CHAPTER 8

A NEW DIVERSITY IN THE WORKPLACE— THE CHALLENGE TO ARBITRATION

I. THE U.S. EXPERIENCE

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Introduction

The work force is changing. Not only are there more women, but there are more people of color, reflecting a wide range of cultural and ethnic backgrounds. With the Americans with Disabilities Act, we can expect to find workers exhibiting a broad range of mental and physical abilities. In addition, the newly constituted work force, which gets older each year, has become militant, no longer willing to be held to the traditional standards of 30 years ago. While the corporate structure may still be predominantly white and male, the value system of this power group is no longer embraced by the new work force, which insists upon treatment on its own terms.

The emerging work force is a new diversity. In both composition and attitude it is very different from that of a generation ago, and poses a new challenge to arbitration.

The New Diversity

Let us first look more closely at the new diversity. There are two major defining characteristics:

1. *The work force composition.* Whether you rely on the 1987 Hudson Institute study,[1] publications of the Bureau of Labor

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[1]Johnston & Packer, Workforce 2000 (Washington: The Hudson Institute, 1987).

Statistics, recent books and articles on the subject, or simply current newspaper accounts, the conclusion is inescapable: The makeup of the American work force is undergoing a significant change.

The facts are clear. It has been estimated that the U.S. population will increase by more than 40 million people over the next two decades. Of this growth, 47 percent will be people of Hispanic background, 22 percent will be of African-American background, and 18 percent will be of Asian background and other people of color. Whites will account for only 13 percent of the increase. It is worth noting that in the 1980s immigrant populations accounted for one-third of the total population growth in the United States.

During the next decade people of color, white women, and immigrants will account for 85 percent of the new growth in the U.S. labor force. Over 70 percent of all working women in 1988 were of childbearing age, and by the year 2000 women will make up nearly half the work force, with over 60 percent of all American women employed. African-Americans will comprise 12 percent of the work force, Hispanic-Americans 10 percent, and Asian-Americans 4 percent. Each of these percentages has increased significantly in only 10 years. In some urban areas the nonwhite growth will be even greater. Of the 25 largest urban areas in the U.S., people of color are in the majority in more than three-quarters.[2]

The work force is aging. Employees in the 35–54 age bracket will increase from 38 percent in 1985 to about 51 percent by the year 2000. During this same period those in the 16–24 age bracket will decline by 8 percent. And, finally, although the labor force expanded at 2.9 percent per year in the 1970s, it will expand at only 1 percent annually in the 1990s. From these data there can be no dispute that the future work force is expected to draw upon significantly fewer available employees from a decidedly different labor pool.

2. *The new diversity involves a change in how workers view themselves as workers.* Traditionally, the U.S. work force has treated "otherness" as a deficiency, as a defect.[3] It has been acceptable to be different, so long as that difference did not intrude into the

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[2]N.Y. TIMES (March 23, 1991).

[3]I have drawn on ideas presented in Loden & Rosener, Workforce America! (Homewood, IL: Irwin, 1991).

workplace. Workers have been expected to conform to the great American cultural norm. Adapting to otherness has been perceived as tantamount to lowering standards. After all, workplace success has come as a result of "everyone pulling in the same direction."

This point was made clear to me several years ago during a day-long American Arbitration Association training program on cross-cultural negotiation. The participants were government employees beginning multinational negotiations. At the close of the session, one Army general stood up and conveyed the following message:

> Professor Fraser, we all very much appreciate your efforts to help us understand how the Japanese, the Arabs, and the Soviets might approach these upcoming negotiations, but you have to understand one thing. This country became great doing business the American way and we're not going to change it now. Those foreigners are just going to have to learn to do it our way.

I felt it would be useless to respond.

To be different has been frequently perceived as a threat to the efficient functioning of the workplace. Complaints about the dominant group's values from an other have been viewed as oversensitivity and therefore discounted. A clear example of this made the public press in 1990, when Lisa Olsen, a highly competent and experienced *Boston Herald* sports reporter covering the New England Patriots, entered the team dressing room after a game, as is the custom, and was sexually harassed by several players. When she complained, her complaint was rejected as frivolous by Patriot owner Victor Kiam, who publicly called her "a classic bitch."

Finally, the workplace ethos has dictated that everyone should receive the same treatment. This, of course, was a major motivating force behind the development and success of labor unions and much of the civil rights movement. For example, the requirement to pay a woman or black the same wage as a white male working on the same job has been strongly supported over the years. Lennie Copeland summarized this history nicely, when he wrote the following:

> In the past . . . we actually conspired to ignore differences. Advocates of civil rights downplayed cultural heritage because differences were regularly used as evidence of minority group inferiority. . . . Consequently, "we are all equal" came to mean "we are all the same." Even now, many of those who say they value

> diversity take umbrage when actual differences are discussed. There's a fine line between recognizing cultural norms and promulgating stereotypes. The consequence of viewing all people as the same is that the majority culture is seen as the standard. Those who don't conform are regarded as not measuring up to that standard. For example, equality for women at work came to mean that women had to become like men: aggressive, competitive, wearing dark suits, talking about sports.[4]

The new diversity is rejecting the notion that there is one standard for all. If there is a statement that captures the changing attitude of workers, it was made to me by a black worker from Chicago: "Treating everyone fairly doesn't necessarily mean treating them the same!" Other workers echo this view: "Being different is here to stay." "Being different is not a deficiency, just a difference. They better get used to it." "I intend to be accepted for who I am, not who you want me to be."[5]

The new diversity is not willing for difference to be considered to its disadvantage. Its members do not intend to slavishly conform to the traditional workplace standards and values. They do not intend to be lumped into groups but expect to be understood and treated as different individuals. They do not intend to be discounted, simply because they may be different. And, perhaps most importantly, they do not intend to have everyone treated the same.

