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Informing the Arbitrator

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INFORMING THE ARBITRATOR

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In any arbitration proceeding the representative of each party has a two-fold obligation of major importance to the arbitrator, the effective fulfillment of which is essential to the success of the arbitration process. In the first place, the arbitrator must be advised in clear and concise terms as to exactly what constitutes the issue or issues to be determined, which, of necessity, to be effective, must be preliminary to the presentation of the case proper.

In the second place, it is, of course, equally important to have a clear presentation of each party's case after the issue has been formulated. As to both matters, parties should bear in mind that the arbitrator has only so much information or understanding of the problem involved as the parties present to him or provide him with a basis for developing.

A statement of these basic needs is not meant to imply that there is one set and only proper method by which these obligations may be discharged. There are many methods used in the discharge of both obligations, and with greatly varying effectiveness.

Statement of the Issue

As to the first obligation, perhaps all arbitrators would like to have in advance of the hearing a clear and concise agreed statement of the issue to be determined. Most experienced arbitrators have learned, however, that this is not always possible. There are reasonable substitutes that are, perhaps, sufficiently effective to enable the arbitrator to have a fair advance understanding of what is involved and to provide a likely basis for an early agreement upon the issue under the guidance of the arbitrator after the hearing begins. Assuming grievance arbitration to be involved, and assuming the existence of a fairly carefully spelled out grievance procedure, as most modern collective bargaining agreements provide, if the parties have carefully followed their grievance procedure, have presented at the proper stage a carefully worded grievance statement properly alleging facts and making specific reference to contract provisions alleged to have been violated, which has been effectively responded to and carried to the final stage of arbitration, with intelligent responses at each successive step in the processing, the issue is likely to be sufficiently formulated, or the basis provided for an easy formulation, and no pre-hearing agreed stipulation of

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the issue or submission agreement need be insisted upon. However, the "ifs" and the "provisos," express or implied, in the above statement are sufficient to insure that not always will they be effectively satisfied.

In this first phase of our problem involving an adequate preliminary presentation of the issue, perhaps reference to some rather extreme cases may provide illustrations to indicate the necessary requisites.

A particular management and its union counterpart well known to the present writer, in accordance with their collective bargaining agreement and by their practice thereunder, provide an excellent illustration of the use of meticulous care in assuring that both the parties and the arbitrator will be fully informed of the exact issue before the hearing stage is reached.

The parties are required to prepare a joint statement in writing of the specific issue or issues to be decided, with accurate references to contract provisions alleged to be involved. If the parties cannot agree upon such a joint statement, each will submit a written statement of the issue or issues believed to be involved, together with agreed or alleged facts, subject to written objections by the other party, and from such statements and objections on both sides, together with a copy of the collective bargaining agreement, the arbitration board is requested to determine the specific issue or issues before it and to so notify each party thereof in writing before the start of the hearing.

In practice, each party provides the tripartite arbitration board, in advance of the hearing, with a full statement of its version of the facts and of the issue, its position as to violation of specific provisions of the agreement or the absence thereof, with somewhat detailed reasons and explanations. In effect, something approaching a full pre-hearing brief is presented on both sides. With this done effectively, as is always true in the case of these parties, the arbitration board has a rather complete understanding of the issue and the theory of each party's case in advance of the hearing, has surprisingly little trouble in formulating the issue when that becomes necessary, and can follow the presentation intelligently and ask questions effectively to clarify the problems involved from the start. Such elaborate advance presentations will be regarded by many as most highly desirable, but they are also highly unusual.

It may also be observed that not all arbitrators favor a full pre-hearing brief, and particularly the inclusion of argument. However, if both sides present such materials, or if the statements avoid argument and restrict themselves to a bona fide attempt to define the issue in terms of the contract provisions and in relation to the details

of the industry involved, they can be extremely helpful. Particularly is this true when the problem is intricate and involved, the details of the industry technical and largely foreign to the arbitrator, and, as so often happens, no stenographic report of the proceeding is provided.

A good illustration of an effort to provide effective assistance to the arbitrator came within the writer's experience recently in a case, not covered by the contract referred to above, involving the technical details of a wage incentive plan in a sizable steel mill, where the representative of the company provided such a preliminary statement, prefaced by an explanatory introduction worthy of reproduction here.

