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A LABOR ARBITRATOR VIEWS HIS WORK

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What follows is, in form and in content, somewhat at variance from the typical law review article. It is not the result of a systematic survey of statutory enactment or of case law. Still less is it based on investigation of the place of arbitration as a part of the social order. Neither is it the product of an inquisition into the materials of the social and behavioral sciences for such light as they may shed upon the arbitral process and its achievements. It is simply an account of the author's own views of arbitration, based on his personal experience as an arbitrator, an experience which he commenced in the capacity of a public panelist under the War Labor Board for the Eighth Region in 1943. That service involved chiefly experience in arbitrating so-called "interests" disputes rather than grievance disputes.[1] Since the termination of the open hostilities, however, his work has been entirely confined to the latter field. It is with this sort of arbitration that these observations chiefly will be concerned. Since they are based so much upon one man's information, derived from arbitrations conducted incidentally and not as a principal vocation, necessarily they will be fragmentary in approach and in coverage. The justification for presenting them is the possible advantage to those who have occasion to conduct cases before arbitrators in knowing how one of the class views his own methods of operation. In view of the nature of the presentation, the author asks to be forgiven for a more extensive resort to the first person singular and for considerably less documentation than is customary in legal articles.

Arbitration as a Form of Adjudication

In grievance cases, I am convinced by my experience that the arbitrator essentially is a judge, and that the process of arbitration basically is a judicial process. The arbitrator is not a partisan. He is not to frame an agreement for the parties, nor is he to remedy the deficiencies of the agreement which they have framed for themselves. He should not be a partisan of either side, nor should he allow his judgments to be swayed by social sympathy. The scriptural

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1. "Interests" disputes are those which relate to what shall be included in a contract or other arrangement governing relations between employer and employees. "Grievance" disputes, on the other hand, arise out of alleged violation of rights under such contracts or arrangements. See the discussion in Elkouri, How Arbitration Works 17 (1952).

admonition that "you shall not be partial to the poor or defer to the great"[2] is particularly applicable to the task of the grievance arbitrator.

All this is rather familiar. The law books, to be sure, are full of adjurations to arbitrators that they must be fair, impartial and disinterested. But, in the emphasis that also is put upon the informality of arbitral proceedings by the very same authorities, there is danger that the essentially judicial quality of grievance arbitration may be forgotten. Some of the criticism which has been brought against arbitration as an instrument for the government of labor relations[3] probably stems from such forgetfulness. And, quite beside that, there is the simple little need for the arbitrator to cultivate the judicial virtues of patience, open-mindedness, and reservation of judgment until all aspects of the case have been developed. Particularly is this necessary in the *ad hoc* arbitrator, who is constantly confronted with situations arising in plants and industries to which he is a stranger. He must become acquainted both with industrial techniques and with the historic background out of which the dispute arises, if he is to exercise a judgment, informed and discreet. To arrive at this acquaintance he must use judicial patience and persistence in inquiry.

ORGANIZATION OF THE ARBITRATION TRIBUNAL

The tribunals under the War Labor Board were organized on the tripartite principle, with the public panel member acting as chairman over the representatives of management and of labor. In my experience since the war, the organization of the boards has varied greatly, dependent partly on contractual stipulation, but still more dependent upon the practice of the parties. Some contracts provide for a single arbiter. In other instances, the stipulation is for a tripartite system, and the board actually functions in that manner. At still other times I have been informed that, while technically the tribunal is tripartite, in fact I am to make the decision on my own responsibility and without the formality of a meeting of the board as such after the testimony is taken. Sometimes, in such a situation, the nominally partisan members will function as such to the extent of sitting with the arbitrator and assisting in the development of the positions of their respective principals by questioning the witnesses or by suggesting points to be cleared up. Some-

2. LEVITICUS 19:15.

3. Thus, some criticism has been leveled at an alleged tendency of some arbitrators to write the contract which they think the parties should have made instead of administering the contract that actually was written. See Phelps, *Management's Reserved Rights: An Industry View*, in MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS 102, 104, 112 (McKelvey ed. 1956).

times they act, instead, as leading counsel for their sides. On other occasions they are present merely as spectators. In some instances the contract, after providing in terms for a tripartite arbitration board, abandons this principle by providing that the impartial arbitrator shall make the decision.