Tom Kochman, Chicago consultant on communication and effective management of cross-cultural diversity, captured this perspective as follows:

> Society is like a large salad bowl, each ingredient adding to the final product, none being submerged by others, each retaining its own integrity and contributing in its own way. People are like plants in a garden: they vary widely in shape, size, color, their need for care and nurturing, their frequency of blossoming, ease of growing, and satisfaction to the gardener.[6]

Diverse groups today have reached a "critical mass" and intend to be a constructive, respected part of the workplace. They will not be denied. Loden & Rosener, noting that managerial success has generally rested upon treating all employees as conforming to the standard mold, wrote the following:

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[4]Copeland, *Learning to Manage a Multicultural Work Force*, in Training—The Magazine of Human Resources Development (May 1988).

[5]*See, for example*, Travis, Racism American Style (Chicago: Urban Research Press, 1991); Grier & Cobbs, Black Rage (New York: Basic Books, 1980).

[6]Statement by Kochman during a presentation sponsored by Kochman Communication Consultants (Chicago, November 1990).

> As employee diversity continues to increase, we are rapidly approaching the day when the tried and true methods for managing human resources will become obsolete.[7]

I raise a correlative question: Is this to become true as well for arbitration? Indeed, is it already true?

The Challenge to Arbitration

Just as the new diversity has presented a clearly recognized challenge to labor and management, it poses a challenge to arbitration, in two distinct areas.[8] First, there is a challenge to effective factfinding, the task of collecting and interpreting evidence in a fair and unbiased way. I submit that the new diversity is creating new and more difficult barriers to the task of understanding who the disputants are, what occurred, and what was intended. I will touch on three relevant areas: (1) the language of witnesses, including the grievant; (2) stereotyping; and (3) ethnocentering.

Second, there is a challenge to the task of decisionmaking. The new diversity raises a question of social responsibility: What should be done if the decision flowing from the evidence appears to be simply unfair to the grievant as an individual?

The Challenge to Factfinding

1. *The Languages of the Hearing.* As the workplace becomes more populated with workers whose first language is not English (as has been the case for years in large urban areas), it is not uncommon to have the arbitrator speaking English with witnesses speaking Spanish, Cape Verdian, Haitian Creole, Portuguese, Vietnamese, Greek, Chinese, or Hmong. In these instances two types of problems may occur within an arbitration hearing.

The first arises when the witness is not fluent in English but no assistance is provided. When the witness hears a long, quickly spoken question from an attorney, the arbitrator may have no

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[7]Loden & Rosener, *supra* note 3, at 23.

[8]Many of the problems facing labor and management in adapting constructively to the new diversity, such as recognizing effective nonstandard leadership styles, do not face the arbitrator. Hence, the issues I raise here are only a subset of those facing workplace participants. While this challenge applies to management and labor during the grievance procedure as well as the arbitrator sitting in the hearing room, I will focus on the arbitrator's role for the sake of simplicity.

way of knowing what the witness understood the question to be. (Indeed, arbitrators also report having such problems.) But such incomplete or inaccurate comprehension is often difficult to discern, and it is questionable whether the nonnative speaker under those circumstances is likely to repeatedly request a repetition of the question asked. It may not be until witnesses appear to contradict themselves that the arbitrator is alerted and faced with the question: Is it a matter of understanding or of "story-changing"? And unless so alerted, the arbitrator may never know.

The second problem arises when the witness is clearly not fluent in English and an untrained interpreter is used. If neither advocates nor the arbitrator is fluent in the witness's language, they are all at the mercy of the interpreter, not a desirable situation.

I recently heard a case in which the grievant, a native speaker of Haitian Creole, a language closely related to French, spoke almost no English and provided his testimony through the assistance of an untrained, bilingual speaker. Midway in his testimony the grievant was asked to describe his activities during a period of the evening at issue. He was asked the question in Haitian Creole, he responded, and I was able to understand the answer based on my knowledge of French. I then heard the interpreter make two mistakes in her rendering of his answer, one of which was potentially crucial. I intervened and obtained a clarification, but I could not have done so had the grievant been speaking Mandarin, for example.

The medical profession has recently come to recognize that an effective interpreter must be someone who is familiar with the physician's role and responsibilities, who understands the relevant terminology in both languages, and who is not personally connected with the patients and their community. Such interpreters do not just appear when the need arises; they must be carefully trained. As the new diversity expands, skilled, trained interpreters may become a requirement to assure a fair hearing.

2. *Stereotyping.* Consider the following questions:

- Are women or men generally more accurate in describing what happened during a work-related incident?
- Are handicapped or able-bodied employees more likely to file grievances?
- Are single women, married women, or exempt employees more likely to be late?

- Are older male employees more reliable than young female employees?
- Do people avoid looking you in the eye when they are lying?
- Are gay or straight employees more likely to cause workplace tension?
- Are young or more experienced arbitrators likely to render a long, detailed decision replete with dicta?

If you found yourself coming up with an answer to any of the above, and you cannot point to a significant number of instances which support your conclusion, then you were engaged in stereotyping—imposing an ungrounded interpretation on the character and/or behavior of a particular group of people.

We need to distinguish at the outset the difference between a generalization and a stereotype. A generalization is a statement that captures some aspect of the group, that more or less holds for all members and has been grounded with evidence. For example, it is an accurate generalization that National Academy members are male and over 60 years of age.

In contrast, a stereotype is a relatively fixed perception about a group of people that is taken to hold for all members, often held even in the face of contrary evidence and/or logic. It is usually, although not always, negative in force. (Interestingly, those few positive stereotypes that one encounters—e.g., that Frenchmen are outstanding lovers—usually derogate another, comparative group.) Unlike a generalization, a stereotype typically functions to justify—that is, rationalize—our conduct and attitude towards the group in question. Stereotypes usually arise during early socialization, often without the benefit of relevant evidence, and are extremely difficult to revise. Even a clear counterexample is often treated simply as the exception that proves the rule.

We all hold stereotypes, even if we don't always or even usually act upon them. When we encounter someone we don't know well, we tend to view them according to our stereotypes for the group to which we think they belong, and to look for evidence that validates this view—a kind of self-fulfilling prophesy. Roger Fisher tells the story of two Americans playing frisbee near London at a time when the toy was relatively unfamiliar there. After observing the two for more than 30 minutes, a well-dressed English gentleman came over to one of the players and asked, "Who's winning?"

