II. PERCEPTIONS OF THE ARBITRATOR AND THE PARTIES

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An examination of decision-making includes those factors that affect both process and outcome. Decision-making in interest arbitration can be examined as it is perceived by the arbitrator(s). Environmental influences, including economic, political, social, legal, and institutional factors, can be considered for their effect on decision-making. The perceptions of the parties as to rationality of the process and desirability of the outcomes are an integral part of a study of the subject. Game theory can be applied. A psychologist might be concerned with personality influences on decisions. A paradigm for analysis of interest decision-making is obviously complex. The approach here is to isolate and discuss certain key factors.

First, I will examine the import and use of criteria in connection with monetary decisions. Next, I will look at arbitral handling of scope problems in the nonmonetary areas. The role of the coercive comparison and the consequent effect of a decision will be considered along with the public interest and its role in contract arbitration. Application of the arb-med tool will be covered. The emphasis will be somewhat subjective—my perceptions and the perceptions of other arbitrators and parties as explained to me. Where available, objective studies will be cited.

Two caveats are in order: The first has to do with the limitations of memory. Jorge Luis Borges, the great Argentine writer, notes his father's observation: "I think that if I recall something, for example, if today, I look back on this morning, then I get an image of what I saw this morning, then what I'm really recalling is not the first image in memory. So that every time I recall something I'm not recalling it really, I'm recalling the last time I recalled it, I'm recalling my last memory of it."[1] Borges goes on to say: ". . . it can be distorted by successive repetition. Because if in every repetition you get a slight distortion, then in the end you will be a long way off from the issue. It's a saddening thought."[2]

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[1]Richard Burgin, Conversations with Jorge Luis Borges (New York: Avon Books, 1970), 26.

[2]*Id.*, at 27.

The second caveat has to do with the context of my experience. My direct exposure to interest arbitration has been largely in police and fire cases—some 35 of them. I have had a few teacher and hospital-employee cases. Usually, I have been involved in conventional tripartite compulsory arbitration. As you will see, I believe there are some useful carry-overs from conventional arbitration to other forms of interest arbitration, notably final-offer.

Criteria and Money

Guidance for the neutral arbitrator ranges from highly explicit criteria in some state statutes and the requirement that they be referenced carefully in the award, to no guidance whatsoever in the laws of other states. Michigan illustrates the detailed approach; its criteria include, inter alia:

a. The interests of the public and the financial ability of the unit of government to meet those costs.

b. Comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally.

c. The average consumer prices for goods and services, commonly known as the cost of living.

d. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

e. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.[3]

Pennsylvania is at the other extreme of the spectrum; no criteria are specified for police and firefighter interest cases. Every

[3] J. Joseph Loewenberg *et al.*, Compulsory Arbitration (Lexington, Mass.: D.C. Heath and Co., 1976), 167.

student of industrial relations knows that criteria are both real and rationalizing standards and that they remain useful despite our ability to find serious limitations in them. Certainly, it is appropriate for the neutral to be guided by the criteria specified by the legislature. The differential emphasis, however, on cost of living, comparable wages, ability to pay, and productivity will depend upon the circumstances at work at the time of the arbitration. In a year with substantial inflation, the Consumer Price Index will play a greater role than otherwise. In years without double-digit inflation, comparable salaries take on greater importance. Ability to pay increasingly moves to the center of the stage. The search for a productivity handle is continuous.

Arbitrators are of two schools of thought when it comes to the specification and analysis of criteria that guide them in reaching a money decision. Some prefer to issue an award without any detailing of the impact of criteria. Others go into varying degrees of analysis. Included in the latter category are those impelled to analysis by legislation and/or court decision, as courts in some jurisdictions have set aside interest-arbitration awards because of the alleged failure of an arbitration board to demonstrate proper consideration of mandatory criteria.

I believe there are limitations to providing a rationale for the money decision. Clearly, the arbitration board should specify that mandatory criteria have been considered when such are part of the legislative mandate. Indeed, it is not unreasonable to indicate the stronger factors at work in shaping the board's decision. Beyond that point, analysis is foolhardy. The exact outcome is a complex determination representing a mix of customary criteria plus trade-offs of contractual components made in the executive session. Detailed analysis, then, is extremely difficult. Further, it can be counterproductive. Detailing of the trade-offs can result in honorable positions becoming ammunition for political attacks on one or both parties. It is important for arbitration boards and the courts to recognize the distinction between adherence to criteria and the potential damage of overexposition.

