CHAPTER 4

DECISIONAL THINKING

CHICAGO PANEL REPORT*

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Introduction

Our mission was to study the decisional process. What made the venture unique was a pioneer effort to pool the knowledge and experience of judges, advocates, and arbitrators as to how decisions come into being and how they are shaped by the institutional framework within which each of the participants operates. Our panel included two federal judges with a combined judicial experience of 25 years and many years of prior experience in active law practice; two lawyers with more than 60 years of advocacy in arbitration between them; and two arbitrators with a combined experience of 50 years.

At the outset we recognized that we were confronted with an unusual challenge—how to reduce to form and substance the amorphous subject of how cases are decided. There have been some impressionistic efforts to describe the decisional process. One of the most influential papers was the Holmes Lecture of the late Dean Harry Shulman of the Yale Law School, for many years the permanent umpire for the Ford Motor Company and the UAW.[1] But Shulman's excursion into the decisional process was incidental to a broader exposition of labor arbitration. The

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[1]Shulman, *Reason, Contract and Law in Labor Relations,* in Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1956), at 169.

few attempts using empirical research techniques have yielded some results in the field of business decisions, but otherwise have not been impressive. The design of a good research project in this area would challenge the best of researchers and is still to be done.

Aside from considering some of the relevant published materials, our study, for the most part, has been an analysis of specific substantive problems presented in the discussion outline prepared by Ted Jones, and in some judicial precedents. The primary purpose of this exercise was not to determine the correct substantive answers to the cases presented, but to expose differences in approach to problem-solving and the impact of the institutional framework on the decisional process.

Despite busy schedules, our non-Academy members gave generously of their time. We enjoyed many hours of candid, open discussion of an interesting and frequently exciting character. We cannot hope to recapture the full flavor of this experience. What follows is an attempt to summarize the varying perceptions of the decisional process and the similarity and dissimilarity in approach to decision-making by judges and arbitrators.

It should be added that the views attributed herein to the judges and arbitrators on the panel are of a tentative character. They do not necessarily reflect how matters will be decided by them in specific cases that may come before them. The right to repudiate or modify their views herein stated is expressly reserved.

I. The Arbitrator's Perception of the Decisional Process

We begin with the arbitrator's perception of his role. His perception depends on his view of the nature of the collective agreement and what the parties' expectations are of grievance arbitration. Two classic positions have been taken. The first is that the arbitrator functions as a problem-solver and as an essential instrument in completing the collective bargaining process. It is based on the premise that the parties cannot by their agreement anticipate all of the problems that will arise during the term of their agreement. Moreover, in order to reach agreement, contract provisions may be left purposely vague. The role of the arbitrator as the final voice in the grievance procedure is

to fill in these gaps of understanding. Arbitration awards and grievance settlements involve, therefore, not only administering the agreement, but completing the agreement. In the process, the arbitrator may rely extensively on mediation rather than imposing decision on the parties as would a judge.[2]

The opposing position is that the arbitrator's role should be more like that of a judge. This position reflects the view that the collective agreement governs and transcends in importance the general relationship of the parties—that the agreement sets forth the rights and obligations of the parties much as a statute does. The arbitrator accordingly is bound by the agreement and must carry out the parties' intention by giving effect to the language of the agreement. This approach puts the burden on the parties to resolve their fundamental problems through negotiations instead of depending on the skill of the arbitrator.[3]

These differences in basic approach are reflected in a series of issues: To what extent should formal rules of procedure apply? To what extent should exclusionary rules such as the parol evidence rule be applied? Does precedent or stare decisis have a place in the decisional process? What about the role of "due process"? What about the right to reasonable notice, the right to be confronted with adverse witnesses, and the right to be apprised in advance of evidence and argument? Should procedural rules designed to protect constitutional rights of persons accused of crimes be available to protect the individuals

