CHAPTER 3

ARBITRATION—AS THE PARTIES SEE IT

I. ONE MANAGEMENT POINT OF VIEW

ROBERT F. GARRETT*

It is both customary and good manners for a guest at the Annual Meeting of the Academy to thank that Academy for being invited to attend. This is particularly so when the guest is also invited to speak. You may all rest easy. Tradition will not be broken. I am delighted to be here and honored that your Program Committee asked for my opinion. However, I must candidly tell you that I am not at all comfortable with my assignment. A few of us advocates have been asked to deliver your report cards to you. We are being asked to compare your performance to your promise. What we are really being asked, I submit, is how well you measure up to *our expectation of your promise and performance.*

But before jumping off into that, let's clear the air so that you will know exactly where I stand or where I may yet be heading. After more than two decades of being in this business, I have *never, ever* received an arbitration award with which I disagreed. Now before you leap from your seats to congratulate the Program Committee for finding that rarest of species—an advocate who never lost a case—permit me to continue. The reason for my concurrence with every award received is simply that I agreed ahead of time that the arbitrator's decision would be final and binding. That's it—whatever the outcome, the parties agreed in the contract to be bound by it.

More than that, I can honestly say to all of you, from my own personal experience, in every hearing in which I have taken part, the *decision* made by the arbitrator was the *right decision.* Based upon what the arbitrator heard or was given, had I been in the arbitrator's seat, my decision would have been exactly the same.

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Now, you can rest assured that I have had my share of adverse rulings. However, those grievance decisions that I lost were because of one or both of the following reasons: They were grievances that should have been resolved at the plant and never reached arbitration in the first place, or they were ones in which I did a lousy job in advocacy.

Taking this one step more—I have never received an adverse decision from which I failed to learn something. Each loser was an educational experience. In most cases I learned something about the meaning of the language in the labor agreement that I had never known. In some instances this may have involved a contract where I had been at the bargaining table each time for the last 10 or 15 years. We may have been dealing with language that I actually wrote or framed, and I thought I knew what it meant. Then, 10 years later, this arbitrator comes along with his "I am the official reader" credentials, leaving me to murmur, "Gee, I didn't know it meant that!" So each loser is really a winner in that you learn something—if nothing more than never to select that particular arbitrator again.

Be that as it may, both sides agree ahead of time that whatever the decision, it will be final and it will be binding. At least it should be. Now, I don't have any problem with an arbitrator's retaining jurisdiction for 30 to 60 days after making an award. This may be appropriate until a satisfactory back-pay settlement can be worked out, or where a discharged employee is reinstated upon certain conditions precedent. That I understand. But last year an associate of mine at our plant in St. Louis shared an FMCS award with me that I will now share just a portion of with you.

The issue and the decision in this grievance are not really important. What is significant is a footnote to the award relative to retained jurisdiction and an automatic appeals policy introduced by the arbitrator. My friend from St. Louis went on to say that at the start of the hearing the arbitrator told the parties about his appeals policy, and said he did this in all cases unless the parties strenuously objected. Here, from the award, is the footnote:

> "This award shall not take effect until at least 21 days after its issuance. Either party may file a motion for reconsideration, provided it is received by me within 20 days after issuance of this award. If any such motion is received within 20 days after issuance of this award, its effective date shall, without further action by me, be post-

> poned to 35 days after issuance of this award. Until the effective date of the award (and during any further postponements of the effective date issued by me prior to the occurrence of an effective date) I reserve jurisdiction to amend the award or to postpone its effective date, whether at the instance of a party or of my own motion. The parties have acquiesced in this reservation of jurisdiction."

By this footnote, this arbitrator is inviting the losing side to take "one more bite from the apple." I suggest that such a process invites sloppy preparation and presentation of the case at the hearing. Either side can wait for the initial ruling and, since the preliminary decision will be adverse to one of the parties, then the losing side can present the rest of its case on appeal. This negates cross-examination, which is an essential part of any adversarial proceeding. Taking it one step further, the side that moved for reconsideration presumably does so by briefing. Does the arbitrator reconsider solely on the basis of that appeal, or does the side that initially "won" get an opportunity to respond to the motion to reconsider? Does the moving side then get an opportunity to make a second rebuttal brief? Note also that the arbitrator retains the right to amend or otherwise change the award of his own volition regardless of whether either party so moved. This could go on and on and certainly do violence to the arbitration process.

