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DIVERSE conceptions about the relationship between collective bargaining and arbitration are at the root of some important current problems about the use of voluntary arbitration to resolve labor disputes. Should voluntary arbitration be considered, in any degree, as an extension of collective bargaining, or should it be basically conceived as an alternative to collective bargaining? In other words, does any part of the criterion of mutual acceptability—the very essence of collective bargaining—carry over when arbitration is invoked, or does "arbitration" connote a process through which employment terms are imposed upon the parties without any regard to the acceptability factor. There is the nub of the most important current labor arbitration question. Nor can it be effectively dealt with as a problem of semantics and by simply defining "arbitration" as a process which excludes the mutual acceptability factor. That merely evades the difficult part of the question.

At the outset, I want to make very clear my own view that either of the two concepts just referred to may be usefully employed as long as both the union and the management are in accord on basic principles. Sometimes an "agreement to arbitrate" is incomplete, however, because it masks a critical difference about the kind of process that is being invoked. May I also state my own belief that, as more mature collective bargaining relationships develop, the parties themselves tend to adopt that kind of arbitration process in which mutual acceptability is a criterion of moment. I have long been perplexed about the insistence of some lawyers that a conference between representatives of both parties and the arbitrator "in his chambers" designed to secure "a settlement out of court" is an unjudicial approach and not compatible with sound principles.

The very nature of collective bargaining makes mediated settle-

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ments an even more natural objective than in most law suits. This statement is no mere assertion. It is based upon three fundamental characteristics of collective bargaining which will be briefly discussed because they are vital to an appraisal of the role of voluntary arbitration.

Nature of Collective Bargaining

Whatever its precise role, voluntary arbitration of labor disputes is obviously closely related to collective bargaining. Voluntary arbitration must be agreed upon by both parties and either has an unquestioned right to reject voluntary arbitration. Arbitration grows out of collective bargaining and, since it is voluntary, may be looked upon as an adjunct of collective bargaining. The following three characteristics of that latter process may, therefore, well be emphasized in picturing the setting of voluntary arbitration:

First: Collective bargaining involves group acceptance by employees of the conditions of their employment. Union representatives speak for a group of employees. Conditions agreed upon may not be entirely acceptable to each and every worker. Individual interests may be, and often are, subordinated to group needs. Let me hasten to add, however, that conditions acceptable to each employee do not more generally obtain when individual bargaining prevails. In large measure, the collective bargaining approach was adopted as a national policy because of the tragic shortcomings of individual bargaining that became so manifest in the 1930's.

Many of the questions arising from the group determination characteristic of collective bargaining are far from resolution. With respect to what matters should the individual interest be subordinated to the group? Perplexing questions of union administration and of the subject-matter scope of collective bargaining are involved. These vital questions fall beyond the limits of this paper. It should be emphasized here, however, that the so-called individual grievance frequently involves a considerable group interest particularly when its disposition gives particular meaning, connotation or substance to a term of the labor agreement. Disposition of many of these grievances is a vital aspect of collective bargaining. As will be noted later, grievance arbitration frequently involves much more than a simple application of the terms of a labor agreement.

Second: Under what has been termed free collective bargaining, management and union representatives are solely responsible for hammering out a meeting of minds about (a) procedures governing the

conduct of the joint relationship, (b) the scope of the joint relationship or, in other words, the subjects that will be dealt with through collective bargaining, and (c) the substantive terms of a labor agreement.[1] The parties *must* agree about these and other matters.

Nor does a mere meeting of minds of the designated representatives commonly suffice as respects the substantive terms of employment. Terms agreed upon by negotiators must ordinarily be ratified by a majority of the union membership before becoming effective. You will recall, too, that management representatives in numerous cases made their recent pension commitments subject to ratification by company stockholders. Except as the conduct of joint relations and as the terms of employment are now specified by law, our collective bargaining system makes mutual acceptability the principal, if not the sole, criterion of fairness and equity in a negotiated labor agreement.