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[2]The leading exponent of this position was George W. Taylor, labor economist and chairman of the War Labor Board during World War II. Taylor, *Effectuating the Labor Contract Through Arbitration,* in The Profession of Labor Arbitration, Selected Papers from the First Seven Annual Meetings, National Academy of Arbitrators 1948–1954 (Washington: BNA Books, 1957), 20–41. Shulman similarly supported a broad view of the arbitral process, although not as extreme as Taylor's. In his role at Ford, he made his own investigation when not satisfied with a presentation. He freely engaged in ex parte discussions of grievances with all of the interested parties and occasionally mediated disputes. Shulman, *supra* note 1, at 197. These views were reflected by Justice Douglas in the *Trilogy* in this dicta in *Warrior & Gulf:* "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . ." The collective agreement covers the whole employment relationship. *Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578–79, 46 LRRM 2416 (1960).

[3]This view was reflected in the first Code of Ethics of the American Arbitration Association which described the office of arbitrator as being of a judicial nature. 1 Arb. J. (1946). Former Senator Wayne Morse, a former member of the War Labor Board, took an unqualified position: "It is my view of arbitration that an arbitrator is bound entirely by the record presented to him in the form of evidence and argument at the arbitration hearing. His job is the same as that performed by a state or federal judge, called upon to decide a case between party litigants." Smith, Merrifeld, and Rothschild, Collective Bargaining and Labor Arbitration (Indianapolis: Bobbs Merrill, 1970).

involved in disciplinary actions? Should the arbitrator receive or give weight to evidence of past misconduct, or evidence secured by search of the person, search of lockers, or obtained by electronic surveillance?

The extensive literature reflecting debate on the nature of the arbitrator's role, some of which we have reviewed, presents a somewhat misleading picture of the realities of the world of arbitration today. Shulman and Taylor spoke from their experience as impartial umpires with tenure. They came into arbitration in the period of its most rapid growth following World War II. The parties were relatively unsophisticated and looked for leadership from experienced, inventive, and gifted labor experts. They not only tolerated, but welcomed the problem-solving approach.

But the bulk of arbitration decisions at that time and today are the product of ad hoc arbitrators. Arbitrators called in to decide particular cases, with few exceptions, limit their role to decision-making. Today, even in the more permanent types of arbitration arrangements, arbitrators function primarily as decision-makers. The parties are far more sophisticated and in many mature relationships know what they want from the arbitration process. Current collective agreements reflect several generations of development and have fewer ambiguities.

The view of the arbitrator members of the panel is that an arbitrator should function in accordance with the parties' expectations. We have found that with few exceptions the parties want a decision. They have between them exhausted the possibility of settlement. They come to arbitrators to decide the hard cases they are unable to resolve on the merits, or for some meaningful "political-strategic" reason where a decision by the arbitrator can better serve an institutional need of one of the parties than a settlement on the merits.

Occasionally, arbitrators have been brought into situations where the grievance procedure has broken down and the parties cannot get off dead center. Here the parties, to get rid of a backlog of grievances, will expressly authorize mediation in addition to arbitration. With willing parties, the two functions can be combined successfully.

Since the parties know in a great majority of cases what they want, the arbitrator's role should be guided accordingly. He is, as is so often said, a creature of their contract. The parties have not signed a blank check when they agree to arbitration. The

arbitrator's decisional authority is placed within bounds. The parties generally set limits on arbitral authority in the collective agreement. The most common provision expressly states that the arbitrator "should not add to, subtract from, or vary the terms of the agreement."

Such contractual restraints on arbitral authority are frequently referred to by arbitrators in awards rejecting contentions inviting them to consider matters outside the collective agreement. A reference to the contractual limits is not merely a crutch for an award. Most arbitrators are acutely sensitive to the fact that it is the agreement which is controlling and will go with the agreement where its meaning is unambiguous even though the resulting award appears to be harsh.

There is a substantial range of arbitral discretion in the interpretation of agreements when a disputed provision of the agreement is ambiguous or where the agreement is silent. But even in such cases the arbitrator is not free to shoot from the hip. To the maximum extent possible, his award must find support in the agreement, from established principles of contract construction or from such established sources as the collective bargaining history or the past practice of the parties.

