CHAPTER 8

TRIPARTITE INTEREST AND GRIEVANCE ARBITRATION

I. TRIPARTITE PANELS: ASSET OR HINDRANCE IN DISPUTE SETTLEMENT?

ARNOLD M. ZACK*

When I first set out to write a paper for this session, my assignment was to play the devil's advocate on the subject of tripartitism. I gleefully trotted out a whole chamber of horrors to demonstrate that tripartite arbitration was so susceptible to abuse by the parties that it contained the seeds for the destruction of the entire arbitration process.

But as I wrote, I began to recognize the assistance I'd received from some partisan arbitrators in difficult cases, and to appreciate the fact that I had been fortunate to work in a number of tripartite systems where my prophecies of doom bore not the slightest resemblance to reality. The fact that I had been "captivated" by my own literary license came home to me one day in the fall when I told one of my favorite wingpersons of my plans for the paper and was greeted with a dismayed, "How can you *do* that?"

When Bill Weinberg announced that he'd be unable to sit with us, I was forced to rewrite, with an opportunity to recant some of my dire forebodings. So now I am before you, purged of my devil's advocate responsibilities. I'm not ready to extoll tripartite arbitration as the cure for all labor-management ills, but I am satisfied that the system works for some parties, as it has on many occasions for me and for other arbitrators. However, I still harbor some skepticism about the ways in which it can be manipulated by the unscrupulous, to a far greater extent than can the single-arbitrator system.

With this new perspective, I'd like to examine and critique chronologically the operation of the tripartite system to point out some of its aspects that both please and trouble me.

*Member, National Academy of Arbitrators, Boston, Mass.

A brief look at the evolution of tripartitism will show that the procedure was intended to provide the neutral chairman with expert assistance in fulfilling his decision-making responsibilities. The passage of the Railway Labor Act in 1926 established the first system of grievance arbitration with provision for each of the parties to have a representative—a partisan arbitrator—to guide the neutral who was assumed to be a layman lacking the experience of a judge in the conduct of hearings and in the preparation of the decision.

Such naiveté, it followed, *required* the neutral to be guided in the proceedings by experts more intimately associated with the pending dispute—namely, arbitrators appointed by the parties themselves. In those days there was no question that the "experts" were the advocates. The neutral arbitrators were occasional, nonprofessional, and inexperienced in industrial problems. The vital national interests that were the basis for arbitration under the Railway Labor Act legitimized the provision of "wingmen" to prevent decisions by solo neutrals that would be harmful to both parties and the country.

The opportunity to have a representative on the panel to guide the neutral at the hearing and thereafter in the decision-making process made the tripartite system very appealing to the disputing parties by providing access to the neutral during the posthearing period. The parties could use this time to educate the neutral who didn't fully understand the uniqueness of their industry, their problem, and their specific dispute. The neutral, as an outsider not familiar with the parties' problems, was not fully trusted. It was not until the War Labor Board, also employing a tripartite structure, that the idea of a professional neutral arbitrator became acceptable. Yet the tripartite format continued.

Thus, when the use of arbitration expanded beyond the railroad industry and into airlines, public utilities, transit systems, and elsewhere, so did tripartitism, with the parties retaining that posthearing access to the neutral, whatever his expertise in their industry. This extra access and a lurking distrust of the neutral's having free rein over the parties' dispute, I suggest, has also contributed to the spread of tripartitism in the public sector, particularly in those jurisdictions that lack the tradition of private, industrial-sector, single-neutral arbitration.

Reflecting this background, tripartitism has now expanded into interest disputes, initially in fact-finding, and then into in-

terest arbitration, culminating most recently in final-offer selection. Although this paper is directed primarily to tripartitism in grievance arbitration, the underlying rationale of party protection is obviously applicable to the problems of tripartitism in interest disputes, particularly in the postmediation step.

In 1968, in the 21st Proceedings of the NAA, Harold Davey concluded, in the most thorough analysis of the "Uses and Misuses of Tripartite Boards of Arbitration" that I've come across, that the future prospects were not bright for increased use of tripartite boards in grievance arbitration. But the fact that they have remained as prevalent as they are today dictates a reexamination of their benefits and risks, and their impact on the neutral's decision-making responsibilities.

Let us walk then through the case, examining the ideal and reality of tripartite panels in their three most crucial stages: the hearing, the posthearing period, and the executive session.

The Hearing

The textbook description of partisan arbitrators has them seated on either side of the neutral chairman, taking notes and permitting the chairman to rule on procedural and evidentiary questions without challenge. They may ask an occasional question of a witness, perhaps to clarify a point, and they join the neutral at lunch and recesses. No wave-making in that scenario!

