CHAPTER IX

PREHEARING ARBITRATION PROBLEMS: A PANEL DISCUSSION

I. STRATEGY: TO SETTLE OR TO ARBITRATE?

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There are certain advantages to being the leadoff man. Although the assignment itself makes it clear that he may not be regarded as a heavy hitter, this is compensated for by the fact that no one expects the leadoff man to hit a home run. He is expected to get on base, but no one cares too much how he does it.

In the hope of getting this discussion to first base and leaving the home runs to my colleagues on the panel, I shall address myself to the topic "Strategy: To Settle or to Arbitrate?"

Framework of the Decision

In order to bring this rather broad topic within manageable limits, I want to establish a general framework within which we can consider the factors that are involved in the decision whether to settle or to arbitrate. I propose that we deal only with cases involving interpretation and application of a collective bargaining agreement—what you and I call grievance arbitration.

The decision to arbitrate or settle can be made at any time from the instant management decides to act, as in disciplining an employee or instituting a new absentee-control program, up to and including the time at which the hearing is completed or even after the decision of the arbitrator is issued. I had a case some years ago in which both parties decided after the decision was received that the arbitrator had done us all in, and we settled as we should have

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in the first place. I hasten to add that this particular arbitrator was not, of course, a member of the Academy. For purposes of this discussion, we shall assume that the decision to settle or to arbitrate is made at or after the final step of the grievance procedure leading to arbitration.

To pursue the metaphor, unless one of the parties is willing to forfeit the ball game before it starts, settlement will take some concession from each side. Since the motive, purpose, and circumstances of each of the parties to the arbitration process are basically different, the factors involved in arriving at a determination as to whether to fight or to make love will be applied and weighed by each on its own scale of values. In this part of the discussion I will apply the criteria primarily from the standpoint of management. This choice is made because by experience I know more about the management view, and also because my colleagues on this panel, Al Brundage and Dick Liebes, are available to give an authentic labor or union viewpoint.

Criteria for Decision

In approaching the decision to advance or to retreat in the no man's land of arbitration, we should be forewarned that if the reasoning upon which our decision is predicated should succeed, it will be hailed as "strategy," but if it fails, it will be labeled simply as "poor judgment." With this in mind, I have evolved certain criteria to be applied, or factors to be considered, in deciding to arbitrate or settle a specific case.

I suggest that the following questions be answered by the parties as an aid in making the basic decision:

(1) Are we right?
(2) Is the issue sufficiently important?
(3) Can the case be won?
(4) What will be the effect of winning or losing?
(5) What settlement is possible?

I would like to have you explore with me the meaning of each of these questions and some possible answers.

Are We Right?

I suppose that many defeated presidential nominees have taken solace in the thought that "they would rather be right than be

President," as though somehow there was a necessary inconsistency between rightness and victory. Whether this is true in politics I do not know, but in collective bargaining being right is certainly no obstacle to success.

The question has a twofold aspect. In order to have any hope for success, the result contended for must be reasonable and have a basis in fact and law. The second element should be a good-faith belief in the rightness or justice of the position taken. In seeking the interpretation or application of their mutual agreement, neither party is obligated to give more, but each certainly is obligated to give no less, than what he knows was intended to be included in that agreement.

The concept of "rightness" applies in a different way to each of the categories of grievances that may arise. One example will serve to illustrate this application. The use of purposely vague language has always been a happy haven for harried negotiators—especially near deadline time. The application of such language to particular factual situations is often difficult. Suppose the contract provides that "overtime shall be distributed equally so far as practicable." This clause requires that management be fair, just, and reasonable in attempting to equalize the available overtime among employees in some designated group. Certainly if a grievance is processed for violation of this provision, management, prior to defending its action before an arbitrator, should have a conviction based upon careful investigation that its agents have acted within the spirit and scope of this contractual requirement. Management should not expose itself to the probability that an arbitrator will point out in writing unjust discrimination or other forms of injustice on the part of the company in the administration of a provision that requires fairness and equal treatment. Management should not permit the union to be cast in the role of "protector" which through arbitration consistently brings about a reversal of poor management decisions.

The question of being right is probably more important to management than it is to the union. Employees are more likely to forgive a union for asking too much of the company than they are to forgive the company for any act or decision that appears unfair, stupid, or petty. Employees cannot be regarded as mere pawns in

a game of collective bargaining between the company and the union. Management should make its decisions in the light of their effect upon the employees, who will judge their company by its actions as well as by its words.

Most of those who labor in the vineyards of collective bargaining tend to be pragmatists rather than idealists. However, I think we can all agree that neither the company nor the union should proceed to invoke the arbitration process unless such action is predicated upon a good-faith belief in the rightness or justice of its position. A more pragmatic reason in support of this proposition is that few arbitration cases will be won by a party who does not present a sound and reasonable theory together with a sense of conviction that his position is right and just. Arbitration should be reserved to settle honest differences of opinion which the parties cannot settle for themselves.