Of all these varied forms, I believe that the most efficient and the most satisfactory are those which, avowedly or in practical operation, vest the decision solely in the impartial arbitrator. Much of course may be said for the assistance given to the third man on the board by the partisan arbitrators in explaining the testimony, making clear the background of the case and acquainting him with the technical atmosphere in which the dispute has developed. All these tasks, however, can be as well performed by counsel at the hearing or by other participants therein. The informal procedures applying to arbitration permit the arbitrator to be tendered, and to make use of, the resources of any attendant at the trial. If he is properly alert, he will explore the points on which he is uncertain and will call for the definition of terms with which he is unfamiliar. On the other hand, there are definite disadvantages to the tripartite system. The partisan members at times tend to be over-insistent upon their respective points of view. If the decision calls for longer consideration than is practicable at the session for the presentation of evidence, grave difficulties often are encountered in finding a time and place for reassembling the board. If this is avoided by requiring decision within a set time, the determination may not be of the best quality.

The selection of the arbitrator by the parties is the most common method of choice. In a few instances, I have sat under a designation by an authority named in the contract. Presumably the widespread use of the agreement of the parties as a means of selection reflects general satisfaction with this method on the part of those who draft collective bargaining contracts. Nevertheless, in my judgment, it has undesirable features. Just recently, I have read that "the most efficient way to lose at arbitration is to choose the wrong man as arbitrator."[4] The context of this statement makes it clear that the author did not have any illegitimate meaning in mind, but there is no assurance that the selection of an arbitrator will be unaffected by consideration of what is thought likely to be his attitude. I have seen instances of such an approach. Also, I have had good cause to suspect that disappointment with a decision may have considerable weight, with some people, in determining the selection of an adjudicator on a future occasion. Others than I have commented upon

4. 8 LAB. L.J. 127 (1957).

these phenomena.[5] One worthy to be an arbitrator will not be deflected by them. But they are inconsistent with the stability and the independence that should characterize the process and they introduce factors which must dilute its quality.

It is easier to diagnose the ill than to prescribe the cure. As long as there is agreement that voluntarism rather than compulsion should prescribe the adjudication of disputes arising out of labor relations, the establishment of institutions of compulsory jurisdiction staffed by independent judges is out of the question. But it might be practicable and consistent with the principle of voluntarism to draw upon the practice under the regional war labor boards. The public panel members were selected by the boards and, of course, had to receive the approval of the representatives of management and of labor. Thereafter, however, they were assigned to hear particular cases without choice of the parties thereto. Somewhat similar machinery surely could be worked out for the designation of arbitrators in voluntary proceedings from a previously approved list. Those who did not prove fitted for the task, in spite of the care given to their selection, could be removed from the roll. This is not unlike the plan set up by some collective bargaining contracts which provide for the appointment of arbitrators by a neutral agency, and I should like to see it tried as a general practice.

FORMULATION OF ISSUES

There has been a rather unusual development in this respect, unusual in the sense that the progression has been from greater to less formality. Under the regional war labor board, in the region in which I served, panels were given quite specific statements of the issues involved in the cases to which they were assigned. Since the war, of course, formulation has been left to the parties. In the earlier part of the post-war period, I would receive fairly specific statements of what the dispute was about. Often there would be a reasonably adequate summary of the contentions of the parties, so that I was substantially apprised of what the hearing would involve. The contract was sent to me in advance, so that I could see what language was relied upon. Almost always I would be furnished, at the least, with a copy of the grievance. Of late years, all this has dropped out of the picture. The most I can expect is a copy of the grievance. More likely I will be told merely that the dispute involves a discharge, or a classification, or by whom work should be performed. I arrive at the hearing with a mind which certainly should be "void of all offense" to either party, since I have had not the slightest preview

5. See Cole, *Arbitration—Whose Responsibility?* 4 PROC. IND. REL. RES. ASS'N 151, 153 (1951).

of the matter. The issues *may* be defined at the hearing by the execution of a stipulation of submission. But, increasingly, when I ask whether such a document has been executed or can be agreed upon, I am told by the representatives of both parties: "We haven't been able to agree on a statement; why don't you just listen to the evidence and determine from it what the issues are?" Like as not, we shall have proceeded but a little way with the testimony until one side or the other objects that a given question "is utterly irrelevant to the issues of this case." Obviously, all I then can say is that I lack the foundation to rule on this objection since I have not yet ascertained the issues. An experience of this sort is the best cure I know for that impatience with some of the acute refinements of pleading in the courts which come to every lawyer who is concerned that procedure shall be a means of justice and not an end in itself.

Probably this delay in the development of the issues is one of the prices that we must pay for the informality, the flexibility, the freedom, of arbitral proceedings. So long as cases are presented by laymen, on the basis of inartificially drafted statements of grievance in the early stages of the disputes, it certainly will be unwise to insist upon formal pleadings as the foundation upon which causes shall be brought before arbitrators. But I think much waste motion could be eliminated if some way could be devised to get before the arbitrator, in advance of the hearing, the exact points at issue between the parties.

