CHAPTER IV

THE IMPACT OF ACCEPTABILITY ON THE ARBITRATOR

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A. Introduction

This paper attempts to analyze and evaluate the influence that the arbitrator's need for joint acceptability by employers and unions may have on the arbitrator's professional services and the arbitration process. It focuses on how arbitrators may react to the question of their acceptability and what impact this may have on the arbitrators' and the parties' views of the arbitral decision process.

This paper is not a product of any research study. The views presented are compiled from chance remarks made infrequently over the years by some experienced arbitrators; the sporadic comments about some other arbitrators, usually by disgruntled advocates who had lost their cases; and my impressionistic observations. My comments are also based upon inquiries directed to some experienced arbitrators and clients of arbitrators in the last several months of identifying the dimensions of this question for this paper.

Some of us in the National Academy of Arbitrators believe that the question of acceptability should be raised before experienced participants in the labor arbitration process in order to examine openly whether a problem does exist. The profession of the labor arbitrator is practiced in a setting where the professional

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has two clients in a conflict that he will resolve in favor of one. In agreeing jointly on the arbitrator, each side usually hopes that there may be some slight margin for victory in the selection of the particular arbitrator. Yet, one of the two selectors is bound to lose and many times is dissatisfied with the professional servicing received or displeased with the result. Basically, the same setting faces the contract umpire over the longer run of a number of cases handled for the same parties.

If the professional were a lawyer representing a client whose case he lost, at least he fought in behalf of his client. If he were a medical doctor whose patient got worse and died, at least he is considered to have done all that he could to save the patient. These professional services are strictly partisan in behalf of the client or patient. Only the privately selected arbitrator is usually considered to give disservice to one of his two clients.

How, then, does the professional labor arbitrator survive in this setting of duality? One must assume he wants to continue to serve the same and other parties and make a living in so doing. And most arbitrators who are competent in the handling of the subject matter of labor disputes do survive and retain and even increase their acceptability.

Of what value, then, may this question of acceptability be to the arbitrator who desires to remain acceptable so that he may practice his profession? One question must be posited openly and candidly: Is the integrity of the arbitration process diminished because this factor exists and must be surmounted? Is there some loss in decisional objectivity and less fairness on the part of the arbitrator because the burden of acceptability is one that he carries along with other professional burdens? It would be lacking in candor to say that the active arbitrator is not conscious of this problem, or that parties to the process are not aware that he may be conscious of it.

B. What Is Visibility?

First we must separate and distinguish acceptability from visibility.

In order that he may be hired, as is true of any person privately practicing a profession, an arbitrator must be known to the par-

ties who need his services. At least his name must be familiar to them if they have had no professional contact with him in the past. His is but one of a number of names that may appear on a panel submitted to the parties by the American Arbitration Assosiation, the Federal Mediation and Conciliation Service, or a state labor agency, or by one party to a dispute to the other. The greater familiarity of one name among a number of submitted names increases the chances that this name will be chosen, even though his services have never been used by the parties (especially where a check with friends reveals no information to particularize a choice). Then again, the least unacceptable name on a list may be selected, and this in itself contributes to the individual's acceptability.

A goodly number of arbitrators are aware of name visibility and seek this visibility in some of the following ways: Many of them attend meetings of state bar labor-law sections, industrial relations associations, and university labor problems conferences where they appear to seek knowledge as well as contact with possible future clients. In this endeavor, some are willing to put out more energy than others by serving as officers or active committee members of these professional bodies. It is granted that some may even be interested in the nature of this work for its own sake.

Some write articles or even books on arbitration, or give papers or act as discussants at meetings such as this. Sending decisions for publication to The Bureau of National Affairs, Inc., and Commerce Clearing House may bring some visibility of name as well as recognition. Younger arbitrators appear to be more prone to do this. Then again, a reported decision may lessen an arbitrator's acceptability to the employer or union side, if one party is attempting to trace the viewpoints of a given arbitrator in reported decisions to determine how he may hold on a certain issue. It is granted that often a decision is submitted for publication because the issue is novel or the factual setting unique and the arbitrator believes he has said something worthwhile that should be added to arbitral law or lore.