Indeed, the more diverse a person is to us, the more likely we are to use stereotypes to classify them rather than struggle to

obtain the actual facts. For many, Asians are regarded as unassertive, maybe a little sneaky, but very smart. Of course, some Asians do fit into this stereotype, as do some French, African-Americans, Germans, Mexicans, and Anglos. Despite the lack of evidence to support this as a generalization about Asians as a group, it is a widely held stereotype.

The problem with stereotypes is not that we have them, or that we cannot easily revise them. The problem is that there is the potential to permit them to unduly influence our impression of whom we are listening to without being fully aware. Anyone familiar with Peter Sellers's character Chauncey Gardner in *Being There* can appreciate how misunderstanding who is doing the talking can provide a very inaccurate understanding of what is being said.

3. *Ethnocentering.* The third area that provides a potential for misinterpretation involves what I call ethnocentering, evaluating another's behavior against one's own "correct" standard.

Each of us carries along our own set of beliefs, values, standards, sense of acceptable behaviors, and customs, which serve to guide us through the social labyrinth each day. This constellation of guidelines (our cultural perspective) was acquired from our social milieu as we matured. It is a predominantly social rather than a biological set of factors. If we were to examine our own set we would find that some reflect our home background, others our ethnicity, others stem from our class associations, others arise from our gender and the socialization process attendant to it, while still others arise from response to our physical and mental abilities, and from our sexual orientation. Some are primarily dependent on only one of these sources, while others are supported by several.

Not surprisingly, our friends tend to share our core set of cultural values, at least to the extent to which we are aware of them. If, for example, you happen to believe that teeing up the ball in the rough is unacceptable behavior, there is a high probability that your friends share this view. Moreover, when someone violates this value, it is noticed, and some interpretation is usually taken, often adverse. As Alport argued: "Human beings are drawn to other human beings who share their own beliefs, customs, and values. They are repelled by those who disagree, who behave unpredictably, who speak . . . at every level of

communication . . . an alien tongue."[9] Moreover, most people are extremely resistant to accommodating the cultural perspective of others unless, of course, there is something motivating them to make this change. What Alport did not mention is that much of our cultural perspective is not obvious to us. It is almost as if we believe that culture is something quaint that only minorities share. Our values and beliefs frequently lie outside our immediate awareness, although they are usually acknowledged when challenged. For example, would you stay home and tend to a sick mother in the face of losing your job? For some groups, this is not a question; it is assumed that you would stay home and would be respected for doing so.

These kinds of differences between the arbitrator and the witness give rise to potential misinterpretations at the hearing. If, on the one hand, the witness provides signals that are consonant with the arbitrator's own cultural system, the arbitrator is not likely to notice. And not having noticed, the arbitrator is predisposed to believe that the witness is not "different," at least along these particular dimensions. If, on the other hand, the witness provides signals dissonant with the arbitrator's cultural perspective, the arbitrator is very likely to notice. And, if an interpretation is made of this difference, the chances are that it will be made relative to the arbitrator's own value system and without any serious examination of whether the inference drawn is justified.

One example from recent political history is telling. As renowned a jurist as Judge Sirica relied on such behavioral clues. Writing after the Watergate hearings about the testimony of John Dean, he admitted that: "For days after he read his statement, the committee members peppered him with hostile questions. But he stuck to his story. He didn't appear upset in any way. His flat, unemotional tone of voice made him believable."[10] Dean's demeanor was not by chance. In his own book written about the same time, he stated concerning his court appearance:[11]

> It would be easy to overdramatize, or to seem too flip about my testimony . . . I would, I decided, read evenly, unemotionally, as coldly as possible, and answer questions the same way . . . People tend to think that somebody telling the truth will be calm about it.

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[9]*See* Alport, Gordon, The Nature of Prejudice (MA: Addison-Wesley, 1958).
[10]Sirica, To Set the Record Straight (New York: W.W. Norton, 1979), 99–100.
[11]Dean, Blind Ambition (New York: Simon & Schuster, 1976), 304, 309.

In cross examination Dean said he became quite emotional:

> I knew I was choking up, feeling alone and impotent in the face of the President's power. I took a deep breath to make it look as if I were thinking; I was fighting for control . . . You cannot show emotion I told myself. The press will jump all over it as a sign of unmanly weakness.

More recently, an article in the *Honolulu Advertiser* suggested that the tendency to make false attributions in intercultural situations may be responsible for the findings (as reported by the Rand Corporation) that in felony cases minority defendants are sentenced more often to prison and receive longer terms. This, they conclude, is due to the judges' lack of familiarity with minority cultures, and may lead to misattributions regarding the defendants' attitudes toward and motivation for the crime.[12]

Let us now examine some of the signals that listeners may elect to interpret, consciously or unconsciously. For most, I have not indicated what a mismatch might imply, since there is no basis for making such a generalization. What is important is that listeners be aware of the potential for mismatches, be aware of what they potentially signal (right or wrong) and thereby become more neutral listeners. I have divided these signals up into two types: those involving discourse style; and those involving nonverbal behavior. It will become clear that an accurate interpretation of these signals is highly problematic when the speaker and hearer share a cultural perspective. It is even more problematic when the cultural perspectives differ.

a. *Discourse Style.* The first area involves interactive style, that is, not what speakers say but the way they engage in conversation.[13] For example, some of us converse in a relatively laid-back (Southern Californian) way, permitting the speaker to finish all points before beginning our answer. There may even be a pause between the end of the other's contribution and the beginning of our turn. On the other hand, some of us interact in a relatively aggressive (New York City) manner, often permitting the speaker to get out only one or two points before beginning our turn. Even when the speaker has finished, we seem to be responding instantly, without thinking about our response. Of

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[12]*See* Petersilia, *Judges and Racial Bias*, THE HONOLULU ADVERTISER, July 19, 1983, at A-11.

[13]*See, for example*, Tannen, You Just Don't Understand: Talk Between the Sexes (New York: Morrow, 1990).

course, some of us are Midwesterners in this regard. In writing on these differences, Tannen, among others, suggests that a mismatch can easily lead to strong negative feelings between the conversational participants. The danger of a mismatch is obvious.

