IV. ANOTHER MANAGEMENT VIEW

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Talking about the assigned topic to this audience is somewhat akin to a missionary commenting to cannibals on their eating habits. I would hasten to add that this analogy is used to illustrate the extent of my nervousness. There is no implied relationship between arbitrators and cannibals, nor can I conceive of any similarity between myself and a missionary.

It is an honor to have been offered the privilege of addressing the members of the Academy and its guests at its 36th Annual Meeting. For many advocates in the audience, like myself, the Academy and its members have always represented the ideals and the acme of professional arbitration. I would like to thank the Academy and its members for giving me this privilege.

I would preface my comments by stating that in presenting the following observations I am primarily concerned with expressing occasionally unsatisfied expectations, not criticisms. However, as the expression goes, "If the shoe fits. . . ." I would add that by relating these expectations, my focal point was a strong belief in the need to perpetuate the process by retaining its credibility in the eyes of the ultimate consumers. These are not the advocates nor are they the arbitrators. I am referring to the employees and the supervisors who rely on it to resolve their work-related disputes. One additional comment: While my stated expectations are tainted by the practices and relationships existing at Hughes Aircraft, they also reflect my contacts with a large number of union and management advocates, from all sectors, while I was employed by the American Arbitration Association.

The Hearing

Arbitration is an expeditious means of resolving industrial disputes. Arbitrators are sought to serve the parties when the need arises. That is, the parties create the need and the arbitrators offer their services to meet the need. There are occasions,

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however, when arbitrators impart a feeling that the process exists because they exist.

A good place to begin illustrating this behavior is the beginning of an arbitration. As the arbitrator enters the room where both parties, including witnesses, are sitting, he spots one of the advocates who happens to belong to the same health club. After discussing the last racquet ball tournament, the arbitrator sits at the head of the table and casually opens his attache case. He extracts an airline guide and begins to leaf through it. He then announces that the last flight leaves at 2:30 and he intends to be on it. Having stated his time schedule, he then acknowledges that under the parties' contract, or the administrative agency's rules, he is required to submit an award within 30 days. Unfortunately, his schedule is tight and he is somewhat behind; therefore, unless either party wishes to object at this time, he will render his award 60 days after the close of the hearing. Having established his preliminary requirements, he now turns to the parties and opens the hearing. As the first party begins its opening statement, the arbitrator notes that the advocate is reading from a prepared statement. Because time is of the essence if he is to make his flight, he offers something like: "Counselor, since you've taken the time to write your opening remarks and I feel that I can read them, I suggest we would all save some time if you would give them to me and I read them."

This setting is an exaggeration. I am not aware of any hearing where all these acts took place. It is, however, a compilation of individual acts which have taken place and which should be addressed.

It is common to find that arbitrators and advocates, within any community, are acquainted with each other. In some instances this may be only a passing professional acquaintance, while in others there may be a more social basis for the relationship. Experienced advocates recognize this and typically are not offended or intimidated. The grievant, the supervisor, and other witnesses, however, are not so knowledgeable. Their perception of the process is often based on their observations at the hearing. A discharged grievant has a very uncomfortable feeling when he sees a tête-à-tête between the opposing advocate and the arbitrator, or even an open repartee as in my scenario.

Hughes Aircraft utilizes a panel of 21 arbitrators, the majority of whom reside within the greater Los Angeles area. Fortunately, those arbitrators who live outside this area and fly in do not

indulge in the behavior I described in my scenario. However, the same behavior may exist when a local arbitrator has scheduled more than one commitment during a given day. While he may not pull out a flight schedule, he will announce that he has other commitments that require an early departure.

I would suggest that if the arbitrator's schedule will not allow for a full day's hearing, he should tell the parties when he is first contacted. What constitutes a full day would depend on the practice and needs of all the parties, including the arbitrator. In praise of some arbitrators, I have noted that, in order to avoid misunderstanding, they will state at the time of their appointment what they consider a full day for both hearing and billing purposes. Once the arbitrator has made a commitment to the parties, that commitment should be honored. While the parties have the ultimate remedy of not selecting that arbitrator in the future, that rationale disregards the needs of the grievant at that hearing. In a court of law, many of the rules of behavior that govern the advocates and the judges are those that recognize the need to maintain credibility, and thereby the public trust in the process. I would suggest that the same need exists in regard to arbitration. Grievants and members of supervision who attend the hearings are not as sophisticated as advocates.