Parties may want to have their dispute handled by a well-known arbitrator because of the umpireships he has had with major corporations and their unions. They may want him for his assumed expertise but also because it enhances their prestige to be iden-

tified as one of his clients. A professorship in a well-known university may serve in this connection. Even a quoted high per-diem rate appearing on a panel list may attract as well as repel some clients. Becoming a wit, a pundit, even a comic, or the good-natured butt of wisecracks may aid name visibility, as long as the right crowd hears of it in the right setting.

These are some of the ways some men may go about getting their name before the buyers. Is this an activity unworthy of a professional person? Is this not a form of advertising practiced in all professional market places adjusted to the specific kind of market? But there is nothing really wrong in these activities. The game is getting the name across. And it stops there. This is visibility. Acceptability is something different.

C. What Is Acceptability?

Some parties are more prone than others to assume that an arbitrator's regard for his continuing need for acceptability will influence the decisional product he produces. It appears that, in general, this is more likely to be true of parties who arbitrate less frequently. But this view is also held by a minority of active practitioners, especially attorneys who frequently represent some employers and unions which take a hard line in grievance litigation. I would call these advocates the unbelievers.

Some of these assumptions are: The arbitrator when giving the decision to one party will intentionally use some mollifying language in his opinion, if he can, to appease the loser. He will split decisions in an attempt to preserve a balance of victories and losses between a given set of clients. If he does not do this when considering multiple grievances at one hearing, he will do it over a period of time in his handling of separate cases in separate hearings. In an opinion, he will intimate how he might otherwise have held if the facts or contractual language had been somewhat different. He keeps a series of private scorecards for combinations of regular clients and will subtly mete out favorable and unfavorable decisions to these clients over an extended period of time, avoiding a one-for-one balance as too obvious and crude. When an uncharitable party thinks this way his problem lies in figuring out when to pick up the arbitrator and when to

drop him. If one side believes that it has a one-for-one man, what makes it come back to him? Could it be optimism on the part of the previous loser, or optimism on the part of the previous winner that the arbitrator will mix it up by reversing the inevitable cycle?

Some parties, perhaps with good cause, may believe that certain arbitrators are guided by short-term considerations of acceptability (that is, the period before the decision is issued). It might be held that this tendency is manifested at hearings if arbitrators rule on the inclusion or exclusion of certain proffered evidence; if they pompously or sheepishly say "I'll let it in for what it's worth"; if they allow aggressive advocates to dominate the hearing procedure so as not to appear abrasive in tempering this aggression; and if they grant continuances to other days so that witnesses may be produced by a party who claims surprise at the testimony of adversary witnesses.

Some parties who use free state-agency arbitrators feel that some of these men may shape their decisional opinions in order to enhance their political careers in state government.

Some parties assume that they are at a disadvantage before an arbitrator if the opposing party uses a law firm which potentially can make a large amount of arbitration work available to the arbitrator. They often attempt to balance this by choosing a firm with an equal potential for arbitration business. Of course, this may only occur in cases where the law firm chooses the arbitrator. However, the same situation may arise with a multiplant company that frequently arbitrates at its various plants and a union international representative who makes a specialty of arbitrating for many locals affiliated with his international union.

Seeking out one or the other client, generally the previous loser, to post-mortem over the adverse decision the arbitrator has rendered is a dangerous and unethical business probably infrequently engaged in. The parties are particularly sensitive to the post-morteming arbitrator, whom they view as business hungry and therefore dangerous unless they can manipulate his hunger. Several parties have cynically observed that such a man seems to seek the opportunity to say: "Why didn't you put that evidence in?" or, "If I had only known that," or, "You won't pull that boo-boo next time, will you?"

It appears that where these assumptions are made, they apply to the *ad hoc* arbitrator as well as to the umpire.