Speaking style is another area for potential misinterpretation. Different from interactive style, it involves the speaker's sentence form and word choice. Linda Carli[14] reports that men are more likely to be persuaded by women who speak in a tentative, self-deprecating manner than by women who talk in an assertive fashion. For example, a woman who begins, "I'm not really much of an expert on this but I suggest . . ." was found to be more effective in convincing male listeners than a woman who begins with, "Look. The fact is that . . ." Competence didn't appear to play a role, since the assertive women in her study were viewed as more competent yet were less effective. Women, on the other hand, are more likely to be persuaded by women who speak directly and get to the point. Carli offered no indication of how to determine one's own predisposition, or whether the listener's predisposition differs if the speaker is from a different ethnic group.

The use of silence is another aspect of discourse style that may cause a mismatch between the arbitrator and the witness. For many of us, a conversational silence of more than one or two seconds becomes uncomfortable; a silence of five seconds or more becomes downright difficult and may be treated as disrespectful. Moreover, sometimes we interpret silence as a sign of forthcoming deceit. There are, of course, groups of people for whom silence has other interpretations. Some show respect by remaining silent until forced to speak. Others view silence as appropriate while they think about what to say, while still others remain silent when they are anxious or embarrassed.

In contrast to silence, there is the issue of vocal style. Some witnesses talk in a well-modulated voice at moderate volume. They are conforming to the assumption that you can't really think about what you are saying—you can't be rational—unless you operate in a calm manner. But what if the witness is speaking in a very quiet, almost inaudible way? Does this denote anxiety? Or what if the witness frequently shouts and sounds extremely emotional? For example, gubernatorial candidate John Silber

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[14]*See* Carli, JOURN. OF PERSONALITY AND SOC. PSYCH.

visited the black section of Boston prior to last November's election and was verbally challenged by an outspoken black woman who raised her voice in protest to his earlier comments. He turned around and drove away, stating, "It is simply impossible to have a rational discussion here." (He lost the election.)

There are many more areas, but I will mention only a few. Consider the witness who responds to the swearing-in with "Sure." Is this to be interpreted as a sign of disrespect? Or the older witness who addresses the arbitrator with "Look, young fella, I don't think you understand what's going on." Or the gay grievant who strongly objected to being referred to as a "homosexual," claiming that it conveyed a negative medical interpretation. Was he just being difficult? The signals and the questions go on.

b. *Nonverbal Signals.* Let us turn to the second area in which we find ethnocentering, the interpretation of nonverbal signals. Nonverbal signals cover a wide range of behaviors: vocal (e.g., giggling, laughing, sighing), gestural (e.g., head nodding, facial expressions, eyebrow raising, mouth grimacing, lip-biting), tactile (e.g., touching, hand-shaking), presentational (e.g., clothing style, hair style, personal grooming, artifacts such as jewelry and eyeglasses), spatial (e.g., seating positioning, interpersonal distance during conversation), and olfactory (e.g., use of perfume, aftershave). Like interactive signals, nonverbal signals are often not under conscious control (for example, one cannot intentionally blush or perspire) and are often not consciously performed or intended to convey anything specific. Yet they frequently provide the basis for messages, albeit of a highly problematic nature. Indeed, there is a wide variety of aphorisms about nonverbal behavior:

People tend to lean back when they are not involved.
You can tell if a hearer is interested by his eye contact.
It is important to look at someone who is talking.
Frequent eye contact evidences confidence.
Squinting signifies skepticism.
A blank stare signifies boredom.
Open smooth hand gestures indicate an open attitude.
Ear tugging indicates nervousness.
Covering the mouth when listening signifies anxiety.
Rubbing the nose conveys doubt.
Running the fingers through your hair suggests frustration.
Finger thumping indicates boredom or impatience.

Finger steepling communicates confidence.

A tense posture suggests considerable stress.

Turning the body away from the speaker indicates suspicion.

Like other discourse signals, generalizations such as these are sometimes accurate for one cultural group, but certainly not across cultural groups. This point was emphasized by the dean of U.S. researchers on nonverbal communication, Ray Birdwhistell, as early as 1970:

> Insofar as we know, there is no body motion or gesture that can be regarded as a universal symbol. That is, we have been unable to discover any single facial expression, stance, or body position which conveys an identical meaning in all societies.[15]

To my knowledge, researchers to date have not challenged this position.

Despite the lack of hard evidence, many people are committed to various folk myths, perhaps due to the publication of popular books claiming to understand nonverbal communication. Many are convinced, for example, that certain nonverbal signals provide the basis for assessing attempted deceit. Failure to meet eye gaze, feet shifting, hand-wringing, and lip-biting are often offered as sure indicators of a deceitful witness. This widely held belief flies in the face of experts in the field, who reject the claim that such behaviors can be effectively associated with lying. Paul Ekman reflects this position as forcefully as any when he writes:

> Our research, and the research of most others, has found that few people do better than chance in judging whether someone is lying or truthful. We also found that most people think they are making accurate judgments even though they are not. There are a few exceptional people who can quite accurately spot deceit. I don't yet know whether such people are naturally gifted or acquire this ability through special circumstances.[16]

It may be the more mundane nonverbal signals that catch arbitrators' attention and virtually demand interpretation. I can perhaps best make this point by the following set of questions:

What is your impression of a witness

- who wears her bleached hair highly coiffed, has rings on each finger, and has triply-pierced ears?

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[15]Birdwhistell, Kinesics & Context: Essays on Body Motion Communication (Univ. of Pa. Press, 1970).

[16]Ekman, Telling Lies (New York: W.W. Norton, 1985), 163.

- who, when shaking your hand, provides the proverbial "dead fish" to you?
- who refuses to look you in the eye, particularly when talking to you?
- whose face becomes reddened during testimony about the incident giving rise to the grievance?
- who has dirty fingernails and whose shirt collar is soiled?

If you can honestly state that you would probably notice but would discount these things in assessing the testimony of the witness, you are indeed unusual. Research shows that such nonverbal signals contribute to the overall gestalt taken by the listener. As one candid arbitrator acknowledged to me, "It's kind of like circumstantial evidence; if I need it, I use it."