A similar concern applies to arbitrators who have difficulty in providing a timely award that satisfies express contractual time lines or those established by administering agencies. By raising this concern, I am aware that I am addressing a ground which has been discussed, hashed, and rehashed on numerous occasions. I am also aware that while advocates bewail the delays in getting an award, they themselves will indulge in practices that may prolong the time span between the hearing and the award. While many of these practices might be indefensible, I can only state that the parties are best capable of assessing and addressing their needs. The arbitrator, however, should not unilaterally conclude that he has similar freedoms and thereby draw separate conclusions regarding his professional obligations. When time limits are expressly stated in the contract, and the arbitrator is aware of that language at the time he accepts the appointment, he should not expand those limits. If he does, he has violated the very contract he has been asked to enforce. Even in those situations where such time limits are based on an administrative agency's policies, their violation provides another example of where the performance has not satisfied the implied

promise. An extreme example which was related to me while I was with the American Arbitration Association is the case of the make-whole award reinstating the grievant which was rendered more than 12 months after the case was submitted for decision.

The last facet of arbitrator behavior in my scenario had the arbitrator reading the advocate's prepared opening statement. Hughes Aircraft Company is somewhat unique. It allows the employee relations representative who investigated and processed the grievance to present it to the arbitrator, thereby providing for full professional development for the representative. Many of these representatives may not have developed the expertise noted among some more experienced advocates and must rely totally on a written, prepared text. An advocate, even one who is experienced, should be permitted to read the text and possibly add that bit of theatrics designed to accentuate the written word. It might well serve in adding to the catharsis of the supervisor or the grievant. Arbitrators have acknowledged the value of catharsis stemming from testimony. I would suggest that the same catharsis may flow from the opening statement. A supervisor or grievant may not be able to state his feelings, and a well emphasized opening statement, even one that is read, may bring some comfort.

A misconception of the role of the final consumer of the service is sometimes demonstrated when the arbitrator undertakes a quixotic quest in search of truth. There is little that can be added to the responsive remarks made by Judith Vladeck[1] to Benjamin Aaron's presentation[2] last year regarding the role of the arbitrator. There is, however, the need to reaffirm the advocate's expectations regarding that role. Consider the situation that arose at a recent discipline arbitration. Following the company's case in chief, the union presented its case, including the testimony of the grievant. Then the arbitrator asked that additional evidence from another employee, who was a potential witness, be introduced. The union counsel objected, stating that the request was an attempt to solicit contrary evidence, that this was a demonstration of bias, and that the arbitrator should re-

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[1] *Comment,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983).

[2] *The Role of the Arbitrator in Ensuring a Fair Hearing,* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983).

cuse himself. The arbitrator denied the motion and the award denied the grievance. Let me first state that I do not believe the arbitrator was biased. I do believe that his performance was objectionable. Such actions do not acknowledge the potential for loss of confidence in the advocates. Unless the arbitrator has knowledge to the contrary, the presumption should be that the advocates are competent and that their respective presentations include all the relevant information on which the arbitrator should base his award.

In his opinion, the arbitrator addressed the incident with a quote from Elkouri and Elkouri,[3] which, in turn, quoted other arbitrators. This frequently cited work is commonly known as the "Arbitrator's Bible"; it is not the advocates' bible. Its contents are not the results of inputs from advocates, but from arbitrators. And while it may be proper for an advocate to cite this text to an arbitrator, the reverse is not always appropriate. I find no better support for claims regarding the arbitrators' misconception as to the intended beneficiary of the process than a cite found in a footnote in this text. The footnote was in a section addressing the arbitrator's role at the hearing. The comment, taken from another arbitration award, stated: "If the arbitrator does not take the initiative where necessary to adequately explore relevant aspects at the hearing, he may later feel some regret for not having done so." The obvious concern so clearly expressed in this statement is for the feelings of the arbitrator. I would suggest that the process was not designed to assuage the feelings of arbitrators.

I hope that the arbitrators in the audience will not misconstrue my remarks. Advocates like arbitrators who control the hearing, but such control must be exercised with an understanding of the process and the role of the arbitrator in serving the parties through the process.

The Award

I turn now to the subject of performance in the written word. An acceptable format for an award includes a statement of the issue(s), a summary of the facts, the highlights of the company and union positions, and the award and opinion. Brevity is wel-

[3]Elkouri and Elkouri, How Arbitration Works, 3d ed. (Washington: BNA Books, 1973), 282, n. 155.

comed, but there is a need to remember the audience, with a special regard for the loser. An award that merely states "Grievance sustained" or "Grievance denied" without any supporting rationale may be too brief. On the other hand, an award in a discipline case was more detailed and lengthy than might be desirable. It was 39 pages long, with 15 of these pages devoted to a statement of the facts. Hughes, like other parties, ordinarily requests a transcript. If there is a need to review the entire proceeding, that transcript is available, and there is no need for it to be summarized in the award, as it was in this instance. To continue: Three pages of the opinion were devoted to a formal analysis, including a citation, of why the stipulated issue was a good one in view of the moving documents, whose text was included word for word.