Is the Issue Sufficiently Important?

I think all of us would agree that arbitration should be reserved for "important" issues—but who is to decide what is important, the degree of importance, and to whom the issue is important? It is much like the maxim offered to those about to venture upon marriage that "two can live as cheaply as one," but the trouble begins when the newlyweds try to decide "which one"?

I submit that in order to decide whether the issue is important, we should ask, "What purpose will be served by an arbitrator's decision? Will it establish a needed guideline? Will it clarify an ambiguous provision? Will it settle a continuing dispute?" If the award will do any or all of these things, the issue may safely be considered important.

From the management view, exercise of its rights to operate the business free of restrictions to which it has not agreed is the primary consideration. Any attempt by the union to infringe or curtail rights which management considers its own are always classed as important, if not vital and essential, by company representatives. In such cases an arbitrator's decision is necessary as a guide to the future conduct of the parties.

Conversely, if a management action appears to the union to be an attempt to renege on a promise contained in the agreement or

an attempt to distort or expand what has been agreed upon, the union is bound to consider the issue sufficiently important to go to the mat with the company. I have in mind such areas as seniority and union representation, which are close to the hearts of most union representatives.

There are many other types of grievances, however, which may have no, or at most very limited, future application or importance. Examples here might be minor disciplinary sanctions, interpretation of the disputed terms of a superseded contract, isolated instances of claims for overtime or backpay under rare and unusual circumstances. If no emotion is involved, and I think management should not let emotion complicate its decision-making, then a cash price tag can be put on these types of grievances.

From the union's point of view, however, grievances of these types may have considerable importance. Too often management fails to recognize that the union is basically a semipolitical organization; its representatives depend for their perpetuation in office upon the willingness of a majority of the membership to vote for them. These representatives must necessarily be concerned first with the political effect rather than the economic or any other impact of a grievance. The term of office of most union representatives is limited to one or two years and they are constantly required to demonstrate their political worth by handling effectively the complaints of their constituents. As you might expect, there is usually a sort of built-in management resistance to this process. This may be one reason why few arbitrators have been spared the painful experience of hearing cases that seem to involve unimportant and insignificant issues.

There is another situation which develops and may tend to explain why some relatively insignificant issues reach the arbitrator. This occurs when a union for any one of several possible reasons decides to file grievances on any and every issue which may arise. This may be a reaction to some management decision or attitude, or it may be initiated by the union to accomplish some purpose of its own. The usual reaction of management, if all else fails, is to say, "O.K., if that is the way they want it, let's arbitrate everything." The result is an indiscriminate backlog of cases awaiting arbitration without regard to the merit or importance of any of the issues involved. Although the arbitrator is paid to

listen and the lawyers or other representatives are paid to advocate, there is no sense of satisfaction for any of the participants. This amounts to a perversion of the arbitration process.

The fact that so many apparently unimportant matters go to arbitration and so many obviously insignificant lawsuits clog our civil courts often has been deplored at seminars of this kind. However, human nature being what it is, and our system of justice being what it is, the parties undoubtedly will continue to decide for themselves to litigate what they consider important, and arbitrators and advocates will be asked to join in the fray.

Can the Case Be Won?

Only the uninitiated would equate being right with being a winner. Justice is not always rewarded with victory. This is illustrated by the story of the senior partner who sent the youngest lawyer in the office out of town to try his first case. The young lawyer was overjoyed at winning and immediately telephoned his employer. "Mr. Beagle, this is Neophyte. The trial is over." "Ah, yes, Neophyte, and how did you make out?" inquired the boss. "Justice triumphed, Mr. Beagle," the young man replied, to which Beagle quickly rejoined, "Don't feel badly, my boy, we'll take an appeal."

The answer to this question involves an objective evaluation of what can be proved and how the case will appear to an impartial third party. I do not intend to dwell upon how a case can be won or lost, since I am sure my fellow panelist, Dick Liebes, will be dealing with that phase of our discussion when he tells us how to prepare a case for arbitration. However, I would like to present a short checklist of basic considerations that should be taken into account when you are evaluating whether you have a winner or a loser.

Assuming the basic legal soundness and rightness of the position taken, you should consider:

(a) What oral or written evidence is available to support the position?

(b) How effective are the witnesses available to testify?

(c) Who will present the case for the other party?

(d) What evidence and witnesses are available to the other party?

(e) Where do the equities seem to be?
(f) Who will be the arbitrator?

I should like to comment briefly on the last three of these considerations.