In summary, arbitrators don't need to—nor can we expect to—acquire the perspective of the diverse groups we encounter. However, if we are to effectively understand the new diversity at the hearing, we need to become aware of the range of variation in verbal interaction and nonverbal signals, whether we recognize them and what interpretation we give them. The challenge is not to ignore these differences but to take stock of which differences we notice, which ones we don't, and consider whether or not they may influence our thinking. I agree with the following comment made by Judy Rosener at the National Academy of Arbitrators Continuing Education Conference in November 1990:

> I'm not suggesting that we become bias free. That's impossible. Rather I am suggesting that we admit that our biases shape the way we think and behave, and that we need to understand the source of our biases and stereotyping so we can minimize their influence in our thinking and behavior.

To do less, I suggest, is to fail to meet this first challenge.

The Challenge to Decisionmaking

Given that the evidence is in and the record is closed, there is still a potential second challenge—that of rendering a fair decision. Of course, rendering a fair decision is always an arbitral responsibility, but this raises a different challenge as the new diversity increases in size and power. I can frame this challenge in terms of the two approaches to arbitration decisionmaking discussed by Dick Mittenthal in his 1991 NAA paper.

According to Mittenthal, arbitration in the postwar era tended to follow what he calls the "Taylor approach," whereby the agreement is treated as a set of principles, like a code, rather than a set of rules. Arbitrators striving to apply these principles to the dispute at hand "were likely to ask themselves . . . what will best effectuate the purposes of the parties or what will best suit the parties' needs."[17] As I understand his paper and the history he draws upon, a predominant principle at this time in fashioning a decision was fairness—fairness to the parties and fairness to the grievant as an individual. He further states that:

> Arbitrators often found the language to be inadequate or irrelevant to the issue at hand . . . and saw themselves not just as judges . . . but also as problem-solvers who were using their knowledge of the workplace and the parties' needs to transform a code provision into the kind of practical result the parties could accept.[18]

Mittenthal emphasizes that during the past several decades arbitration has evolved to adopt what he labels the "Braden approach," in which the agreement is treated as a formal contract to which the traditional rules of contract interpretation are applied. Arbitrators "look to the language of the contract, and [look] further to the parties' purposes, or matters of equity, only if the language itself [is] truly ambiguous."

The upshot of this change is that arbitrators today feel highly circumscribed in the degree of discretion they can exercise. Their responsibility is to the parties and their creation, a contract rather than an agreement, and there is only minimal concern for the grievant. As this model of arbitration has become predominant, the parties have come to expect this role of the arbitrator.

Here, as I see it, lies the challenge: what are arbitrators to do if, when working within the current "contract model," they find the decision to be "unfair"? The issue of fairness has always been present. We can find published cases in which the arbitrator acknowledges struggling to render a fair decision, not just one that is driven by the contract provisions and the facts at hand. There are occasionally comments that the arbitrator is convinced the grievant acted as alleged and should be terminated,

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[17]Mittenthal, *Whither Arbitration?* in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1992), Chapter 4 *supra*.

[18]*Id.*, at 37.

but the company failed to prove its case; or comments that the arbitrator believes the grievant didn't intend to have that last accident but did so, and pursuant to the parties' agreement, there is no choice but to sustain the discharge. We also find decisions in which the arbitrator concludes out of fairness that despite the contract and the grievant's actions, the grievant gets one last chance. The basis of these "fairness" decisions often rests primarily on certain accepted grounds for arbitral discretion, for example, the length of dedicated service, or the grievant's indulgence in alcohol or drug abuse at the time of the infraction.

What I am questioning, given the current contractual rule-driven ethos of arbitration, is what arbitrators should do if they are faced with what they see as a fairness issue that arises from the otherness of the grievant? Do arbitrators have a social responsibility to the grievant as well as to the parties, or are they simply contract interpreters?

I am not suggesting that arbitrators impose their own arbitral justice, or denying that there are many policies, workplace rules, and contract provisions that allow no exception, irrespective of how "different" the employee. Smoking a cigarette in the paint shop is a safety hazard and cannot be tolerated any more than refusal to wear a hard hat at a construction site or the habitual abuse of break time by someone who doesn't move very quickly. Moreover, I am mindful of the fact that working as an ad hoc arbitrator rather than an umpire may lead arbitrators to conclude that they have a relatively limited range of discretion, particularly if they are engaged in arbitration as full-time employment. Nevertheless, I think the point is worth making.

With the new diversity, I believe that there will be new fact situations arising for which former decisions provide insufficient guidance (assuming this is desired), and where reference to traditional benchmarks of acceptable action are not considered fair by either the arbitrator or the members of the new diversity. Consider the following situations:

> The company has a very explicit policy concerning discipline for unexcused absences which has been consistently applied. The grievant, who is terminated for excessive absences, has a very ill infant son, is single, lives alone, and just moved to the city. Sick-child day care costs nearly her entire earnings.

> The grievant and several other co-workers were alone in the lunchroom. The grievant was disciplined after he was observed by

> another employee, who happened to be walking by the doorway, affectionately patting the butt of a woman co-worker in the presence of these other workers, all of whom laughed when it occurred, and none of whom, when questioned, thought the act to be the slightest out of line, given the people involved and the location.
>
> The parties have agreed to a promotional examination for officers wishing to move to the rank of sergeant. The grievant challenges the examination, claiming it is culturally biased against him, the union presses this argument, there is expert testimony to this effect, and management does not disagree.[19]

I have presented these examples in an attempt to suggest situations in which the arbitrator is faced with the question: Do I look straight ahead, interpret the language and the facts in a "contractual" way, even though I feel the decision will be unfair to the grievant?

What are the alternatives? To discuss these concerns with the parties privately? To suggest that the parties try to settle the dispute? To offer to mediate? To retreat from Braden and approach Taylor for the decision, thereby exercising the discretion articulated by Justice Douglas, who wrote the following:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.[20]

Or, on the other hand, to do nothing different, to ignore the felt unfairness, and to write the decision, leaving it to the parties to bargain a change in the policy or the agreement's provisions?

