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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arbitration process. The *ad hoc* arbitrator must do this, if at all, the first time he meets the parties. He may not get a second chance. Permanent arbitrators have their own special problems regarding ethics and of course some overlap those of the *ad hoc* assignment. But all arbitrators are often confronted with peculiar problems, as the following example will illustrate.

One evening I received a telephone call from an individual, a stranger, who identified himself as an employee of a local company at which I had never arbitrated. He said that he had a grievance and he wanted my opinion on it. Before I could stop him he had related some of the facts. I told him that I did not believe it proper for me to advise him since I was an arbitrator, a neutral, and that he should process his case through the grievance procedure. I also informed him that the person to speak to was his union representative. There was a long pause. Finally, he came back with more facts. I told him it was impossible for me to help him—I was sure his union could take care of the situation for him. He thanked me and hung up. The next evening he called again, said he had talked to his union as I had advised and that he wanted to discuss the case. Finally, I asked him, "Where did you get my name?" His answer was "in the contract." I was listed in the agreement as the contract arbitrator, and he took the position that having obtained no satisfaction from the company or the union, it was only fitting to call the arbitrator listed in the agreement for advice.

Typical Problems

Many of the problems which I will now advance did not arise from my own experience, but were submitted by other Academy members in my area.

1. There is the question of whether an *ad hoc* assignment should be taken when the arbitrator owns stock in the company in question or in any of its affiliates.

2. Then there is the question that arises when the arbitrator who is a lawyer has at some time in the past represented one party or the other in litigation, not necessarily in the field of labor law.

3. Another problem is the one that faces the *ad hoc* arbitrator when he discovers that one of the parties is represented by a former associate of his either at the university or in the practice of law.

4. A similar problem exists when the representative is a former student, perhaps one who did special research for the professor-arbitrator. (In my opinion, as an aside on this case, the professor-arbitrator can expect former students to appear before him. This should not create any special problems. There may be a problem, however, if the former student while in school was a research assistant to the professor. The latter situation should, in my opinion, call for disclosure.)

5. There is the difficult problem that arises when one of the individuals connected with the case, perhaps even the grievant, turns out to be a neighbor or a church associate.

6. All of us have had the offer to be met at the airport or the hotel in the morning for the drive to the plant without any indication having been given in the plan-making correspondence that the other party agreed to or was even aware of the offer.

7. There is, of course, the unilateral offer to have lunch or dinner.

8. Another problem that sometimes occurs is when one of the parties reserves a room for you, and upon arriving at the hotel you learn that you are to be placed in a room that is customarily reserved on a continuing basis for that party. Also, it may be impossible to determine immediately whether the other party is aware of the arrangement.

9. Closely akin to this situation is the knowledge that you are in an adjoining room to the spokesman for one of the parties; the telephone rings, and you are invited for a drink with representatives of the other side not present.

10. A company or union representative may try before the hearing to present arguments and evidence. Or, presentation of additional arguments, outside of the hearing room and without the presence of the other party, is attempted after the hearing is concluded.

11. Some *ad hoc* arbitrators have received calls from the grievants, after the case has been presented, to inquire about their grievance and perhaps to attempt to supply additional testimony or persuasion.

12. At least one *ad hoc* arbitrator has received an overpayment on his fee under circumstances in which he believed the mistake was not inadvertent.

13. There is the persistent problem of the request for clarification. The Code of Ethics [1] is quite clear on this issue. It says, and I quote: "After the award has been rendered, the arbitrator should not issue any clarification or interpretation thereof, or comments thereon, except at the request of both parties, unless the agreement provides therefor."

Requests for Clarification

Suppose, in this regard, the arbitrator has before him for decision a discharge case. He decides that the grievant should be reinstated with no loss of seniority and that he should suffer no loss of earnings. The opinion clearly states the arbitrator's reasoning. The award itself is awkwardly worded, but its meaning should be obvious. It says: "I return Joe Blow to his former classification and job with no loss in seniority or backpay." A week or so later the arbitrator receives a letter from the union asking for clarification. It seems that the company has interpreted the award to mean that the grievant is to be reinstated with seniority but that he should receive no backpay. The union asks for clarification. There is nothing in the body of the opinion that in any way indicates that the grievant should be penalized by a denial of backpay. A literal compliance with the Canons of Ethics would require that the company be invited to join in the request for clarification. The company refuses, however, to do so, asserting that there is nothing to clarify and that no backpay is warranted. The union's only recourse is to go into court for enforcement. The union cannot understand why the arbitrator refuses to clarify such an obvious abuse of the arbitrator's award.

Take another case. The arbitrator returns the grievant to work with no loss of seniority but with a 60-day suspension. The grievant had, in fact, been off work for six months. The company deducted the total amount of outside earnings of the discharged employee from the amount of the backpay due. The union's position is that only the earnings received during the four months

[1] See *The Profession of Labor Arbitration*, (Washington: BNA Incorporated, 1957), pp. 153-159.

representing the period of backpay should be deducted, not the amount earned during the 60-day period of suspension. The company refuses to join in the request for clarification. The union believes the arbitrator is being unduly technical in not pointing out the appropriate rule regarding the deduction of outside earnings under these facts.

These two cases concerning issues of backpay are to be contrasted with a case in which the arbitrator limited an award concerning an erroneous job assignment to the particular product being manufactured. The company changed the product, but not, according to the union, in a meaningful way. Management then assigned the work to an employee other than the grievant in the original case. The union protested but did not file another grievance. Instead, it wrote to the original arbitrator and said that the company had not complied with the original award. The company joined in a request for clarification. Actually, even though in this case the company had joined in the request, this was in fact a new case with new facts. Clearly, the Code of Ethics requires a joint submission of the issue in the latter situation. But is it a violation of the spirit of the Code of Ethics in the other two cases, those involving backpay where no new facts are involved and the answer should be readily apparent?

I will not attempt to give answers to the other problems raised. The experienced arbitrator may well find that most, if not all of the problems are easily handled. But this is an area where more than image is involved. The parties may excuse an erroneous decision. A sense of mistreatment arising from the conduct of the arbitrator in a moral sense is less easily dismissed. I will appreciate the expressions of my colleagues on the subject.

IV. COURT REPORTERS AND OTHER MATTERS

WILLIAM J. FALLON*

Having accepted the topic "Practical Problems of the Ad Hoc Arbitrator," I have an implied obligation to advert to the original program reference, "Court Reporters." Please be assured, however, that you are not about to be subjected to a learned discourse

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