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L'arbitrage des griefs

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Volume 31, numéro 4, 1976

URI : <https://id.erudit.org/iderudit/028747ar>

DOI : <https://doi.org/10.7202/028747ar>

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Éditeur(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (imprimé)

1703-8138 (numérique)

[Découvrir la revue](#)

Citer cet article

Gandz, J. (1976). Grievance Arbitration. A Model for the Study of Policy Change. *Relations industrielles / Industrial Relations*, 31(4), 631-654.
<https://doi.org/10.7202/028747ar>

Résumé de l'article

A model is developed which explains the factors involved in a trade union's decision to press a grievance to arbitration. This model is then used to analyze the impact of policy initiatives designed to reduce the costs of arbitration, speed up the process and facilitate mediation prior to arbitration. Finally a number of research strategies for validating the model are proposed and discussed.

Grievance Arbitration

A Model for the Study of Policy Change

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A model is developed which explains the factors involved in a trade union's decision to press a grievance to arbitration. This model is then used to analyze the impact of policy initiatives designed to reduce the costs of arbitration, speed up the process and facilitate mediation prior to arbitration. Finally a number of research strategies for validating the model are proposed and discussed.

The purpose of this paper is to develop a conceptual model identifying the major factors influencing a trade union's decision to go to arbitration on a grievance arising during the life of a collective agreement. This model is used to analyze the probable impact on arbitration case volume of legislative and administrative changes designed to speed up the procedure, reduce the costs to unions and facilitate mediation prior to arbitration. The implications of such changes are discussed from the management, union and public policy perspectives. A number of potential research strategies for validating the hypotheses suggested by this model are proposed and discussed.

While this paper deals specifically with the province of Ontario, the analysis is generally applicable to a number of Canadian and U.S. jurisdictions which call for mandatory binding arbitration for settlement of grievances during the life of a collective agreement.

BACKGROUND

Binding arbitration, as the terminal stage in the grievance procedure, is compulsory in the Canadian federal jurisdiction and in all provinces except Saskatchewan.¹ Mandatory in only a few states in

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¹ Section 37(1) in the Ontario Labour Relations Act (1975) is fairly typical of Canadian provincial legislation.

A review of other Canadian labour legislation may be found in *The Grievance Arbitration Process in Canada*, Labour Canada, Federal Mediation and Conciliation Service, Ottawa, 1976.

the U.S., and not mandatory in the important federal jurisdiction, it is a feature of 94% of all U.S. collective agreements.²

Although the acceptance of binding arbitration appears to be widespread, there is substantial criticism of the way in which the procedure operates, particularly from trade unions in Ontario. They cite the length of time it takes to process a case through arbitration, shown in one study to average seven months, as a denial of justice to the grievor, particularly if a discharge or other severe penalty is involved.³ The provision in some jurisdictions that the union should pay half the cost of arbitration has been stated to be a disincentive for unions with limited financial resources to pursue worthwhile, justifiable grievances to arbitration.⁴ The unions are critical of the extremely formal, legalistic nature of proceedings and awards, claiming that this inhibits witnesses and other participants and renders the findings incomprehensible.⁵ They criticize the frequent judicial review of arbitration awards, claiming that this forces a reliance on the inappropriate common law of contract rather than facilitating the emergence of a «common law of the workplace» relevant to labour-management relationships.⁶ While the unions would like to see government policy initiatives to remedy these deficiencies, they have stopped short of recommending specific legislative, regulatory or administrative changes.

Those who would like to see the current procedure continue unchanged feel that its deficiencies are within the power of the parties to a collective agreement to correct.⁷ They point to the fact that the parties have the freedom to specify their own arbitration system, providing it falls within the broad guidelines established by legislation.

² U.S. Department of Labor, Bureau of Statistics, Bulletin 1425-6, Arbitration Procedures.

³ H. GOLDBLATT. «*Justice Delayed*». Labour Council of Metropolitan Toronto. 1974. pp. 11-13 A study of grievances in the United States indicated an average of 8.5 months from grievance to award. P. DAVIS and G. C. PATI, «Elapsed time patterns in labor grievance arbitration 1942-72. » *The Arbitration Journal* V. 29 No. 1, March 1974. pp. 15-27.

⁴ The issue of cost to the union was the subject of a number of briefs, including those of the National Union of Public Service Employees and the U.A.W., to the Attorney-General's Committee on the Process of Arbitration in Ontario, 1962.

⁵ Laberge has used the term «a ritualized legal gavotte» to describe the current practice of arbitration in Canada. R. LABERGE, «A look at arbitration of rights disputes.» *The Labour Gazette*, V. 75, No. 7, July 1975. pp. 443-8.

⁶ *Op. cit.* Note 4.

⁷ H. J. CLAWSON. «Grievance arbitration-alive and well.» *The Labour Gazette*, V. 75, No. 7, July 1975. pp. 449-52.

The provisions for expedited, simplified arbitration in the INCO-U.S.W. collective agreement at Sudbury⁸ or the use by many U.S. organizations of the expedited arbitration procedure of the American Arbitration Association are frequently cited as examples.⁹ Those who advocate «no change» believe that any moves to reduce the costs of arbitration, or make it simpler to use, will encourage its use and hence the reliance on third parties to settle disputes which should be sorted out by the parties themselves. Inherent in this is the belief that solutions reached through bi-lateral negotiations are superior to those reached through third party arbitration, either in their quality or the degree to which they will be accepted by the parties.

There has been a great deal written about arbitration by both practitioners and academics involved in labour law and industrial relations. There has not been any systematic research effort directed at developing a greater understanding of the factors involved in decisions to go to arbitration on a grievance. The model presented in this paper attempts to integrate established concepts of labour relations climate, conflict types, collective bargaining relationships and decision making in an overall framework which will identify those factors and provide a model for the analysis of policy change and the future guidance of research strategies.

THE MODEL

The dependent variable in this model is the choice, by the trade union, of alternative ways of dealing with a grievance that is not satisfactorily settled through the intra-organizational grievance procedure. The union is seen as having three alternatives. It may refer the grievance to arbitration, make it an agenda item for collective bargaining or abandon it altogether.

