evidence. But if insecurity precedes the *ad hoc* arbitrator like Cyrano's nose by a quarter of a mile and if his anxieties take over, obviously he cannot be either an effective or a competent arbitrator and his approach to matters of accommodation is likely to be disproportionate. Perhaps all one can really say about this factor of insecurity for purposes of this paper is for each arbitrator to raise to some objective level of recognition the degree to which it exists in him. That may not solve the problem but it certainly cannot hurt.

II. PROCEDURAL PROBLEMS IN AD HOC ARBITRATION

FREDERIC MEYERS*

It is sometimes said of disputes settlement under collective agreements that, unlike many other types of disputes, the parties must continue to live together after the supposed settlement. I guess that whoever suggested that we should discuss the problems of *ad hoc* arbitration had in mind that there must be problems differing from those of the permanently designated arbitrator. Such differences must arise from the fact that the *ad hoc* arbitrator and his clients, perhaps to the good fortune of the parties if not the arbitrator, need *not* continue to live together. I must say, however, that as an arbitrator I have had some blind dates whose acquaintance I had no interest in pursuing.

My assignment of choice was to discuss some of the procedural problems that may be unique to *ad hoc* arbitration. In thinking about it, I became less sure that many such *unique* problems exist. I shall be brief, and try to raise selected, general, and probably disconnected issues in the hope that they will stimulate some discussion.

Demand for Consolidation

Perhaps the most fundamental procedural issue that may come before the *ad hoc* arbitrator is the demand of one party or another for consolidation of cases. Like many procedural issues, it shades into the substantive in the sense that it often requires an award construing the agreement. The situation may be that both parties

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agree bilaterally to advance a case to arbitration and select an arbitrator. Then one party or the other demands that one or more other cases ready for arbitration be heard in the same proceeding before the same arbitrator.

Individual decisions turn, of course, on the language of the contract under which the case arises. But the *ad hoc* arbitrator forced to make such a decision is placed, it seems to me, in a most difficult position—that of possibly deciding to force himself as arbitrator on an unwilling party at least as to one or more cases. The permanent umpire may find that for a particular type of dispute he has become unwelcome to one, or both, parties. But it is clear, in his case, that this is a risk the parties deliberately undertook when they named him. Even though it may be argued in a particular case that the contract clearly anticipated consolidation of cases before an *ad hoc* arbitrator, it is not always clear that both parties understood when a particular arbitrator was selected that a demand for consolidation would subsequently be made. To many procedural questions there are ethical correlatives. Although I don't want to get into Carl Warns' jurisdiction, it seems to me to be a question worth raising whether the *ad hoc* arbitrator who finds he must decide in favor of a demand for consolidation, which one party did not realize it would be faced with at the time of his selection, ought not to retire from hearing the substantive cases in order to give the parties the opportunity to select an arbitrator with full knowledge of which cases he is to hear.

Need for Submission Agreement

Another old saw of arbitration is that the award should somehow lie within the range of expectations of the parties. It is perhaps as important that the procedure itself lie within the range of expectations of the parties—that justice be seem to be done. The problem of the *ad hoc* arbitrator which is distinguishable from that of the permanent umpire lies in the fact that customary procedures vary widely. Indeed, the *ad hoc* arbitrator often finds himself with parties who have arbitrated so infrequently that they have little idea of what to expect or of how to proceed. Although the permanent umpire can develop or rely on procedures which the parties expect and accept, the *ad hoc* arbitrator must feel his way in each

case, unless, of course, he has had previous experience with the parties and knows what satisfies mutual procedural expectations.

It is my view also that the arbitrator, in handling a case for unfamiliar parties, perhaps must be more careful than with the familiar to protect himself and the integrity of the proceeding. Initially, for example, I always insist on some form of submission agreement even if it is only the question, "Should the grievance described be sustained or rejected? If sustained, should the requested remedy be applied?"