Parties who hold these assumptions claim that their safeguard lies in always using arbitrators who have more business than they can handle and, therefore, are not concerned with acceptability. Do these parties stop to think how these arbitrators developed such good business in the first place—or, put in other words, how they built their acceptability so that they no longer need be concerned with this problem? Were they honest and ethical all along? And are they not still conscious of their acceptability?

Some parties claim that one is safer with an arbitrator who is a professor because he has lifetime tenure and a salary that gives him basic economic security, so that he doesn't have to worry about acceptability as far as the income factor is concerned. It is the observation of the author that there is no difference on this score between the professor and the nonacademic arbitrator. The incentive to maximize moonlighting income appears to be as strong in academia as elsewhere.

D. Manipulation by Parties

Assumptions such as those described above may lead party advocates to try to manipulate an arbitrator who they believe is inordinately sensitive about his continuing acceptability.

They may press him for rulings at the hearing to indicate that he is on strict trial and had better "come across" with favorable rulings. They may overargue a position at the hearing and indirectly communicate that an adverse award would be a clear dereliction of his duty which would never be forgiven. They may bring an important company or national union official who merely sits by at the hearing and conveys the impression that the case is of paramount importance to his side. They may befriend a new arbitrator who obviously wants business and say that they will recommend him in future disputes, or query at every opportunity his availability to hear cases. An active arbitration advocate who has many management or labor clients may deliberately try to get a new man selected and then indicate to the new arbitrator that he is trying him out. An umpire may be dropped without fanfare to indicate retributive displeasure as a warning to others who

might be considered in his stead. A party may comment to an umpire on an occasion unconnected with a hearing that he will be hearing an important or crucial case. An advocate who is deliberately instigating post-mortem discussion may indicate that although he takes no umbrage over the loss of a case, his constituents do. He may hint that the arbitrator should consider this in future cases, or allow the arbitrator to draw his own conclusions.

These attempts to influence and manipulate arbitrators are reported to be few, but they are occasionally made.

E. Gaining Acceptability

What are the techniques apparently used at hearings by some arbitrators to maintain or even gain acceptability?

An arbitrator's conduct of a hearing can be one of the most important factors in his having genuine and continuing acceptability. Besides being fair to all, scrupulously objective, sensitive to an advocate's need for saving face, he may employ some of the following techniques: showing friendliness to both sides; indicating empathy when an advocate or witness is finding it difficult to express himself; perhaps helping that individual along by nodding and saying, "You mean this really, don't you?"; showing respect, care, and patience in the handling of a witness; listening attentively to the humble and generally nervous employee grievant, employee witness, or unhappy foreman who is testifying against men he supervises yet knows that he must not let the company down by being a poor witness, especially under cross-examination.

On the other hand, some arbitrators appear to be deliberately remote and unsmiling, never signalling their reactions by any facial expression—the figure of justice with blindfold, unfearful and unfavoring. Both of these forms of behavior have special appeal to different parties.

At the hearing, the arbitrator is frequently faced with rulings on whether or not he should permit as evidence testimony or documents apparently extraneous to the issue being litigated. His rulings in this connection tend to find favor as well as disfavor.

When this circumstance arises, decisive and assured rulings in either direction tend to carry him through difficult confrontations with both parties.

Meeting at hearing parties new to him generally, a sensitive arbitrator attempts to sense whether the parties want to have the hearing conducted tightly or loosely. Parties who arbitrate frequently with each other tend to develop hearing-procedure characteristics and an arbitrator who does not try to find out what they may be and follow the preferred style may lose favor with one or both sides. With an umpire, the character of the proceeding is a product of tripartite creation.

One arbitrator had the experience of being interviewed by union and company national officials in connection with a national umpireship he finally accepted. He was struck by the repetition of a question from union interviewers as to whether he took a good many notes at his hearings. (The parties did not use court reporters.) He handled the question incidentally and went on to hold hearings in connection with the umpireship. He noted rather early in this service that union advocates of different locals were most patient in slowing down or stopping when he seemed to be preoccupied with note-taking. He later learned that the previous umpire, whom the union was instrumental in getting dismissed, was not much of a note-taker. The union advocates believed, however, that the company prepared better and more comprehensive prehearing briefs than they did and were convinced that the previous arbitrator's decisions were much influenced by the briefs. Needless to say, the succeeding arbitrator was most diligent in his note-taking, even recording material he ordinarily would not have recorded.