> The purpose of this Preliminary Statement is to orient the Arbitrator to the dispute existing between the parties and, thereby, equip him to conduct the hearing in a fashion that will be most useful to him. It is our intention merely to state the facts which define the area of dispute and the issue presented for decision. We propose to avoid the inclusion of evidentiary material and argument in so far as this is possible. However, the Union has been supplied with a copy of this Statement and thereby has been given an opportunity to register disagreement with what we have stated. Therefore, this Statement together with the Union's Counter-Statement, if any, should constitute a reliable point of departure, so to speak, for the Arbitrator at the hearing.

As something of an opposite approach to this matter by the parties is the case, duplicated all too frequently, in which the arbitrator's request for a copy of the collective bargaining agreement and a statement of the issue, preferably in the form of an agreed stipulation, draws the joint response that "we prefer to present the case at the time of the hearing, along with a copy of the collective bargaining agreement." In one such case the number of the grievance had been vouchsafed to the arbitrator in advance, and when it was discovered at the beginning of the hearing that the parties had settled that grievance and were presenting an entirely different one, this seemed like a major irregularity until it was realized that the arbitrator had no idea what the original grievance was about, so the substitution could not put him under any additional handicap. But this appears to be carrying the matter of secrecy a bit too far. And when we add to this the further facts that the parties are not able to clarify the issue very effectively at the hearing, the case is not presented with clarity on either side, and no stenographic record is made available, something less than a completely satisfactory performance is reasonably well assured.

It must be recognized, however, that not infrequently, and seemingly increasingly so, the parties have great difficulty in agreeing on a statement of the issue to be arbitrated, and may need some help in

their final formulation. Two illustrations may serve to indicate how this failure may handicap not only the arbitrator but the parties as well. Some years ago in a case assigned by the Federal Mediation and Conciliation Service, the initial notice indicated in a vague sort of way the general nature of the problem involved. A date was set for the hearing with assurance from both parties that an agreed stipulation of the issue would be presented in advance of the hearing. In the several weeks intervening a lengthy interchange of correspondence ensued, each item of which brought modified proposals from one party with objections to the latest suggestion from the other, until the date of hearing arrived, as did also the arbitrator, with the issue as fully undetermined as at the beginning of the correspondence. After some two or three hours spent in a futile effort to get agreement on the issue, it was suggested that the case, if any, be heard and an effort be made to clarify the issue as the hearing proceeded. Following three or four more hours in which clarification appeared not to play a major part, the presentation of evidence was halted for a renewed effort at statement of the issue. On the third attempt by the arbitrator the parties agreed and it was reduced to writing, at which point the spokesman for each party announced that he had nothing further to present. The arbitrator turned to the company secretary who, by agreement of the parties, had supposedly made a shorthand record of the proceedings, and inquired as to when the transcript would be available. To his utter consternation, her reply was, "I don't take dictation very well but I think maybe I got the gist of it." The whole of the arbitration proceeding had thus been completed, with nobody knowing what the issue was until the end, with the arbitrator, in reliance on the transcript, making almost no notes, and with a record that proved to be almost completely unintelligible. Obviously no arbitration proceeding thus handicapped can be a success from any one's point of view. Arbitration must be carried on intelligently, else it can be of no benefit to the parties and of no credit to the arbitrator. Unless the parties effectively meet their obligation properly to inform the arbitrator so he can function intelligently, the process can serve no useful purpose.

One final illustration may be permissible. This case is like the last only in the failure of the parties to agree on the way the issue should be stated, and an agreement to proceed with the hearing without its formulation until later in the proceeding. This time the presentation of evidence and argument proceeded to within minutes of the hour when the company attorney was scheduled to catch a plane for a distant engagement. He suddenly suggested, and the attorney for the union agreed, that the matter of formulation of the issue be dumped in the lap of the arbitrator. In that case the

parties did not know the final formulation of the issue until they received the arbitration award, the task of the arbitrator was rendered vastly more difficult, and the chances of party dissatisfaction with the results were substantially increased.

It is submitted that these failures of the parties to provide in intelligible form a sufficient statement of the issue to eliminate from the mind of the arbitrator all uncertainty as to exactly what he is being called upon to decide, constitutes an unforgivable laxity upon the part of the representatives of the parties, subjects the arbitrator to an unfair burden, and gravely endangers the success of the whole arbitration process.