Some parties in dealing with an unfamiliar arbitrator will begin by testing him. This usually starts with discussion of the submission. I find it an extremely rare case in which the parties have arrived at a submission agreement prior to the hearing. Either because of a wish to test the arbitrator, or through inexperience, one party or the other will attempt to get the arbitrator to express a preference for particular submission language. I have always taken the position that I cannot act formally until some kind of question is placed before me by the parties mutually. I generally try to refrain, therefore, from intervention in discussion of the submission agreement. With obviously inexperienced parties I do on occasion point out the patent flaws in some of the language that may be discussed, asking, for example, whether the parties wish to limit the authority of the arbitrator, or to limit themselves in ways that some language may do. Even though the arbitrator should, I think, try to prevent trickery in developing submission language, he should not, in my view, act formally unless, of course, the parties stipulate that the arbitrator shall have the power to frame the issue. This, however, is a situation I always try to avoid.

Another point of testing often follows immediately when the arbitrator asks for the beginning of testimony, especially in discharge cases. The party expected to open sits back. I then ask him to open, in accordance with customary arbitration procedure. He then raises the burden-of-proof bogey. This is one I always avoid with a statement that order of presentation in arbitration has no necessary connection with the locus of the burden or the degree of proof required.

Unequal Representation

Delicate problems often arise when one party is represented by

counsel—professional or self-made—and the other by an inexperienced representative who has not even watched "Perry Mason" or "The Defenders." This situation leads to a quick flow of objections, motions for directed verdicts, and much of the remaining content of a law dictionary. If the parties both want and understand the rules of evidence, I am usually willing to play that game. If they both want maximum latitude, I am also willing to sit for as long as it takes. The permanent umpire can, after his first case or two, work out understood procedures that are seen as equitable. The *ad hoc* arbitrator cannot, over some period of time, get to hearing efficiency and equity, understood as such. His job is to conduct the single hearing so as to maximize the likelihood of getting in the relevant facts, unobstructed so far as possible by the ineptness of one party's being taken advantage of by the other. Yet the *ad hoc* arbitrator must avoid the appearance of making the case for either party, or of making the nonprofessional look too bad to his constituency.

I know of no rules for accomplishing this. It simply takes a quickly acquired feel for the individual situation, and a determination that insofar as possible the case will not turn on the failure of one party or another to make available relevant evidence, or that such evidence will not be excluded because of the inexperience of one party, or intimidation by the other.

It may well be that the permanent umpire can be freer than the *ad hoc* arbitrator to take the initiative in drawing on information acquired from past experience with the parties, after a relationship of ease and mutual confidence has been developed. He can then more easily raise questions of past practice, missing evidence, or precedent. The *ad hoc* arbitrator, on the other hand, may find such initiative on his part at least equally important to an equitable determination of the case, yet vastly more difficult to exercise.

Tripartite Boards

One fairly difficult situation in maintaining fair procedure arises when there is a tripartite arbitration board. I have had experience with one partisan member of a board who asks questions in a manner prohibited to counsel for the party designating him, or to which an objection would be sustained. I have found no satisfactory answer to this problem; fortunately it occurs infre-

quently. I have always supposed that under the typical agreement members of the board are coequal. The opposing party often finds it difficult to raise an objection to acts of a member of the board, and, when he does, I find it difficult to invoke the majority of the board to silence a colleague. However, when it becomes a blatant evasion of fair procedure, I think the offending member of the board should be curbed.

There are a variety of other problems especially related to experience with tripartite boards, some of which are procedural. Perhaps at some time a session on such problems would be warranted. I will not mention them here, although perhaps some of them may be raised in the discussion.

Decisions of Other Arbitrators

Another category of problems peculiar to the *ad hoc* arbitrator is that of his proper regard for decisions of other *ad hoc* arbitrators under the same agreement, or his knowledge, sometimes unofficially acquired, that other arbitrators may be dealing concurrently with the same or closely related problems. These questions are related to case consolidation, submission language, and determination, apart from the stipulation, of what it is the parties really want to have decided. I have always felt put upon when I discovered that another arbitrator was dealing concurrently with another aspect of the same problem, arising essentially out of the same fact situation. Here the parties run the risk of inconsistent awards, though on minutely different issues, and choose to spend time and money on duplicate or nearly duplicate presentations.