Conclusion

In the foregoing I have outlined what I have called a "new diversity," a workplace that not only is demographically different but also rejects the old way of doing business. I have suggested that arbitration is faced with two challenges.

The first involves the task of carrying out effective factfinding. Given the problematic nature of effective communication when different languages are spoken by the hearing participants, the human tendency to invoke stereotypes in the face of confrontation with unfamiliar groups, and the tendency to ethnocenter (to

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[19]Each of these has been taken from cases brought to my attention, although in some instances I have simplified the facts for discussion.

[20]Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960).

interpret differences in the light of our own cultural framework), I maintain the parties and arbitrators must develop a greater awareness if they expect to conduct a fair hearing.

The second involves the social responsibility of arbitrators. Given the likelihood of fact patterns in which adherence to the current and party-endorsed contract model leads to what the arbitrator perceives as an unfair result, what is the arbitrator to do? I don't know the answer for this last challenge, one which is felt more keenly by some arbitrators than others. But I do believe the question needs to be addressed.

I want to close with the following thoughts:

- The new diversity is here to stay.
- The old way of doing business is changing.
- If arbitration wishes to participate in the change, the time to act is now.

II. A Canadian Viewpoint

Richard B. Bird*

Introduction

I am a full-time labor arbitrator practicing in Western Canada, chiefly in British Columbia. Let's look at some of the points about cultural diversity in the workplace made by Bruce Fraser and reexamine them in a Canadian context.

Cultural Diversity in Canada

One definition of culture is the customary beliefs, social forms, and material traits of a racial, religious, or social group.[1] The original inhabitants of Canada were native Indians and Inuit, formerly called Eskimos. The first large-scale emigration in historical times to what is now Canada was from France, beginning in the 17th century. The second was from the British Isles, including Ireland, beginning in the 18th century. Emigration from Catholic France slowed significantly, but emigration from predominantly Protestant Britain accelerated after the British defeated the French at the Battle of the Plains of Abraham

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[1]Webster's Ninth New Collegiate Dictionary, 314 (1985).

outside Quebec City in 1759. In 1867 most of the British colonies of eastern North America joined together to become provinces in a self-governing Canada.[2] Early in the 20th century many Catholic, Protestant, and Jewish emigrants arrived in Canada from throughout Europe. By 1905 Canada consisted of nine provinces from the Atlantic to the Pacific.

After World War II many more Europeans emigrated to Canada, and Newfoundland, a former British colony, joined the Canadian confederation. As Europe has prospered in the last part of this century, European immigration into Canada has dwindled. As this was happening, Canada admitted many immigrants from Asia and the Caribbean. Among the Asians in Canada are strong contingents of Hindus and Sikhs from India, Muslims from Pakistan, and adherents of various religions from China, including Christians.[3]

Canada has two official languages, English and French, with English as the language of the majority. The once popular Canadian concept of two founding nations, the English and the French, has faded somewhat, giving way to the "multiculturalism" theory of Canadian society. Canada is a federation with a federal government and provincial governments. The federal government includes a Ministry of Multiculturalism. It promotes a cultural mosaic theory of Canadian life although the individual provinces do not all subscribe to this theory.[4]

Official statistics show that the racial composition of Canada has substantially altered since it became self-governing. The addition of many other races and cultures to the predominantly English and French country has changed Canada into a complex society where those of neither British nor French origins are in the majority.[5] In modern Canada greater diversity in the workplace challenges the labor arbitrator in factfinding and decision-making, just as in the United States.

Culture and Demeanor

Fraser makes a strong case for arbitral caution in assessing credibility by relying on the manner in which a witness testifies,

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[2]British North America Act (1867); *see also* Stacey, *Plains of Abraham, Battle of* and Waite, *Confederation*, The Canadian Encyclopedia.

[3]Kalback, *Population*, The Canadian Encyclopedia.

[4]Office of the Commissioner of Official Languages, *Language Policy* and Henripin, *Languages In Use*, The Canadian Encyclopedia.

[5]Kalback, *supra* note 3.

including voice volume, eye contact, body language, and so forth. I refer to these sorts of things as demeanor. He points out that what is polite conduct in one cultural group is rude or evasive in another. He condemns cultural stereotyping and distinguishes it from classification. My long experience as a labor arbitrator resolving disputes involving persons of many cultures supports his views. Superficially, the typical behavior of Punjabis as witnesses is very different from that of native Indians. The former tend to have a proud bearing and be voluble, whereas many native Indians tend to be reserved. These characteristics do not help to discern truth from falsehood. However, I would not draw the inference that the Punjabi's long answers represent attempts to avoid the truth or that the native Indian's reserved manner is evasiveness.

An arbitrator might correctly identify a cultural group, know its characteristics, and be able to place a witness in that group. However, when there is a conflict of testimony, the arbitrator cannot resolve it by reference to culture. At best, an understanding of culture helps the arbitrator avoid making mistakes about demeanor. Whether the witness is telling the truth, the whole truth, and nothing but the truth is not the product of culture.

Credibility Test in a Cultural Diversity

How should a Canadian arbitrator resolve questions of credibility in the current climate of cultural diversity? I propose an answer, but I do not claim it is original. I borrow from the reasons for judgment of an appellate court judge, which many Canadian arbitrators have followed, and adapt them to deal with the subject at hand.[6]

This is the credibility test I favor. If a finding of credibility depends solely on which witnesses have made the best appearance of sincerity, the arbitrator may favor the best actors. The appearance of telling the truth is only one of the elements that should enter into the arbitrator's determination of who is telling the truth. The arbitrator should also take into account opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what the witness has seen

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[6]Faryna v. Chorny [1952] 2 D.L.R. 3564, O'Halloran, J.A., B.C. Court of Appeal, quoted in Brown and Beatty: Canadian Labour Arbitration, 3rd ed., at 3-51, 3-52, and quoted in Palmer and Palmer: Collective Agreement Arbitration in Canada, 3rd ed., at 71, n. 34.

and heard, cultural differences, as well as other factors. A witness may create a very unfavorable impression on the arbitrator as to truthfulness. Nevertheless, the surrounding circumstances in the case may point decisively to the conclusion that the witness is telling the truth. Especially in cases of conflicting evidence, an arbitrator cannot gauge the credibility of witnesses solely by the test of whether the demeanor of particular witnesses carries the conviction of truth. The real test of the truth of a witness' story is its harmony with a preponderance of the probabilities that a practical and informed person readily recognizes as reasonable at the particular time and place. Only in this way can an arbitrator satisfactorily appraise the testimony of the quick-minded, experienced, and confident witness, and of those shrewd persons adept in the half-lie, who have had long and successful experience in combining skillful exaggeration with partial suppression of the truth. It is not enough for an arbitrator to accept the evidence of one witness over that of another. An arbitrator should go further and say why. An arbitrator's finding on credibility must take into account all available elements bearing on the question and be based on a preponderance of probabilities.

