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MEETING THE NEED FOR LABOR ARBITRATORS A NEW APPROACH

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It has been estimated that ninety percent of all collective bargaining contracts between unions and employers provide for arbitration as the final step in the grievance procedure.[1] In terms of numbers there are approximately twenty million workers covered by such contracts.[2] The number of cases going to arbitration increases every year Last year arbitrators handed down awards in more than fifteen thousand controversies, and it has been estimated that the case load is increasing at the rate of ten percent each year [3] Despite this large volume of cases and the ever-increasing case load on labor arbitrators, only three hundred or so arbitrators handled ninety percent of these cases; the majority of these men are in their fifties and sixties.[4] As their ages would indicate, most of these arbitrators received their training under the aegis of the old War Labor Board. But that fertile training ground is no more. Where is the new blood? The simple answer is that there is very little new blood, nor is there any real prospect of a transfusion adding an appreciable amount of new blood in the near future.

One encouraging sign, however, is that more and more people are recognizing this as being a major problem and are asking aloud for some solution. In the Fifteenth Annual Report of the Federal Mediation and Conciliation Service, for example, the statement was made that: " one of the very definite problems the parties in certain areas had was a shortage of arbitrators."[5] Another group to recognize this

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1. AMERICAN ARBITRATION ASSOCIATION, LABOR ARBITRATION, PROCEDURES AND TECHNIQUES 4.
2. KAGEL, ANATOMY OF A LABOR ARBITRATION, VII (1961).
3. Stessin, *A New Look at Arbitration,* N.Y. Times, Nov. 17, 1963, § 6 (Magazine), p. 26.
4. *Id.* at 84. In fact he quotes one observer who said, " a dozen heart attacks could wipe out the profession."
5. FEDERAL MEDIATION AND CONCILIATION SERVICE, FIFTEENTH ANNUAL REPORT, FISCAL YEAR 1962 43 (1963).

problem was the Committee on Labor Arbitration of the American Bar Association. They chose this problem as their committee project for 1961.

The committee consisted of thirty-eight members, rather evenly divided between labor representatives and management representatives. There were three co-chairmen: Frederick R. Livingston of New York, Bernard Dunau of Washington, D. C., and this writer After a lengthy exchange of correspondence a committee meeting was held in New York which was well attended by members from various parts of the country There was unanimous agreement that the problem of developing new labor arbitrators merited the committee's immediate attention. The discussion then turned to an analysis of the various ways of accomplishing this. As finally embodied in the committee report, the problem was seen as being threefold and involving the interrelated matters of experience, standards and acceptability [6]

1. EXPERIENCE

The committee pointed to the present lack of any training agency comparable to the War Labor Board. It recommended that the American Bar Association take the initiative and organize some form of program for the training and development of new labor arbitrators. The committee recommended that such a pilot program be staffed by a few well known and respected arbitrators. It was thought that by so restricting the program the judgment of these arbitrators would be more highly regarded by those who pick arbitrators for companies and unions. The placing of a seal of approval, so to speak, by eminent arbitrators on the graduates of such a program might be an aid in making the new arbitrators more acceptable.

It was suggested that these experienced arbitrators should then select the trainees for the program and proceed more or less on an apprentice basis in on-the-job training. The apprentice would attend arbitration hearings with his mentor, observe what went on and thus gain practical experience.

6. REPORT OF THE COMMITTEE ON LABOR ARBITRATION, SECTION OF LABOR RELATIONS LAW, 1961 PROCEEDINGS 89 (1962).

Such a proposal presented some obvious problems. Should the trainees receive compensation for any work they might do in drawing up drafts of the final award as part of their training? If so, who would pay them, the arbitrator, the parties or some agency? Requiring the arbitrators to pay for such work which might or might not be of value in the final award would seem to be asking too much in view of the fact that they were already contributing to the program by serving as instructors without pay The committee expressed the thought that various foundations should be approached in an attempt to gain financial backing for such a program.