Most advocates would acknowledge that, even if they lose, if the award is well written, it can teach in that it clarifies the thinking of the arbitrator and all is not lost. But this arbitrator had taken it upon himself to provide a lesson on a facet of arbitration that was not relevant to the issue. This is more than a case where we asked for the time and got an engineer's report on how to build a watch. Here we also got a report on why we use the sun's movement as a basis for tracking time. An award is not the proper format for developing the writer's next contribution to a legal journal or a chapter in an upcoming textbook. Yes, we would like some insight into the rationale used in reaching the decision. The award, however, should be aimed for consumption by the involved supervisor or grievant and not the subscribers to the BNA *Labor Arbitration Reports* or the members of the faculty.

In order to maintain the credibility of the process, arbitrators, in their awards, must make a conscious effort to constrain their feelings and retain an appearance of objectivity. This includes refraining from making editorial comments or inserting sarcasm into the award. An advocate may recognize such statements for what they are and may not always be offended, but the same is not true of a supervisor or a grievant who sees the award.

A recent award sustained a grievance challenging a suspension for an altercation that had some racial overtones. The last name of one of the employees involved in the altercation was "Goodwill." The award included the following parenthetical statement which followed a reference to this employee's name:

". . . and Goodwill (which, as I think about it, is an ironic name for someone with his obvious level of prejudice) . . . ."[4]

Consider also the award that sustained a grievance challenging a company failure to allow a senior employee to bump into a lower classification. The award included the following language: ". . . if these tasks are so sensitive, delicate, demanding, and still ranked as unskilled, then possibly a revision of the classification structure should be undertaken by both parties in their next bargaining session."

In both of these examples, the arbitrators rendered a well-reasoned decision. In fact, there was nothing else in their performance that was subject to any criticism. But the inclusion of the parenthetical expression in the first example and the additional sentence regarding future bargaining in the second instance added nothing and were not expected, desired, nor called for.

In an independent quest for truth, the arbitrator may take what has been presented at the hearing and imbue it with traits and characteristics that are at best, tainted assumptions, at worst, errors of fact.

At a recent arbitration, the record included reference to an earlier formal grievance settlement between the company and the union regarding a job classification and promotion dispute. The arbitrator, referring to the formal grievance settlement, concluded that the company had two options and proceeded to describe what he felt the options to be. It must be remembered that this was more than two years after the incident arose. After describing the two options, he concluded that the first, as he saw it, was the "clean contractual way." As for the second option, and I quote from the award, ". . . the company evidently pressed for what seemed to it an achievable settlement from the union at less cost to it, thereby depriving [the grievant] of some eight months of differential compensation. It thus elected the second option in which the union was willing to concur."

A review of the record would have revealed that no money was involved since the promotion concerned grades with overlapping rate ranges and the contract did not mandate any increase upon promotion. The greater harm, however, stems from the language which appears to imply the company's capacity to

[4]While citations normally call for full identification of the source or author, in view of the context of this presentation, the names have been omitted to protect the guilty.

dupe the union by foisting upon it settlements that are uniquely advantageous to the company and disregard the rights of the employees. Conclusions and implications such as these not only undermine the potential for finality from mutual agreements at earlier steps of the grievance procedure, but tend to erode any foundation for trust between the parties and confidence in the grievance resolution process. Finally, in this award, the arbitrator specified a remedy that called for retroactivity in excess of clear contract limitations, and which was subject to amendment by the court.

Arbitration should provide the final resolution of a grievance. The best evidence for this is the language of the contract stating that the decision of the arbitrator shall be final and binding. In occasional cases it may be acceptable for the arbitrator to retain jurisdiction for a limited time in order to deal with questions regarding certain remedial determinations. But interim awards are rarely justified and they should be used with great discretion. The following is an example of when an arbitrator should not have issued an interim award. The grievance alleged a change in a past practice, and the arbitrator's interim award called upon the union to introduce additional evidence that the practice had been changed and the company to introduce evidence that the practice had not been changed. My feelings regarding the use of the interim award are best described in a remark by Alexander Mekula in his presentation at the 24th Annual Meeting of the Academy: "All too often the interim award encourages trial grievances and provides the other party with an opportunity to rehabilitate a weak position or a losing case. In short, such decisions frustrate the state of finality which arbitration was designed to provide the parties."[5]

Having commented on the need for finality in arbitration awards, I feel that it is only proper that I acknowledge a similar need in my presentation. I would conclude by noting that my faith in the arbitration process has not been diminished by the isolated instances cited above. I recognize that the benefits offered by arbitration far outweigh the occasional imperfections. More than that, I recognize that these cited shortcomings are occasional—and were easily recalled because they were the ex-

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[5] *Implementation of Arbitration Awards: The Ford Experience,* in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), 122.

ceptions. However, I must add that there has been an increase in the total number of incidents and that the examples I noted are attributable, in most cases, to members of the Academy and not to novice arbitrators. My reason for citing these instances where performance has deviated from expectation is the need to remind both the advocates and the arbitrators that we and they are not the ultimate customers of the process. It is the consumers—the grievants and the supervisors—who must be kept in mind during the hearing and when the award is rendered.