The Hearing

Probably the first thing to strike the lawyer turned arbitrator as unique about the proceeding over which he presides is that the parties are quite likely to be represented by advocates who are not members of the bar, who, indeed, lack any legal training. Yet these same advocates essay one of the most difficult tasks in jurisprudence, the interpretation and the application of a contractual agreement. In addition, they often are charged with presenting to an adjudicator the evidence from which he is to make a determination of disputed fact. I do not condemn intransigently the relative infrequence of lawyers as counsel. Through experience and aptitude, many men in company departments of labor relations and many union representatives acquire a forensic competence equal to that of established members of the bar. At one plant where I have held several arbitrations, the company normally is represented by a lawyer. The union is represented by a man who came from the ranks of labor to the position of international representative in his union, which carries with it the role of counsel in arbitration hearings. Through his ex-

perience he has developed into an extremely able representative in this class of litigation. Both men have the gift of exceptional discernment of the crucial issues in grievance matters. Both have a highly developed instinct for separating the relevant from the irrelevant. Neither one ever attempts to clog the proceedings with immaterial matter or resorts to far-fetched and untenable theories. As a result, some of my most pleasant arbitrations have been those in which these two men appeared as opponents, and, on the basis of helpfulness to the arbitrator and service to the client, I would not rate the self-taught labor representative either below or above the professionally-trained lawyer. And there are many other lay representatives who are equally skilled.

Nevertheless, after paying all proper tribute to the effectiveness of these laymen, I think the arbitral process would be improved by more frequent use of lawyers as representatives. These are sins of which lay counsel frequently are guilty: inadequate perception of the vital issues; obscure phrasing of questions; excessive use of leading or concludent questions in such a way as to destroy the effectiveness of the testimony produced; unnecessary prolongation of hearings; extreme and untenable contentions, particularly in the interpretation of contractual language; hypertechnicality. Too many laymen think they are acting like lawyers when they resort to pettifogging objections or fight to the last ditch over each minor incident. The lawyers who have appeared before me have manifested an appreciation of the broader aspects of labor-management relationship, a fairness, an adaptability and a resourcefulness that rebuts completely the objections which some have raised against participation by lawyers in the arbitral process. So far from obstructing it with undue technicality and belligerence, they have helped it to run more smoothly. I hope that we shall have increasing use of lawyers as representatives of both sides in labor arbitration.

The conduct of the hearing, with or without lawyer representation, is quite different from the formal court proceeding. We have no formal opening, no bailiff, no distinctive dress for the arbitrator. Usually there will be opening statements and presentation of evidence by the respective sides in an order that approximates the turns of the plaintiff and the defendant in a judicial trial, and with full opportunity for cross-examination. But there are no set patterns. Interruptions come frequently. Any attendant who thinks he can throw light on a dark corner is free to volunteer. The strict rules of evidence, it is common learning, do not prevail in arbitrations.[6] My own custom is to admit almost anything that is tendered by

6. See Singer, *Labor Arbitration: Use of Legal Rules of Evidence*, 2 LAB. L.J. 185 (1951) for a general discussion with most of which my own experience leads me to concur.

either party, unless it clearly is without probative value with respect to the issues at the hearing—a determination which, obviously, can rarely be made until the case is near conclusion. I believe I have gained enough experience in listening to evidence to be able to judge how much or how little weight ought to be accorded a particular piece of evidence. I think I am quite able to appreciate the policy back of the exclusionary rules and to decide whether the instance before me is one in which that policy demands that the evidence be disregarded. The arbitrator should be willing and anxious to learn everything that may illuminate the controversy. Indeed, he should not hesitate to question witnesses, when necessary, to clarify statements that seem to him obscure. On occasion, I have asked for the production of particular individuals who were not on either party's witness list. However, I feel that the arbitrator should be reluctant to take a leading part in the examination of witnesses. He should avoid any suggestion of partisanship, and this is difficult if he continuously is injecting himself into the development of the story. But there are times when he must intervene to make sure that nothing is overlooked that is necessary to present a complete picture. My custom is to wait to do this until the questioning of each witness is over in the hope that the gaps will be filled in without my participation.

The testimonial oath is desired by some parties and considered unimportant by others. My habit is to follow the wishes of the parties as to whether an oath should be administered to the witnesses. I have serious doubts as to the legal effect of an oath administered by an arbitrator in most of the states where I conduct hearings. I think the arbitration should be conducted on the basis that men are to speak the truth as a part of the common obligation upon us all as responsible members of society. But it is a fact that some people have their sense of responsibility greatly stimulated by oath-taking. Therefore, if parties desire this safeguard, I will administer it. Letters, written statements of one sort or another, affidavits, I will receive, but, obviously, where they are not otherwise corroborated, the lack of opportunity for testing their truth, by cross-examination or by other methods, detracts from their efficacy to establish disputed issues.