Mutual acceptability is, of course, the standard criterion for contract-making in general under our system of relatively free enterprise. The collectively-bargained labor agreement, however, must be distinguished from the usual commercial contract. It is an agreement specifying the conditions under which the services of individuals will be contracted for. But, another characteristic of the labor agreement makes it unique. There can be no failure to consummate a labor agreement. There must be a meeting of minds. Unlike most other contractual arrangements, the parties cannot eliminate any gulf between them by the simple expedient of refusing to do business with each other. They must do business; they must arrive at a meeting of minds.

Adoption of collective bargaining, with its emphasis upon compromise and agreement, as a governmentally-approved institution undoubtedly reflects the absence of any universally applicable formulae, or of commonly acceptable objective measurements, for appraising the fairness and equity of employment terms. The terms at which employees as a group are willing to work and at which management is also willing to offer employment are the fair and equitable terms of employment in a collective bargaining system.

Third: The right to strike[2] is essential to the collective bargaining system. It has a function to perform. A desire of workers and management alike to avoid the risks and the costs of work stoppages is a strong

[1] Each of these phases of collective bargaining has now been "regulated" to some extent by the Taft-Hartley Act and "free collective bargaining" has thus been modified. There remains, however, a vast number of problems in each phase which must be reconciled by agreement of the parties and which can only be so resolved.

[2] And also the right of employers to lock-out.

motive power for bringing about the modification of extreme positions which is necessary if mutual understandings are to evolve—and they must evolve. Without a strong inducement for both parties to "make concessions," agreement would be less likely. One may recall the enervation of collective bargaining during World War II when the "penalty" upon the parties for failing to work out a negotiated agreement was not a work stoppage but a War Labor Board proceeding.

A meeting of minds—mutual acceptability of the terms of employment—is deemed to be so vital that, under collective bargaining, each party is accorded the right to stop production. Why? As a means of exerting ultimate pressures for a modification of extreme positions to the extent necessary to make an agreement possible. In short, provision is made for a final arbitrament by test of economic power. The results of a work stoppage are not necessarily fair and equitable by some objective standard. Nor is it required that the acceptance of terms by each party be enthusiastic. But the terms must be mutually preferable to a continuance of the work stoppage and the costs of idleness.

What it takes to avoid a strike or to settle a strike are often rather fundamental criteria in the determination of conditions of employment by collective bargaining. These may be appraised as harsh and unintelligent criteria. As a matter of fact, if they are not tempered with reason and persuasion there is a strong risk that the costs of their use will be deemed by the public to be excessive. Collective bargaining could then be supplanted by governmental specification of employment terms. The test of all democratic institutions over the years has always been in the ability of people to exercise restraint in the use of their individual and group power. The real test of collective bargaining lies in the ability and willingness of union and management representatives, in the great majority of cases, to reconcile their differences through peaceful negotiations. Mutual acceptability of the terms of employment has to be arrived at principally by analysis of the facts, persuasion, modification of extreme positions by one or both parties, compromise and agreement. And the resultant meeting of minds has to embody a reasonable attention to public necessity.

The foregoing analysis of collective bargaining serves briefly to indicate the kind of a process to which labor arbitration is appended. In many ways, collective bargaining is a unique institution. It is entirely reasonable, it seems to me, to assume that, arising out of collective bargaining, labor arbitration gives rise to problems that are also unique as compared, for example, to commercial arbitration or to "litigation" in general.

Nature of Voluntary Arbitration

Voluntary arbitration enters "the labor relations scheme of things" when the parties cannot directly agree but when neither wants to resort to a strike or to a lockout to resolve the differences which must be resolved. The above comment applies not only to disputes over new contract terms but to so-called grievance disputes as well. In years gone by, the strike to resolve day-by-day differences arising during the term of a labor agreement was standard practice. The arbitration clause and the no-strike clause of the labor agreement were introduced as complementary clauses.

Voluntary arbitration is a collectively-bargained substitute for the strike. Use of arbitration need not indicate a "complete break with collective bargaining," as is frequently assumed. Acceptance of arbitration does not *necessarily* evidence a final conclusion of both parties that a difference between them cannot or should not be resolved by a meeting of minds. Acceptance of arbitration clearly indicates, however, that both parties are unwilling to endure the risks and the costs of the work stoppage which can be undertaken to bring about the meeting of minds. If mutual acceptability is the commonly approved measure of fairness and equity in collective bargaining, how can it be lightly dismissed as a criterion when the parties decide against work stoppage as the final arbitrament? What they say is that there will be no strike even if a direct agreement is not achievable. But that can scarcely be interpreted as a conclusion against the desirability of an agreed-upon solution peaceably arrived at.