The textbook description, I suspect, would have no great problem either with the partisans' occasionally caucusing with their respective teams, or caucusing with the neutral prior to rulings on important procedural or evidentiary issues, particularly if the privacy of the latter caucus is respected, with no reporting back to the teams. Most of the partisans I have worked with adhere to that restrained pattern. Indeed, when we recognize that they *are* partisans, there's little concern over their passing notes to their team or even leaning over to whisper something to them.

What does cause me concern is behavior that impacts on my role as a neutral—behavior which, but for the existence of the partisans, would not occur in a single-arbitrator format. Certain elemental standards of due process are accepted as necessary for fair hearing, even in arbitration hearings. That due process is corrupted by partisans who, acting within their authority as arbitrators, interrupt and disrupt counsel for the other side dur-

ing cross examination of witnesses. It is corrupted by the partisan who interrupts the advocate for his own side and then asks the witness leading questions inappropriate in direct examination. It is corrupted when counsel for one side sits in the partisan arbitrator's seat and conducts his case from that location. It is also, I suggest, corrupted when a party calls its partisan arbitrator as a witness to testify about negotiating history—or when all other witnesses are sequestered. Is that partisan then expected to join the chairman in assessing his own credibility?

Although it could reasonably be argued that the partisans are, in reality, mere appendages of the parties who designated them, and thus subject to the procedural rulings of the neutral arbitrator, there are many parties who ignore the real roles of the partisans and insist that they are members of the arbitration panel and thus free from the chairman's scrutiny and rule. Even when they are excoriated by the neutral, the harm is often done, the opposition's presentation undermined, and the grievant's faith in the integrity of the process eroded.

Another gambit used by many parties, which I suggest is also unjust, is the substitution of the partisan arbitrator at the conclusion of the hearing. The person who heard the case for one side, who might have participated in caucuses of the board during the proceedings (and has perhaps divulged their content or the inclinations of the arbitrator to his team) is replaced for the executive session by the party's spokesperson. In at least one case, I have had as a substitute a higher ranking official of one side who was not even present at the hearing. With such tactics, the appearance of tripartite justice, as well as the form, is diminished.

Posthearing Period

After the close of the hearing, the tripartite panel usually holds a meeting, commonly referred to as the executive session. Since tripartitism appears to have bred increased reliance on transcripts and posthearing briefs, the session immediately following the hearing usually focuses on setting a time and place for the executive session. In cases where the argument has been oral, the panel may be in a position to commence its discussion on the merits. If the conventional wisdom were operant, the partisans would emphasize the best argument raised by counsel in the hearing, while the neutral chairman listened attentively to

verify that he understood the positions of the advocates and had full comprehension of the case. But, unarmed with a draft decision, and absent the opportunity to have even reviewed his notes or a transcript, the neutral is usually wary and noncommittal during such a session.

It is in this session that the neutral must be alert to the efforts of one or both partisans to steer his decision away from the course logically followed by a single arbitrator. Most blatant is the request for an informed award, or an award that would treat the grievant in a different manner than would the solo arbitrator. In the single-neutral format, such an approach would result in resignation, or at least a revelation to the other side. But in tripartite arbitration, the suggestion of impropriety comes not from the parties, but from the so-called fellow arbitrators. I suggest that the response in tripartite arbitration should be no different from that in solo arbitration, although the form of the approach may be so sophisticated that the proposal of an informed award is not readily apparent. The neutral's problem arises from the requirement of a concurring vote for the majority award, or from the fact that integrity dictates a dissent from an award agreed to by the partisan arbitrators. Here, too, resignation is a palatable option.

A frustration of a different type arises from the posthearing meeting when there is discussion on matters such as credibility, with the neutral virtually baring his hand in respect to the future award. In one case recently, in a session immediately following the hearing, having expressed to the partisans my tendency to believe that a disciplinary penalty was excessive, with back pay probably appropriate, I was surprised to learn a week later that the case was settled: Reinstatement without back pay.

My chagrin arose, not due to lost writing time, but rather from the fact that the settlement reached by the parties was substantially different from what I would have awarded as a neutral. My annoyance was vitiated only after repeated reminders to myself that the process was the parties' and that settlement, rather than arbitrator's edict, is the goal of that process.

One other aspect of the session immediately following the hearing troubles me; that is the mandate from the partisans to "just write the opinion and send it to us for signature, with concurrence or dissent." Certainly I endorse the precept that the process is the parties' and the ideology that we lend ourselves to that process to facilitate the dispute-settlement ma-

chinery. But I guess I still covet some of the idealism of the textbook tripartite panel. If the opinion and decision bears three signatures, I like to assume that the two partisan arbitrators played a role in the decision-making process. I suspect my basic reaction is resentment, on the one hand, of the partisans' unwillingness to participate in the process called for in their agreement, and, on the other hand, of their continuation of the vestigial tripartite arbitration format with its appearance of joint decision-making, rather than deleting it in favor of single-person arbitration.