One of the traditional methods for preserving the purity of testimony, "the rule" that witnesses be excluded from the hearing chamber during the reception of others' testimony, frequently is invoked in arbitration. Whenever it is sought, I grant it, except, of course, as to the parties. On several occasions, I have observed the effectiveness of this safeguard against the possibility that one witness may be influenced in his testimony by what he has heard some one else say.

DECISION

When the evidence is in and the arguments have been made comes the time for reflection and decision. In all but the simplest cases, I prefer to reserve judgment until I have time to study the evidence and to make investigation into such past decisions as I think will be helpful. I feel sure that the quality of adjudication gains much from taking this time. In my earlier arbitrations I found that some collective bargaining contracts specifically stipulated that decision should come within a very short time after the close of the hearing, in some instances before the board separated. This always seemed to me an unwise requirement. Reflection, and the opportunity to review the evidence as a whole, rather than a hasty attempt to organize it on the spot, are better suited to arriving at a correct view of the facts. Also, for reasons which I develop later, it always has appeared to me to be desirable, in solving difficult problems of interpreting and applying contractual language, to know what other arbitrators have ruled in similar situations.

Reporters rarely are available to arbitrators. The matters usually involve too little to warrant the incurrence of such expense. But I always take complete notes of the testimony, even though it be necessary at times to ask that further questioning cease until I have caught up. Thus I am able to summarize, compare, reconcile, or, if necessary, choose between various accounts in order to arrive at what seems to me the true picture. I am sure that the opportunity to do this is of great importance in improving the quality of decision. I have always thought it a great mistake that our law frowns upon the taking of notes of the testimony by jurors, and my experience as an arbitrator with note taking, as against my earlier practice dispensing with it, confirms that opinion.

The parties frequently desire to file briefs. The request always is granted. However, the advantage of the brief to the arbitrator varies greatly. Many briefs are nothing more than summaries of the evidence with more or less acute comment designed to uphold the parties' contentions about the facts. In these I find little help. If there has been adequate oral argument at the hearing, I have been apprised already of everything that is in them. Even if there has been no adequate formal argument, I have probably been made sufficiently aware of the conflicting contentions as to matters of fact by the discussions that spring up interstitially during the hearing. In any event, I am conceited enough to believe that I can analyze evidence pretty well on my own account. On the other hand, if the arbitration involves a difficult question of contractual interpretation, or a problem as to the significance of principles of law, including that body of arbitral doctrine that has been building up over

the years, a diligently prepared, well-written brief can be of tremendous help. On occasion, I ask for briefs, when I am confronted with a perplexing point which I do not feel has been adequately dealt with in argument. It must be confessed, however, that on too many occasions the desired help is not forthcoming from the briefs. Always, I undertake my own research on matters about which I have doubt, never trusting the briefs to be exhaustive.

What about this matter of rules of law; resort to reported decisions; observance of precedent? Some writers inveigh against resort to such materials, as a sort of "creeping legalism" threatening to stifle the usefulness of arbitration.[7] This seems to me a strange and unrealistic attitude. Clearly, I must follow the applicable statutory and decisional law of the state within which the dispute arises. I can look to that law for guidance by way of analogy in determining the meaning and application of contractual provisions. When, as usually is the case, no conclusive guide can be found there, or in general law, why should I not inquire what other arbitrators have done in similar cases with provisions of like import? Actually, I believe I am bound so to do. As to decisions of other arbitrators under the same contract between the same parties, I believe that I expressed the correct principle when I wrote, in an unreported decision which I find in my files:

> Unless clearly wrong, and it cannot be said that Arbitrator C was clearly wrong, such a decision should be binding as to the interpretation of the same clause in respect to like situations.

Obviously, contractual provisions should be applied with equality, or justice is denied. Also, if this rule is adhered to generally, it discourages the reprehensible practice of shopping around for the most favorable arbitral opinion. The same principle I have applied to similarly phrased contracts, negotiated by the same union with component corporations of an integrated organization.