Nor should it ever be overlooked that voluntary arbitration comes into being only if *both* parties are willing to accept this process as preferable to the use of economic power. If either party is "unsold" on arbitration to such an extent as to prefer a work stoppage, then arbitration loses its usefulness in a collective bargaining system.

It follows, I submit, that arbitration should be developed to meet the needs of the parties to collective bargaining rather than the needs or doctrinaire notions of arbitrators, college professors, lawyers, or other outsiders. Collective bargaining practices and procedures vary; so will arbitration practices and procedures. In some industries, an arbitrator who did not seek to get an agreed-upon "decision" would be considered by both parties to be incompetent. In other industries, both parties would react violently against any such practice as being incompatible with their concept of arbitration as a "judicial proceeding" in which the arbitrator must "decide" the case.

There is no great dilemma as long as the parties see eye-to-eye about the kind of settlement procedure they have created. When such an understanding does not obtain, however, difficulties are often encountered. Acceptance of the principle of arbitration by the parties has, moreover, rarely been preceded by negotiations about the details of the process which is being substituted for the strike. In consequence, the agreement to arbitrate may itself embody only an incomplete meeting of the minds.

Such a situation may not be serious at all if the parties recognize the responsibility of the arbitrator selected by them to decide any disputed jurisdictional or procedural questions. The arbitrator then deals, however, with fundamental questions about the very nature of the joint relationship between the parties. He gives substance to the arbitration agreement. This is of particular importance in grievance arbitration. One of the tasks of the so-called permanent Impartial Chairman is to work with the parties gradually to develop the form and procedures of grievance settlement that are mutually desired but seldom worked out beforehand. The lack of a complete understanding between the parties as respects the nature of the grievance arbitration machinery has never been overcome in some relationships where ad hoc arbitration is specified. It seems axiomatic to me that if the use of such ad hoc arbitration is to be successful, it should be preceded by a detailed arbitration understanding between the parties.

There is enough dissatisfaction with arbitration as a substitute for the strike as to call for a reappraisal of fundamentals. Is voluntary arbitration likely to prove desirable both to unions and to managements, over the long pull, unless it is developed, with their joint approval, as a process in which the meeting of minds and the mutual acceptability criteria have a place? These two mentioned criteria (meeting of minds and mutual acceptability) have different connotations in arbitration. Meeting of minds implies a mediated agreement. Mutual acceptability involves primarily the development of acquiescence by a "losing party." Let it be clearly understood that by reason of neither criterion should there be pressure for a mere compromise without regard to the merits of the case. It is true that such a pressure may be exerted by strike or lockout actions particularly if responsibilities in the use of such powers are overlooked. But the old adage about "the lion's share to the lion" is erroneously conceived both as respects direct collective bargaining and arbitration. What we are talking about is the range within which the terms of employment can be logically and reasonably determined. Mu-

tual acceptability involves no mere compromise irrespective of the intrinsic merit of positions taken.

There needs to be a careful re-evaluation, too, of the premise of some arbitrators that they somehow "represent the public interest" even though they have status solely because of authority conferred by the union and by the management whose duty under collective bargaining is to compromise and agree. It is reasoned in some quarters, however, (a) that arbitrated terms should be decided by reference to entirely different criteria than are used by the parties themselves, and (b) that arbitrated terms should be "imposed" by reference to what is in the general public interest and without any regard to the meeting of minds or to the mutual acceptability criteria. In other words, it is assumed that resort to arbitration is implicitly a final determination by both parties that no meeting of the minds is possible and that only by an imposed solution can the dispute be settled. One observer who holds this point of view has said, "In arbitration, one party must lose."