The credibility of the arbitration system, single or tripartite, dictates that the procedure called for in the parties' agreement be utilized, not fabricated. As long as the parties themselves have not amended their agreement to exclude the tripartite system, they and their partisan arbitrators are obligated to adhere fully to that process.

Preparing for the Executive Session

Here, too, arbitrators have had a wide variety of experiences. As noted by Syl Garrett in his Presidential Address to the Academy in 1964 (17th Proceedings), some arbitrators prepare completed drafts prior to the executive session, while others prepare partial drafts. Some arbitrators prepare simple memoranda for discussion purposes, and some present alternate drafts, suggesting opposite conclusions. Some, I suspect, do none of the above, approaching the executive session as a tabula rasa.

From the purist's viewpoint, these documents, whether in draft or final form, are the neutral's best judgment on resolving the dispute. If the format were for a single arbitrator, their judgment would prevail and the dispute would be resolved. To the extent that the partisans undertake to vary those draft decisions, they are diluting and politicizing the arbitration process by forcing, persuading, or, as Garrett uses the term, *mesmerizing* the neutral away from his or her best position, toward one that is affected by the parties.

The Executive Session

In the idealized tripartite arbitration, the executive session provides abundant opportunities to facilitate a more equitable

decision than would obtain in the solo-arbitrator system. The conventional wisdom in favor of tripartitism is as follows:

First, it provides the parties with a positive assurance that the neutral fully understands the issue or issues before him. Only in the confines of the executive session can the partisans freely ask, "Do you understand?" or challenge the affirmative answer to that question if they feel the arbitrator does not. While deplored as a second bite at the apple, the conviction that the partisans have gotten their arguments across to the arbitrator is most easily attainable through the give and take of the off-the-record executive session. This opportunity to assure that the issues are understood is of particular importance in technical issues such as time study and bumping sequence.

Second, from the neutral's point of view, such easy access to the partisans is often a helpful tool for clarifying technical issues, or those on which the arbitrator acknowledges his uncertainty or fuzziness or on which he did not focus until receipt of the posthearing briefs. An unfortunate consequence of the trend toward increased legalism and posthearing briefs in arbitration is the abandonment of closing oral arguments which enlighten the arbitrator and increase the prospect that the parties will respond to each other's issues in their briefs. To that extent the executive session may provide a helpful safety net for the arbitrator who missed some point because he was tired, bored, or even somnolent. Certainly the same result can be achieved by a single arbitrator's calling in the advocates for a posthearing discussion or requesting reply briefs. But arbitrators rarely admit that they didn't completely understand the case as they left the hearing room.

Third, tripartite panels can better assure both the parties and the neutral that the language of the opinion does not create greater problems than existed before the arbitration. The luxury of language review is denied the solo arbitrator as well as the advocates in single-arbitrator cases. Only in the tripartite format do parties and arbitrators have the opportunity to steer the opinion away from rocky shores and so protect themselves from ancillary grievances or legal challenges. Only through such joint review can the arbitrator assure himself that his opinion expressed fully and clearly his thoughts and intent. Such sessions also tend to protect the arbitrator against hastily written as well as overwritten opinions and decisions.

Fourth, tripartite panels provide the ideal format for the me-

diated decision. Perhaps in the hands of a George Taylor the philosophy or reasoning together in an executive session to achieve a consensus decision was readily attainable. But I suspect that neutrals with his talent are rare and that the population of like-minded partisans is thinning. Settlements during executive sessions don't occur often.

Admittedly, in interest arbitration the subject matter of the dispute is broader, the number of issues greater, the tools for mediation more convenient, and thus the prospect of a mediated arbitration decision greater, but in grievance arbitration, with less gray area between the parties' positions, that approach has less applicability. Nonetheless it is clear that such opportunity is more readily available in the tripartite format than in single neutral arbitration. Many grievance disputes are mediable, and the executive session is an acceptable mode for attempting such resolution even to the point of settlement to avoid the arbitration decision.

Fifth, even if a complete settlement of the issue is not achieved through the mediation of the chairman, the tripartite forum provides an otherwise missing opportunity to narrow the area of dispute between the parties and thus fashion an opinion and decision that is more palatable to the parties and strengthens their faith in the dispute-settlement process. Such an approach is most useful in interest disputes where it has been described as med-arb. There, the acceptability of an award or the terms of a new contract, even though the award is to be binding, may hinge on a decision which falls within the range of the parties' expectations.

Sixth, and perhaps most hopefully for neutrals, adept handling of the hearing and particularly the executive session offers the arbitrator a forum for exhibiting his skill, his articulateness, his mediating ability. Such a demonstration may persuade the partisans that he may be valuable for a future dispute. But then again, such exposure may be the last thing the frequently eccentric arbitrator should be willing to risk. The lamentable consequence could be avoidance rather than the guarantee of future cases.