It is true that these are unusual cases, but the explanation of these and great numbers of other illustrations of failures or partial failures of the parties adequately to define the issues, that come within the observation of most experienced arbitrators, are probably attributable to many and varied causes. Perhaps this fast moving age in which we live, when nearly everyone seems to be undertaking more than he can find time properly to accomplish, makes such situations well nigh inevitable. Some are attributable, in part at least, to a combination of incompetence and insufficient effort. From the standpoint of the need for protecting and preserving the arbitration process as a satisfactory method of settling labor-management disputes, it needs to be emphasized that in many, and probably most, cases in which the parties find it impossible to agree on what the issue is, or how it should be stated, they have not sufficiently completed the process of bargaining, have not properly processed their case through the steps of the grievance procedure, and their case is probably not yet fully ripe for the final step of arbitration. In any event, if the parties fail adequately to inform the arbitrator of the issue, for whatever reason, they have fallen down on their first essential obligation, without which the arbitration process must proceed under a near fatal handicap. The arbitrator can know only so much about the issue and the case as the parties tell him. If the parties do not know what the issue is, a fortiori, the arbitrator can never know.

We are all aware of considerable current controversy about a proposed Uniform Arbitration Act applicable to labor-management arbitration. Much of the controversy centers around the authorization for a court to vacate an arbitration award on any of several grounds, one of which is that the arbitrator exceeded his powers. The collective bargaining agreement commonly restricts the arbitrator to dealing with matters of interpretation and application of the terms of that agreement. And whether we do or do not have an applicable statute, it is uniformly recognized that the arbitrator has no authority to go beyond the scope of the issue submitted to

him by the parties, as limited or controlled by provisions in the collective bargaining agreement such as just referred to. Any time the parties fail to define the issue to be decided with clarity, or provide the basis upon which it can, with the assistance of the arbitrator, be sufficiently clarified, they are inviting, if not assuring, potential controversy over the propriety of the arbitration award, and endangering the arbitration process as a satisfactory means of settling industrial disputes. No arbitrator's decision is likely ever to be superior to the clarity with which he understands the issue. No arbitrator can ever understand the issue unless the parties understand it first and effectively impart to him the basis upon which that understanding rests.

All of this is not to say that the arbitrator himself has no responsibility in relation to the preliminary job of seeing that the issue is properly defined. Not only does the submission agreement, or any substitute therefor referred to above, make known the issue to be decided, but it also very largely determines the confines of the arbitrator's authority. Not infrequently the statement of the issue may appear to restrict the arbitrator's decision to a very narrow and specific matter, such as the rate of pay for a named employee for a single definite occasion, whereas the basic controversy may really be much broader and more fundamental, and which an award framed in terms of the narrow statement of the issue would do little or nothing to resolve. In such a case it is a proper responsibility of the arbitrator to assist the parties in so wording their statement of the issue as to permit a decision that can effectively dispose of the broader controversy. This, however, is only possible where the parties make the real issue sufficiently clear initially for the arbitrator to see the inadequacy of the original statement to provide the basis for a satisfying award.

While that which precedes the decision of the parties to take a dispute to arbitration may, on the surface, appear to be of no concern to the arbitrator, and to deserve no consideration in the present discussion, such is really not the case. It appears to the present writer entirely proper to assert that the duty to state very carefully the original grievance and equally carefully make reply thereto, are the first steps in the discharge by the parties of their obligation to provide the arbitrator, if the case later goes to arbitration, with a basis for a full understanding of the issues. In any case, if these preliminary steps are carefully performed, no difficulty is likely to arise in the matter of formulating the issue when the arbitration stage arrives, and it may well be found that no formally worded submission agreement is necessary. When it is further considered that it may well be only in such careful processing through the various steps