With the almost complete absence of any pretrial discovery, it is sometimes difficult to evaluate the evidence and witnesses available to the other party. However, in a continuing relationship, the same advocates, witnesses, and arbitrators tend to reappear in the various arbitration hearings that are conducted over the years between the same parties. It is often possible on this basis to formulate rather accurate opinions as to the strengths, weaknesses, bias, and other characteristics of the persons involved in a forthcoming hearing.

In this respect I recall rather clearly one witness who used to reappear for a particular union in various cases over the years. When "old Bob" showed up as a witness, I knew there was trouble ahead. He always showed up in his work clothes as though he had been called off the job on a moment's notice and had not even heard of the case before his appearance at the hearing. He was tall and stooped and wore glasses in his later years. He always looked directly at the arbitrator when he testified. Nobody had to lead this witness, who seemed to know instinctively what was important. He answered questions clearly and succinctly. If he volunteered any information, which was seldom, it was always given as a sort of afterthought and was always damaging to my case. I used to observe that the arbitrators and hearing officers would sit up straight and start to take copious notes as Bob commenced his testimony. He spoke slowly and deliberately, obviously straining to be as fair and impartial as possible. The arbitrators loved him. It was almost useless to cross-examine. I always discounted my chances somewhat if "old Bob" was to be a witness for the union.

As the years advance, and hopefully I become more experienced in the ways of judges and arbitrators, I am ever more impressed with how important the "equities" are to the outcome of any case. It may be true that ours is a government of laws and not men, but men interpret the laws and prescribe what they mean. Judges say, and I am sure many arbitrators agree, that "hard cases make bad law." Translated into action, this means that where the law dic-

tates one result, but the "equities" point the other way, the law will suffer.

If there is an important principle to be tested or established, try not to test it in a case where the equities run strongly the other way. Another way to say it is to pose the question: Is this the right case to try this particular issue? It may be necessary for the company to institute a revised sick-leave policy because of widespread abuse of the old system. The contract may leave the company free to make revisions; but the first case that goes to arbitration should not involve a literal application of that policy to a female employee with substantial seniority who wanted time off to bear a child but failed to fill out the proper form.

Some lawyers are cynical enough to say it is more important to know the judge than to know the law. Although I do not agree that this is true, I do know that it is important to know as much as possible about any judge, arbitrator, or hearing officer who will decide a case in which you are interested. As the profession of arbitration develops, there is less shopping around for arbitrators than there was years ago, but it is still an extremely important phase of the arbitration process. Arbitrators and judges, like the rest of us, are the products of their own heredity and environment, which produce certain natural predilections and predispositions. There is nothing wrong with the practice of seeking the right arbitrator for a particular case. It is the hope of any advocate to have a judge who will be disposed by nature and experience to look with favor on the advocate's presentation.

Overall, it is my view that management should be convinced that there is substantially better than a 50 percent chance of winning before it makes a final commitment to arbitrate. This is because each arbitration case basically involves a management decision which the union is challenging. If the company's decision that underlies the grievance is reviewed and found to be erroneous or unjust, it should be reversed or modified by management itself.

What Is the Effect of Winning or Losing?

Red Sanders, the famous UCLA football coach, used to say, "Winning isn't the most important thing in football—it is the only thing." Duffy Daugherty, of Michigan State, was asked how much

luck had to do with his success as a football coach. He replied that he really did not know, but he added, "I have found it is awfully unlucky to be behind when the final gun sounds."

Although winning may be everything in football, this is not necessarily true in collective bargaining. In the words of a well-worn maxim, I tend to think that how you play the game is often more important. Triumph achieved in a single skirmish may well prove a Pyrrhic victory in the long run. Since a particular arbitration case occupies but a few hours in a continuing relationship which may extend for years, the effect of the decision in that case on the long-range relationship must be considered. I think the parties should ask themselves two questions:

(a) Is there anything to lose by winning?

(b) How much is to be lost by losing?

There are some graphic illustrations of what can be lost by winning an arbitration case. Picture a situation in which the contract is silent on the matter of whether overtime is compulsory or voluntary. The past practice is fragmentary and gives no conclusive basis for a decision. The company is required to work a good deal of overtime in an area of some labor shortage, and for the most part 80 percent or 90 percent of those who are asked do work overtime. As they get their fill of long hours and have overtime cash jingling in their pockets, the percentage of employees who will work overtime drops to 70 percent and some of these will work only a very limited amount of overtime. The collective bargaining agreement has about six months to go until expiration. In the production pinch, the company puts out an edict that all employes will be required to work overtime as scheduled unless excused by the company. The union reacts as may be expected and challenges the management directive. The issue is joined.

