CHAPTER 8

UNIQUE PROBLEMS AND OPPORTUNITIES OF PERMANENT UMPIRESHIPS—A PANEL DISCUSSION

I.

ARNOLD ZACK*

There are two kinds of permanent umpireships—the major and the minor. The major kind is when you know you are the umpire and you actually do hear cases; the minor kind is when you don't know you're a permanent umpire until somebody calls you in the fifth year of your umpireship and tells you that your name has been listed in the contract as the permanent umpire but there have been no cases to arbitrate until this time.

A couple of months ago I got a call from a client in Massachusetts for an arbitration, but they called back and told me that a terrible mistake had been made, that I had been on the permanent panel under the previous contract, but that my name had been taken off the list when the new contract was signed. I hadn't known I was named in the previous contract and, of course, had never had a case.

We've all been lured with the glamour of a permanent umpireship, the socializing, stories about the grand masters participating in the parties sponsored by the auto and other industries. Prospects of a steady income, the security, the longevity of the relationship, the financial arrangements—that image was the goal of every arbitrator when I joined the Academy in 1962. The status of permanent umpires even at the Academy meetings was enormous, but these goals are not achieved by all of us. For example, just as I was about to join Saul Wallen in 1956, he learned that he was being fired as permanent umpire for General Motors because he had decided an issue one way

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while Harry Shulman at Ford had decided it another way. By that time he had invested about 75 percent of his work time in GM, and it represented a very critical portion of his income. After that he told me he would never spend more than a third of his time in a permanent umpireship because he could not afford to lose the income when it ended. So there comes a time when people lose their umpireships.

Usually you lose an umpireship for deciding the "crucial" case, as happened in Wallen's experience. I had a similar situation. In one umpireship I was told by both parties that if I decided against either one, it would be my last case. And that's exactly what happened. There is always that kind of pressure. There is also the possibility that you won't be fired, but for six or eight months while working out your contract you'll be in the very uncomfortable position of attending hearings when one or both parties would rather not have you there.

Umpireships have also been lost for another reason—scorecard keeping. I was umpire for a tire and rubber company and mediated most cases before me, so that 102 grievances were settled, leaving me with eight to arbitrate. The union said they just couldn't settle those because of political and fair representation problems. The union lost all eight and the membership insisted that they fire me. So mediation may be a cause of demise. There are also political changes within the union. Cleaning house may mean getting a new umpire, without regard to whether the umpire has acted fairly.

Now, are umpireships appealing on other grounds? Do they really entail a lot of money? I can't believe that companies and unions would be willing to throw away a lot more money on a permanent umpireship than they would pay for an ad hoc relationship. Their rationale would be to save money or at least pay no more than they have to for going to arbitration. Sometimes you have more cases, sometimes less; it's a gamble. Of course, frequent-flyer privileges may be one of the benefits. But the time spent in getting to some of these places often outweighs those benefits. The out-of-the-way places where some of these plants are located makes it very difficult, and it takes hours to get back to civilization again. The time, the energy, the exclusion of opportunities to work elsewhere are costs.

Some of the relationships I have had have been very enjoyable. They have given all concerned satisfaction with the fun and camaraderie. But there is a down-side to that as well because

sometimes the parties may feel they own you, that they can call you and complain about your awards hoping that you will tilt toward them in the next case. That is something you don't face with ad hoc arbitration.

As to the enduring relationships, a lot do last. I don't mean to bad-mouth umpireships, but the average duration is said to be about three years. Involvement tends to create a dependency to the exclusion of other work. Then when you're fired, it takes quite a while to build up your practice again. And there's always that doubt about why the parties fired you. Some of our distinguished members have come to these meetings and asked around about whether anybody knew why they were fired. Apparently there is always a nagging feeling that if they had done something different, the umpireship would have lasted longer. It's a pretty hurtful situation.

I think ad hoc arbitration is a much more satisfying way to go. You have more freedom—freedom of scheduling, freedom to reject cases you don't want. For example, I like to take summers off. Under an umpireship that was very difficult. You have your choice of clients to deal with; you don't have to live out a contract. You can choose your locations, travel where you want; it's a much more comfortable arrangement, with more control.

Everybody wants to be loved and wanted. The costs may be particularly painful when you lose an umpireship, both financially and professionally. Losing one is not the end of the world. There is a round robin of people serving on umpireships, going from one to another. But at the bottom line, if people didn't lose umpireships, none of us would get them.

II.