Where criteria exist or are being considered by legislatures for interest-arbitration cases, it is desirable that they be the product of careful thought and expert analysis. Otherwise, there will be problems, as illustrated by a Texas case. The state's Fire and Police Employee Relations Act requires pay for these employees to be:

". . . substantially the same as compensation and other conditions of employment which prevail in comparable private sector employment; therefore, compensation and other conditions of employment for those employees shall be based on prevailing private sector wages and working conditions in the labor market area in other jobs, or portions of those jobs, which require the same or similar skills, ability and training, and which may be performed under the same or similar conditions."[4]

The obvious problem with a single inadequate criterion was demonstrated by a Beaumont case. The City of Beaumont argued that the salaries of private security patrolmen, plant guards, protection officers, and the like were lower than those received by the city's entry-level police officers. Curiously, the city did not carry out its logic by requesting no increase, but felt that a 5-percent increase was reasonable. The police argued that there was no direct analogue to police work in the private sector and that a broad definition of similar work should be used to permit comparison with skilled operatives and craft workers.

The arbitration panel struggled with these problems. It noted that the CPI had increased by 6.9 percent over the previous year and that wages generally had been increasing by about 7 percent. The panel, by majority vote, concluded: "But it is extremely important for the city to be able to compete for 'good' employees; and therefore, on the basis of using a fair comparison of the 'good employer' in the private sector who generally pays higher wages, it is recommended that policemen be granted an across-the-board increase of seven and one-half percent. . . ."[5]

The case makes two points. First, specification of an inadequate criterion molded the hearing, let alone bargaining, into detailed consideration of relatively indirect arguments. Second, however reasonable the decision of the arbitration panel may have been, the case did not lend itself to a finely tuned exposition of its rationale.

Another aspect of decision-making by a tripartite board involves the routine requirement that decisions be made by a majority of the panel. In most cases there is no problem, but a problem does occur when the partisan panelists take extreme positions on money and other issues and refuse to budge signifi-

[4] 691 GERR 14 (1977).
[5] *Id.*

cantly. The decision then becomes de facto final-offer arbitration, even though the legislature may have considered and rejected final-offer as a method for resolving disputes. The reality is that hard-line positions may be taken by partisan arbitrators, perhaps seriously, politically, or unwittingly, but the outcome is the same. Unless the neutral arbitrator elects to resign, the neutral is perforce required to adopt an uncomfortable final-offer position.

Jamaica has handled this situation in an interesting manner. That country has had more than 20 years' experience with a compulsory arbitration law, the Public Utility Undertakings and Essential Services Arbitration Act. The law met the problem head-on. Decisions are made by a majority of a board of arbitration. When a majority is not present, the decision of the neutral is binding. I have studied the Jamaican experience and am satisfied that this voting procedure has had a salutary effect on decision-making in executive sessions of the boards of arbitration.[6]

As we have seen, arbitration decisions on salaries and other monetary issues raise difficult problems. An added dimension is present when we consider the range of nonmonetary issues.

Nonmonetary Issues

The obvious and overriding problem is the appropriate scope of bargaining. Does the issue belong on the table? Despite heroic efforts by some political jurisdictions to solve the problem, scope and arbitrability matters are routinely part of the decision-making nexus for boards of arbitration. Some jurisdictions work with the National Labor Relations Board distinctions of mandatory, permissible, and illegal subjects of bargaining. Others seek to distinguish between managerial policy and the impact of managerial policy. Pennsylvania in its Act 195, the Public Employee Relations Act, adopts the latter approach. Decision-making difficulty arises in distinguishing between the two concepts. Staffing patterns are managerial decisions, but a fine line inevitably arises in separating the impact of the policy from the policy itself. Impact judgments may have the effect of modifying the underlying policy determination.

