parties of a contract provision plainly stating that the source of rights in arbitration lies in the express terms of the agreement and not in any prior practice unspecified in the words of the contract. Under a contract containing the source clause, the arbitrator could still consider past practices in interpreting ambiguous contract references, but he first would have to find words in the agreement that expressly speak to the issue and require interpretation.

81. Excluding a matter from arbitration—the butcher-knife approach to limiting arbitral jurisdiction—does not, of course, assure that a dispute concerning the issue will not arise during the term of the agreement.

82. *See* Abrams, *supra* note 75.

83. Delay in the issuance of awards has long been a major problem in arbitration. *See* Jones & Smith, *Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1140-41 (1964).

84. The American Arbitration Association requires an arbitrator to render his award within 30 days. VOLUNTARY LABOR ARBITRATION RULE 37 (1975). If, however, the par-

To promote a fair resolution of their disputes, the parties might explore the particulars of arbitration procedure in their collective agreement. Should a record be made of the arbitration hearing by means of a tape recording?⁸⁵ Should the parties specify that the arbitrator shall render a brief opinion setting forth the reasons for his award?⁸⁶ The parties might also explore the possibilities of designing an expedited arbitration system for some matters⁸⁷ and a procedurally more rigorous arbitration system for others—for example, disputes raising race and sex discrimination issues.⁸⁸

II. CONCLUSION

Labor arbitration continues what the parties began when they sat down at the bargaining table. Success in presenting one's position to the arbitrator depends in large measure on success at the bargaining table in preparing an agreement which will be the crucial evidence before the arbitrator. While the other constituent elements of success in arbitration should not be ignored—*e.g.*, careful presentation of the issues, thoughtful brief writing, and selection of a talented neutral—in the final analysis the words of the contract will be determinative. The time to focus on those words is not in preparing for arbitration but in preparing for negotiation.

It is never too late to repair an agreement. The fact that the parties have lived under an agreement may make the tightening up process easier: Terms have been defined by practice and that practice can be specified in the words of the document; trouble

ties agree to arbitrate under the Association's expedited rules, the award is to be rendered within five days. EXPEDITED LABOR ARBITRATION RULE 19 (1975). The guidelines of the Federal Mediation and Conciliation Service strongly urge the rendering of an award within 60 days, adding that an award rendered thereafter, while still valid, reflects "upon the performance of an arbitrator with regard to his continuing relationship with the FMCS roster." 29 C.F.R. § 1404.15(a) (1977).

85. See Abrams, *supra* note 75, at 256–58.

86. *Id.* at 259–60.

87. See Cohen, *The Search for Innovative Procedures in Labor Arbitration*, 29 ARB. J. 104 (1974).

88. The Supreme Court, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974), stated that findings in arbitration would be apportioned greater weight in a subsequent title VII judicial proceeding if the court determines that there was procedural fairness in the arbitral forum, an adequate record with respect to the issue of discrimination, and that the arbitrator had a special competence in the area. To make arbitration a meaningful proceeding in such cases, the parties should consider creating an arbitral system that satisfies these factors. A proposal designed to meet these requirements has been made by Professor Harry T. Edwards. Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 LAB. L.J. 265 (1976).

spots have been isolated and they can be confronted at the table; ambiguities can be clarified; poor draftsmanship can be corrected. The continuous process of bargaining and arbitrating repeats itself like a Möbius strip.⁸⁹

The deal struck in collective bargaining negotiations is intended to last for a period of time. Care must be taken in reaching that agreement to draft a completed document with optimum clarity. The clearer the document, the less likely that grievances will arise. If grievances do arise, a clear document will enhance resolution through the grievance procedure. The clearer the document, the more likely that the arbitrator will resolve the dispute consistent with the parties' true bargain. The parties should work during negotiation time to assure that their deal is interpreted and applied at arbitration time in accordance with their intentions at its creation. There is much they can do in anticipation of arbitration to avoid the unnecessary hard case.

89. The task of renegotiating an agreement in anticipation of arbitration may be an endless endeavor. The collective bargaining agreement will undoubtedly always remain a "document with broad rules, a miscellany of gaps, unclear language, and unsettled issues." Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 529 (1969). But as the Mad Hatter said at the tea party, "Let's all move one place on." L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 108 (1914).