THE VALUE OF OLD NEGOTIATED LANGUAGE IN AN INTEREST DISPUTE

MR. JOHN BACHELLER, JR.: A threshold question in interest dispute arbitration is whether or not such arbitration is a viable part of the voluntary collective bargaining process, or whether it is an acknowledgement of the failure of the process in particular cases. I view interest dispute arbitration as the tranquilizer that relieves anxiety and pain while substantially reducing the parties' ability to engage in willful self-determination. For this reason, interest dispute arbitration should be invoked as a remedy sparingly, and as a continuing obligation only in the most unusual circumstances.

Compulsory Terminal Arbitration Clauses

Initially, several recent interest dispute decisions holding that future compulsory arbitration of contract terms will be ordered by an arbitrator over the objection of one of the parties to the contract will be considered. The cornerstone of this area of the law was the *San Joaquin Baking Company* case,[1] decided in 1949, in which Arbitrator Haughton granted the union's request to omit the compulsory arbitration clause because, in his words, the collective bargaining process is based on voluntarism and freedom of contract.

In the following years this seemed to be the general attitude of arbitrators, with the notable exception of *United Traction Company*,[2] a decision relying heavily on the public orientation of a bus transportation company. For example, in a 1970 decision, Arbitrator Oppenheim noted that arbitrators "seem almost uniform in holding that the continuation of the terminal arbitration clause in a contract without the consent of both parties violates the principle of collective bargaining." [3]

Despite this uniformity in prior decisions, three newspaper industry cases decided in 1972 rejected the apparent weight of authority. In *Columbus (Ga.) Enquirer and Ledger and Pressmen's No. 252*,[4] Arbitrator Gregory ruled, over the objection of the publisher, that the new contract would continue the provision

[1] 13 LA 115 (1949).
[2] 27 LA 309 (1956), Israel Ben Scheiber et al.
[3] ANPA Bull. No. 6213, at 464 (1970).
[4] ANPA Bull. No. 6281, at 233 (1972).

for future contract arbitration. The decision relied on a 1968 decision of the Fourth Circuit enforcing a clause requiring contract arbitration.[5] Additionally, Arbitrator Gregory sought support in the general public policy favoring arbitration and advanced the reason that, because in an earlier day the parties agreed to contract arbitration, the agreement should be continued, even though the parties now openly disagree. The previous agreement to arbitrate (perhaps as an innovative experiment; perhaps in terribly different circumstances) can, and in this instance did, create such an endless web. What had originally been voluntary contract term arbitration became compulsory contract term arbitration.

Again in 1962, in *Atlanta Constitution-Atlanta News Associates,*[6] Arbitrator Robertson continued a clause requiring contract term arbitration over the company's objection. The decision, noting that the clause had been in the contract for a number of years, also advanced the "you agreed to it once and now you're stuck with it" argument. Furthermore, Arbitrator Robertson felt that continuation of arbitration would stabilize future labor relations. Apparently, the concepts of "voluntarism" and "freedom of contract" in the collective bargaining process yielded to "stabilization" in labor relations. Finally, the decision points to Congress' having ordered arbitration in certain "critical industries" and concluded that this supports an arbitrator's ordering it among a group of newspaper reporters.

Arbitrator Dworkin continued the trend by denying the union's request to delete the clause in *Employing Printers Association of Akron and Pressmen's Union No. 42.*[7] He acknowledged the overwhelming weight of arbitral opinion to the contrary, but generally followed the earlier Gregory case, noting that the clause had been in the contract for 35 years.

In each instance, the arbitrator referred to the presence of the clause over a number of years and the possibility that it might be removed in subsequent negotiations by mutual agreement. (This presupposed, of course, that one party would change its mind, a kind of uncertainty that negates the validity of this premise.) The cases seem to assume that the clauses, having once been

[5] *Winston-Salem Printing Press and APU* v. *Piedmont Publishing Co.,* 393 F.2d 221 (4th Cir. 1968).
[6] ANPA Bull. No. 6291, at 429 (1972).
[7] ANPA Bull. No. 6300, at 593 (1972).

agreed to, have facilitated collective bargaining over the years. This reasoning rejects the obvious. The parties seeking to delete the clauses in these decisions unquestionably felt strongly that the clause had become an impediment to collective bargaining. Finally, the arbitrator relied on the tendency of the clauses to stabilize collective bargaining. If "stabilize" means no economic sanctions, that's true, but this procedure is supposed to be *voluntary* arbitration. The wounds of an unacceptable interest dispute award run as deep as most economic sanctions, and the acceptance of the award by the parties is the real measure of the stability of the collective bargaining relationship.

Acknowledging agreement with Arbitrator Dworkin's statement as to the weight of decisional authority, why is there concern? Until the decision of the Fourth Circuit in *Piedmont Publishing Company* [8] and the three arbitration decisions last year, this seemed to be an area of arbitration law in which a lawyer could advise his client with some confidence—specifically, parties can agree to contract arbitration, but if it does not work out, arbitrators will not order it in the future over either party's objection. Such advice can no longer be given, and as a result, (1) employers, and specifically publishers, who have contract terms arbitration in their agreements are wondering whether or not they should get out now, while the door may still be open; and (2) those without the clause are concerned about taking a step that might be irrevocable.