Despite the foregoing ideals of the tripartite system, the practitioners frequently have a different goal—to win cases. Thus, the idealized tool is only as good as the craftsmen who employ it.

Tripartite arbitration in the hands of mere mortals who are

saddled with representative responsibilities thus tends to evolve as merely another forum for achieving victory. The added complexity inherent in the tripartite system—the three-man panel, posthearing access to the neutral, the executive session, and the right to share in signing the decision—offers additional opportunities to influence and alter the neutral's decision-making process.

I am greatly concerned about partisan conduct which insidiously and adversely impacts on the independent judgment and decision-making role of the neutral and which can only raise questions as to the integrity of the arbitration process as a whole. Let's look at these problem areas.

First, the partisan arbitrators are often frustratingly unequal in competence. On one side is the competent, articulate partisan who has careful and complete notes and total recall of the testimony. On the other side is a second- or third-string player who sat and doodled through the hearing and who is virtually mum throughout the executive session. While such obvious imbalance may be unusual, and while it may not have any impact on the neutral's already-made-up mind, it can have an insidious impact on the marginal case where the articulate partisan arbitrator can swing the balance in his favor in the absence of effective opposition. Even worse is the undecided or marginal case where the silence or minimal contribution on the part of the incompetent partisan arbitrator may be interpreted as acquiescence to a decision in favor of the other side.

Second, there is a frightening and all-too-common tendency on the part of partisan arbitrators to confide in the neutral, during the executive session, the "real facts" behind a grievance. While most arbitrators seek to squelch the offering of such tidbits and nip such improper revelations in the bud, many do not or cannot do so before the unsought information is blurted out. This is not merely a matter of one partisan's providing information which the other may not have been privy to, it is a problem of providing assertions to the neutral which have not been subject to the truth-finding exercises of cross-examination or rebuttal and which may constitute a serious deprivation of the grievant's right to confront his accuser. The resulting impact on the neutral of such "private insights" is hard to gauge. It may be that they are accepted as gospel. It may be that they are resented as an underhanded effort to influence the neutral. Whichever reaction prevails, there is no question that it in-

troduces into the decision-making process one more element that is precluded from the single-arbitrator format, providing the innuendo which forces a reweighing of the neutral's individual "best judgment," perhaps even to the point of changing the decision.

Third, there is too frequently the requirement of a majority award. While the problems of a majority decision may be avoided by the issuance of the chairman's opinion, this does not lessen the problems of securing agreement of the majority of the board of arbitrators on the decision. In most cases it is not a problem, since one party prevails and that partisan arbitrator signs the decision. But there are many cases where the neutral's decision does not endorse fully the position of one party or the other, as well as many instances where the partisans refuse to concur in part to the portion from which the other partisan(s) dissented. I have had one such deadlock case where I reinstated a discharged employee without back pay and both partisans dissented. In such a case the neutral may find himself in the awkward position of having to negotiate with one of the parties against the position he deems appropriate in order to secure a concurring signature and, thus, a majority opinion.

Fourth, attendant on the additional delays of tripartitism is the inequity of reinstatement which is held up that much longer. When viewed in the light of the frequency with which such reinstatement is made without back pay, it places the total cost of the delay on the shoulders of the grievant who can least afford it and who would have been more rapidly returned to work and to breadwinner status under the single-arbitrator format.

Conclusion

I would like to have concluded this paper by proclaiming that my arguments in support of the merits of tripartite arbitration swept me off my feet. But I must admit that despite a series of very pleasant, positive, and helpful relationships that I have enjoyed under tripartite arrangements, I am frankly unpersuaded that decisions emanating from tripartite arbitration systems are any better than those resulting from the solo-arbitrator system. My skepticism as to the supremacy of tripartitism is compounded by my own observations of the abuse of the tripartite system as well as its potential impact on the integrity of the neutral and on the arbitration system as a whole.

Arbitration is increasingly challenged because of delays and costs. With the delays necessitated by the need for an executive session, let alone transcripts and briefs, and with costs escalated by the use of partisan arbitrators with their lost work opportunities and expenses on top of the fees and expenses of the neutral, it is clear that tripartitism is a greater offender in the area of costs and delays than solo arbitration.

Moreover, if the suspicions are valid that tripartite arbitration is only a traveling road show existing solely to "cut the deal," then I suggest the institution and its participants are in jeopardy.

It is up to the partisans to recognize the consequences of their improprieties and to institute reform. It is up to the neutrals to be forceful in curbing these improprieties and to assert their unwillingness to continue in a procedure that they view as improperly influencing their independent judgment.

For the time being the jury—or should I say the "panel"—is still out on the question of whether tripartite arbitration has become an asset or a hindrance to the dispute-settlement process.