The next performance problem I would like to address is dicta, those gratuitous gems that some arbitrators feel they were ordained by the Deity to bestow. Quite frankly, these bits of speculative, unsolicited advice create problems.

As an advocate who also administers the labor agreement on a day-to-day basis, allow me to tell you what I expect from an award and opinion. The first thing I would like for the award to do is to state the facts surrounding the grievance as you, the arbitrator, perceived those facts to be. Next, the award should note the specific contract language applicable to the award and opinion. Third, the award should examine the positions of the parties.

The reason I like to see these items in the award is to find out if you were paying attention when we put on our case. Moreover, I also would like to find out what you thought was important. Having seen this, we are now ready to learn of your decision and how you came to reach that decision.

It is tremendously important to the *losing side* that you critically examine and dispose of the claims proffered. It is impor-

tant to that advocate's constituency (whether management or labor) that their spokesman gave every reasonable argument on behalf of their losing cause. Having accomplished this preliminary task, all that's left is for you to take the persuasive arguments and contract language relied upon by the prevailing side, lay these out, and make your award.

A word of caution: As you go through the ritual of disposal on the points made by the losing side, please, please resist the urge to enter the world of "what if" and "on the other hand." When you do this, you are inviting this same grievance to be arbitrated again. By your dicta, the losing side will see a bit of a hole in it and will pounce like a ravenous tiger on a bony morsel. A short time later, that same grievance will be back in arbitration until the hole that you created with your dicta is finally plugged. I suspect that when you do these things, your motives are both political and financial. You want to "give" the losing advocate something so that he will not appear totally inept to his client or constituency. In turn, this may contribute to your own acceptability in the future. I submit that, for the capable advocate or arbitrator, neither is necessary.

So what happens when you hear this same case the second time around? If you are a permanent umpire, do you now rule differently, based upon the modified circumstance that you created, or do you maintain your earlier position and say, "Hey, guys, I realize what you've done, but nothing's changed and I really didn't mean what you thought I meant"?

But suppose you're ad hoc and another arbitrator gets the rerun. What is the likelihood that this revised set of circumstances will be viewed no differently than the first? Or maybe, instead, the second arbitrator will find that you were totally off base to begin with—that has been known to happen. Haven't you really done a disservice to the parties? All we, the people who hire you, want is for you to give us a decision of absolute judgment on the issue we bring before you—nothing more, nothing less.

There is yet another way that your dicta can reenter our lives and relationships long after you deliver your award. This next case will illustrate my point of concern.

A friend of mine in another paper company shared an award he received, one that came through the AAA offices in Dallas. By way of background, most southern paper mills run around-the-clock on a four-shift, seven-day swing schedule.

This means that during each 28-day cycle, employees work 21 days and are off seven days. The off-days of any given employee are scattered throughout the week, not just on weekends.

The circumstances of the grievance were such that the grievant was on one of his midweek off-days, and they called him from the paper mill that night to come in to work on the 11–7 shift because another employee was absent and they were short one towmotor driver. The grievant responded that he had driven his family to Dallas that day, which was about 250 miles round trip, and he was just too tired to work. The foreman would not accept fatigue as an excuse and ordered the grievant to come in to work. Again, the grievant refused, whereupon he was subsequently given a one-day disciplinary layoff.

The company's position was rather basic: "Obey now and grieve later." They also cited several similar disciplinary actions taken in the past for failure to respond to a call-out that were not contested and were, therefore, controlling. The union's position also was pretty basic. The call-out provisions in the labor agreement are concerned only with pay (one and one-half × four hours worked with a four-hour minimum) and the priority for calling in employees, but this same language does not give the company the right to discipline employees who elect not to respond to this extra work opportunity.