of the grievance procedure that each party comes to understand fully the other's position and thus the full significance of the issue involved, which, incidentally, furnishes the only adequate basis for an intelligent settlement of the controversy without the intervention of an arbitrator, it becomes even more important to stress the significance of careful performance of these preliminary obligations. Whether it only results in making it easy for everybody, including the arbitrator, to have a full understanding of the issue, or, as often happens, results in resolving the issue without the necessity of resort to arbitration, it is time and effort well spent. Any time the parties lightly agree to by-pass the preliminary steps of the grievance procedure and dump their controversy into the lap of an arbitrator without careful exploration, as appears to be happening increasingly of late, they are not only storing up difficulties for themselves and for the arbitrator at the arbitration stage, but they are shirking a primary obligation of overall collective bargaining and neglecting to make use of an opportunity to improve their relationships by working out a settlement of their disputes. That this is no academic matter dreamed up by the speculations of an arbitrator is emphasized by the frequency with which it becomes clear in the arbitration process that the parties did not fully understand the issue and each other's position, and by their willingness then to agree on a settlement and a withdrawal of the controverted matter from arbitration. While it is not an improper function of an arbitrator to encourage the parties to compose their differences and reach an agreement when, obviously for the first time at the arbitration stage, they find they are not so far in controversy as they thought they were, that is still not the function the arbitrator was employed to perform, and it demonstrates that the parties probably could have reached the settlement unaided, at least in most cases, and could have improved their relationship in the process, by the expenditure of a little time, effort and patience.

In the sense that no arbitration hearing can proceed intelligently or effectively until both parties and the arbitrator have a clear and full understanding of the issue to be determined, the importance of this preliminary step cannot well be overemphasized.

Presentation of the Case

Once the issue has been clearly stated, the real arbitration is only then ready to begin. But before the major presentation by each party of its full case, a somewhat brief preliminary statement can serve a highly useful purpose, and in many cases is a real necessity. These statements should clarify and limit the issue and make clear the scope of the arbitrator's authority, apprise the arbitrator of the agreed facts, thus eliminating the presentation of evi-

dence as to matters not in dispute, make clear each party's theory of his case, explain the nature of the industrial or production process involved, unless the arbitrator is known to be familiar with it, and this should never be lightly assumed, point up in some detail the respective positions of the parties with regard to alleged violations of specific contract provisions, and, desirably, provide a clear indication of what each party expects to be able to establish, though without presentation at this point of any evidence or argument.

Not infrequently the original statement of the issue may fail to make it clear exactly what type of award or relief is being sought. Whether a specific award of back pay to one or more employees, for example, is being sought, or merely a determination of whether some provisions of the contract has been violated and a declaration of the rights of the parties as a means of guiding and controlling their future relationship, may have been left somewhat less than fully clear. Certainly the preliminary statement should clarify such uncertainties. Also, the original statement of the issue may leave some lack of clarity as to what specific provision of the collective bargaining agreement is alleged to have been violated, and whether the arbitrator is being confined to a single provision or given something of a roving commission to look for possible violations. The latter, of course, should never be lightly assumed by the arbitrator, and if there is doubt in his mind he should ask for clarification. But the primary obligation rests upon the parties to make that clear, and they will not have discharged their duties properly if such matters are left in doubt.

If the matters to which the preliminary statements properly should be addressed are clarified effectively by both parties, the task of the arbitrator can be greatly simplified, and his chance of following each step of the subsequent presentation with full understanding will be greatly increased. This is particularly important where a technical problem in the functioning of an unfamiliar industrial enterprise may be involved. It is commonly necessary for the arbitrator to ask a good many questions to make sure he gets all of the information he needs for an effective disposition of an issue, but he will be able to do this intelligently only if these preliminary tasks have been performed effectively by the parties.

It hardly seems necessary to state that in any arbitration proceeding, the arbitrator needs to know specifically and in detail the position of both parties with the reasons therefor. He needs to know specifically and in detail what the facts are, and insofar as the facts are in dispute the presentations by the parties must be sufficiently clear to permit the arbitrator to find the facts with some degree of assurance.

In any case in which a stenographic record is not being made the parties need to assume an added obligation to make their presentations of evidence and argument clear, since the arbitrator must make his own notes, keep fully abreast of the presentation as it proceeds, and be prepared to ask the necessary questions properly to clarify all doubtful points.