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This paper will focus on what the parties get out of a permanent umpireship as the device of choice to resolve contractual disputes. The issues facing advocates and neutrals in such a relationship will be discussed in light of the opportunities afforded by a permanent umpireship, as well as the difficulties such a structure may create. The paper is intended to highlight some of

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the many positive aspects of an umpireship as the institution has developed and the unique issues that are likely to surface when such a relationship has been adopted.

Comparisons and Salient Characteristics

One purpose of the panel today is an attempt to grapple with the differences between the permanent umpire relationship and standard arbitration practice, including the negative aspects of a permanent relationship, such as the hurt engendered when an arbitrator is terminated by one or both parties, a reduction in the freedom of scheduling of cases, and the issues of excessive party control and too much concern for maintaining acceptability, feelings that the institutional structure itself may help to create in a particular umpire. Fellow panelist Arnold Zack has discussed what he perceives are the overwhelmingly negative aspects of a permanent umpireship. On the other hand, I believe a permanent umpireship has many positive characteristics, both for the umpire and for the parties. Otherwise, umpireships would have fallen into disuse or been eliminated over time. Simply put, the device must be serving some institutional need for the parties in industries where it continues to be commonly used, and it must satisfy at least some interest of arbitrators, because umpireships are still thought to give prestige and to be desirable appointments.

It is my assumption that the basic arbitration model, that is the ad hoc appointment, requires that the hearing be conducted in a manner allowing the participants to present the case fully to the arbitrator. It is usually far better in an ad hoc case that the arbitrator hear too much rather than too little. Thus the arbitrator commonly encourages the parties to present the case in a comprehensive fashion. All concerned must be satisfied that the issues have been fully aired.

In the case of a permanent umpireship, less encouragement is necessary to make sure the parties present all issues or angles surrounding each issue, when the only motivation is a concern that participants be fully heard. Objections on the grounds of lack of relevancy or materiality therefore may be sustained after the arbitrator comprehends the issues and the subject matter of the dispute. The focus of the inquiry may be more quickly directed at the basic elements of the case, but the proceedings

still achieve accurate results in an efficient manner acceptable to the parties.

That standard, i.e., that the procedural integrity of the process must be weighed against the accuracy of the results, the efficiency of the proceedings, and the acceptability of the process and results by the parties, was articulated by Roger Abrams in an article published in 1977.[1] Abrams' thesis is that the integrity of the arbitral process increases as structural devices permitting fuller review by courts of law are added, so long as efficiency and acceptability are not at the same time decreased causing the parties not to use the process. In other words, Abrams' basic arbitration model must include: (1) an unbiased adjudicator, (2) who conducts a hearing in an informal yet orderly manner, (3) protecting the rights of the grievant, (4) in a proceeding for which a record is made; (5) the arbitrator must render a reasoned decision, so that (6) a court can meaningfully review the proceeding to ensure the integrity of the arbitral process.[2]

This thesis (that the integrity of the arbitration process is enhanced by procedural structures or devices permitting courts to review the proceedings) is directly contradicted by Reginald Alleyne in a recent article.[3] Alleyne rejects "the wide gap that often separates the simplicity of an arbitration issue and the complexity of the hearing employed to resolve it."[4] It is his thesis that resisting "creeping formalism," often brought about by the use of lawyers and legal procedures, is the desirable goal for both the parties and the arbitrator. I agree.

History

At the heart of the idea of a permanent umpireship is the fact that umpires were first chosen where mass justice was needed, i.e., in the clothing manufacturing industries, such as hosiery, in the 1920s, and then in the mass production industries that were organized by the CIO unions in the 1930s. These industries included steel, auto, rubber, electrical products, and petroleum refining. In the early development of arbitration, permanent umpireships were more common, at least in the sense that a higher percentage of total cases heard came out of disputes

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[1]Abrams, *The Integrity of the Arbitral Processes*, 76 Mich. L. Rev. 231 (1977).
[2]*Id.* at 243.
[3]Alleyne, *De-Lawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93 (1989).
[4]*Id.* at 93.

where the parties had engaged a permanent umpire rather than made an ad hoc selection. The basic idea was that cases heard before an umpire could be handled in less time than cases where the parties and the arbitrator were not familiar with each other and where for each case procedural ground rules had to be arranged, or at least discussed, between the advocates and the neutral.

Other procedural differences flowed from the permanence of the relationship. For example, because the same arbitrator was hearing *all* cases brought under a particular labor contract, consistency of result in cases with similar issues could be expected. An umpire got to know the bargaining history between the parties and the background and peculiarities of a specific industry. By custom and practice attorneys were less involved as advocates in the presentation of cases before a permanent umpire. Because of the great number of cases to be decided, procedural requirements could be kept simple, and a specific number of days for hearing before the same unbiased, skilled, and experienced adjudicator could be assured.