Certain advantages are claimed for such an approach. If arbitration, like the strike for which it is a substitute, is established as a costly and as a risky proposition, then avoidance of arbitration may, like the right to strike, induce negotiated settlements. By and large, this is a rather "sophisticated" view that does not hold up too well when a "sour" decision is being explained to union membership or to top management. The view has pertinence, moreover, only to grievance arbitration actually set up in the contract. It does not apply to disputes over new contract terms for which arbitration has not been provided in advance of the impasse. There the threat of strike has not induced an agreement and ad hoc arbitration has therefore been called into being.

It is also claimed that resort to arbitration implicitly constitutes a deliberate choice of the rule of reason as expressed by an arbitrator as preferable to the rule of force as exercised through a work stoppage. Considerable weight attaches to that point of view. But no little difficulty is encountered in giving substance to the general phrase, "rule of reason." Various objective and respectable criteria of fairness often give widely conflicting results. To a marked extent the parties themselves use such objective criteria to rationalize positions rather than to formulate policy. The impossibility of devising commonly-accepted objective measures of fairness and equity accounts in large measure for the very adoption of collective bargaining. It may also be noted that, especially in grievance arbitration, an imposed determination often does not finally settle a dispute despite very erudite reasoning. A more criti-

cal dispute for the next general contract negotiation may merely be generated.

For the reasons just enunciated, and for others, there is a need to examine carefully the pros and cons of consciously developing the meeting of minds and the mutual acceptability criteria as an integral part of the arbitration process. Can arbitration be viewed not as an alternate system for fixing employment terms entirely foreign to the collective bargaining approach, but as an alternative method for effectuating, at least partially, the same criterion of mutual acceptability which has been selected as fundamental to the collective bargaining system?

It is not implied that the imposed decision, "letting the chips fall where they may," is improper as long as the parties knowingly "buy" such a substitute for the strike. The danger is that the absence of commonly-accepted, objective standards of fairness will make the decision imposed by someone essentially unfamiliar with the operating necessities of management and of the union seem arbitrary and so unacceptable to one side or the other as to make the strike preferable to voluntary arbitration in future difficulties. In short, it seems likely that voluntary arbitration will fall short of the needs of sound industrial relations and of peaceful solution of labor disputes if it is developed strictly as a process through which an outsider is requested to impose his judgment upon the parties.

There is some evidence to suggest that union and management representatives have already sensed the desirability of developing arbitration as an extension of collective bargaining. At any event, especially in new contract cases, they frequently agree upon the tripartite arbitration board with a majority vote required for a decision. Three-party bargaining is thus substituted for two-party bargaining and the "outsider" has been brought in to act as a kind of mediator with a reserve power. The growth of the permanent Impartial Chairman, as differentiated from the Impartial Umpire, to resolve grievance disputes is another indication of the tendency to carry the mutual acceptability criterion over to arbitration. These types of arbitration, of course, bring their own problems. In my opinion, however, they indicate a desire of union and management representatives actively to participate in the arbitration process if that process is to be chosen over trial by economic combat.

Attention has so far been focused upon certain general considerations. I would now like to make a number of more specific comments about three principal types of arbitration—of grievances, of labor agreement terms, and in public emergency disputes.

Grievance Arbitration

In evaluating the role of voluntary arbitration in labor disputes, it has become customary to assume that there are two separate and distinct types of arbitration: (1) the arbitration of new contract terms and (2) grievance arbitration involving the application of contract terms to day-by-day problems. It is my considered judgment that such a differentiation has become so doctrinaire as to preclude a proper understanding of the arbitration process. I do not at all imply that there are no differences between the two types of arbitration. But I do suggest that there are similarities and that the differences are not as ordinarily described.

An important key to understanding grievance arbitration is in realizing that while collective bargaining starts with the negotiation of an agreement, it *necessarily* continues in the settlement of many grievances. They are the difficult grievances. Negotiation or arbitration of grievances should not "add to" the labor agreement in the sense that new basic terms are incorporated; nor should a clear agreement of the parties be modified. During the life of an agreement, however, grievance settlements will inevitably add important substance and significant meaning to the terms that are in the agreement. Grievance settling, by its very nature, fills out the understandings expressed in the contract which are inherently incomplete. Clear and unmistakable answers to many day-by-day problems covered by a particular clause are commonly not found in that clause. If they could be disposed of by direct application of the clause, there would be no real reason to submit them to arbitration.