The effectiveness of the presentation of the case by the parties is likely to be in direct proportion to the extent of their preparation. There was a time when the apparent lack of preparation was almost chronic, especially in the less vital cases. And while that is not so common as formerly, the failure to organize materials for a cogent and concise presentation comes frequently within the experience of most arbitrators. Most of us are familiar with what may be called the shot gun or brief case method of presentation by which the party fires in all directions hoping that some shots will hit the mark, or he may have vast amounts of materials accumulated in a sort of unassembled cross word puzzle fashion which he literally transfers from his brief case to the table in front of the arbitrator without any attempt at careful organization. In either event, if sufficient pertinent materials can be found by the arbitrator to base an intelligent decision on, his task is made much more burdensome and the chance of an unsatisfactory decision is greatly increased. If the party making the presentation does not understand the case he is trying to present, as is sometimes obviously true, it is a foregone conclusion that the arbitrator won't understand it, and if his material is poorly organized and he makes a haphazard and almost unintelligible presentation, as continues to happen from time to time, the results can well be equally bad. There are likely to be, among the many thousands of arbitration cases decided annually, a good many decisions regarded as unsatisfactory by the parties bound by them. And while there is no purpose to deny the existence of any arbitrator responsibility for such results, that responsibility must be shared by the parties in a great many cases because of their inadequate clarification of the issue, or their ineffective presentation of the case, and sometimes for both reasons.

All grievances that reach the arbitration stage—and probably most of those which do not reach that stage—have in them the possibility of bettering or substantially worsening the relations of the parties, depending on how they are handled and disposed of.

If a case is worth carrying to arbitration, it is worth preparing and presenting with meticulous care.

All lawyers are familiar with the common assertion that a judge in his decisions largely reflects the industry and intelligence, if not the integrity and the moral fibre, of the bar about him. The same thing

is inevitably true, in large measure, of the arbitrator in relation to those who prepare and present the cases that come before him. In the absence of established precedents, and with the total inapplicability of the doctrine of stare decisis, the arbitrator is even more completely dependent upon the parties presenting the cases than is the judge.

Not infrequently the representative of one or both parties little experienced in arbitration have seemingly given little or no consideration to what an arbitrator, wholly unfamiliar with the problem involved, with the enterprise out of which it arose, or with the collective bargaining agreement that controls their relationship, will need to know in order to render a well considered decision. The issue may seem quite simple to one who has grown up with the processes involved, but it may well appear quite complicated to the uninitiated. In such cases, particularly if a statement of the issue and a copy of the agreement are withheld until the day of arbitration, the arbitrator may not be in a position to ask the necessary questions to fully clarify the problem, and frequently finds it necessary to address inquiries, even repeatedly in some cases, to the representatives of both parties in order to secure the information and explanation which should have been provided at the hearing. This necessity not only delays the final award, but the information or the explanations so secured are seldom as adequate as if presented at the hearing and clarified by questions and answers on the spot.

The representative of either company or union who appears to think the arbitrator can make a proper award without the presentation of sufficient pertinent and necessary information, serves his client no better and perhaps less well, than he who dumps all of his vast amount of material before the arbitrator, devoid of label or connecting tissue. In a recent utility wage contract arbitration case, the representatives of both parties were ready to close the proceeding after less than a single hour, including all preliminaries. In effect the union said we want a fifteen cent an hour increase across the board. We think it is an entirely reasonable demand. The company, with equal terseness, sought to dismiss the affair by saying, last year we gave substantially the same wage increase as most other electric companies in the same general area, we think the present rate is reasonable, and we ought not be required to pay more. With the arbitration process having reached its present state of wide usage, it seems a bit strange that an arbitrator should find it necessary to spell out to experienced company and union representatives the sort of data that is essential upon which to base a wage determination. In this case, the parties apparently had negotiated the matter over a considerable period of time, but they felt it unnecessary to do much more than present their request and denial

to the arbitrator. It is entirely possible, of course, in fact probable, that their so-called "negotiation" may have been little more. In a similar utility contract arbitration case an inexperienced union had requested a pension and retirement plan and, when denied by the company, brought that, along with several other issues, to arbitration. In doing so they presented no specific request, but in response to questioning by the arbitrator suggested that a plan similar to that in use by another named company would be satisfactory. Even that suggestion had not previously been made to the company. In such a case, of course, there is no alternative but to advise the parties that they are not yet through negotiating and have not reached the arbitration stage.