Another problem was that of securing the permission of the parties to allow the trainee to attend the hearing. Companies and unions are sometimes reluctant to have outsiders attend arbitration hearings at which their dirty linen is aired. Then too, the parties would have to know how much if any of the final award would be the work of the trainee. After all, they are paying for the services of the experienced arbitrator, not the trainee. If they had been willing to accept an award written by a newcomer to the field, there would be less need for such a program in the first place. As will be discussed below, it is the reluctance and/or outright refusal to use arbitrators with limited experience that adds to the problem.

2. STANDARDS

The second aspect of the problem, in the committee's opinion, was the need for the establishment of realistic standards for labor arbitrators. The committee urged the American Bar Association to collaborate with the two major appointing agencies, the American Arbitration Association and the Federal Mediation and Conciliation Service, in establishing a uniform set of standards. Each of these agencies has its own ideas as to what standards a person must meet in order to be added to their list of labor arbitrators. It is from these lists that many arbitrators are selected. These lists are sent out, on request, to companies and unions seeking the services of an arbitrator The Federal Mediation and Conciliation Service list is free for the asking. There is no charge made for it since this agency is required

by federal law to provide such a service.[7] The arbitrator thus selected is, of course, usually compensated for his services on a fifty-fifty basis, half from the company and half from the union. The current policy of the Federal Service is to permit the arbitrators on its list to charge the parties up to $150 per day [8] The American Arbitration Association, on the other hand, makes an administrative charge of $30 to each of the parties for supplying them with a list of names.[9] Unlike the Federal Service it does not place a ceiling on what the arbitrators on its list may charge. In practice, however, experience has indicated that the usual charge made by an arbitrator on their list has been $100 per day [10]

3. ACCEPTABILITY

The committee thought that the most difficult aspect of the whole problem was whether or not a new arbitrator would be acceptable to companies and unions. The two appointing agencies can be as selective as they wish in maintaining their lists and have sound standards by which new additions are measured, but if he is never selected to arbitrate a labor dispute, his presence on a list does little to meet the need for new blood in this field. The American Arbitration Association roster lists approximately two thousand arbitrators. However, it is only the experienced arbitrators who are selected over and over again. A study conducted by that agency reveals that despite their satisfaction with the credentials of their people, companies and unions will seldom use them if they have only limited experience. As of January 1962, of the two hundred names added to their roster in the years 1959, 1960 and 1961, only thirty-six, or less than twenty percent had been chosen to arbitrate a case.[11] This would seem to indicate more than a mere reluctance on the part of companies and unions to use arbitrators who do not have a large amount of experience. It is, rather, evidence that companies and unions actually "shop" for a particular arbitrator or type of arbitrator in a particular type of dispute. Thus, only a known

7. § 1404.12 Federal Mediation and Conciliation Service Arbitration Policies, Functions and Procedures.
8. *Ibid.*
9. *Supra* note 1, at 22.
10. *Ibid.*
11. THE DEVELOPMENT OF QUALIFIED NEW ARBITRATORS, NATIONAL ACADEMY OF ARBITRATORS, PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING 221 (1962).

arbitrator could be examined in terms of how he would probably decide a particular type of case. For example, a company which has just discharged an employee for smoking in the rest room and which now finds itself in the position of having its action challenged by the union in an arbitration case will look for an arbitrator who has a reputation of being "tough" on employees who violate company rules. The union, on the other hand, will be looking for an arbitrator who tends to be lenient in judging the transgressions of employees. Much more is at stake than saving face by winning. The arbitrator may order reinstatement with back pay and perhaps impose a serious economic penalty on the company for its action. In the case of an older, established arbitrator, both parties will know, or be able to find out, how he will be likely to rule in such a case. However, a beginner who has not decided many cases cannot have his final award predicted as accurately, and he is therefore avoided. As one partisan in this field has said,

> We get a line on arbitrator thinking by reading his previous awards and - oh yes, there is one other way; unions - and management too - have pretty good grapevines on who is ruling how in current arbitrations.[12]

As long as labor and management continue to place stress on winning arbitration cases rather than on the fair and equitable solution of their problems, this shopping for the most favorable arbitrator from the ranks of established persons is inevitable.