At a hearing, an arbitrator may at times wonder whether the existence of a certain fact not in the record can be inferred from facts already disclosed. Since disclosure of its existence may harm or help a party's case, he is faced with a dilemma as to whether he should raise the issue and incur the risk of being considered partisan by one of the parties. A number of experienced arbitrators who were questioned on this point stated that they would nevertheless seek to ascertain whether the fact exists. My impression is that the more acceptability-conscious arbitrators will avoid

doing anything in this connection. They appear to read danger to themselves in hearing events of this and like nature—often without good reason.

Many arbitrators also train themselves to resist any impromptu expression which may lead a party to believe that the arbitrator has prematurely reached a negative decision.

It is my impression that the more sophisticated and experienced parties do not care about the degree of participation of an arbitrator at the hearing. However, where the advocates' trial abilities are clearly unequal, there may be some negative feelings on the part of the more able advocate, who may feel disadvantaged.

On balance, it appears that the more acceptable arbitrator, as far as hearing conduct goes, is the one who conducts the hearing with assurance; keeps aggressive advocates from taking over and dominating a hearing; makes his rulings promptly and decisively even when he may err; and avoids giving any party the feeling of being shut off from presenting his case fully.

Some arbitrators who anticipate their holding on an issue consciously follow a practice of indirectly signalling to the eventual loser in the open hearing. They may make some casual remarks delicately evaluating the eventual loser's primary positions on the issue, wonder openly about the contractual validity of those positions or the weight of the evidence in their support. They do this to prepare the loser by softening the shock of the written opinion. Some arbitrators feel that this is a way of helping the losing party accept its loss with less trauma and less personal reaction against the arbitrator. The arbitrator who occasionally does this must have great self-confidence and conviction as to what his eventual decision will be. If he signals one way and then, in analyzing the evidence and writing the opinion, reverses the decision, he may receive an extremely negative reaction from the losing party, who is greatly shocked because he had reason to believe he was going to win.

F. Impact on Arbitration Process

Let us now consider the ways, some inseparable from those already discussed in this paper, in which the factor of acceptability could more directly and substantively affect the very nature of

the arbitration process. Researched evidence in this connection does not exist, and I am not aware that any research is contemplated or even what the research design could be.

Obviously, one way is the plain dishonesty that might characterize an arbitrator's attempts to get and retain business. Defined in this connection, dishonesty would include rendering a decision which the arbitrator knows to be wrong for the purpose of winning one party's favor. It is also dishonest when an arbitrator goes into a hearing wanting one of the sides to win and utilizes any slim opening to effect this.

Another way would be a tendency to balance decisions over a period of time, evaluating in the context of acceptability what the direction of a key decision might mean to one's future retention as arbitrator and, perhaps, permitting this concern to influence that direction, especially where the run of decisions has mostly favored one side.

Another way would be the conscious use of dicta in the opinion to mollify a loser in circumstance where the arbitrator thought at first there was decisional substance in the propositions advanced in the dicta but on balance concluded they carried insufficient weight. The arbitrator writes in such a manner as to allay somewhat the feelings of the loser.

Arbitrators might take a soft approach in discipline cases and a hard approach with the same parties in management-rights issues. They might tend to be liberal toward unions in matters of arbitral jurisdiction and conservative, and thus favorable, to management on whether questions of law should be considered as part of the contract-interpretation process.

They might cultivate the parties socially and use the foreknowledge of their attitudes and beliefs on certain critical issues to influence the direction of a decision. They might give weight to a consideration of interpersonal politics in the plant, within the union, or within management, or their awareness of managerial planning in relation to the work force might have an extraneous affect on related arbitration issues.