Many industrial relations specialists—particularly in management ranks—insist that agreement-making, and hence collective bargaining, is limited to the negotiations for a formal agreement and that, thereafter, agreement terms are simply applied to dispose of day-by-day disputes in an administrative fashion. In no small measure, that position reflects a management claim of possession of all directional and administrative rights except those explicitly ceded by the clear and unmistakable terms of a labor agreement. Management representatives often argue that unless an employee grievance can be clearly and unmistakably supported by directly applicable words in the contract, management has retained an uninhibited right to do as it pleases as respects that grievance. The trouble with such a view, advanced by management but not accepted by the unions, is that no policy is provided for actually disposing of very real day-by-day problems in a satisfactory

manner. The consequences could include impaired employee morale, wildcat strikes, and the accumulation of a vast number of "demands" for presentation at the next contract negotiation. Imposed "settlements" of grievances are often no settlement as all. The hard facts of the matter are that many contract clauses (1) cannot be written in full anticipation of all the problems that will arise under it, (2) can best be developed gradually in terms of a series of real situations, and (3) need to provide flexibility to the parties in dealing with day-by-day problems.

Grievance settlement between the parties themselves involves collective bargaining, i. e., of developing a meeting of minds concerning the terms and conditions of employment. This is because, even as respects the subjects covered, the labor agreement, in many respects, does not and cannot constitute a complete meeting of the minds. The labor agreement is skeletal. Substance is given to the subjects covered by the manner in which so-called grievances are settled.

I do not mean to suggest that day-by-day questions are never determinable by direct application of agreement terms. Many of them are. But they are the easy cases that seldom go to the final stages of the grievance procedure including arbitration. The difficult and important grievances are those arising under a contract term but for which no real basis for settlement is embodied in the contract term. In settling such grievances, it must be admitted that collective bargaining is widely undertaken in the direct negotiations between the parties. Compromise and so-called give-and-take settlements of grievance cases gradually add up to an amplification of and a substance-giving to the agreement term. Sometimes the cumulative effect of such grievance bargaining between the parties is to amend, to modify, or entirely to change an agreement term. So-called established practice often prevails as against an agreement term when the two are in conflict. There should be no misconception about the crucial collective bargaining that goes on between the parties in the settlement of grievances.

What about the arbitration of grievances? Does submission of an unsettled grievance to arbitration mean that the meeting-of-minds criterion of a sound settlement has been abandoned in favor of an imposed settlement? The question needs to be considered in relation to the fact that, as respects the crucial grievances, the answer is not to be found in the explicit terms of the labor agreement.

There is another aspect of grievance arbitration which should be clearly recognized. In most contracts, the provision for such arbitration

covers future and unknown disputes. The agreement to arbitrate does not usually follow an impasse over a particular issue. In consequence, grievances may be submitted to arbitration because of their tactical or face-saving implications. The flow of grievances to arbitration is dependent, moreover, upon the ability and the willingness of top union and top management representatives to take issue with their constituents in turning back or screening grievances on the way up. It is all very well to decry such practices on various obvious grounds. But, it will be long before they are abandoned. For the present and discernible future there will be such grievances and some of them will be submitted to arbitration. It may even be that the substitution of arbitration for the strike encourages the pressing of these kinds of grievances. If arbitration is to be on an informed basis, it must be able to cope with them.

Grievance arbitration on the imposed decision basis—and particularly on the ad hoc basis—can produce some capricious results because the arbitrator is not likely to be aware of all the factors in the case or of the manner in which a particular clause has been developing through direct grievance settlements between the parties. Especially is this the case when the record is made by representatives who argue to win the case rather than to solve the problem. Too often, an artificial case is presented rather than the real case which is bothering the parties. At any event, all of you must have noticed frequently the difference between the parties' statement of the case as formally presented and as privately discussed with "all the cards on the table." Sometimes, the arbitration proceeding is something like a medieval joust.