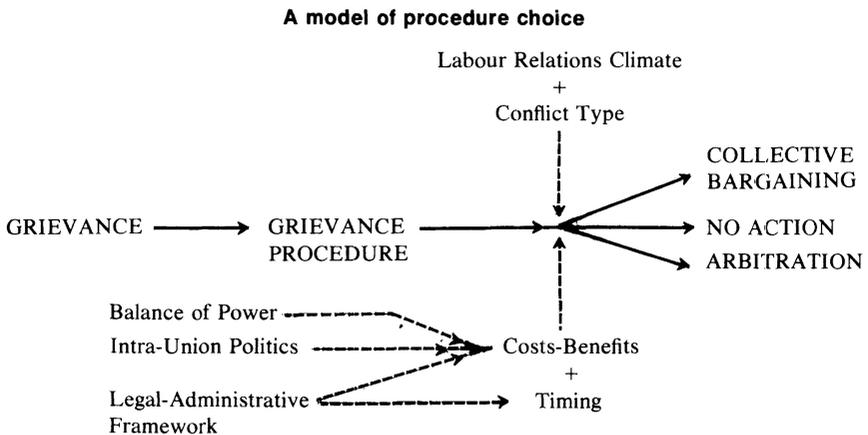
This choice will be based on the union's perception of the appropriateness of each of the alternatives for the actual grievance in question and, where more than one alternative is feasible, the one offering the greatest expected utility. The interaction of climate and conflict type perception will determine the appropriateness of alternatives. The

⁸ *Teamwork in Industry*. V. 30, No. 4, April 1973.

⁹ See, for example, SCHLAGER, W. L. «Expedited arbitration on the LIRR.» *The Arbitration Journal*. V. 30. No. 4, December, 1975. For a more critical review of expedited arbitration processes see S. E. KANE, «Current developments in expedited arbitration.» *Labor Law Journal*. V. 24, No. 4 April 1973. pp. 282-7.

subjectively expected utilities of the alternatives will be a function of the probabilities of winning and the costs and benefits associated with each of them. These costs and benefits will be influenced by the balance of power between labour and management, intra-union political considerations and the legal and administrative framework within which both arbitration and collective bargaining function. Finally, a number of timing considerations will affect the choice of alternatives.

FIGURE 1



The grievance pathway

This model will be limited to the discussion of grievances initiated by the union as a result of some action taken by management. It is acknowledged that certain grievances are initiated by managements but these are few and far between.

In the context of this model «the union» refers to the person or persons in a trade union organization who make decisions with respect to arbitration. The titles or roles of such people will vary from one union to the next. There may be a single person involved or there may be a committee; the locus of decision making may shift as the grievance passes through various stages in the pathway; there may or may not be involvement of union officers or staff outside the local either in an advisory or decision making capacity. The dominant mode is believed to be a decision made by the elected officials of the local with the advice of the professional staff of the national or regional organization. The extent to which this, or other modes of decision making predominate

is a matter for empirical determination and may have a bearing on the time it takes to process a grievance.

Figure 1 depicts the pathway taken by a grievance. Initially it is dealt with in the grievance procedure established in the collective agreement. This is usually a multi-stage procedure in which a grievance is presented informally to first-line supervision and then more formally through two or three levels of management usually ending up at some joint union-management committee where management will give its final word and the union will indicate whether it is prepared to pursue the matter to arbitration or drop it.¹⁰

If the grievance is not dropped the union has two alternatives. The union may decide that it will seek arbitration and will so inform management. At that time management, faced with going to arbitration, may decide to reconsider its position so opening up the internal grievance procedure once more. Alternatively the union may decide that the grievance should be made an agenda item for the next round of negotiations on some upcoming collective agreement.

Procedure characteristics

The use of the grievance procedure and collective bargaining as alternatives will be considered in this model largely to be determined by the timing constraints and the costs-benefits associated with each. They are both procedures within which bargaining takes place.¹¹ Walton and McKersie described four basic forms of bargaining. Distributive bargaining takes place when the parties have a clear conflict of interest and the situation is clearly «fixed-sum» in nature. Integrative bargaining takes place in «variable-sum» situations where the issue has the potential for both sides benefitting from its resolution, although not necessarily to the same extent. Attitudinal structuring refers to the ways in which the parties in labour negotiations seek to modify the attitudes of their opponents and intra-organizational bargaining describes

¹⁰ There are many descriptions of the grievance procedure in the literature including: J. W. KUHN. «The Grievance Procedure», in J. T. DUNLOP and N. W. CHAMBERLAIN (eds.) *Frontiers of Collective Bargaining*. Harper and Row, New York, 1967. A.W.J. THOMSON. *The Grievance Procedure in the Private Sector*. New York State School of Industrial and Labor Relations. Cornell University, 1974. For an extremely extensive discussion of the literature on grievance procedures see; A.W.J. THOMSON and V. V. MURRAY. *Grievance Procedures*. Saxon House/Lexington. Westmead, Hants. 1976.

¹¹ J. W. KUHN. *Bargaining in Grievance Settlement*. Columbia University Press, New York. 1961. p. 71.

the processes whereby the negotiators seek to align the expectations of their principals with either their own expectations or the reality of the bargain struck.¹²

The dividing line between bargaining for a new agreement and bargaining under the old agreement is not sharp; experienced labour negotiators are used to sitting down to negotiations for a new contract and finding the first order of business to be the resolution of certain individual or policy grievances of long standing. While the relative power of the parties in the grievance procedure or the collective bargaining procedure may be altered by, for example, the legality of a strike at a particular point of time, the procedures are similar in many other respects.