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[6]Walter J. Gershenfeld, Compulsory Arbitration in Jamaica (Kingston, Jamaica: Institute of Social and Economic Research, University of the West Indies, 1974).

Major public-policy choices are present which affect the decision-making activity of arbitration boards in connection with these issues. Some states have their public-employment relations boards review challenged topics before they can be submitted to arbitration. Lengthy lists are available of bargainable/arbitrable and nonbargainable/nonarbitrable subjects. Some states require arbitrability challenges to go to the courts. Other states leave the matter to the discretion of the board of arbitration, usually with court review possible.

The prior legal approach has the disadvantage of delay. It takes time and expense for the parties to pursue these matters to a decision. In addition, no matter how neatly the lists of negotiable/arbitrable topics versus nonnegotiable/nonarbitrable topics are drawn, interstices are inevitable. Gaps may be filled by arbitral decisions, which are then subject to further review and delay. I believe the net effect is likely to be a deterioration of the management-union relationship.

I can understand the reluctance, particularly of management, to have some issues appear on the arbitration table. Herbert Haber, representing New York City, has noted his lack of eagerness to have an "itinerant philosopher" make these decisions. I submit that interest arbitrators hesitate to pioneer without some all-compelling reason to do so. They prefer to leave such matters to the parties. This does not mean that arbitrators will hesitate to make a warranted decision. It does mean that leaving these matters to arbitration will probably produce sound results with a minimum of governmental interference. Posthearing court review of arbitrability determinations should be possible, but, based on the Pennsylvania experience, these cases are likely to be infrequent as issues work out and problems are solved.

Numerous nonmonetary issues appear frequently in interest-arbitration cases. Although the large number of these issues can complicate arbitration, I am convinced that the complexity has a legitimate basis. That is, the underlying goal of a public-employee statute is to encourage bargaining as a form of workplace participation. It follows that the parties must be free to bargain with the understanding that should arbitration eventuate, they are able to repair to their original positions when they appear before an arbitration board. Otherwise, there is little incentive to bargain in good faith. If this results in added complexity for arbitrators, so be it.

Finally, it is worth noting that decision-making for arbitrators in the multi-issue case has been marvelously eased in some final-offer jurisdictions. Iowa is a case in point. There, the neutral arbitrator may select from the final offers of not just the parties, but also the recommendation of the fact-finder. In that situation, the difficult task is more likely to be performed by the fact-finder than by the arbitrator. I suspect the neutrals of Iowa prefer to be arbitrators rather than fact-finders.

The Public Interest and Decision-Making

The public interest and its impact on new-contract arbitration decision-making is a somewhat elusive subject. The public-interest concept has rightfully been labeled spongy. Fortunately, we have some recent useful work by Schick and Couturier, who studied the public interest in governmental labor relations.[7]

They found that the only meaningful way to understand the public interest was to examine it operationally from the multilateral bargaining point of view, i.e., who and which groups had access to information and influence on the outcome of the bargain. After examining a number of case studies, they concluded: "The case studies reveal that, with one or two exceptions, those groups that got involved in the bargaining process represented special interests and not the public interest. They did not represent the public interest even in those few cases where the group actually was a public interest group, in the broad sense of having concerns beyond the immediate special interest of the group."[8]

Thus, ascriptions of the public interest by even nominally appropriate groups may leave us empty-handed. Under these circumstances, what value standards exist for the responsible neutral in public-sector interest-arbitration cases? Some hold that useful values are inherent in criteria applicable to an instant case and the neutral need go no further. Others stress the fairness of the settlement, taking into consideration needs of the employees for adequate income, benefits, and working conditions, the need of the employer to maintain an efficient operation, and the need of the taxpayer for financial relief. We have

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[7]Richard P. Schick and Jean J. Couturier, The Public Interest in Government Labor Relations (Cambridge, Mass.: Ballinger Publishing Co., 1977).

[8]*Id.*, at 199.

no sound set of definitions and no operational value calculus for making determinations as to priority. Nevertheless, I believe value judgments are being made which increasingly reflect an operational concept of the public interest.