The most effective restraint on abuse of arbitral authority is the expendability of the arbitrator. This is a unique aspect of arbitration. The arbitrator is chosen on a case-by-case basis, for a period of time, sometimes euphemistically described as permanent. The selection of the arbitrator, his performance, and his award must be acceptable to the parties.

Acceptability is an essential protection in a system of private law that confers finality to awards, and the parties have properly regarded arbitrators as expendable. Arbitrators are acutely aware of their expendability and realize that they will be judged by their performance. Although the acceptability standard is widely accepted, some serious misgivings are expressed later in this report by one of the panel members (see page 83, *infra*).[4]

Another brake on arbitral discretion is judicial review, but the scope of review is exceedingly limited by the *Steelworkers Trilogy*.[5]

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[4]*See The Impact of Acceptability on the Arbitrator,* in Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), Ch. IV.

[5]*Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97, 46 LRRM 2423 (1960). It should be added, however, that recent cases indicate a trend toward expanding the scope of review as the fair-representation concept involves greater judicial

Another limitation affecting the decisional process is the growth of external law affecting labor relations. While arbitration continues to be an area of private law, the collective agreement no longer states all the terms applicable to the employment relationship. Accordingly, the arbitrator's decision may not be the last word. The rapidly expanding body of relevant external law includes the Labor Management Relations Act, the Wage and Hour Law, Title VII of the Civil Rights Act, the Occupational Safety and Health Act, ERISA, ADEA, and, for the host of employers who qualify as federal contractors, the entire regulatory apparatus of OFCCP through Executive Order 11246. The debate on the proper role of the arbitrator in trying to reconcile his role as interpreter of the contract with external law has now gone on for over a decade.[6]

Alexander v. *Gardner-Denver*[7] has played a special role in this debate. In that case the Court decided to implement both the national labor policy favoring arbitration and the policy on civil rights. It permitted an employee claiming employment discrimination to pursue both his full remedy under the arbitration clause of the collective bargaining agreement and his cause of action under Title VII in a de novo proceeding in the federal court. The Court held that an arbitrator has authority to resolve only questions of contractual rights.

The Court, although not according the arbitration award preemptive status, held that it need not be completely ignored, but might be considered and weighed by the trial court. In a footnote it set forth the following factors relevant to the weighing process:

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participation. See cases cited in Appendixes I and II attached. See also *Detroit Coil Co.* v. *Machinists Lodge 82*, 594 F.2d 575, 100 LRRM 3138 (6th Cir. 1979); *Amalgamated Clothing Workers* v. *Webster Clothes*, 612 F.2d 881 (4th Cir. 1980). For a comprehensive and insightful discussion of judicial review since the *Trilogy*, see Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1978), 29.

[6]Howlett, *The Arbitrator, the NLRB, and the Courts*, in Proceedings of the Twentieth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1967), 67; Mittenthal, *The Role of Law in Arbitration*, in Proceedings of the Twenty-First Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1968), 42. But *cf.* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in Proceedings of the Twentieth Annual Meeting, *supra* this note. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 97; St. Antoine, *Discussion—The Role of Law in Arbitration*, in Proceedings of the Twenty-First Annual Meeting, *supra* this note, 75, at 82; St. Antoine, *Judicial Review*, *supra* note 5.

[7]*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

(1) The existence of provisions in the collective bargaining agreement that conform substantively with Title VII, (2) the degree of procedural fairness in the arbitral forum, (3) adequacy of the record with respect to the issue of discrimination, and (4) the special competence of the particular arbitrator.

The Court went on to say that, where the arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight: "This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."[8]

Gardner-Denver rekindled the debate as to whether arbitrators should attempt to interpret and apply external law. The views expressed range from one extreme to the other.

The arbitrator may have no choice if the agreement specifically includes references to relevant statutes. But barring such provisions, our view is that arbitrators should limit themselves to the task specified by the arbitration clause—the interpretation and application of the agreement.[9] This conforms to the parties' intent. It also reaffirms the essential holding of the *Trilogy* which emphasized the arbitrator's expertise in industrial relations and the law of the shop. It also recognizes that many arbitrators are not lawyers and have no special competence in interpreting federal statutes and court decisions.