What may be the impact in this connection of long tenure for an arbitrator, usually in an umpireship, who may believe that

reluctance to terminate him allows him to range in making decisions in substantive contractual areas in order to reinforce his acceptability?

What may be the effect on the decision-making process in a long-term (or even a short-term) relationship where a party assumes that arbitrators attempt to balance wins and losses and so makes a practice of throwing in some poor cases with meritorious cases in order to improve its chances of winning the good cases? (Of course, what appears to be a good or a poor case to a party may not seem so to the given arbitrator.) Nevertheless, if the arbitrator goes along with this practice, what is the impact on him? Is he not being subverted by considerations of acceptability if he acquiesces and makes no comment to the parties?

What does or should an arbitrator do when both parties (and this must happen very seldom) signal him that they both would accept a given award—for example, one that sustains the discharge of an employee grievant that both union and management would just as soon see out of the plant? Does the arbitrator gain greater acceptability by going along with the parties, or does he gain even more by returning the man to his job?

Instead of an arbitrator's being motivated to compromise to enhance his acceptability, might not the opposite be true, that is, that he will *avoid* compromising even when there is judicial merit in doing so because he wants to avoid being viewed as someone who seeks acceptability in this manner?

How does an arbitrator's concern for acceptability modify his inclination to use his remedial authority to innovate in a given case where he believes this to be justified? Should he play safe and not chance it? Or live dangerously and do it?

Frequently, an umpire or an *ad hoc* arbitrator in a continuing relationship faces a situation where one of the parties, generally the union, keeps processing and losing arbitration cases based on poor grievances generated by factors of intra-union politics. The score card becomes very one-sided. Then comes the grievance where both parties have merit in their positions. In making his decision, the arbitrator may be tempted to lean to the union side in order to score one victory for it? Is the arbitral processing of

a sequence of poor union cases fair to the arbitrator or to the company? Or should no consideration be given to the arbitrator's situation in this connection? I heard of one arbitrator, repeatedly faced with this circumstance, who went to the union officials and told them he was quitting the umpireship because it was harming his acceptability with other unions because they believed he was a company-minded man.

In this connection, what may it do to an arbitrator when a losing advocate who knows better tells his constituents that the arbitrator is solely to blame for a decisional loss? Or where union-member constituents or company officials hasten to blame the arbitrator although their advocates believe that he was fair and objective but because of constituent pressure nevertheless agree never to use him again?

Also, how does an umpire keep from getting brought into the politics of the parties' relationship and thus chance loss of his acceptability by permitting or not permitting his involvement?

Might it not be said fairly that if an arbitrator cannot survive in certain relationships, the problem is usually political rather than one of acceptability?

G. How Arbitrators Respond

If we assume that these areas of possible influence on the decisional process exist to some degree in some arbitral relationships, can the arbitrator withstand these pressures? It appears, in most cases, that he does.

He accepts as a political norm the cynical realities of his expendability and is resigned to this fact of his peculiar profession. He tries to protect himself by widening his geographical range of activity and is willing to engage in the necessary travel. He consciously widens his visibility to include other industries and accepts cases from different companies and different unions. He tries to build a practice portfolio of management and union clients by industry and geography to balance "hot and cold" periods of invitations to arbitrate from these sources. He knows that fellow arbitrators face the same problems and that clients who lose cases try other men. Thus, broadly speaking, clients who continue to arbitrate are merely exchanged.

More important, an arbitrator tries to write cogent, well-reasoned opinions which support his decisional propositions so that the losing party knows why it had to lose. He attempts to eliminate equivocal reasoning in his opinions so that winners and losers will be aware of his firmness and feel secure about his objective consideration in future cases. In a related sense, the sophisticated arbitrator learns that he generally will not suffer for what he does not say as long as he meets the need for saying what is necessary. He knows that he might sometimes have to say more than he would ordinarily like to say when he has a contentious advocate who appears to want all of his contentions dealt with in a written opinion.

He renders decisions that avoid surprise and adventure. His overall assessment of the positions taken at the hearing are made with what may be called euphemistically a "clinical feel" for the merits of a case, and he renders a decision that meets the legitimate expectations of the parties.