It is obvious that a ruling that overtime is purely voluntary would be a setback for the company, and on the facts stated its chances of success are probably less than excellent. But what would be the effect of a ruling that overtime is compulsory? Under the circumstances, would not such a ruling merely aggravate the basic problem? How many of the reluctant 30 percent would quit or accept discipline or discharge rather than work overtime? Of

those who did work overtime against their desire, how many would give a fair day's work? Would not this ruling create a strong issue for the union in the upcoming negotiations? Would not a victory here be winning a battle at the risk of losing the war?

Another trap into which the parties, particularly management, can fall in this jungle of collective bargaining may be classed as a form of "painting the lily." One of my own early cases will illustrate how much can be lost by losing. The names are changed only to protect the guilty.

The company employed a large number of leadmen. The job descriptions were many years old and did not spell out the duty of leadmen to perform production work when lead duties were completed. However, by custom and practice, lead people generally did perform other production work with their hands and tools when there were no specific lead duties to perform. The company's new wage evaluation specialist was bothered by this fact, and the job description for lead personnel was changed to recite specifically that leadmen were required to perform production work when not occupied with other duties. The applicable contract provision was somewhat ambiguous, but it had always been assumed that the company could change job duties, provided the rate for the amended job was reevaluated by mutual agreement.

The arbitrator ruled that the change in the job description was improper in this case and went further to hold that the company had no power to change by adding or subtracting from the job description during the life of the contract. Most of the lead people who had performed production work ceased to do so after the award was made known to them by the union. The result was embarrassing to the company and its lawyer. The problem was finally settled in negotiations, but in attempting to "paint the lily," the whole nursery was destroyed.

Arbitrators with authority to decide an issue have as much power to make a bad decision as a good one. For this and the other reasons indicated, the impact of victory or defeat must be measured not just in terms of present conditions, but rather in the light of its effect tomorrow and thereafter.

What Settlement Is Possible?

Unless it has been decided at the outset that there can be no compromise on a grievance, and these cases are extremely rare, it would seem advisable to find out before any final decision to arbitrate just what kind of settlement, if any, is possible. In many cases the company may have overacted and the union may have overreacted and there is room for a bargain.

Unfortunately, when a case has been certified to arbitration, new principles may come into play. For many parties, prestige is involved and there is face to be saved. This prestige or face factor may set in so strongly as to freeze the position of one party or the other.

Some time ago, I had a case in which a union challenged a company's right to subcontract certain work in connection with a new multimillion-dollar project. The contract clause precluded the company from subcontracting work which its employees "customarily performed." On only one prior occasion the company had experimented with doing this particular work and had found it to be economically unfeasible. Next time around it bought the items from outside vendors as did everyone else in the industry. No one was laid off and the company had open requisitions for many classifications of employees involved in the work. It appeared that this was one the union would lose, and even if the arbitrator were to hold that the company's prior experiment obligated it to do this work in the future, the union would suffer because the company would be discouraged from ever experimenting with any new work that it had not customarily performed.

Attempts to settle the case were fruitless. The company felt it could not yield anything on the basic issue. To the union representatives, the issue had become a hot potato before all the facts were known. They simply could not back off at the last minute with union elections on the horizon.

We would all agree that grievances should be settled on their merits, and yet we all know that settlements are not always based on this esteemed principle. I have seen a slate of 75 grievances that have been gathering dust for months settled in a single day's hard bargaining and evaluation, with only three left for the arbitrator. The lawyers, consultants, international representatives, and people

of this stripe usually participate in these sessions when the parties sit down to decide which cases can be settled and which must be resolved in the crucible of a formal arbitration proceeding. All parties leave the session greatly relieved by eliminating the backlog, and while neither party is jumping for joy, neither is anyone trying to jump out the window. I am not necessarily recommending this process, I am merely saying it happens, and not infrequently.

Since the parties tend to put different values on the same things, what is "big" to one may be relatively insignificant to the other. If the relationship is fairly normal and the situation fluid, there are so many factors and elements involved that it should be possible for each party to come away with less than he wanted but with more than the risk of trial would justify.

Conclusion

In summary, if you believe you are "right," if your case is sound on the merits, is sufficiently important to you, and you estimate that there is a 70-percent chance of winning with no adverse long-range effect that will result from your victory, the price of a settlement on your part may be high, but it should be explored. If, on the other hand, your case is not sound, or you think you are not right, or it's not that important, or there is something to be lost by winning or much to be lost by losing, then you had better avoid the risk of arbitration and take refuge in that old American political axiom that "you can't beat something with nothing."

II. DEFINING THE ISSUE AND THE REMEDY

CHARLES M. HEATH*

I believe that labor and management in this country today are almost totally committed to the concept that disputes over interpretation and application of agreements shall be settled through the grievance procedure, ending, if necessary, in final and binding arbitration. They are likewise committed in principle, if not always in practice, to the concept that such disputes should be fairly resolved and expeditiously brought to a final conclusion.

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