But even though most arbitrators try to stay aloof from external law, the decisional process has been substantially affected by such cases as *Gardner-Denver* and also by the *Collyer* and *Spielberg* doctrines of the NLRB considering the respective roles of the Board and of arbitrators in unfair labor practice cases, especially in cases involving the refusal to bargain.[10]

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[8] *Id.*, at 59.

[9] When implementation of the agreement is in direct violation of federal or state law or would in the light of such statutes be impractical or against the interests of the parties, the arbitrator may be well advised to refer the matter back to the parties unless it is clear that an award is essential to the parties. See discussion *infra*, p. 77).

[10] *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971); *Spielberg Manufacturing Co.* v. *NLRB*, 112 NLRB 1080, 36 LRRM 1080 (1955). In substance, the NLRB has deferred taking action on complaints of unfair labor practice and refusal-to-bargain cases, where the arbitration remedy is available, and will give weight to the award if the following criteria are met: (1) prompt submission to arbitration proceedings which are "fair and regular"; (2) agreement to a binding award; (3) the arbitration decision is not clearly repugnant to the purposes of the Act. Recent decisions of the Board have sharply restricted the application of the *Collyer* deferral doctrine in alleged violations of Section 8(3) of unlawful interference with employees' Section 7 rights. *General American Transportation Corp.*, 228 NLRB 808, 94 LRRM 1483 (1977); *Roy Robinson Inc.*, 228 NLRB 828, 94 LRRM 1474 (1977). These decisions reflect the impact of *Gardner-Denver* on the

One of the chief advantages of arbitration has been the finality of awards. This factor is essential to expeditious resolution of disputes. If, despite an award, a grievant may relitigate his grievance in another forum, the parties' system of private law is frustrated. The arbitrator probably best serves the parties if he confines his award to an interpretation of the agreement, but conducts the hearing in a manner that will meet the criteria of the NLRB and the Supreme Court.

The need to comply with these criteria has influenced the decisional process. The parties as well as the arbitrator must keep these criteria constantly to the fore especially where the collective agreement contains provisions similar to statutory provisions such as clauses barring discrimination because of union activity, or because of race, ethnic origin, sex, or age. To achieve finality, an adequate record is necessary. This may require a stenographic record. Special care must be taken to observe procedures safeguarding the grievant's right, and the complaint which parallels the statute must be referred to in the evidence and in the award. The award is not likely to be the final word if the parties and the arbitrator fail to observe these criteria. The decisional process may suffer in increasing formality—but there may be no other choice.

II. The Judges' Perception of the Arbitration Process

We turn next to the judges' perception of the arbitration process. There are important similarities in the judicial and arbitral processes. Both arbitrators and judges operate within constraints of an institutional character. Both are engaged in adjudication. As stated by Lon Fuller, "adjudication is a process of decision in which the affected party ["the litigant" or "the grievant"] is afforded an institutionally guaranteed participation

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Board. *Gardner-Denver* has also had its impact on the courts as well. In a recent decision of the Ninth Circuit, the Board was barred from honoring an arbitration award absent evidence that the issue of a discharge of a discriminatory character under the Taft-Hartley Act was submitted to or considered by the arbitrator. *Stephenson* v. *NLRB*, 550 F.2d 535, 94 LRRM 3234 (9th Cir. 1977). *Cf. Servair, Inc.* v. *NLRB*, 607 F.2d 258, 102 LRRM 2705 (9th Cir. 1979). *See also Suburban Motor Freight, Inc.*, 247 NLRB No. 2, 103 LRRM 1113 (1980) where the NLRB refused to defer to arbitration awards if unfair labor practice issues were not raised by the arbitrator, and *Sea Land Services, Inc.*, 240 NLRB No. 147 (1978) where it was held no deference is to be given grievance settlements short of arbitration.