I hasten to say that such a formalistic method for settling grievances can conceivably be reconciled with collective bargaining necessities. But that requires a clear understanding by both parties that their persistent differences will be settled by a method which will give results unacceptable to one or both of them and sometimes unworkable. The threat of such results should serve, like the strike, to induce agreements and thus avoid arbitration. A series of unworkable and "unacceptable" settlements, however, puts a severe strain upon the willingness of the parties to use arbitration. They tend first to berate the arbitrator and then to weigh whether or not they would have been better off by resorting to work stoppages.

I like to think of the above-mentioned type of grievance arbitration as the umpire type. In contrast is the impartial chairman type. This

implies the use of a chairman who will be expected to work closely with associates representing each of the parties. All participate in working out a solution to a grievance. This is of particular value as respects the settlement of those grievances which give substance to labor agreement terms. It is the duty of the Impartial Chairman, as far as possible, to achieve an agreed-upon solution or, if that is not possible, to gain the acquiescence of the representatives of both parties in a decision he must make. Emphasis is thus placed upon the collective bargaining aspects of grievance settlement.

There are simple but potent reasons for such an emphasis. The parties know their situation and its needs better than can any "outsider." A determination which both parties conclude is workable and acceptable will be truly a final settlement. Never forget that a grievance disposed of on some other basis can give rise to a critical issue in subsequent contract negotiations. And, many grievance settlements are every bit as important as the essential negotiation of the very term of the contract which is being "interpreted."

It has been suggested that the Impartial Chairman approach has an important place in labor relations but that it is not arbitration. There is a semantics difficulty which should not be gone into here. What is important is that the use of the meeting of minds and mutual acceptability criteria in grievance arbitration is a notable characteristic of the Impartial Chairman method which has been long used in well-established collective bargaining relationships. In my opinion, it is the method for final settlement of grievances which is best adapted to the institution of collective bargaining and which gives the greatest promise as an "arbitration" substitute for work stoppages. At the same time, I reiterate the conviction that, in the last analysis, the decision on this point rests with unions and managements who bring voluntary arbitration into being and who will fashion it to meet their necessities.

Arbitration of Contract Terms

Arbitration, of one type or another, has been appraised by labor unions and by management generally as preferable to strikes as a way of finally settling grievance disputes. In marked contrast, these parties have been unwilling, by and large, to use arbitration to resolve disputes over new contract terms. Both parties usually prefer a work stoppage in such cases. Why? Can it be that they recognize the irreplaceable nature of mutual acceptability as respects the basic terms of

the employment relationship? Or to put the question in more usual terms, how can either party afford to give an outsider, without stake in a particular relationship, the power to decide "life and death" matters for a union and for a company?

With the exception of one or two industries, the question of whether to arbitrate a dispute over new contract terms arises only as respects a known dispute. This is in marked contrast to the grievance arbitration situation as previously outlined. For some time, it seemed to me that the decided preference for work stoppages over arbitration of new contract terms arose from an evaluation of relative risks and was accentuated by a lack of development of the agreement to arbitrate. Perhaps the risks of arbitration could be limited by a turning to "restricted" arbitration and away from "open-end" arbitration. In "open-end" arbitration, determination of the dispute is on the basis of an arbitrator's own freely exercised judgment and selection of the criteria as to what constitutes fairness and equity. These obviously vary. The choice of an arbitrator whose views were well known could be tantamount to deciding the case. In what I term "restricted arbitration," in their agreement to arbitrate, the parties instruct the arbitrator as respects procedures and even as to criteria to be used in deciding the case.

Altogether too little analysis has been made of the situations calling for "open-end" arbitration and those calling for "restricted arbitration." It would seem that a selection between these two types would depend, partially at least, upon the kind of arbitration desired by the party least desirous of avoiding a stoppage of production. As a general proposition, however, it is likely that one-man arbitration of new contract terms will not prove to be generally feasible or widely acceptable unless it is established by a detailed agreement to arbitrate, which limits the authority of the arbitrator and provides guides for him. In short, the parties will seek to retain at least a measure of control over the arbitration process and not abdicate completely in the settlement of vital questions.