Concerning certain parties who give him a rough time during or after the hearing or after a decision is issued, he places them on his own private blacklist and pleads unavailability when he receives future requests from them for his services. If he follows the formula I am suggesting, he probably has enough business to enjoy the luxury of his own blacklist.

He consciously works at developing expertise in some industries where he has been invited to arbitrate and his expertise tends to get him reinvited.

He watches his fee charges so as not to load a billing even where he did more work than he can charge for. He is sensitive to parties' reactions to the composition of his fees if he describes the composition in his billings.

Apparently, taking a long time in issuing a decision works in two ways. One or both parties may resent and drop the arbitrator from consideration in future cases. Again, a surprisingly large number of parties appear to want arbitrators who give them long-delayed hearing dates and delayed decisions. They appear to want the very busy man on the ground that he is necessarily a "top man." I submit that if parties let the recalcitrant decision-maker

know that they are displeased with the delays, considerations of acceptability probably will encourage him to issue his decisions sooner.

Above all, it is competence and fairness in the handling of the hearing and in the rendering of a decision that seem to make for continuing acceptability. I draw these conclusions after spending a good deal of time thinking about and frankly discussing the acceptability question with individuals privy to arbitration practice. If I am right in these conclusions, the factor of acceptability has no meaningful impact on the arbitration process in the final scoring.

How can this problem be researched? What would a reasonable design be for such a research project? Are only the arbitrators the fitting subjects for this probing? Can assumptions of the parties be considered in this search? Would the result be merely conjecture colored by a respondent's emotional reactions to their experience with arbitration cases? Would only psychologists be competent to do this researching? Or sociologists? Or economists, who may provide a cynical slant? How can these questions be measured and quantified? Would research results tend to alleviate the problem if one really exists? Might the study influence the acceptance of some other system of disputes resolution, such as labor courts? Or would the resolution of disputes be left to the existing judiciary?

H. Conclusions

Finally, I submit that it is the labor-disputes arbitral process that inherently shapes the configuration of this problem; that the arbitrator's professional outlook is molded by the highly contentious parties that select him; that his conceded need for their acceptance jointly exercised in each instance of selection sensitizes his role in seeking their regard; that the distortion of the process is as much their responsibility as his. Is not his expendability but a facet of the bargaining process?

Can there not be some good that flows from all this? May there not be some disputes where compromise increases acceptability and is fitting and creative? After all, an arbitrator is engaged in a legislative function when he is asked to interpret and decide a negotiated ambiguity.

It may be reasonable to advance the thesis that the labor arbitrator can surmount the vagaries of his acceptability problem only by striving to do a more professional job in handling the hearing and composing his decision; that if he accomplishes this, it is jointly recognized by the parties as indicative of the professional ability they jointly require. As demonstrable reason modifies emotion, the arbitrator faces less jeopardy in maintaining his acceptability.

Is not the high continuing acceptability of many arbitrators one proof that the private arbitral process is needed by the management-union relationship? Is it not also proof that consciousness of the arbitrator's need for acceptability is but a minor problem and that it is not a corrupting force on the arbitration process?

Is it not a fair and reasonable proposition that a private litigation system requiring the free selection of private judges whose returnability is tested by the judgmental efficacy of their case handling is a safer method for obtaining a higher level of judicial service? Would the imposition of a judge on the parties be a better guarantee? Cannot more be said for full private control than for some form of public control? Attorneys know that, where possible, they try to pick the judges they come before in the civil courts. Would this not be true of labor courts? Should not the personal risk of the arbitrator be listed as an asset on the balance sheet reporting the gains for private control by the parties in the resolution of labor disputes?

Discussion——

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When I received Program Chairman Martin Wagner's flattering invitation to participate in your discussion of this subject, I had two reactions. First, I had some doubts that I, as a management attorney, would really have anything to contribute to the question of what secret influences make arbitraters rule the way they do. Second, I felt some stirrings of distant memory which I was at first unable to identify. When Professor Ryder sent me his

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