A few illustrations: It was commonplace in the early period of interest arbitration in the public sector to concentrate on criteria as they directly affected a case. The consequent impact may have been raised as an issue, but it was generally not given much weight. Increasingly, neutrals appear to be taking into consideration the coercive-comparison aspects of a decision. If arbitration is envisioned as an extension of collective bargaining, the approach appears to be correct. Certainly, the effect of a settlement in one part of an organization on other upcoming bargains in the same organization is a very real consideration. It may be that criteria taken alone can justify a certain level of salaries and benefits for the group before the board, but the extension of these benefits to other organized employees of the same employer may create difficulty. I believe arbitrators are giving increasing weight to such concerns and, in effect, an articulation of the public interest.

In the past, a relatively minor cost item might appear on the table. The employee group would give it a high priority and the cost might not be out of line for the employer. In fact, some projected gains in other areas may have been trimmed to accommodate the new item. The benefit was granted to a small group of employees. Suddenly, the same item became an insistent demand for other employees.

Decision-makers in public-sector interest-arbitration cases are aware that protagonists in related jurisdictions are highly conscious of each other. Comparisons are direct and forceful. Very little happens in isolation. It has become necessary for the neutral arbitrator to reflect on this tight world in making determinations. Again, this does not mean that changes will not be made. It does mean that neutrals are given pause in their decision-making as they contemplate the consequent effect of their decisions.

The public employer has at times verbalized dissatisfaction with the decisions of interest arbitrators. As a result, positions are taken which would have been unheard of a decade ago: A League of Minnesota Cities discussion of impasse resolution techniques resulted in this evaluation: "Strikes, when properly prepared for, seem to have the best effect on labor relations.

Referenda are less favorable, since they take the decision away from the proper decision makers—the elected officials. Arbitration seems to be the least favorable, since professional arbitrators seem to be compromise-oriented rather than issue-oriented."[9]

Probably the major employer charge against arbitrators is not compromise-orientation but rather the allegation that they have been too generous. We must note that the bulk of interest-arbitration cases in the United States has involved public-security forces. In many cases, these employees were woefully underpaid. Well into the 1970s I handled a case where full-time police officers of a substantial city were entitled to $5900 as the job rate. There is no question that we have witnessed a catch-up phenomenon.

The work of employees in the security forces was found to be far more difficult and complex than that of their earlier counterparts. They were entitled to higher earnings and better standing in the earnings-league table. Substantial increases were awarded or negotiated. I submit, however, that catch-up has basically occurred. For the five-year period 1972–1977, salary maximums for police and firefighters in 153 cities with populations of more than 100,000 increased by an average of 6.9 percent per year. The average earnings increase for production workers was 7.5 percent.[10] Further, it has been found that the presence or lack of arbitration and, indeed, the presence or lack of collective bargaining have produced, in general, fairly homogeneous salary results.[11] Certainly, the pressure of coercive comparisons has been a factor in salary increases. I suspect, however, that the legitimate aspirations of security forces and the general upgrading of these personnel would have produced substantial increases in the absence of collective bargaining or arbitration.

A new public-interest problem may well arise from the relative tightness of future awards. Catch-up has occurred in most jurisdictions, and ability-to-pay problems are real. I suspect neutrals are likely to reflect their understanding of public interest with

[9]United States Conference of Mayors, *LMRS Newsletter* (October 1977).

[10] 740 GERR 28 (1978).

[11]Illustrative is a New York State study which found that there were no significant increases or decreases due to the arbitration statute. *See* Thomas Kochan *et al.*, An Evaluation of Impasse Procedures for Police and Firefighters in New York State (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, 1977).

smaller awards. The emerging problem may be employee dissatisfaction and potential interruption of service.

Creative Decision-Making: Arb-Med

Each case has its own unique aspects, set of circumstances, and timing which provide the alert neutral with an opportunity for creative decision-making.

We are all familiar with med-arb as introduced and presented by the Kagels. Many arbitrators are proud of their mediation abilities. The arbitrator as closet mediator is fairly common. When med-arb was first mentioned, one of the reactions by arbitrators was to note that mediating arbitrators were hardly a new phenomenon. Many of the early arbitrators, George Taylor, for example, argued the importance of the meeting-of-minds use of arbitration. What was different in med-arb was the explicit selection by the parties of an individual to *mediate* their case. Arbitration was a reserve power designed to heighten the effectiveness of mediation. While med-arb is not widely used, it has been applied successfully in a number of cases and is likely to continue as a useful part of our dispute-settlement tool kit.