In short, the structure permitted the development of a system to do "mass justice" with a minimum of procedural requirements, and yet decisions were made by an individual familiar with the bargaining relationship in a context where consistency was clearly a primary value for both the advocates and the neutral. These circumstances persist today.

The history of umpireships was discussed in some detail in an article by Dennis Nolan and Roger Abrams, who indicated that permanent umpireships developed early, especially in the clothing industry.[5] George Taylor was engaged as a permanent umpire in the hosiery industry in the 1920s, for example. However, the real growth of umpireships occurred when the mass production industries were organized in the 1930s for the CIO unions. To use the words of Nolan and Abrams:

> These new industrial unions developed contract administration systems which differed significantly from those in the older craft unions. Multi-step grievance procedures became commonplace and the newer contracts often limited the scope of the arbitrator's authority. These developments encouraged manufacturers and unions alike to move from grudging acceptance of *ad hoc* arbitration to voluntary establishment of permanent arbitration machinery.[6]

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[5]Nolan & Abrams, *American Labor Arbitration: The Early Years*, 25 Fla. L. Rev. 373 (1983).
[6]*Id.* at 418.

Nolan and Abrams note that Taylor engaged in a hybrid system of mediation and grievance arbitration when he functioned as permanent umpire for the hosiery industry and later at General Motors. He rarely wrote formal opinions, and when he did they were extremely brief. He used the device of showing his draft opinions to the advocates for both sides prior to issuing an opinion and award, to make sure that the language did not cause the parties problems or have an effect in areas beyond the precise issue presented. He conducted hearings with a minimum of formalism. He believed that the labor contract was only a skeleton and not the complete agreement between the parties, and that the mediated results of the disputes arising under the agreement which were "decided" by him directly added to the totality of the bargain and became an integral part of the collective bargaining agreement.

By 1940 the permanent umpireship system had been adopted at General Motors. The development of the GM system was discussed by Gabriel Alexander at the 12th Annual Meeting of the Academy in 1959.[7]

It was Alexander's view that the 1940 agreement between GM and the UAW expressly restricted the umpire to handling grievance disputes rather than interest issues. Moreover, the contract clauses dealing with arbitration expressly limited arbitrators to interpreting the written agreement. The office of the "umpire" and the procedures and structure of the GM-UAW arbitration model were developed under the first four permanent umpires, including Taylor as the second umpire. The system did become "legalistic," at least to the limited extent that certain basic elements of arbitration procedure deemed essential to the achievement of accurate results were incorporated. The model was crafted so that a privately appointed neutral disposed of disputes in an informal yet orderly manner, decided cases from a "record," permitted confrontation between grievant and the employer, all with the result that the arbitrator made a reasoned decision in writing based on the evidence adduced on the record.

It is a truism that, from the time of its ascendency as the nearly exclusive means of resolving disputes over the meaning of collective bargaining agreements, labor arbitration has been por-

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[7]Alexander, *Impartial Umpireships: The General Motors-UAW Experience*, in Arbitration and the Law, Proceedings of the 12th Annual Meeting, National Academy of Arbitrators, ed. Jean T. McKelvey (Washington: BNA Books, 1959).

trayed as a simple and expeditious procedure. There is obviously real tension between that goal and the ever-growing legalism and resulting increase in cost and time before a final decision in ad hoc cases. Umpireships have retained this simpler structure better than ad hoc grievance arbitration. Grievance hearings were intended to be swiftly reached and swiftly conducted; nonlawyer representation for both sides was the rule rather than the exception. These attributes were considered desirable in all arbitration. In my view, they are still deemed a "must" where a permanent umpireship exists. However, it is clear that in ad hoc arbitration, quite different development has occurred.

A majority of the legal trappings have not been grafted on the permanent umpire system, as distinguished from ad hoc cases. Perhaps the reason that the parties and the neutrals often reach the same conclusion that the system works faster and more efficiently than an ad hoc selection has a great deal to do with the fact that procedures have been kept simple. The role of precedent, when a substantial body of decisions has been issued interpreting language of the labor contract existing between the parties, helps to ensure consistency, which is a prime value in this relationship. Extensive objections for reasons other than relevancy or privilege are not often honored or even tolerated. In many umpireships as many as three or four cases are heard in a single day. No great loss in accuracy or fairness results from this system put in place specifically to emphasize efficiency, knowledge of the particular bargaining history, and consistency in overall decision making.