In recent years it has become quite apparent that union and management representatives face formidable obstacles in agreeing directly upon the details of a restricted arbitration. Yet they are desirous of avoiding a work stoppage without losing all control over the arbitration process. Out of these circumstances, an emphasis has been given to "open-end" arbitration by a tripartite board which can decide the issues in dispute only by a majority-approved determination. The creation of such a board connotes a conclusion of the parties that the arbi-

tration should be a modified form of collective bargaining. In negotiations, the parties of direct interest have been unable to agree. But, they are ready to have an arbitrator impose his ideas upon them only after they have been tested in executive session discussions with partisan representatives and only if the arbitrator can then get at least one of the parties to "go along" with his ideas. And, of course, the most successful result would come about by the issuance of a unanimous award.

The impartial man on such a board—the arbitrator—has an implicit duty to attempt to work out a settlement which can be supported by both his colleagues. Those colleagues should understand the process, too, in order to participate effectively. The arbitrator does not perform his function by simply deciding which of two extreme positions presented will receive his support. Since the only possible settlement in direct collective bargaining is a meeting of minds, a similar result coming from a three-party arbitration board can scarcely be condemned as inadequate. In the modified collective bargaining which is set up with the establishment of a tripartite arbitration board, there is, moreover, a strong motive power for agreement between the representatives of the parties that has previously not been present in the earlier negotiations. Since the arbitrator may ultimately have to choose as between the two positions, there is reason for compromise and settlement to avoid the risks of a decision by the arbitrator. One might logically say that the arbitrator on a tripartite board has been assigned the role of mediator with a reserve power to decide the issues in dispute by joining with one of the partisan representatives.

In serving on a tripartite board, the arbitrator has been given no authority to impose his unrestricted judgment upon the parties. His judgment has status only if it is acquiesced in by at least one of the partisan members. It follows that the arbitrator must be able and willing to modify his views if necessary to arrive at a decision. This presupposes that there is no one and only answer to a labor dispute. At the same time, the arbitrator can be placed in a wholly untenable position if both partisan members, despite the risk of a total rejection of the position held, hold rigidly to their extreme positions and make no "concession" to the arbitrator's views. Under these conditions, the arbitrator can only decide which of two conflicting extreme positions he will go along with. If, in good conscience, he can vote for neither, the arbitrator will then have no alternative but to withdraw from the proceeding. Such a step is seldom taken. The very possibility is usually

a sufficient pressure to induce one party to accept a final decision proposed by the arbitrator.

Much criticism of the tripartite arbitration board has been based upon its "non-judicial" results although it is clearly set up to insure a collective bargaining result. In this respect, such arbitration has certain of the advantages and the disadvantages of collective bargaining. Frequently lacking, however, is the advantage of mutual acceptability to both parties. Perhaps the most significant feature of tripartite arbitration is that the terms of employment must be acceptable to at least one party. Avoidance of a feeling of "imposition" upon either party is the most crucial duty of the arbitrator on a tripartite board. The constructive decision is one that has acquiescence of both parties, even though one may dissent for the record.

My predilection for the tripartite arbitration board in new contract cases is held with full awareness of the difficult responsibilities of all members of such a board. Partisan representatives may have to vote for something less than is expected by the constituents. Their reluctance to do so has often resulted in decisions that are less than helpful. Direct participation of the representatives of the parties in the proceedings, however, can provide the arbitrator with an understanding of the issues and of practical solutions that are not otherwise obtainable. The partisan representatives, moreover, know that each bit of evidence has been evaluated and they are aware of the cumulative reasoning and the procedures used by the arbitrator in bringing about a conclusion. The shock of a surprise decision is obviated as well as the upsetting response which such a decision can evoke. Tripartite arbitration has many strengths as a substitute for the strike.

The compromise results of tripartite arbitration—and its accommodation to the needs of both parties when most constructively undertaken —leads some critics of the process to insist that such a practice is not arbitration at all. What is more important, however, is whether the cause of peaceful industrial relations can best be furthered by use of one impartial arbitrator, or of a board of impartial arbitrators, to decide new contract disputes without the restraints that go with participation of partisan representatives. In other words, would the parties be better off by making a clean break with the meeting-of-minds and mutual acceptability criteria of collective bargaining when they submit their differences to arbitration? The hard fact of the matter, as shown by the reluctance of unions and managements to accept imposed decisions as a worth-while alternative to a strike over new contract terms, is that

voluntary arbitration of new contract terms seems to have a significant future, only by use of the tripartite board and all that this connotes.