My quarrel with this award is not that the grievance was sustained and the employee was awarded back pay. Frankly, if the employee had been shopping all day in Dallas on his scheduled off-day and had to drive 125 miles both ways to do it, I'm not so sure I would want him driving a towmotor for eight hours on the 11–7 shift that night. Listen, instead, to these final words from the award:

> "The company expresses some concern that this decision will offer a 'pat excuse' to any employee who wishes to reject a call-out in the future. The most effective method of getting employees to respond to a call-out is to pay them a premium for it, and if the existing premium is inadequate to accomplish this purpose, the company is not going to have much more success by imposing discipline on some poor soul who was not clever enough to manufacture an excuse, much like Voltaire's cowardly soldier who was shot *pour encourager les autres.*"

Several questions come to mind as a result of this unsolicited, gratuitous statement from the arbitrator: (1) Who the hell is Voltaire? (2) Who in this Texas paper mill, foreman or shop

steward, knows or gives a damn about a "cowardly soldier who was shot [in the] *pour encourager les autres*" or shot anywhere else? (3) The arbitrator is saying to the parties: You did a lousy job of negotiating time and one-half for hours worked on a call-out. Make it double or triple time and you won't have any problem getting employees to come to work. No matter how tired they may be, they will come to work. Does anyone in this room want to speculate that increased premium for call time *will not* be on the union's agenda at the next negotiations? And what about the problem of safety brought about by this added monetary inducement? The employeé is not in shape to come to work, but the premium pay is so high that he simply can't refuse the offer.

In preparing for collective bargaining, it is customary for me to go back through all our grievance files, particularly those that were denied. This exercise will give me a pretty accurate prediction of what the union will be seeking in the way of language changes. Most assuredly, this is so when you get to those grievances the union was denied in arbitration. Let me assure you arbitrators that the unions I deal with are very capable negotiators; they really don't need the help of your dicta to build their agenda. So when you write your award and opinion, stick to the issues, avoid making suggestions, and for heaven's sake leave out Voltaire.

But "Voltaire" has many faces. To the advocates, next to "Enclosed please find check," the most beautiful words in the languages of mankind are "Grievance denied" or "Grievance sustained," depending on your perspective. But as important as the decision is, equally important is your explanation of how you arrived at that decision. We need to know and you need to tell us, but tell us in a way that we can understand. Use words that the average person, manager or worker, will understand. Write to us just the way you would talk to us.

A third award and opinion is from another one of Georgia-Pacific's plants, this one in Gary, Indiana, and was delivered to us by way of AAA. In this case, a short-service maintenance worker amassed a terrible attendance record, he would not respond to progressive discipline, and he was about to be discharged. At the union's request, the grievant was permitted to sign a "last-chance agreement" that called for a new 90-day probationary period. Following this, the worker's attendance did not improve and he was discharged. The resultant grievance went to arbitration.

Here, I will pull out selected sentences or paragraphs from the award. There are many, but I will use just three:

1. In response to the union vice-president's interpretation of the diverse meaning of two contract provisions, our arbitrator said:

> "In fact, a close reading of these two provisions *pellucidly* indicates the impact of verbal and written warnings is *inextricably* interconnected, however that is only an *ancillary* concern in the instant matter."

2. Here is the arbitrator's characterization of the company case:

> "The company's only witness, the Personnel Manager, attempted to recount the grievant's work record (to which the Union *ineluctably objected*). Nonetheless, it became amply clear the grievant's work history was less than *condign* and the Union interceded on his behalf with its probationary proposal in an effort to save his job. The Personnel Manager *asservated* she was unaware of the grievant's drinking problem—and the *putative* reason for his sundry absences—until the 21 November 1981 meeting. She recalled the grievant stated he would take care of his problem and the company accordingly did not offer any *succorance.* She rebutted the grievant's and Union's charge alike that the grievant was 'coerced' or *inveighed* into accepting the probation by *irrefragably* pointing out the Union proposed the terms of the probation *per se!* As a *desideratum,* the grievant thanked the Company for another chance. Somehow, it seems to torture the truth to claim to be 'coerced' when offered a last chance or discharge—and especially if the last chance is sponsored and *promulgated* by one's Union—and then claim it to be the *coup de grace.*"

3. In disposing of the grievant's claim that his absentee record wasn't all that bad and he should not have signed the last-chance agreement in the first place, listen to these enlightening words:

> "Finally, if indeed the grievant strongly felt his remedy *reposed* in the contract he should not have accepted the probationary agreement. Now, in effect, he is asking for a 'second bite of the apple.' The grievant's collateral charge that the Company does not consistently follow its own guidelines (while possibly true) was not substantiated by the burden of proof, hence *cadit quaestio* (the question falls; the argument or case collapses)."