Unfortunately, a publication put out by one of the appointing agencies might possibly be interpreted as encouraging the practice of shopping for arbitrators from the ranks of those who have established reputations. In a publication purporting to advise companies and unions of ways to cut arbitration costs, one bit of advice was to:

> Find out as much as you can about an arbitrator before you make your selection. Read his reported opinions and awards.[13]

12. *Supra* note 3, at 84.
13. AMERICAN ARBITRATION ASSOCIATION, 9 WAYS TO CUT ARBITRATION COSTS 3.

Thus, it is implied, at least, that the use of an unknown arbitrator who does not have any published awards which can be read in advance in order to get a line on his thinking will cost the parties more in the long run than will a more experienced man. It is unfortunate that this agency did not include in that publication, a statement which it made elsewhere to the effect:

> A party should not seek to obtain the appointment of an arbitrator in the belief that he will favor that party and thereby give him an advantage over his adversary [14]

The committee's recommendation on the problem of acceptability of new arbitrators was to set up impartial groups of labor and management representatives in various regions of the country Such committees would then evaluate the credentials of persons aspiring to become labor arbitrators. The thought was that by such a screening process those approved by such a group might be more acceptable in that region than persons without such approval. The obvious danger of such a recommendation, and one which the committee recognized, was the establishment of a blacklist. However, in the opinion of the committee, the problem of acceptability was so great that this danger was worth taking. After all, a new arbitrator may take all the training programs in the world, satisfy all the standards of the American Arbitration Association and the Federal Mediation and Conciliation Service, receive the endorsement of the arbitrators under whom he studied and still never be selected to hear a case. Thus all the time and effort involved in training him would not have served to add new blood to the ranks of arbitrators. The possibility that a labor and management screening group's approval of the newcomer might possibly add that final touch of magic which is necessary to transform a rejected neophyte into an accepted arbitrator, was thought by the committee to be worth the risk of a blacklist.

Step Two: The Results Of The Committee's Report

14. AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS AND PROCEDURAL STANDARDS FOR LABOR-MANAGEMENT ARBITRATION 7.

The report was submitted at the next annual meeting of the American Bar Association. Nothing happened. The report died quietly

Fortunately, however, the matter did not end there because one of the co-chairmen refused to let it end there. Undaunted by the lack of interest on the part of the American Bar Association Fred Livingston presented the committee report to the National Academy of Arbitrators of which he was also a member The National Academy held its Fifteenth Annual Meeting in Pittsburgh in January of 1962. Prior to that meeting he had circulated to all National Academy members a copy of the committee report. A workshop session was then scheduled during the annual meeting to discuss the report. Four speakers participated in the workshop: Fred Livingston; William E. Simkin, Director of the Federal Mediation and Conciliation Service; Paul M. Herzog, the then President of the American Arbitration Association; and Ralph T Seward, the first President of the National Academy of Arbitrators.[15]

The session began with a summation of the committee report by Fred Livingston. He was followed by William E. Simkin who suggested that the primary purpose of any program which might be developed should be directed at the problem of increasing the acceptability of new arbitrators. He noted that in his experience as Director of the Federal Service he saw a great deal of reluctance on the part of companies and unions to accept new arbitrators. These very same companies and unions recognized the need for someone to break in the newcomers to the field, but wanted that someone to be someone else, not themselves. He viewed favorably the proposal to set up regional committees of labor and management representatives to screen new arbitrators stating that in his opinion the stamp of approval of such a committee would aid the new arbitrator in gaining acceptability in that region. He even went further and welcomed the advice of such a committee in evaluating the list of arbitrators which his agency maintained.

The next speaker was Paul Herzog of the American

15. *Supra* note 11, at 205.