In summary of the discussion of these two types of arbitration, it cannot be too strongly emphasized that labor arbitration is an aspect of agreement-making. Although this is readily apparent as respects disputes over the terms of new agreements, it is also applicable, for reasons noted earlier, to grievance settlement. The unique characteristic of labor negotiations is that an agreement must be made; a meeting of minds must be achieved even though the pressures of a work stoppage may be exerted to bring this about. It is, of course, conceivable that both parties will agree that a decision imposed by an arbitrator is preferable to a strike. They sometimes do. But, the collective bargaining tradition of acceptability is strongly entrenched in this country. That is basic to the entire industrial relations structure. A recognition of this fundamental principle in the development of labor arbitration is entirely logical.

Public Emergency Disputes

Earlier reference was made to the function of the work stoppage in a collective bargaining system. A labor dispute creates a public emergency when the strike cannot be permitted to perform its function because it will bring the public to its knees before it brings the parties to terms. In consequence, a work stoppage which creates a public emergency often introduces greater pressures for governmental intervention than for an agreement between the parties.

The possibility or probability of governmental intervention in a public emergency dispute can, under certain circumstances, serve to induce agreed-upon settlements (including resort to voluntary arbitration) but have also been known to prevent negotiated settlements. Much depends upon the kind of government intervention which is likely and whether a real or assumed improvement in position is anticipated by one or both parties as a result of the intervention. One will readily recall how contemplated government seizure of the coal mines in 1950 resulted in an immediate modification of the operator's position, and an at-long-last agreement, following removal of the threat of injunction consequences which had previously not caused the mine workers to recede materially from their demands.

If labor and management would securely preserve their collective bargaining rights, and if both are genuinely desirous of avoiding direct governmental regulation or indirect governmental influence over their

affairs, they will give more serious attention than heretofore to the use of voluntary arbitration to resolve persistent differences which could lead to public emergency work stoppages. However, a desire to obtain immediate objectives by whatever means is always strong despite the consequent enervation of collective bargaining. A clearly stated government policy for action to be taken in public emergency disputes can easily solidify the negotiation impasse if either side envisioned a substantial strengthening of position through invoking the known governmental policy. The case-by-case approach of the government without a precisely stated policy for intervention has, therefore, been recommended by some close observers who are desirous of maintaining the collective bargaining structure to the fullest possible extent. Under such a policy, it is reasoned, there would be a greater likelihood of negotiated agreements or of volutary arbitration in the disputes with public emergency aspects.

I have no doubt about the undesirability of compulsory arbitration in public emergency disputes. Four characteristics of this process make it particularly suspect. A compulsory arbitration program (1) does not prevent public emergency work stoppages; it only makes them illegal and inevitably interjects the government into a partisan position as respects the industrial relations controversy. (2) Required arbitration must relate to future unknown disputes and thus tends to increase the number of issues making up the usual labor dispute, (3) requires the designation of employment terms through imposition upon both parties and thus inevitably carries the necessity for sanctions, (4) requires the specification of employment terms by "outsiders" who have no objective criteria for their guidance.

How can a meeting of minds be achieved when direct negotiations fail but when the strike cannot be used as the ultimate means of inducing or forcing the disputants to recede from their extreme positions. As respects the public emergency disputes, there appears to be a fundamental defect in our collective bargaining theory. Government intervention is inevitable either to specify the terms of employment directly or strongly to influence them by recommendations or required procedures. It is in this area that voluntary arbitration commends itself to the parties who would keep the determination of employment terms within their own hands to the fullest possible extent. For reasons expressed earlier, the tripartite board of voluntary arbitration has a particular role to play in the public emergency dispute over new contract terms.

Throughout this analysis there runs the theme of the need for developing voluntary arbitration as an adjunct to and not as a substitute for the collective bargaining process. It is indeed timely that careful analysis be given to this matter now when the goal of peaceful industrial relations through collective bargaining is so urgently sought. My hope is that the thoughts expressed in this paper may be the basis for a discussion of this problem. They are not advanced as a doctrinaire answer to those problems.