What a show-off! Who is this arbitrator writing for—BNA? Certainly not for the people who work at the paper mill in Gary, Indiana. There is absolutely no excuse for such pseudo-intellectual posturing. Do you suppose this arbitrator actually

talks like this? If so, to whom? The parties were probably charged two extra days in "research" that it took the arbitrator to look up all those tongue-twisting words. I suggest that papers of this sort are more appropriate for delivery at the National Academy of Arbitrators than in grievance decisions.

Up to this point I have cited and critically examined three awards with some measure of contempt. In doing so I have not identified the arbitrators in order to protect the guilty. Nor have I bothered to do any amount of research to see if any of these awards have been published by the reporting services. It is my fervent hope that none has been published.

The final award I would like for you to consider is the one I hold in my hand. Note that it is a single sheet of paper. Those of you nearby can see that, even double-spaced, there is a lot of white space on the sheet. The arbitrator here was the late Paul Styles of Huntsville, Alabama. Here is the total decision, the opinion and award in its entirety:

> "There is very little difference between the parties as to the facts involved in this case. The Grievant admits that he violated the Company's rules. In effect, he throws himself on the 'mercy of the court.'
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> "The arbitrator is convinced that the grievant is telling the truth about having been 'slugged' by another man when some kind of drug was placed in the grievant's beer shortly before work time. No evidence was presented to the effect that the grievant had ever acted in a disrespectful manner to members of Supervision. He seems to have been a very good employee except in the instant case. Therefore, the Arbitrator will 'temper the wind to the shorn lamb' and makes the following award.
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> "The grievant shall be reinstated to his former position with all rights restored, but without back pay."

That's it—short and sweet. Mr. Styles addressed the facts, stated the parties' positions, evaluated the evidence, and rendered an opinion and award. So you see it can be done. No "what if," no "on the other hand," no dicta, no obscure multisyllable words, and, except for a little wind blowing on a goat, no "Voltaire." And all on one single page. In fact, I'm told that "Pappy" Styles never wrote more than two pages. The late Whit McCoy also had a tendency to write sparingly, but well. I think that it's safe to say that if you will keep your awards to one or two pages, there is little or no room for you to go wandering off down paths uninvited, thereby creating more problems than you have solved and new grist for the arbitration mill. Try to remember the people for whom you *should be* writing. You are

not writing for BNA, nor for your own glory, nor for posterity, but to and for the parties who hired you.

As for your report cards, I think that most of you do a creditable job. Your grades would reflect a typical bell curve—mostly Bs and Cs. A very few would get As and yet another few would get Fs. Those Fs would be for decision-writing, not for the decision itself. I truly believe that arbitrators are honorable women and men who diligently strive to apply the parties' labor agreement to the dispute they are asked to resolve. My only quarrel with your performance is when you begin to reduce that decision to writing.

No matter how many of your awards are published, no matter how many text books and law journal pieces you write, no matter how many of your arbitral decisions are upheld in the courts, remember this one, inescapable fact: No matter how famous you become, the weather will still determine the size of your funeral. On a nice day like today, you would probably get a good turnout.

II. A UNION POINT OF VIEW*

WINN NEWMAN** AND CAROLE W. WILSON***

> "The reasons for the development and increased use of arbitration are clear. Neither the judicial process nor resort to economic warfare is a practical method of resolving disputes over contract interpretation and application. Litigation is too slow, expensive, and technical. . . . Arbitration offers greater speed, less expense, more flexibility and a more rational and knowledgeable result than any alternative, and does not interfere with the continuity of the enterprise."[1]

> "[T]he grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective bargaining agreement contains a nondiscrimination clause similar to Title VII,

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[1]Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1 (1958).