Arbitration Association. He agreed that acceptability was the most difficult aspect of the problem. Mr Herzog pointed out that despite the fact that his agency does have standards by which it measures new arbitrators before adding them to its roster, companies and unions seldom use them. He also agreed with the wisdom of establishing some sort of training program.

The final speaker was Ralph Seward speaking for the National Academy He pointed out that not all members of the academy favored a program which would, in effect, be developing their own competition. One member, for example, thought that there was a greater need for fewer blacklists of present arbitrators than there was for a training program to develop new arbitrators. In general, however, the academy members did favor some form of training program. In closing he urged that if any such program be instituted, it should be flexible and not over institutionalized.

Results of the Workshop

Unlike the disappointing reaction to the committee report by the American Bar Association, the discussion before the National Academy had concrete results. The National Academy joined forces with the two appointing agencies and drew up plans for an experimental training program. Such a program has recently been instituted in Pittsburgh.

There are eight trainees currently in this program. Of the eight, seven are lawyers. This would seem to indicate that the administrators of the program, who did the selecting and issued the invitations to participate, view law training as the best possible vehicle for launching new arbitrators into the field. The eighth trainee is affiliated with one of Pittsburgh's universities in their labor and management division. Of the seven lawyers, four are law professors, two are in general practice and one is an investment banker While a background in law is the common denominator for most of the trainees, their background as labor arbitrators varies greatly This ranges from one participant who has never had a case to one who has had a reasonable number of cases but who wants more.

The Pittsburgh program began with a day long program of formal instruction. The morning session was devoted to discussions of some of the problem areas in labor arbitration. The instructors were: Herbert Schmertz, Special Assistant to the Director, Federal Mediation and Conciliation Service; H. T Herrick, General Counsel of the Federal Service; Joseph S. Murphy, Vice President of the American Arbitration Association; and John Schano, Regional Manager of that Association. The afternoon session was devoted to discussions by labor and management attorneys of the Pittsburgh area who not only present arbitration cases for their clients, but who also select arbitrators for their clients. They discussed the things that they look for in arbitrators and also what they expect from arbitrators. The final speaker of the day was the Regional Chairman of the National Academy of Arbitrators. He outlined some of the more difficult problems which are faced by arbitrators.

The second phase of the training program consists of actual experience in the field. Here the National Academy members in the Pittsburgh area will serve as instructors. Whenever they are contacted by companies and unions desirous of securing their services they will ask permission, on a form prepared by the Federal Service, to bring a trainee to observe the proceedings. If the parties agree, the trainee will accompany the arbitrator to the hearing. He will observe the proceedings and then discuss the case with the arbitrator There is no rigid, formalized pattern of instruction. The exchange between instructor and pupil may end with an oral discussion of the case or may continue with the trainee drafting an award for the arbitrator's criticism. It is not anticipated that the trainee will receive any compensation for whatever services he may perform. This is somewhat offset by the fact that there is no charge for the instruction which he receives. The two agencies and the National Academy are sharing whatever administrative costs are involved and the National Academy members serve as instructors without pay

The trainee's attendance at the hearing will also be of some help in his gaining acceptability He will be meeting the representatives of labor and management at the hearing

and will, thereafter, be more than just a name on a list. In this respect, the National Academy members realize full well that they are training men who may well be their competitors in the future. However, their recognition of the need for more arbitrators and their dedication to the preservation of labor arbitration are overriding considerations.

No definite decisions have been made concerning the future of the Pittsburgh program. Most of it will continue to consist of practical on-the-job training at arbitration hearings. Some future workshops, roundtable discussions and social events are in the planning stage. At this writing it is, of course, too early to evaluate the program. Its importance cannot, however, be underestimated. The need for new, qualified arbitrators clearly exists. Those most directly involved in the field of labor arbitration—the two appointing agencies and the National Academy—have recognized this need and are attempting to do something about it. *This* is the most significant result of the committee report.