As to arbitral decisions rendered under other contracts between parties not related to those in the case at hand, usefulness depends upon similarity of the terms and of the situations to which they are to be applied. They must be weighed and appraised, not only in respect to these characteristics, but also with regard to the soundness of the principles upon which they proceed. Certainly, an arbitrator may be aided in formulating his own conclusions by knowledge of how other men have solved similar problems. He ought not to arrogate as his own special virtues the wisdom and justice essential to sound decision. In at least two instances in recent months I have found by investigation that a strong current of arbitral decision had overborne my first impression of the implications of particular

7. *Cf.* Manson, *Substantive Principles Emerging from Grievance Arbitration: Some Observations*, 6 PROC. IND. REL. RES. ASS'N 136, 147 (1953).

language. To yield to this "common sense of most," especially as, on examination, the reasoning on which it was based carried plausibility, was neither to evade my responsibility nor to sacrifice my intellectual integrity. Contrariwise, it reduced discriminatory application of similar provisions. It enabled me to make use of the wisdom of others at work in the same field. It increased the reliance which draftsmen of future contracts might feel as to the application which would be made of the words which they had chosen. It informed these same draftsmen of words to be avoided if they desired a different result. And it could lessen the need for future arbitrations by adding to the consensus in favor of the particular interpretation of commonly used forms.

This resort to precedent in aid of interpretation and application does not deserve the scornful appellation of "playing follow-the-leader."[8] One is not to accept a single prior decision elsewhere as binding precedent. Indeed, no number of decisions has such an effect. The resort to the opinions rendered under other contracts is simply for the purpose of making available, for what they are worth, the judgment of informed and able adjudicators and the developing usage of the community. In each instance the arbitrator is to apply his own acumen in valuing the decisions of the past. Certainly, he must use them with due regard to the facts of the case before him, which well may call for a disposition different from that in other instances. Particularly he will need to take into account any light that the negotiations preceding the contract or the practices of the parties may shed on the problem of interpretation. Such factors often dictate a result varying from determinations elsewhere.

The process of decision, obviously, involves determination both of the facts and of the principles which should govern their significance. Fact determination often is simplified by agreement of the parties. Where there is no such agreement, I try to reconcile the evidence so far as possible. Realizing the fallibility of human observation and recollection, I try to reconcile, as far as possible, variant renditions of the facts. Of course there are occasions where this is impossible. Then I must try to arrive at the correct picture by marshalling the evidence, in corroboration or in disproof, of particular viewpoints. There *are* occasions in which demeanor or circumstances may convince me that a witness has been unmindful of his obligations. In most instances however the explanation of such conflicts lies in imperfect observation or recollection.

Upon occasion, satisfactory decision seems impossible to achieve. In such cases, I have never been able to get help from Judge Hutch-

8. See McPherson, *Should Labor Arbitrators Play Follow-The-Leader?*, 4 ARB. J. (n.s.) 163 (1949).

eson's judicial "hunchery."[9] Faced with such a stalemate, my practice is to start writing a decision, in the direction which seems most acceptable. Sometimes the process of writing confirms me in the previously tentative conclusion. On other occasions, the result of attempting to put the tentative judgment into reasoned form is to make clear its inacceptability and to compel a different solution. Indeed, there are times when a determination which, at its inception, seemed reasonably clear, simply will not survive the attempt to put it into a rationally explicable form. This is a chief reason for my opposition to contractual provisions that hurry the arbitrator into a poorly considered decision. Swift justice is desirable, but only if it *is* justice.

In drafting an opinion I try to state the facts and the issues concisely, but in sufficient detail properly to inform those who may have occasion to read the decision. In order to give the parties adequate enlightenment as to my interpretation of the contractual provisions they have brought into the contest, I undertake to deal with all issues raised, even though the determination of a single issue might have disposed of the case. This departure from traditional judicial habit is justified by the function of arbitration as a means of adjusting industrial relationships rather than simply as a method of disposing of individual claims. Of course, there are some occasions on which questions will have been raised in argument that are so far outside the legitimate scope of the grievance that they may not be determined with propriety. On these occasions I set forth carefully the matters not decided, in order to avoid, as far as possible, misconception as to the scope of the determination. To aid in showing the basis of decision, I cite statutory law and judicial decision, where they are pertinent, authoritative writings in the labor law field and arbitral precedents, so far as I have found them helpful.

A review of my files shows frequent occasion, in other than cases turning entirely on fact situations, for resort to the application of legal principles and methods. Particularly is this so of the canons for the interpretation of contractual agreements. At random, I note use of the objective test for the construction of offers, the plain-meaning rule, the construction of language in the light of related provisions, the accomplishment of the purpose of the parties, practical construction by the parties, the avoidance of absurd results, and of many others. This may simply reflect my legalistic background, but my own feeling is that it justifies my view that arbitration in essence is a part of our machinery for the administration of justice according to law.

9. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision,* 14 CORNELL L.Q. 274 (1929).