Weiler has suggested that arbitrators operate in two fundamentally distinct modes. An arbitrator may see his role as an adjudicator although within this role he may view his function either as one of interpreting the specific and explicit terms of a contract or its underlying meaning. An alternative role is that of a «labour relations physician». In this role the arbitrator sees himself as either a mediator or as an industrial policy maker whose job it is to settle industrial disputes with an eye to the public interest, however defined.¹³

Whether this categorization represents a true dichotomy or only points along a spectrum is debatable. The extent to which arbitrators function in each of these modes is a matter for empirical determination, one that does not appear to have yet been made. Weiler suggests that the present corps of arbitrators in Canada works in an adjudication mode unless the language of the collective agreement specifies some other role.¹⁴

As usually practiced in North America, arbitration is an adversary procedure. The parties to the grievance present reasoned arguments, call witnesses, cite precedents and «case law» to either a sole arbitrator or a panel chaired by a neutral person. The arbitrator or arbitration board is usually empowered to rule on all matters governed by the

¹² R. E. WALTON and R. B. MCKERSIE. *A Behavioral Theory of Labor Negotiations*. McGraw-Hill, New York, 1965. pp. 4-5.

¹³ P. C. WEILER. *Labour Arbitration and Industrial Change*. Privy Council Office, Ottawa. Queens Printer, 1970. pp. 54-75.

¹⁴ *Ibid.*

collective agreement and awards are not subject to judicial review unless natural justice has been contravened or jurisdiction exceeded.¹⁵

The arbitration procedure is not a bargaining procedure if the arbitrator sees his role as an adjudicator. It is, therefore, fundamentally different to either the grievance procedure or collective bargaining. Whereas in the bargaining procedures the parties could bargain integratively over issues with variable sum pay-off potential, this possibility does not exist within the arbitration procedure. It is this difference in the nature of the procedures which makes them either appropriate or inappropriate for the resolution of different forms of conflict that arise during the life of collective agreements.

Conflict types

Grievances are conflict incidents,¹⁶ but conflict may take several forms.¹⁷ Competitive-issue conflict describes issues of common concern between parties where their resolution objectives are incompatible. This type of conflict usually involves competing for some rare resource and may be seen in an industrial relations context in the conflict over the share of revenue to go to wages or profits. Disputes over management rights, hours, wage and allowance issues or certain disciplinary matters are other examples of competitive-issue conflict. Where bargaining takes place, competitive-issue conflict becomes the subject of distributive bargaining.

Common-problem conflict does not involve fundamental incompatibilities between the parties. The conflict situation holds the potential for both parties benefitting from its resolution, although not necessarily to the same extent. Examples in the industrial relations setting may include conflict over job reassignments in the presence of a well defined

¹⁵ The question of whether or not jurisdiction has been exceeded is, of course, a matter for the courts to decide. Traditionally trade unions have wanted far greater jurisdiction for the labour arbitrator, facilitating the development of an industrial jurisprudence. Managements have, in general, wanted to carefully circumscribe the jurisdiction of arbitrators and have frequently resorted to court action when they feel the arbitrator has exceeded the arbitrable issues outlined in the collective agreement.

¹⁶ Grievances invariably stem from an individual's disagreement over some managerial action and represents the institutionalized way of expressing that disagreement. Certain policy grievances may not fall into this category but even they represent a form of conflict.

¹⁷ This section draws very heavily on the chapter on conflict by K. THOMAS in: Marvin D. DUNNETTE (ed.) *Handbook of Industrial and Organizational Psychology*. Rand McNally, Chicago, 1976. pp. 889-935.

productivity agreement or technological changes clearly benefitting employees as well as improving profits. Although the assignments may cause some conflict, there is a benefit to both parties from resolving it. If bargaining takes place over such types of conflict, it will be integrative bargaining involving joint problem solving behaviour.

Mixed-issues conflict is perhaps the most prevalent form and covers situations which have a mixture of conflict of interest and common problems. Whereas with competitive-issue conflict one party's satisfaction can come only at the expense of the other's, and with common-problem conflict each party's satisfaction is accompanied by an increase in the other's, no such statements can be made about mixed-issues conflict. It is a «variable-sum, variable-share» form of conflict. If bargaining is engaged in, it will take the form of some integrative bargaining and some distributive bargaining.

The final form of conflict type is pseudo-conflict, literally conflict which doesn't exist. The industrial relations field is full of such conflicts which stem from a misunderstanding or misinterpretation of the other party's intentions, desires or actions.

A central thesis of this paper is that the parties to a collective agreement will not knowingly select a conflict resolution procedure which is inappropriate for the type of conflict that exists. Therefore the perception of conflict type will be an important independent variable in the parties' selection of conflict resolution procedure. It is hypothesized that if the union perceives that the grievance may involve common-problem or pseudo-conflict, or mixed-issue conflict with a high common-problem component, it will not be inclined to select arbitration for the resolution of a grievance.¹⁸ This hypothesis is conditional on the union believing that the climate is such that effective integrative or mixed bargaining can take place between the union and management. Thus the climate is a major variable which will also influence the union's selection decision.

Labour Relations Climate

In the context of this paper, labour relations climate refers to the pattern of relationship that exists between the union and management in an organization. Walton and McKersie describe five such patterns

¹⁸ The importance of perceptual processes in industrial relations is reviewed in R. STAGNER and H. ROSEN, *Psychology of Union-Management Relations*. Wadsworth, Belmont, Calif. 1965. pp. 8-20.

of relationship including conflict, containment-aggression, accommodation, cooperation and collusion.¹⁹

Conflict describes a pattern of relationship characterized by competitive tendencies between the parties to destroy or weaken each other, denial of legitimacy and extreme distrust or hate. Containment-aggression is characterized also by competitive tendencies but there is a grudging acknowledgement of the legitimacy of the other party accompanied by distrust and antagonism in the relationship. Accommodation is characterized by a «hands-off» policy for each party. They do not try to destroy the other, but they also offer no assistance. There is an acceptance of the other's legitimacy, limited trust and a neutrality or courteousness in their relationships. Cooperation describes a pattern of relationship in which there is a tendency for the parties to assist each other and try to preserve the cooperative relationship. Each acknowledges the other's legitimacy completely, there is extended trust between them and a degree of friendliness in their relationship. Collusion is characterized by cooperative tendencies based on the potential for mutual blackmail rather than on trust and legitimacy. It may be found in relationships between unions and employers which benefit the leaders of both but not the principals they are supposed to represent, in the case of the union, or shareholders or the public at large in the case of the employer.