In a recent case, I found the reverse tool, arb-med, to be helpful. When I arrived on the scene for a police interest-arbitration case, both parties informed the panel they would appreciate as early a decision as possible on the critical money issue. They went further and explained that their bargaining and arbitration scheduling had placed them in a time-bind with regard to the budget. If a bench monetary award was not possible, they wanted an indication of the approximate monetary position.

Testimony and argument were taken on the monetary issue. A recess was called, and the board of arbitration found it was pretty much in agreement on money. The final money position was, of course, subject to what we did with the remaining issues. The financial award could go up or down a percentage point or so. The arbitration board agreed to communicate its position to the parties. When we did, their collective sigh of relaxation was audible. We had taken the heat of the critical issue away from the table. After they had caucused briefly, they reported that they would be pleased to have further bench indications if we felt free to make them.

The hearing continued. We were unable to indicate a position on the next issue. We did offer a unanimous stand on the follow-

ing issue. The parties then began to discuss the issue we had bypassed in terms of trade-offs involving an upcoming issue. We asked for a brief presentation on the issue which was not yet on the table. Gradually, we moved away from the relative formality of the arbitration hearing to a full-fledged mediation session. The parties became caught up in working out a settlement, with the arbitration board playing a sounding-board and suggestion-making role. In essence, arb-med moved to med-arb. We wound up with an agreed-upon three-year settlement.

Arb-med is not generally recognized in the literature. Yet, I have little doubt that the scenario above has occurred before. What is different is that the tool is being disseminated for analysis and consideration by others. We regularly decry the limitations of our dispute-settlement arsenal of weapons (incidentally, a terrible name). Yet, new approaches do appear regularly and are integrated into our dispute-settlement bag, for example, med-arb, final-offer arbitration, and expedited arbitration. I believe arb-med warrants such consideration. In a fair number of cases, there are one or two critical issues. Little can be done by the parties on the wide range of relatively easy issues because the parties are too tied up with their positions on the critical issues. Arb-med can be helpful in such cases.

In fact, I can envision a special scenario for arb-med. The parties may find it convenient to convene an informal hearing on certain key issues and seek a nonbinding indication of direction from an arbitration panel. Such a determination may succeed in relieving the pressure of an intolerable situation and enable the parties to proceed to their own settlement. They would be free to use the same or a different panel if arbitration eventuates. The approach has fact-finding implications and applications. Too often, fact-finders address themselves to a wide range of critical and noncritical issues. Issue limitation, already practiced by some fact-finders, may make the process more effective.

Again, each case has its unique aspects and opportunities. If we remain alert in emerging situations, we provide ourselves with a framework for better decision-making and the parties with more useful decisions.

Conclusions

When legislative criteria are established which affect arbitral decision-making in interest cases, they should be clear and not unduly limiting. Arbitrators should be responsive to statutory criteria and willing to indicate the general basis for a monetary decision. Criteria provided arbitrators must be well thought out and not represent the output of political expediency. Reviewing authorities need to recognize the limitations inherent in discussing the basis for a decision and should not invalidate an award because it lacks the neat precision of a rights-case analysis.

Scope questions can usefully be left to arbitration. Court or other appropriate review should be possible. The basic conservatism of arbitrators when it comes to opening new turf will likely result in minimal need for outside review of scope decisions.

I believe public-sector interest-arbitrators are moving away from a pure "creature of the parties" approach to a recognition of some public-interest role. To a degree, the role is built in when we consider conventional criteria. The public-interest task then becomes a balancing one when, for example, there are contrary indications from ability to pay and comparable wages. A major operational decision-making problem involves the consequent effect of a decision. I believe arbitrators increasingly reflect some concept of public-interest responsibility in making such decisions. The issue is obviously sensitive, and we could use more hard data as to what is actually transpiring and its rationale.

Alertness to creative decision-making opportunities, particularly with regard to process, should be the norm. Arb-med, as presented above, illustrates a potentially useful format.