Recommendations

There are common characteristics in decision making when a permanent umpireship is involved. Initially, these are the need for mass justice because there are thousands of employees involved in multiplant units in the mass production industries of our nation; a central or national agreement that needs to be consistently enforced at numerous locations; clear restrictions on the umpire limiting his or her decisions to interpreting the written agreement and deciding only the issue presented; and a strong desire by the parties for consistent interpretation and application of the labor contract.

In an umpireship the assumption that formalism is essential in labor arbitration proceedings, perhaps best articulated by Abrams,[8] has been rejected and been found invalid to the extent that its across-the-board application to this kind of arbitration hearing has not happened. This makes a great deal of sense, especially considering the relative simplicity of the usual issues in dispute. The fact is perhaps that there is no need to "delawyerize" a permanent umpireship. It is both the symptom and cause of its vitality, along with the fact that consistency is easier to maintain where there is a "permanent" arbitrator in place.

Accordingly, to the extent that the system takes into account institutional needs in making particular choices of procedures, there should be adherence to what is already being done, in accordance with Alleyne's recommendations summarized as follows:

> Needless and counter-productive formalism in labor arbitration should be avoided whenever possible;
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> Objections to documents should go only to weight, after the documents have been properly marked and admitted into evidence. Post-testimony comments on evidence, either through the oral summation at the conclusion of the hearing, or in the advocate's brief, should be pointed to the basis for devaluating the evidence, including written documents and not the technical issues of admissibility;
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> Objections to questions and testimony should be limited to relevancy or materiality and questions of privilege. Such common objections as form of question, best evidence, lack of foundation, and hearsay should be uniformly rejected;
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> The burden of proof and persuasion should be on the party filing the grievance in all matters except discipline cases and, where discipline is involved, the Employer should be obligated to go forward and to sustain the burden of proof. The quantum of proof standard should be that the arbitrator is convinced that the facts are as contended for by the particular party;
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> The parties should have broad control of the order desired for the calling of witnesses (except the individual neutral must determine for his or herself whether a grievant can be called as an adverse witness in a discipline or discharge case).[9]

These are keys to an effective arbitration proceeding when the neutral is a permanent umpire. I would suggest that these recommendations be considered in the conduct of ad hoc arbitration. Ultimately, a rejection of formalism, a respect for bargaining history, and the need for predictability and consis-

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[8]*Supra* note 1.
[9]*Supra* note 3 at 107.

tency will help to return arbitration to its declared purpose of resolving disputes through an expeditious and informal procedure while providing accurate and acceptable results to the parties. The assumption that formalism is necessary to help courts to review arbitration decisions, even if true, cannot outweigh the harm done by the rejection of the basic values which caused the adoption of arbitration. The parties do a better job in presenting a case to a neutral if they have actively and carefully assessed the case on the merits, and do not become bogged down in issues of admissibility of evidence. Use of simple procedures may result in more settlements, since the focus will be back on the actual issues in dispute. The rejection of formalism should cut down the number of cases that end up in arbitration. All these results are to be encouraged if this system is to be maintained in the future. Umpireships are accordingly a useful model or example for the entire arbitration process.

III.

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Serving as permanent umpire provides some unique experiences. Some are pleasant and even exhilarating, others are quite unpleasant and frustrating. But, all such experiences are educational, providing new insights into the variety of ways people perceive the process of collective bargaining and especially arbitration.

One of my more rewarding experiences has been with the School System of Pinellas County, Florida. This is the second largest school district in Florida. It employs about 7,000 teachers and 3,500 support personnel. What is unusual about this experience is the fact that I am the only arbitrator the school board and the teachers have ever known. And this goes back 22 years.

When this relationship (the board, the teachers, and my role as arbitrator) began, there was no public employee bargaining law in Florida and the status of my award was clearly only advisory. With this in mind, I routinely arranged to have a meeting with the parties wherein I had an opportunity to mediate and generally test the limits of what rulings might be seen as acceptable. I

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guess you could say that I was practicing "med-arb," although this was before I was aware that there was a term to describe the process.

In 1974 Florida passed a collective bargaining law for public employees, and arbitration awards became final and binding. I should say, almost final and binding, because the law so clearly favors the school boards, especially where personnel assignments are concerned, that every award favoring the teachers is a potential case for the courts.