The climate will have an influence on the type of conflict that actually occurs, the way in which conflict is perceived and the degree to which the parties feel that certain forms of conflict resolution behaviour are possible.

For the sake of simplicity we will assume that collusive relationships are relatively rare and ignore them: their inclusion would not invalidate the rest of the argument although it would complicate the presentation. We will also simplify even further by referring to the climate as good (cooperation, accommodation) or poor (containment-aggression, conflict).

It is hypothesized that when the climate is poor, more cases of pseudo-conflict will arise, more cases of common-problem conflict will be incorrectly perceived as competitive-issue conflict and there will be no perception of the possibility of engaging in problem-solving, integrative bargaining with the other party. In poor climates therefore, the resolution of conflict will be as a result of distributive bargaining,

¹⁹ WALTON and MCKERSIE. *Op. cit.* pp. 185-90.

either in the grievance procedure or in collective bargaining, or as a result of arbitration.

In good labour relations climates there will be fewer cases of pseudo-conflict since such conflicts will tend to be resolved informally, prior to the grievance procedure becoming activated. There will be a greater tendency to perceive the common-benefit potential in conflict situations, even where such may not in fact exist. There will be an appreciation of the possibilities of joint problem-solving behaviour and a willingness to engage in it.

Where the climate is good, the union will not seek arbitration of a grievance with common-benefit potential. In the first place it is probable that integrative bargaining in the grievance procedure, which temporally precedes arbitration, will result in satisfactory resolution. In the second place the union will recognize the inappropriateness of arbitration for such types of conflict and will prefer the issue to be dealt with in collective bargaining where integrative bargaining will be possible.

On the other hand, there is the probability that the grievance procedure will be ineffective in handling common-problem conflict if the climate is poor. In such cases, or for all cases of true competitive-issue conflict, the union that cannot satisfy its objectives through the grievance procedure must choose between collective bargaining, arbitration or abandoning the grievance.

The selection of alternatives

TIMING

The grievance procedure temporally precedes the decision to opt for either collective bargaining or arbitration and hence grievances will normally be processed through the intra-organizational procedure as a matter of course. There may be certain exceptions to this however. Sometimes collective agreements may contain deliberately ambiguous language; at the time the agreement is negotiated there is a recognition of the fact that issues may arise which will require arbitration and a tacit understanding that when they do, the parties will abide by an arbitration decision.²⁰ Certain forms of grievance may therefore short-circuit the internal grievance procedure and proceed, by agreement of both union and management, to arbitration. Failing resolution in the

²⁰ Carl M. STEVENS. «The analysis of voluntary arbitration; contract disputes.» *Industrial Relations*. V. 7, No. 1 October 1967. pp. 71-9.

internal grievance procedure, the union must select between the three alternatives of dropping the grievance, going to arbitration or trying to bargain for the grievance.

The union's decision will be influenced by the timing of the grievance relative to the start of a new round of collective bargaining and the expected duration of the grievance arbitration procedure. If there are seven months to go before a new set of negotiations begin, and if the union expects the grievance arbitration procedure to take nine months then other things being equal, the union would tend to try to win its grievance through collective bargaining rather than through arbitration. It is hypothesized that, *ceteris paribus*, a reduction in the time taken to process arbitration cases would result in greater use of arbitration for the resolution of grievances thereby increasing the case load.

The time taken to process a grievance through arbitration, and the time to the next round of negotiations, may also influence an individual's decision as to how hard he would pressure the trade union to press his grievance. We can only speculate how many more dismissals or penalties would be grieved if an «instant» or at least extremely fast grievance arbitration procedure was available for use. How many individuals are simply deterred from grieving in the knowledge that it could take over six months before their case would be heard by an arbitrator and in the knowledge that, in the interim, the penalty is in force?

Thus timing considerations will influence both the choice between collective bargaining and arbitration and the desire of a grievor to seek satisfaction of his grievance.

It will be shown, in the next section of this paper, that the time taken to process arbitration cases could be affected by legislative and administrative action by governments. The legislative and administrative framework is shown, in Figure 1, as an independent variable influencing the timing considerations in the model.

COSTS-BENEFITS

The selection of procedure, from the set of suitable and feasible alternatives, is explained in this model by the maximization of Subjectively Expected Utility (SEU). The SEU function²¹ has four compo-

²¹ The subjectively expected utility (SEU) of an alternative is the product of the subjective utility and the subjective probability of success associated with that alternative. W. EDWARDS. «Behavioral Decision Theory.» *Annual Review of Psychology*. V. 12 (1961). pp. 473-98.

nents; the expected benefits of success, the expected costs of failure, the costs and benefits associated with the use of the procedures and the probabilities of the outcomes associated with the choice of procedure.

The benefits of success and costs of failure may be instrumental, political or psychological. Instrumental benefits and costs include those of a financial nature, such as wages to be gained or lost, or of a non-financial nature such as rights to accept or reject certain job assignments.

Political benefits or costs may be reflected, for example, in changes in the security of the leadership, the influence of the international or national organization on the local or the standing of the paid staff representative or business agent. There may be some positive benefit involved in winning the grievance of a politically active member of the bargaining unit which might not exist for a non-active member. The evidence that political influences affect grievance processing is apocryphal rather than empirical. There is considerable evidence linking political activity in the union with grievors²² and it is probable that the rank and file's assessment of the quality of union leadership is influenced, at least in part, by the union's performance in the prosecution of grievances and its success rate in obtaining redress²³.

Psychological benefits may include the intrinsic satisfaction of helping a friend or workmate or the pleasure derived from «defeating the enemy». Psychological costs would include the dissatisfaction resulting from a failure to do these same things.

The costs and benefits associated with success and failure will be influenced by the balance of power between the parties, intra-union political dynamics and the legal-administrative framework within which the conflict resolution procedures functions.

The balance of power between the parties will determine the costs of concessions the union will need to make to «win» the grievance or the amount of coercive power it can exert in a given situation²⁴.

²² H. A. SULKIN and R. W. PRANIS. «Comparison of grievants and non-grievants in a heavy machinery company.» *Personnel Psychology*. V. 20, No. 2. 1967. pp. 111-20 D. PEACH and E. R. LIVERNASH. *Grievance Initiation and Resolution; A study in basic steel*. Graduate School of Business Administration, Harvard University, 1974.