It is usually too late to do anything about it, even if there were a way, and, as I have indicated above, I dislike having to decide consolidation demands, and must assume that in the situation just described one or both parties chose the route of separate cases deliberately. Discovery of this situation may, however, lead to more than usual caution in writing an award.

The rare (in my experience) "general grievance" may describe what the parties really want decided in the stipulation. More often, a general question is submitted on the basis of a specific grievance. Here the useful function of the opinion is to assist in seeing that the general issue the parties want decided is met. Patently the opinion should not deal with a matter the parties

really don't wish to have dealt with; but it should serve the intended purpose of the arbitration. But when I know another arbitrator is hearing a related issue, I quite deliberately narrow the problem discussed in the opinion as much as possible, and indicate only as few general principles of contract application or interpretation as are necessary to decide the specific issue before me, narrowly construed. I think I owe this to my fellow arbitrators, and to the parties. Here the choice is made, on the one hand, of facing the parties with possibly inconsistent decisions or, on the other, of inefficiency in arbitration, in that the decision may not give the parties what they wish, and may result in their being faced with additional future disputes or in the case of the losing party with a second bite at the apple. I am not sure this is strictly a procedural problem, but it doesn't seem to fall into one of the other categories to be discussed.

It is an aphorism of arbitration that each arbitrator in each case is his own jurisdiction, and that he is not bound by decisions of other arbitrators. It is agreed, however, that he should pay at least closer attention to awards involving the same parties and the same contract. I have nothing really to add to this statement. *Ad hoc* arbitrators continually have other awards by other arbitrators cited to them, and when they involve the same parties and the same contract, one should pay attention to them. I do so *except* when I can't discover how my predecessor got where he went. In due respect to those who succeed me, I do try to present in the opinion a reasonable summary of findings of fact and of reasoning. This, it seems to me, is particularly important in *ad hoc* arbitration, whereas a summary of the arguments of the parties is much less so.

Conclusion

Much of what I have said, I am afraid, is primer material. Procedure in *ad hoc* arbitration does not, I think, differ in principle from arbitration by a permanent umpire.

General procedural principles for the assurance of equitable determination, order, and efficiency are equally applicable. There must be almost as much variance in the arbitral environment among situations where umpires sit as between these and *ad hoc* cases. In each situation the problem of the arbitrator is to apply

principles of procedure in such manner that he has the best chance of coming to the best decision without injury to the relationship of the parties, given the arbitral environment. The *ad hoc* arbitrator may only be *somewhat* less permanent. In essence, the umpire has an opportunity to achieve efficiency and procedural agreement by working with the parties. The *ad hoc* arbitrator must, at one and the same time, be exceptionally careful to preserve the amenities while also seeing to it that, for his case, the case is fairly and completely presented and is understood to be so. If he succeeds, he may grow up to be an umpire.

III. ETHICAL PROBLEMS OF THE AD HOC ARBITRATOR

CARL A. WARNS, JR.*

The ethical problems of the *ad hoc* arbitrator arise essentially from the same source as the other special challenges of the *ad hoc* assignment—the stranger relationship between the parties and the arbitrator. I do not speak, of course, of the more obvious, deliberate ethical offenses that can occur in the permanent or semi-permanent association. The problems of which I speak take place in the main, to oversimplify perhaps, because of the lack of information or experience about those aspects of the arbitration process which are not *ad hoc*. To state this another way, the only thing "ad hoc" in an *ad hoc* arbitration is the arbitrator. The other fundamentals are continuing—the contract to be interpreted, perhaps the problem area, the parties to the contract, and the process of arbitration with its own standards that must be observed on a continuing basis if the process is to survive and serve its purposes.

Ignorance on the part of the participants of any of the fundamentals that are constant serves to disrupt and, at the least, to embarrass. The permanent arbitrator quickly learns the level of experience of the parties and their expectations concerning the process and their contract; the *ad hoc* arbitrator as a rule does not get this opportunity. The permanent arbitrator may get the chance by direct or indirect means to improve the level of understanding of the parties; at least, if he is skillful and lucky, he might achieve some accommodation of the various attitudes toward the

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