While these are extreme cases, even well experienced parties not infrequently seek to take issues to arbitration which have not been sufficiently bargained or processed, and which, in consequence, they are likely to be unable to present satisfactorily to the arbitrator. In fact, if they are unwilling to go through the necessary bargaining or grievance processing, they have not only passed up a possible or probable opportunity to settle the dispute for themselves, but they are frequently equally unwilling to do the necessary preparatory work to make an effective presentation before the arbitrator. As a matter of fact, lacking the detailed bargaining and the give and take discussion that goes into a careful processing of an important grievance through the various steps of the grievance procedure, the task of preparation for an effective presentation at the arbitration stage is vastly increased. And this is largely true whether the persons who process the grievances also present the case for arbitration, or merely advise an attorney who makes the final presentation. In a recent case involving several important issues, in which the matter of arbitrability was raised as to two, the representative of the company was quoted, admittedly correctly, in his response to a complaint filed as a grievance, as saying, "Oh, let's just dump them all in the pot for arbitration." This apparently ended all joint consideration of the matter until the time for arbitration arrived.

Perhaps equally objectionable from the standpoint of satisfactory arbitration is the practice of presenting vast amounts of wholly irrelevant materials. Not only may this tremendously increase the burden upon the arbitrator in separating the wheat from the chaff, but it may well prejudice the case against the side that appears to be unable to determine what is pertinent to the specific issue before the arbitrator. In a recent discharge case some thirty distinct and separate complaints or charges were rehearsed against the single discharged individual, some running back for a period of ten years, and more than three-fourths of them completely without supporting evidence.

Such a process can well lessen the seriousness with which any charge is likely to be considered.

This again is an extreme and unusual case, but there are many illustrations in the experience of probably every arbitrator of one or both parties, probably through lack of sufficient careful preparation to be able to select materials wisely, presenting substantial amounts of material that can serve no useful purpose. What one leaves out may, not infrequently, be as important as that which he presents. The vital need for a carefully cogent and concise, yet full and comprehensive presentation cannot be overemphasized. The attorney or other representative of each party is likely to be, and should always be, much more completely familiar with the whole problem than the arbitrator can ever hope to become, who necessarily must depend upon such representatives for his knowledge of the case. It therefore would seem to be wholly illogical and unrealistic to present materials that have no immediate pertinency to the specific matter at issue and leave to the arbitrator the task of separating the immaterial from that which is really pertinent, and of organizing and correlating the latter, and setting it in its proper relation to the specific issue to be decided.

In this connection it is not inappropriate to emphasize that the arbitrator ordinarily does not find it desirable to exclude materials which may appear to be of doubtful relevancy, because in so doing he may unintentionally prevent the disclosure of what may be helpful and which may not otherwise be brought to his attention, because the general informality of the usual arbitration process gives little recognition to the exclusionary rules of evidence but operates on the assumption that each party may present largely anything he thinks will be helpful, with the arbitrator being fully able to evaluate whatever is presented, and finally because of the danger that a party may feel that he is not being given a fair opportunity to present his full case. The caution still runs to the parties, however, in presenting their case not to burden the record and the arbitrator with so much irrelevant material that the whole process is placed at a serious disadvantage.

A mistake that continues to be made from time to time in the presentation of cases, especially when that task is performed by a member of management largely engrossed in the detailed problems of the enterprise, such as the job evaluation expert when problems within the scope of his domain are involved in arbitration, or by a union representative lately risen from the ranks of the production employees, is to take too much for granted with respect to the knowledge and understanding of the one to whom the case is being entrusted for decision.

Arbitrators are constantly being called upon to decide issues involv-

ing the details of many and varied problems growing out of the operation of strange, unfamiliar and frequently highly technical industrial processes. It is always a great mistake for the parties to assume that an arbitrator is familiar with the processes involved, or that he understands the shorthand plant jargon that management officials and employees find descriptive of their own particular activities and processes. It should not be regarded as too much of a burden to spend a few minutes explaining to the arbitrator in an elementary sort of way these matters which the representatives of the parties may have spent the major part of an adult life time in reducing to routine familiarity or, sometimes better still, in taking him through a plant whose operation must be understood before the evidence being presented can be evaluated properly.