²³ SEIDMAN, J., J. LONDON, B. KARSH and Daisy L. TAGLIOCOZZO. *The Worker Views His Union*. Chicago, 111.: University of Chicago Press, 1958.

²⁴ For more discussion of the concept of «balance of power» see THOMSON and MURRAY, *op. cit.*

The powerful union may be able to have a member reinstated, despite just cause for discharge, either by threat of reprisal or by offering some concession desired by management. The weak union may be unable to threaten management and may have to make some substantial concession in order to «win» the grievance. We would therefore expect to see some relationship between the procedures chosen for conflict resolution for grievances and other measures of relative union-management strength such as economic gains in collective bargaining. It is beyond the scope of this paper to analyze the causes of such power or influence which may be rooted in traditional relationships, labour and product market conditions or relative financial resources.

The legal-administrative framework exerts a direct influence on the balance of power between the parties insofar as it dictates and sanctions the actions the parties might take at a specific point of time. The prevailing Canadian legislation, specifically the mandatory no-strike provision in most jurisdictions, means that the power of the union over the grievance must be at its lowest ebb immediately following the signing of a new collective agreement if the union poses a significant threat to management by striking. As the time in which strikes are legal draws closer, the union's power will increase, other things being equal.

The political dynamics within the union will also influence the costs of failure and the benefits of success. Included in such dynamics are the security of the leadership, the factionalization within the union local and the political characteristics of the grievors. There may be many political forces acting on the decision-maker including leadership pressure from above and pressures from the rank and file below. As the locus of decision making moves, so the political forces assume a different configuration.

In addition to the benefits and costs associated with success and failure there are a group of benefits and costs which are independent of the outcome of choice of procedure; these are called procedure benefits and costs. They may be instrumental or political in nature. Procedural costs include tangible items such as the costs of arbitrators' fees, meeting rooms, payments to witnesses, the costs of the personnel involved in preparing and presenting cases or the «costs» of worsened relationships resulting from the use of distributive bargaining tactics. Benefits may be derived from the rank and file support for the leadership that may be encouraged by the adoption of overall policies such as the prosecution of all grievances arising from discharges all the way to arbitration in order to demonstrate militance or representativeness. Grievances on a collective bargaining agenda may also have some

positive tactical value in focusing attention on important issues for negotiation rather than being there in anticipation of «winning» them in the present contract.

Both the legal-administrative framework and the political dynamics within the union may be expected to influence these procedural benefits and costs. The former exerts an influence insofar as it establishes the costs that the parties have to bear and the onus on the union for fair representation of all members of the bargaining unit. The intra-union political dynamics will influence the benefits and costs of procedure selection through establishing the consequences of such choices to the decision maker(s).

Finally the SEU function must take into account the probability of succeeding in winning the grievance. In the case of arbitration this will be a subjective estimate based on an assessment of the merits of the case and will be highly influenced by previous experience with similar cases in previous arbitrations, either within the specific organization in question or in the general field of industrial arbitration. The function must take into account the fact that «winning» is not a simple issue itself. Where the arbitrator has the licence to modify a penalty, as is the case in most discharge and discipline cases in Ontario, «winning» may involve the substitution of a lesser penalty or the complete reversal of management's actions. The same situation applies to bargaining, either in formal collective bargaining or in the grievance procedure. There is, in effect, a range of possible outcomes from winning completely to only a minor managerial concession; in addition there will be different probabilities attached to obtaining some benefit from different levels of union concession.²⁵

The final selection of appropriate alternatives will be on the basis of the pathway offering the greatest subjectively expected utility (SEU) where SEU is represented as:

$$\text{SEU} = \sum_{i=1}^n (Pw \times \text{Benefits}) - (1-Pw) \times \text{Costs}] \\ + (\text{Procedure Benefits} - \text{Procedure Costs})$$

Where:

Pw is the probability of winning the grievance.

Benefits are those associated with winning.

Costs are those associated with losing.

²⁵ WALTON and MCKERSIE expand the SEU function to accommodate the collective bargaining process. *Op. cit.* p. 37.

Procedure benefits and costs are those associated with the use of the procedure independent of winning or losing. SEU is summed over all possible outcomes from the procedure choice.

The pathway chosen will be the one which offers the greatest SEU, other things being equal.

THE ANALYSIS OF POLICY CHANGE

The model described above can be used to analyze a number of possible policy initiatives which would change the legal and administrative framework within which binding arbitration operates. Before analyzing the probable effects of changes which would alter costs and timing constraints, it should be made clear that there will be a group of grievances totally unaffected by such changes.

The model implies that grievances representing common problem conflict, occurring in good labour relations climates, will not end up at arbitration. If they are not resolved in the grievance procedure they will be dealt with in collective bargaining. The only grievances that *could* end up at arbitration are those representing competitive-issue conflict or which arise in poor climates.

Critics of eased access to grievance arbitration say that this will be a disincentive for the parties to resolve their own problems through bi-lateral negotiations. If the conflict is a competitive-issue type, creative solutions, benefitting both parties, are unobtainable. On the other hand, if the conflict is a common-problem type but the climate is poor, then integrative, problem-solving behaviour will not be engaged in. We therefore question the supposition that bi-lateral negotiation will yield a qualitatively superior solution to third party arbitration. It is true that there is a valid argument that participation in a decision process is likely to improve commitment to that decision, another argument in favour of bi-lateral negotiations. However arbitration, through the presentation of reasoned arguments, offers participation to the parties. On balance, the argument suggested by those who oppose easier access does not hold up to close scrutiny.

There is an argument which would favour the transfer of grievances from collective bargaining to arbitration. The extremely poly-centric nature of collective bargaining has been pointed out by a number

of authors.²⁶ Any move to lessen this polycentricity, by removing grievances and as many rights issues as possible from bargaining over interest disputes which can be represented financially, may well simplify the collective bargaining process.