Decisionmaking

Having gathered and evaluated the evidence, the arbitrator must make a decision. Most Canadian arbitration cases deal with either the interpretation and application of contractual terms or discipline and discharge. Except where a party alleges discrimination, cultural differences will seldom have a bearing on arbitral decisionmaking in contract interpretation and application cases. This is not necessarily a small exception in a cultural mosaic.

In discipline and discharge cases, three issues usually arise: (1) Did the grievant give the employer just and reasonable cause? (2) If so, was the employer's response excessive? (3) If so, what disciplinary measure ought to be substituted? If the grievant did not give just and reasonable cause, the arbitrator must determine what remedies are appropriate. In fashioning remedies, Canadian federal and provincial legislation gives arbitrators a wide scope.[7] Sensitivity to cultural factors may be

[7]*Scott*, [1977] 1 Can. LRBR 1 at 5, Canada Labour Code, s. 157(d); *see, e.g.*, Industrial Relations Act, R.S.B.C. 1979 s. 98.

important in substituting penalties when the original penalty was excessive.

Recent Developments in Jurisprudence

Canada and all provinces have antidiscrimination statutes protecting people from racial, religious, and other forms of discrimination. These statutory rights depend on special tribunals for enforcement. Many collective agreements incorporate the statutory expressions of those rights so bargaining unit employees have a choice in seeking to enforce their rights. Accordingly, decisions of the special tribunals affect the interpretation and application by arbitrators of many collective agreements.

The Ontario Human Rights Code was amended in 1986 to require employers to accommodate the needs of individuals and groups to ensure equal treatment respecting goods, services, and jobs unless doing so would cause "undue hardship." By process of interpretation, the Supreme Court of Canada appears to have achieved the same result respecting Alberta's Individual's Rights Protection Act. Section 7(1) contains an antidiscrimination provision, and section 7(3) provides an exception in the case of a bona fide occupational qualification.

In the *Alberta* case an employee was a member of the World Wide Church of God, which expects its members not to work on Easter Monday. The employer, which operated a milk plant, scheduled the employee to work on Easter Monday. Mondays were busy days in the plant; employees must process milk the day it is received or it will spoil. The employer rejected the employee's request to work another day so he could have off Easter Monday. The majority of the court held that this was a case of indirect discrimination, deciding that the employer had a duty to accommodate, provided there was no undue hardship on the employer.[8]

An Ontario board of inquiry constituted under the Human Rights Code determined that an employer's attempts to promote a fundamentalist Christian working environment amounted to religious harassment of certain employees. In conversation with

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[8]Alberta Human Rights Commission v. Central Alberta Dairy Pool, Supreme Court of Canada (September 13, 1990).

some employees the employer criticized their religion and passed out religious tracts.[9]

An arbitration board upheld the discharge of a black grievant. Before the board made its award the chairman wrote a letter to a newspaper which published it. In the letter the chairman suggested that Canadians had no right to criticize South Africa for its treatment of blacks because of Canada's poor treatment of aboriginal people. After a delay in receiving payment of his account for services as chairman, he said that if the grievant had been a white man the account would have been paid. A trial judge quashed the award for bias. The Manitoba Court of Appeal overturned the trial judge's decision and restored the award, holding that the chairman's conduct raised a suspicion of bias but was not proof.[10]

An Ontario arbitrator rejected the grievance of an employee against the employer's rejection pursuant to a job posting. The job required the incumbent to work overtime on Friday evenings and during weekends. The employee's religious beliefs did not permit him to work from sunset Friday to sunset Saturday. A provision in the collective agreement incorporated the Ontario Human Rights Code of 1981. The arbitrator found that the requirement for the incumbent to work on Saturdays was a bona fide occupational requirement. The incumbent had to perform overtime work on Friday evenings and Saturdays for the efficient operation of the plant. To accommodate the grievant would entail higher labor costs, the arbitrator found.[11]

In Nova Scotia an adjudicator rejected the grievance of a Jewish employee. His employer refused his request for special leave on a Jewish holiday. He claimed discrimination. He pointed to the contractual holidays including Christmas, Good Friday, and Easter Monday, the antidiscrimination and special leave with pay provisions of the collective agreement, and the Nova Scotia Human Rights Act. In the past the employer accommodated the grievant by allowing him to take vacation days or lieu days on Jewish high holidays to avoid losing pay. The collective bargaining agreement did not incorporate the Human Rights Act, but statutory law recognized the designated days as holidays. Therefore, the adjudicator declined to denounce the

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[9]Dufour v. Deschamps Comptable Agree, CC/HRR Adell (April 1989).
[10]Simmons v. Manitoba, LAN, Manitoba Court of Appeal (June 1989).
[11]*In re* Varta Batteries Ltd. and Canadian Automobile Workers, 10 L.A.C. (4th) 161 (H.D. Brown, 1990).

collective bargaining agreement's choice of holidays as discriminatory. Alternatively, the adjudicator found the employer had reasonably accommodated the grievant's religious beliefs. If the adjudicator allowed the grievance, the grievant would have received three more paid holidays than other employees. The bargaining unit included Christians, Moslems, Buddhists, and one Jew, the grievant.[12]

Summary

Just as an arbitrator must decide each case on its own facts, so in a case of conflicting evidence, an arbitrator must treat each witness as a unique individual. In evaluating conflicting evidence, the arbitrator must not be misled by cultural stereotypes. The duty of "reasonable accommodation" of cultural differences will continue to provide arbitrators with grievances to adjudicate.