Apart from the question of whether or not contract arbitration will be voluntary, a slightly different problem, but nonetheless substantial, arises after the parties have agreed to interest arbitration. Implicit in the reluctance, or to state it more strongly, the refusal of some arbitrators to disturb old contract language previously negotiated by the parties, is the question of whether or not other relief can be obtained by arbitration that employers and publishers feel is essential. Technological progress in the newspaper industry has been phenomenal. Processes and equipment that were taken for granted a few years ago have become outmoded. Contracts with the unions must yield to this progress; yet the unions, in the interest of job security, have resisted. There should not be a rule that old, negotiated language is undisturbable only because it is old and negotiated. Additionally, publishers are

[8] *Supra* note 5.

rightly concerned about old practices that need alteration, such as compulsory manning tables, the requirement that the foreman be a member of the union, or the useless performance of composition make-work that will never appear in the newspaper.

Concededly, unions will resist or, at best, serious disagreement will arise about the implementation of changes, but any reluctance on the part of the arbitration process to meet and deal frankly with these problems makes the process less acceptable to management.

Interest Dispute Standards

Much has been written about both the vague and the sometimes mechanical approach used to resolve economic issues in interest disputes, and there appears to be no necessity to reiterate these comments.[9] However, within this area of criteria or standards utilized to resolve interest disputes, one standard deserves consideration. In many interest disputes outside the newspaper industry, comparisons of wages and other economic benefits can be made on the basis of comparisons in the community. The existence of competition among community employers; identical social, environmental, and cost-of-living circumstances for the workers; and the general familiarity of the employer and his employees with their local situation make community comparisons a generally acceptable standard for examining wages and economic benefits. In the newspaper industry, the community standard is oftentimes not available because a community may have only one major publisher. For this reason, arbitrators have fallen into the game of comparative cities, and the comparisons have tended to be made on the very unreliable, but ascertainable, basis of cities with comparable populations. In Atlanta, for example, the normal procedure will be the presentation of the average wage of the 100 cities nearest Atlanta in population by one party to the dispute, followed by a counter of the nearest 25 by the other party. This process will continue until finally each

[9] It appears that the criteria used by arbitrators in making interest determinations are as varied as the evidence introduced by the parties. Yet there are many generally accepted and commonly used standards which, generally speaking, are the same ones that are utilized by the parties in negotiations. An excellent compilation of the criteria used by arbitrators is contained in F. Elkouri and E. Elkouri, *How Arbitration Works*, 3rd ed. (Washington: BNA Books, 1973). While the standards enumerated by the Elkouris have greater application with respect to wage determinations, the standards have equal application to any question relating to economic issues.

side, seeking to squeeze the last possible advantage, will present the one city it feels is the most comparable.

The process is flawed because population alone does not ensure comparability. For example, Newark, N.J., had been advocated in past years as a city comparable to Atlanta. With all respect to the problems and opportunities of both Atlanta and Newark, it cannot be said that the interests of either city can be served by comparison. Somehow, the considerations that bear on wage and benefits determination must be broadened, and the comparative cities standard must be diluted in terms of importance.

Conclusion

Six years ago I began representing the largest employer in a country outside the United States. There had been a dramatic change from a conservative to a more liberal government. Implicit in the change was the fact that the labor movement would become more active. The issue was, beginning where customs and practices were nonexistent or at best vague, what traditions should be established. Rather than following Britain's history of economic sanctions as the employees' sole remedy for grievances, the parties agreed to a no-strike clause and neutral arbitration of contract grievances. The result was reached based on the conclusion that the industrial union concept would achieve the best possible result in terms of industrial harmony. The parties negotiated contracts and even engaged in mediation to finality under the auspices of a Minister of Labor. During this period, the question of arbitration of contract terms was approached on several occasions, and each time an answer was voided. The answer to the question is still open, both there and in the United States.

CHAIRMAN PLATT: I think you will find the next topic interesting and unique. Every so often arbitration users express concern over the legal finality of arbitration decisions and the arbitrator's power to render, as it were, an unsound or bad award. Their apprehension, of course, stems from the fact that an arbitrator's award is final and binding and cannot be appealed except on narrow legal grounds, none of which include judgmental errors or errors in evaluating evidence or in interpreting contracts.

Well, that's not quite the situation under the arbitration system in the newspaper publishing industry where there is an

appellate procedure for reviewing decisions of local arbitrators by an International Arbitration Board.

I rather think the fact that such an appellate procedure exists will be news to many of you—at least I have found it so in recent years. Even arbitrators are not fully aware of that fact, even though the procedure has been operative for more than 70 years. I will not take time to say more about this because that is the function of the next two speakers.

THE APPELLATE PROCESS IN THE INTERNATIONAL ARBITRATION AGREEMENT BETWEEN THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE INTERNATIONAL PRINTING PRESSMEN

MR. JOHN S. MCLELLAN: It is both a humbling and a perilous task to address such a group of the distinction in the field of labor arbitration as the National Academy of Arbitrators, particularly on any subject dealing with or related to the arbitral process. In the time allotted to me today, I shall address myself to a rather unique facet of the comprehensive arbitration contractual scheme between the American Newspaper Publishers Association and the International Printing Pressmen's Union.

Unlike most labor unions and industries, the Pressmen and the newspaper publishers have, for more than three quarters of a century, maintained industrial peace in relation to that industry and to the pressrooms operated by members of the Pressmen's Union through the successive execution of arbitration agreements providing not only for the disposition through arbitration of conventional grievances, but further for the arbitration of disputes respecting terms of renewal contracts.

To realize that three quarters of a century ago an industry and a labor union were contractually committed to the principle of arbitration in all aspects of their relationship, including disputes relative to new contract terms, is to know the distinctive quality of the leadership of both the union and the industry, reflecting a crusading or certainly, at least, a reforming streak. As you know, until the very recent past, most industries and unions viewed arbitration of new contract terms with a jaundiced eye; and except for the Pressmen and the Amalgamated Streetcar Workers, this concept was a stranger to the collective bargaining relationships generally prevalent in the United States.