This section will deal with a number of changes to legislative and administrative provisions in Ontario which would:

- a. Reduce the cost of arbitration to the trade unions.
- b. Reduce the time taken to convene arbitration boards, schedule hearings and issue awards.
- c. Facilitate mediation prior to arbitration.

Reducing the cost to the union

Reducing the cost of arbitration to the union would increase its SEU both absolutely and relative to the SEU of collective bargaining. This would result in an increase in arbitration case volume emanating from three sources.

There would be a transfer of grievances from collective bargaining, or bargaining in the grievance procedure, to arbitration. It has been argued that such a transfer, if it reduces the polycentricity of collective bargaining, may be beneficial from the point of view of public policy. It would certainly be a step in the direction of using arbitration for the purpose it is best suited for.

There would be an increase in case load from grievances that had previously been dropped, even though they were justifiable, because of financial constraints on the local union. Managements are unlikely to view such developments with favour since, inevitably, this represents more challenges to managerial rights. From the point of view of public policy however, the issue involves one of equity for the worker and a more subtle implication for industrial relations as a whole. We need to ask the question as to who benefits if justifiable grievances are repressed through lack of the financial resources to resolve them? Such unresolved conflict, if felt by the grievor(s) can only result in manifest conflict in the form of lowered productivity and increased labour-

²⁶ D.J.M. BROWN. *Interest Arbitration*. Privy Council, Ottawa. Queens Printer. 1970. P. C. WEILER. «The role of the arbitrator; alternative versions.» *University of Toronto Law Journal*. V. 19, No. 1. 1969. p. 33. These and other authors draw on the work of L. L. FULLER, an unpublished manuscript entitled «The forms and limits of adjudication.»

management hostility.²⁷ A case could be made for encouraging all worthwhile grievances to be referred to arbitration.

The third source of increased volume poses a more difficult problem. The removal of financial constraints would make it almost impossible for the union leader to refuse to process a grievance through to arbitration even if the grievance was clearly unwarranted or frivolous. The political pressures to process grievances would increase if the costs were eliminated and the arbitration procedure could become flooded with such spurious, unjustifiable grievances.

We are not in a position to estimate the potential increased volume associated with each of these sources, although research could be conducted to throw more light on the issue. The implications for policy initiatives are such that complete elimination of cost to the union would appear to risk a massive increase in the use of arbitration with the increase reflecting, to some substantial extent, intra-union political factors. However there could be consideration of two possible initiatives. There could be partial relief from the cost burden, perhaps by making the arbitrator's fee a public expense and limiting the union's and employer's costs to their own out-of-pocket and personnel costs. Another alternative, more radical in nature, may be to award costs for arbitration just as costs are awarded in civil legal actions. This should not deter the processing of justifiable grievances but would deter spurious grievances; in addition it is likely to encourage more systematic pre-screening of grievances by the parties prior to arbitration.

Reduce arbitration duration

The average arbitration case is estimated to take over seven months from the time the grievance is first presented to the time an award is handed down.²⁸ The time delays occur for a number of reasons. Decisions to take matters to arbitration are, themselves, time consuming especially if some form of democratic process is involved and the grievor chooses to appeal decisions made by the local's leadership.²⁹

²⁷ I. KATZ. «Minimizing disputes through adjustment of grievances.» *Law and Contemporary Problems*. V. 12, No. 2. Spring, 1947.

²⁸ H. GOLDBLATT. *Op.c it.*

²⁹ The United Steelworkers procedure allows a grievor whose grievance was not processed by the stewards committee to appeal directly to a general membership meeting and other unions have similar internal appeals procedures which may be time consuming.

³² P. C. WEILLER. «The role of the arbitrator.» *Op. cit.* p. 24.

There is extensive use of tripartite boards with the inherent problems of juggling the schedules of a busy arbitrator and nominees from the union and management. This practice persists despite overwhelming evidence pointing to time savings involved in the use of sole arbitrators.³⁰

There is frequently difficulty involved in reaching agreement on a suitable Chairman, one acceptable to both parties. Studies in both the United States and Canada have shown that the same few arbitrators handle most arbitrations.³¹ There is no research which shows which party, either management or the union, is most reluctant to use less experienced arbitrators; the indications are that both parties tend to prefer the arbitrator whose track record is known.

The model developed in this paper shows that a reduction in the time taken to process an arbitration would result in an increase in arbitration case load. The increase would stem from two sources. There would be some transfer from collective bargaining and this transfer would, it is argued, be largely beneficial for all the parties. There would also be more cases reaching arbitration which would otherwise be dropped since individual grievors may be inclined to use a procedure to which there is an end in sight from the start. If this results in increased conflict resolution then it is probably desirable. However there could also be an increase in spurious grievances if the grievors can have an «instant» hearing for a grievance. There is no evidence that this has happened in the published reports of expedited arbitration procedures. It is suspected that it would only be likely to happen in the case of «instant» arbitrations and that moves to reduce the current lengthy procedure would only be beneficial to all concerned.

A number of such policy initiatives could be taken, mainly in the form of educational and administrative actions. The benefits of sole arbitrators or permanent umpires compared with tri-partite boards could be widely publicized, the establishment of acceptable Chairman in the collective agreement could be encouraged and either party to the collective agreement could insist that a sole arbitrator hear the case if

³⁰ H. GOLDBLATT. *Op. cit.* R. WERRY and R. CAREW. «An enquiry into the preponderance of tri-partite arbitration boards in Ontario.» *Queens Law Journal*. V. 1, No. 1 (1971) P. W. LOCKETT. «An enquiry into the utility of tri-partite arbitration boards.» *Queens Law Journal*. V. 1, No. 1 (1971)

³¹ *Ibid.* pp. 49-50. W. J. PRIMEAUX Jr. and D. E. BRANNEN. «Why few arbitrators are deemed acceptable.» *Monthly Labor Review*. V. 98, No. 9 September 1975.

there was an indication that insistence on a tripartite board was definitely delaying the scheduling of a hearing.

Facilitating mediation

In the model it is suggested that the only types of grievances which become subject to the choice between arbitration and collective bargaining are competitive-issue grievances and those that occur in poor labour relations climates. The reality is that a number of grievances which represent common-problem conflict types *do* end up at arbitration, a procedure singularly unsuited for their resolution in any way which mutually benefits the parties.