Arbitrators who hear teacher cases are in general agreement that labor relations in most schools are less than ideal. Teachers are notorious and articulate complainers; school boards are protective to a fault of their management rights, and both teachers and school boards will go to court on the slightest provocation. In spite of this potential for excessive arbitration and litigation, my case load, at least in recent years, is quite low (between five and ten cases a year), and none of my awards has ever been challenged in court.

There are several possible explanations for this atmosphere of relative harmony. I believe the most important contributing factor is the procedure we follow. I still meet with the parties after the hearing to explore settlement opportunities and, more importantly, to send up "trial balloons" relative to possible rulings. This is important because it gives the parties an opportunity to remind me of relevant precedents, and to point out the problems that a particular ruling might present to their relationship sometime in the future. Then, as I face the task which is often quite difficult in any permanent umpireship, namely, maintaining a semblance of consistency while providing a reasonable resolution of the grievance and looking to the future, the task becomes much more manageable.

In light of this experience, I would recommend to any school board that it give some thought to trying a permanent umpire because school boards change, superintendents are quite transient, and advocates come and go with great regularity. As a result, there tends to be little stability in the relationship between the two groups (administrators and teachers) who are relatively permanent employees of the school system. In my opinion a permanent umpire tends to be more consistent in providing contract interpretations, and this helps the advocates to settle grievances short of arbitration. In my case, I have survived several school superintendents, countless new advocates, and

about a dozen school board elections, which leaves me as the only permanent decision maker standing between the administrators and the teachers.

I held another umpireship that provided some valuable insights into the internal politics of the company and the union. For the first year or more of this umpireship, the union won the vast majority of cases that reached arbitration. Then came the telephone call which I had been expecting. I was asked to meet with the corporate vice president for human relations and his union counterpart. I thought to myself, "If they want to fire me, why can't they tell me over the phone and save us all a trip?" But it did not turn out that way. Instead, the company representatives informed me that he had read every one of my decisions and that he would have decided them exactly as I did. He commented, "The local facilities are not taking their responsibilities seriously enough, and I intend to do something about it." Whatever he did, it worked. Indeed, it worked too well. Either the message was too strong or the local company representatives overreacted, as often happens. For the next year the union never won a single arbitration case. So, I knew my days were numbered.

In spite of this long unbroken string of losses for the union, I might have survived for a while longer had it not been for some internal union politics. The local unions resented any type of international control and requested ad hoc arbitration. The international wanted a permanent umpire and a board to participate in and review all decisions. As a compromise, the local accepted the permanent umpireship but with the assurance that there would be no board. This seemed like a reasonable accommodation. But almost immediately I received a call from the international union directing me to send all of my decisions to them for "approval" before releasing them to the local. By this directive the international union violated its agreement with the locals and created a board—in this case, a clandestine board.

I did not appreciate being placed in this position, but I thought "It's none of my business—that's how things are done in unions." And I could have lived with this arrangement except that whoever was supposed to review and eventually approve my decisions for the union took forever to respond. As a result, I often returned to a particular local facility to hear a series of cases and had to face hostile local union officers, demanding to

know when I planned to give them decisions in hearings which were held three or four months before.

One of my umpireships was the most rewarding while it lasted, and the saddest experience when it ended. It was rewarding because the three-person board worked to near perfection. It was a sad day when it ended because, in the eight years we served together on the board, we had become close friends as well as colleagues. The board's success was due primarily to the integrity of these two men. Both were deeply and sincerely religious. This was manifest in all our dealings. In our discussion of grievances, they would not shade the truth, much less deviate from it. And each was knowledgeable and highly respected within his own organization. Working with such a board, it was possible to solve problems, which at some point had seemed insoluble, because neither man was afraid to express his opinions and defend them, however unpopular they may have been within his own organization.

A lesson I learned from this experience was that, once the board had a statement of the facts that we could rely upon, a resolution of the grievance was almost a certainty. I became convinced that, when the company and union select persons such as this to serve on a board of arbitration, they are making a wise choice, since the board's decisions tend to be not only more consistent but also more reasonable. This encourages settlement of disputes before they reach arbitration, which engenders an atmosphere of mutual trust and respect throughout the collective bargaining relationship.

Finally, reflecting upon all the collective bargaining relationships I have known, I would describe the ones having permanent umpireships as more effective in dealing with employee complaints than those relationships that rely upon ad hoc arbitration. However, I must admit, I am not certain that the umpireship system created, or even contributed to, this comparative advantage. It may well be that, because the relationship was mature and stable, the parties opted for a permanent umpire, someone who would be more consistent and more predictable. In other words, when I think about permanent umpireships and mature collective bargaining relationships, I am convinced that they are related, but I do not know which is cause and which is effect.