There was a time when it was not uncommon, at least in some areas, for one presenting an arbitration case to try to confuse the arbitrator, or to prejudice him against the opposing party. Fortunately that is much less common as the bargaining relationship between the parties reaches some degree of maturity, but there are probably few arbitrators who have not had repeated experiences with presentations that emphasize what no good so and sos make up the management, or the union, as the case may be. Not only have such tactics no proper or useful place in any arbitration proceeding, but they are almost sure to backfire in more ways than one. Quarreling with or taking pot shots at the opposition across the arbitration table is never helpful to the arbitrator, and certainly is not calculated to convince the other side by the time the arbitration stage has been reached. If the arbitrator is prejudiced as a result, it is fairly certain to be against the user of such tactics, rather than against his intended victim. It has become somewhat trite to say that the winning of a case should never be the one and only goal, or even the principal goal, in the presentation of an arbitration case. However it may be phrased, it remains true that labor and management as the parties to almost any industrial relationship must, as a practical matter, go on living together and working together for the uncertain and indefinite future. There is no chance of either divorce or desertion. The controversy that goes to the final step of arbitration is merely the one, among a very substantial number, for which the parties, unaided, have failed to find a mutually acceptable solution. In most instances the single issue, or the few that go to arbitration, do not overbalance in importance the much larger number disposed of in the early steps of the grievance procedure, and for the sake of the future relationship of the parties, neither side can afford to build up animosity against itself in an effort to win a single case, even if that result were likely to follow, which is almost never true. The real purpose of labor-management arbitration, and the only truly

legitimate purpose, is to use it as a means of disposing of those controversies which the parties themselves cannot dispose of by agreement, and in a way that may be considered reasonably fair and just under the circumstances and in the light of the existing collective bargaining agreement, thus enabling the parties to wipe from the slate what would almost certainly become increasingly a source of irritation and misunderstanding if allowed to fester and ferment without solution or disposition for a substantial period of time. If this can be done in a manner to relieve rather than increase tensions between the parties, it can well be an aid to their long-time harmonious relationship. If such a process is to be fitted into a wholesome scheme of labor-management relationship, based on mutual confidence and respect, the personal animosity type of presentation must be ruled out as being inconsistent with every legitimate purpose which the process can be used to serve. Certainly, if the preceding emphasis upon the purpose to inform the arbitrator and assist him in reaching a fair and just result has any validity, such a process can only destroy what is sought to be achieved. If a selfish purpose to win a case by creating prejudice should ever be the goal, the arbitrator must be much more naive and far less understanding than those with whom this writer is acquainted, if it is not to have the opposite effect. The least harmful effect such a presentation can have is to distract attention from the real issue and make more difficult the task of the arbitrator, which is almost always far from simple or easy without such distractions, and there are few situations in which it will not almost certainly serve to worsen what may already be a none too good relationship.

If the parties always keep in mind that arbitration is not a process by which they try each other before some fancied bar of public opinion, and that the arbitrator needs to know only those things which pertain to the merits of the issue to be determined, then, and only then, will the process serve its properly intended purpose most effectively.

In the presentation of witness testimony care should always be taken to separate testimony as to facts from argument, instead of leaving that task to the arbitrator.

While arbitration proceedings are usually highly informal and without strict application of the rules of evidence, and desirably so, the practice not infrequently indulged in, even without objection on occasion, of leading a witness to the extent of practically making his answers for him, may very well weaken the value of what might otherwise be convincing testimony.

It goes without saying, of course, that not only the content of what is presented is important to the arbitrator, but also the manner of its presentation. Even today, with arbitration having assumed a status

of some maturity, there are occasions from time to time, particularly in non-lawyer presentations, when several persons on both sides are permitted or encouraged to get into the act by presenting their "two cents' worth" without much plan or organization, and without sufficient care to prevent a babel of voices that can contribute little but confusion. Since such situations continue to develop from time to time, in spite of an arbitrator's effort to prevent them, it seems excusable to emphasize the obvious that a single spokesman should always have responsibility for the presentation on each side and others should be heard from only as witnesses, or at the direction of the spokesman and with the consent of the arbitrator. This is, of course, no more than saying that if the arbitrator is to be properly informed and be able to follow the proceeding intelligently, the case on each side must be presented in orderly fashion, but the fact that such situations continue to arise, even if with decreasing frequency, underscores the justification for saying it.