While some collective agreements specify that the arbitrator may take the role of mediator, and other jurisdictions have legislation which facilitates mediation before adjudication, most legislation severely curtails the ability of an arbitrator to act in this fashion. The most common cause for the overthrow of arbitration awards by a higher court stems from the arbitrator acting outside his jurisdiction; there is always the risk of that when attempting to mediate between parties when the climate is poor.

There are many problems involved in trying to alter the arbitration process to facilitate mediation. Weiler has suggested that collective agreements have become so detailed, so legalistic that the arbitrator simply has «no room to move» to fashion a compromise agreement.³² In addition it is questionable whether there are sufficient trained personnel to develop the in-depth knowledge of the issues and the intimacy with the parties that constitute essential prerequisites for successful mediation.

These problems may be insurmountable. It is hoped, however, that this model may have helped focus attention on the clear need for some form of process which will help identify pseudo and common-problem conflicts which end up in the arbitration procedure. We have compulsory mediation in collective bargaining, although the sincerity with which the parties participate in it is questionable, why not some serious consideration for greater use of mediation in the grievance procedure, either by the arbitrator or as a prearbitration stage?

THE NEED FOR RESEARCH

In the extensive literature on arbitration, there is very little empirical research reported. Given the important role that arbitration plays

³² P. C. WEILLER. «The role of the arbitrator.» *Op. cit.* p. 24.

in the industrial relations system, this is both surprising and a cause for concern. The empirical support for the tentative model proposed in this paper is almost non-existent. The model is derived from a review of existing, non-empirical, literature and interviews with a small number of arbitrators and union personnel.

There is need for two forms of research. Most obvious is the need for better descriptions of the arbitration procedure than we currently have. It would be helpful in formulating the appropriate research questions if we knew the number of grievances that are arbitrated, compared with the number being settled through other channels, the issues the grievances represent, the unions and managements participating in the procedure and the nature of awards. The time taken up in the arbitration procedure needs to be analyzed, beyond the level of the Labour Council's study,³³ to identify the causes of delays in the system. In addition there is a need to establish the actual costs that the parties to arbitration have to bear.

The second major need is for an investigation of the factors affecting the use of arbitration instead of the bargaining procedures and whether or not the costs and time delays involved in arbitration do inhibit the processing of justifiable grievances. One of the purposes of developing and presenting this model was to identify a number of possible factors and guide researchers toward the development of research strategies.

A number of potential research strategies should be further investigated. The concepts of labour relations climate, conflict type and balance of power could be operationalized in terms of «macro» variables such as strike incidence, grievance issues, financial states of the parties, labour and product market conditions, size and previous collective bargaining results. A correlational study which involved the investigation of variations in the frequency of arbitration usage in terms of these variables may offer some support for sections of this model.

A «micro» strategy would involve an attempt to measure directly the variables specified as being factors associated with procedure choice in this paper. A sample of grievances in an organization could be intensively studied and an attempt made to determine, on a post hoc basis, the factors associated with the actual decisions made by the union. This would involve attempting to measure the union's assessment of the costs and benefits associated with alternative procedures

³³ H. GOLDBLATT. *Op. cit.*

as well as its perceptions of conflict type and labour relations climate. Such a strategy offers the potential for validating the model by comparison of two random samples of grievances, one used to develop the estimates of the variables and the other used for prediction and validation.

In addition to these strategies there is also the benefit to be gained from intensive studies of actual situations in which expedited, low-cost arbitration has been used and from a comparison of the arbitration procedure in other jurisdictions in which mediation is encouraged, costs are lower and the time taken in the procedure is much less. While isolated reports of such cases appear quite regularly in the literature, systematic comparative studies have not been conducted. There is undoubtedly much that could be learned from such comparative analyses and intensive case studies.

CONCLUSION

This paper has attempted to arrange some important determinants of the choice of binding arbitration in an overall framework which facilitates policy analysis and provides some direction for future research.

At first sight the research problems appear to be formidable. There are problems of access to organizations, operationalization of such concepts as labour relations climate, conflict type and, of course, the problems involved in measuring subjective expected utilities. There are the ever present problems, so well described by Kuhn, of separating appearances from realities. There are problems associated with the changing locus of decision making and determining the real bases of decisions in politically complex situations. These problems cannot be taken lightly.³⁴

With concerns about worker dissatisfaction and alienation, lowered productivity and poor labour-management relations, it is hoped that overcoming these problems will be viewed as a research challenge rather than as inhibiting factors preventing research into this important field of industrial jurisprudence.

³⁴ J. W. KUHN. *Bargaining in Grievance Settlement*, *Op. cit.*

L'arbitrage des griefs

Le but de l'article précédent est de mettre au point un schéma permettant de préciser les différents facteurs qui déterminent un syndicat à décider de recourir à l'arbitrage pendant la durée d'une convention collective. L'objet de ce schéma est l'analyse des répercussions probables de changements qui seraient destinés à accélérer le processus de l'arbitrage, à en réduire le coût pour les syndicats et à faciliter le recours à la médiation avant l'arbitrage. L'auteur discute des conséquences de ces changements du point de vue de la direction, des syndicats et de l'État.

L'article s'applique d'abord à l'Ontario, mais il vaut aussi pour les autres provinces canadiennes et plusieurs États Américains, car l'arbitrage exécutoire, en tant que stade ultime de la procédure de griefs, est obligatoire partout au Canada, sauf en Saskatchewan. On retrouve également un régime similaire dans la plupart des conventions collectives outre-frontière.

Cette généralisation de l'arbitrage exécutoire ne signifie pas qu'il soit exempt de critiques. On estime que les délais sont beaucoup trop longs, que l'enquête est conduite d'une manière beaucoup trop formelle, que les décisions sont trop souvent sujettes à révision par les cours civiles, que l'obligation pour les syndicats d'avoir généralement à en défrayer la moitié du coût empêche les plus faibles d'y recourir suffisamment.

Ceux qui désirent le maintien du régime actuel estiment qu'il est possible pour les intéressés de l'améliorer en établissant, à l'intérieur des conventions, leur propre système d'arbitrage. Ils considèrent aussi que toute tentative pour en réduire le coût se traduira par la multiplication des griefs déferés à des tiers.

L'auteur signale que, sous le présent régime, le syndicat, suivant les circonstances, a un triple choix : soumettre le grief à l'arbitrage, réserver la question pour règlement à la prochaine ronde de négociations ou, tout simplement, l'abandonner. Ce triple choix dépend de la situation de force dans laquelle se trouve le syndicat au moment du grief. Si le grief n'est pas abandonné, le syndicat pourra demander l'arbitrage, ce qui peut inciter la direction à le régler. Si la direction ne bouge pas et si l'on est à la veille d'entreprendre de nouvelles négociations, il se peut que le syndicat préfère tenter de trouver une solution au moment des conventions collectives.

L'auteur passe ensuite à l'analyse de la conception que les arbitres se font de leur rôle, les uns s'en tenant à l'interprétation stricte de la convention ; d'autres, beaucoup moins nombreux, cherchant à jouer si possible le rôle d'un médiateur. D'une façon générale, l'arbitrage est généralement considéré comme un procès, les parties présentant une argumentation, s'appuyant sur une jurisprudence et citant des témoins.

La nature des griefs est aussi fort variée. Les uns portent sur des questions de fait précises ; d'autres viennent s'insérer dans le processus même des négociations collectives. Il est rare que l'on soit en présence de conflits de droit pur. On est la plupart du temps en présence d'un conflit de droit auquel viennent s'ajouter des questions d'intérêts.

Il arrive également que l'on se trouve en présence de pseudo-conflits, c'est-à-dire que les conflits sont inexistant, les parties ne se comprenant pas ou faisant mine de ne pas se comprendre.

En effet, les rapports entre des contractants assujettis à une convention collective sont de plusieurs types. Les uns sont en opposition marquée cherchant à se

détruire ou à s'affaiblir l'un et l'autre. D'autres adoptent une attitude d'agression mutuelle, mais l'un accepte l'existence légitime de l'autre. D'autres encore cherchent à s'accommoder: ils ne vont pas jusqu'à travailler à se démolir, mais ne prêtent aucune assistance, gardant des rapports courtois de stricte neutralité. Enfin, il y a ceux qui marchent la main dans la main en parfaite collusion.

L'existence de ces climats variés exerce, cela va de soi, une influence sur le type des conflits qui se produisent, sur la façon dont ils sont perçus et aussi sur les modes de règlements de griefs qu'on recherche.

À partir des observations précédentes, l'auteur simplifie les choses en estimant qu'il s'installe généralement deux types de climats: les uns, bons, où l'on s'efforce de coopérer, de s'accommoder; les autres, mauvais, où l'on se défie sans cesse mutuellement.

Dans le premier cas, il y a peu de pseudo-conflits, puisque ceux-ci ont tendance à se résoudre entre les parties, c'est-à-dire que les problèmes se règlent aux divers stades de la procédure des griefs. Au contraire, si le climat de l'entreprise est mauvais, il y a de fortes chances que le mécanisme mis en place pour le règlement des griefs fonctionnera mal, le syndicat devant choisir l'arbitrage, retenir le grief en vue de son règlement au moment de la négociation collective ou se résigner à le laisser tomber.

C'est ici qu'intervient le choix de la méthode à suivre. Par exemple, on sait que la procédure de règlement des griefs précède le recours à l'arbitrage. La décision du syndicat sera alors influencée par le moment où se soulève un grief. Si l'on est à la veille d'entamer de nouvelles négociations et que l'on sait que les délais seront longs avant d'obtenir une décision, le syndicat cherchera à régler le différend par le biais de la négociation collective, d'où l'on peut déduire que des considérations de temps jouent un rôle important dans la décision de porter ou non un grief à l'arbitrage. L'autre aspect, qui entre en ligne de compte, a trait aux gains que l'on peut obtenir. Parfois, quand il s'agit de problèmes relatifs aux salaires, il est possible d'évaluer les avantages qu'on pourra tirer d'une victoire, mais quand il s'agit des droits d'un individu, il est bien plus difficile de trouver une unité de mesure. Le syndicat tient également compte des dépenses qu'il aura à effectuer au cours d'un arbitrage comparativement aux gains qu'il escompte obtenir par la décision et également au risque qu'il court de ne pas avoir gain de cause.

Le schéma précédent permet d'étudier plusieurs possibilités de modifier les lois suivant lesquelles le système d'arbitrage avec décision exécutoire peut fonctionner. Ce schéma implique que, là où les relations sont bonnes, la plupart des griefs ne se rendront pas à l'arbitrage. C'est pourquoi les adversaires de la modification du régime estiment que rendre l'arbitrage plus facile d'accès, c'est inviter les parties à ne pas faire tous les efforts voulus pour régler directement les conflits, mais on peut se demander aussi si un régime d'arbitrage moins dispendieux, moins long, moins formaliste ne serait pas un bon moyen de faciliter les négociations collectives.

La réduction du coût de l'arbitrage, de sa durée et de son formalisme aurait pour effet de débarrasser la négociation collective de nombreuses questions qui conduisent souvent à des impasses mais, cela accroîtrait le volume des griefs et forcerait aussi le syndicat à poursuivre des griefs qui ne sont pas sérieux.

L'auteur conclut son étude en disant que, étant donné le rôle important que joue l'arbitrage dans les relations de travail, il faudrait pousser plus loin les recherches dans

ce domaine pour mieux connaître d'abord le fonctionnement du processus d'arbitrage et ensuite pour mieux comprendre les facteurs qui poussent les syndicats à y recourir, ce à quoi l'on peut arriver par l'étude plus poussée de la formation et du cheminement de beaucoup de griefs.

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Fernand MORIN, en collaboration avec Rodrigue BLOUIN

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PLAN SOMMAIRE

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Titre II – Aperçu des règles de droit applicables à l'arbitrage des griefs

Titre III – L'arbitrage des griefs : ses coordonnées générales

Titre IV – La procédure d'enquête

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