It is not the purpose of this brief discussion to undertake a detailed analysis of how most effectively to inform the arbitrator in relation to specific and varied types of issues. It may not be improper to observe, however, that in certain types of cases, such as those involving the necessity that the arbitrator develop an understanding of intricate industrial machines and processes, or of the application of detailed formulae, resort to more extensive use of the carefully prepared exhibit may well be encouraged. Again, in cases of which wage controversies are a good example, resort to statistical and economic data in graphic form is likely to be extremely helpful. This is not to suggest that such methods are not in use, but because of the time and effort, as well as expense, involved in their preparation, they are often not used as extensively as might be desirable. To take one more illustration, in cases turning completely upon the interpretation of contract provisions, and particularly if they are, or are closely similar to, provisions commonly found in similar collective bargaining agreements, citation and use of other arbitration decisions may be regarded as helpful. They will only be so, however, if it is kept in mind that such so-called precedents are not actually precedents in the full sense in which lawyers and judges commonly use the term, that they have no binding effect, and that other possible differences in the agreements under which they are rendered, and differences in backgrounds and practices may have been important factors in the determination of such cases. Most experienced arbitrators, of course, are fully aware of these limitations. In the sense that an arbitrator may benefit by a study of the processes of reasoning and analysis by which others have dealt with a closely similar matter, and that the inclusion of such cases in the presentation or brief may short cut his research if he wishes to

make use of such cases, their presentation may be quite desirable. Many other special matters might be mentioned, but would hardly be consistent with the desired brevity of this discussion.

One last step in completing the process of informing the arbitrator may well be no less important than those which precede, particularly in the complicated case. That is the final argument or summary, or the post-hearing brief. Sometimes both are used, and they are not objectionable, but there is hardly necessity therefor. There are, of course, many simple cases in which neither closing argument nor post-hearing brief are at all essential. If the first of the two alternatives is employed, and there are several issues, there may be certain distinct advantages in having the summary or argument at the close of the presentation of each separate issue rather than at the end of the whole proceeding. Undoubtedly it is easier for the one presenting the case, and it is calculated to be much more helpful to the arbitrator. At that time he should have that particular issue and the opposing presentations relevant thereto fresh in his mind, undiluted by other issues and other presentations to follow, and he is in much better position to profit by the analysis and argument of opposing counsel than he can be at any later time.

In any event, the representatives of the parties should, at this point, make every effort to clarify the position of their respective clients, explain and tie together the evidence which they have presented, and explain its pertinency to the details of the problem involved.

Some parties prefer to present a post-hearing brief, or both the argument and the brief, and in many respects the brief has its advantages from the standpoint of the arbitrator, and, of course, it is solely for his better understanding that such presentations are made. Particularly is the brief to be preferred if no stenographic report of the proceedings is made available. The particular advantage of the summary immediately following each issue may be lost, but the brief covering all issues will be available for study, and possible restudy, at any time by the arbitrator. If there is to be any appreciable time lag between the hearing and the decision, as well may occur in the case of a busy arbitrator, this advantage becomes increasingly important. From the standpoint of the person presenting the brief, the opportunity to take the time to write it with care may well insure much more complete and effective coverage, than by the oral summary or argument on the spot, and thus give the arbitrator the benefit of the more carefully considered presentation.

In either case of oral argument or summary, or a brief, the parties, who are much more familiar with every aspect of the case than the arbitrator can possibly be, can render a real service to the arbitrator as well as to themselves by carefully analyzing and synthesizing the

important aspects of the case, emphasizing the facts they feel they have proved and placing them in proper relation to the ultimate fact sought to be established or to the ultimate conclusion at which they seek to persuade the arbitrator to arrive. Particularly is it true, where an arbitration involves detailed and technical problems with which the arbitrator has little or no advance familiarity, that this part of each party's task, if well performed, may be of great service to the arbitrator in helping to assure that he will have sufficient overall understanding of all aspects of the problem involved to enable him to render an intelligent and well considered opinion.

In summary it may be said that the quality of an arbitrator's decision and award is likely to be no better than the effectiveness with which the parties to the arbitration proceeding have discharged their major obligations of making clear exactly what the issue is of which a determination is demanded, of defining clearly the scope of the arbitrator's authority, and of providing the information on the basis of which the arbitrator can acquire a full and clear understanding of the problem involved and of the full nature and significance of each contending party's claim, as a means of reaching an informed and intelligent decision.