III. A Union Viewpoint

MICHAEL H. GOTTESMAN*

Bruce Fraser has made a wonderful contribution. He has provided invaluable sensitivity training that will benefit employers, unions, and employees at least as much as arbitrators. He has proffered a sensible agenda for how arbitrators may utilize that heightened sensitivity in their factfinding. I am troubled, however, by the more ambitious arbitral problem-solving role that he suggests might flow from this greater awareness.

Fraser's first proposition, that arbitrators' factfinding should be informed by an awareness of cultural differences, surely is correct. No sensible person could dispute that the arbitrator should try to understand what the witness is saying, steer clear of stereotypical assumptions, and the like. The key, as he notes, is that the arbitrator must have sufficient information to realize that there is a language barrier or a stereotypical assumption at

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[12]*Re* Civil Service Commission and Nova Scotia Government Employees Union, 7 L.A.C. (4th) 257 (Outhouse, 1990).

*Bredhoff & Kaiser; Professor, Georgetown University Law Center, Washington, D.C. [Editor's note: Mr. Gottesman was unavoidably prevented from making this presentation at the Annual Meeting but subsequently submitted this manuscript for publication.]

work. Here he has drawn on his specialized training to provide data that will greatly assist in that task.

Those data can perform a second valuable service, which Fraser does not discuss in his paper: It can inform employers and unions, who write collective bargaining agreements. As the demography of the workplace changes, and with it the cultural values of the participants, new issues will surface that require contractual resolution. Conduct by an employer that was acceptable when the work force was all white and all male may be offensive to women and minorities when they enter the workplace. For example, gross sexual innuendos by supervisors may be a tolerable practice (however distasteful) when the work force is all male, but would likely be offensive and hurtful to women who are admitted to that workplace. The challenge to unions is to understand the different needs of the newly diversified bargaining unit and to advocate the appropriate changes to satisfy those needs. The challenge to employers is to respond sensitively and favorably when those demands are made.

Warning alarms go off, however, when Fraser proposes—even as tentatively and delicately as he has done—that arbitrators perform this amending function without awaiting the parties' agreement to do so in collective bargaining. The suggestion that the changing demography may justify arbitrators' abandoning their perch as contract reader and assuming a role as problem solver bodes ill for the reception that those awards will receive in court. I am less concerned that arbitrators will actually do this than that they will *say* they are doing it. The latter is an invitation to judicial disapproval of awards.

So that my point is clear, let me distinguish two types of cases in which an arbitrator's perception may be affected by cultural diversity. In the first case an employee has been fired for failing to execute a supervisor's order. The ground for discharge is willful disobedience. In fact, the arbitrator believes that the employee, because of language difficulties, did not understand the supervisor's order.

The just cause provision is elastic enough to enable the arbitrator to solve this problem. The quality of the employee's offense is materially different from what the employer supposed when it decided to discharge. If the employer ordinarily treats less harshly those employees whose failures to execute orders are the product of misunderstanding rather than willfulness, setting aside the discharge is a routine application of the just

cause provision. The arbitrator is not straying from the traditional task of interpreting and applying the parties' agreement.

But now consider the case in which the union's grievance asserts that white male employees are insulting newly hired, minority employees by racial and ethnic slurs, and seeks an award directing higher management to cause this to stop. If the contract, fairly construed, imposes such an obligation on management, the arbitrator plainly has the authority to grant the grievance. The harder case, of course, is when the contract is not fairly susceptible of such a construction. It is here that the temptation to be a problem solver arises and in these circumstances that arbitrators need to exercise restraint.

The issue is not whether there is a problem in this workplace; of course there is. Nor can it be doubted that an order such as the grievance seeks would be a worthwhile solution. But, absent contractual sanction, the arbitrator is not the one empowered to furnish that solution. Within the collective bargaining context it is the union's job to bring this matter under contractual constraint. Only then will the arbitrator be entitled to regulate it. Parenthetically, it is worth noting that here, as in so many cases implicating the problems of cultural diversity that Fraser discusses, there is likely to be a remedy available under the law independent of the collective bargaining agreement. An employer who knowingly countenances racial, ethnic, or sexual harassment of some employees by others commits a violation of Title VII of the Civil Rights Act. An injunction requiring the employer to police the situation is the usual remedy. If Congress adds compensatory, and perhaps punitive, damages to Title VII, as the pending civil rights bill would do, the victims would be entitled to recover monetary relief for the distress they have suffered.

For decades members of the Academy have debated the question of whether arbitrators should go beyond the role of contract reader to solve problems, as though it were a question entrusted to arbitrators to decide. The students in my labor law class still read about the famous Mittenthal/Meltzer debate at the Academy's 1968 meeting,[1] which is featured in the leading labor law

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[1]Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 42; Meltzer, *id.* at 58.

casebook.[2] But, alas, this is not an issue committed to arbitrators for resolution. Arbitrators are not free agents in this matter; their awards are subject to review in the courts. And the courts are quite insistent that, unless the parties expressly empower the arbitrator to perform a role beyond interpretation and application of the agreement, awards that purport to go beyond that narrow mandate will be set aside. In the familiar refrain arbitrators are not empowered to dispense their own brand of industrial justice.[3]

There was a day when that refrain was uttered by courts who, nonetheless, enforced the awards that were brought before them. But the past decade has ushered in a new diversity in the federal courts as well. The new judges are not as willing to indulge every assumption that arbitrators have stayed within their proper bounds. The rate of arbitral set-asides in court, while still a mere trickle in the context of all awards issued, is measurably higher than in prior decades.

I close with a somewhat mixed message. As a union lawyer, I am not likely to be distressed when arbitrators "problem solve" by granting awards to grievances that they have no business granting. But I am very distressed when arbitrators say that is what they are doing, for that is a prescription for judicial set-aside. The legal rules still say that an arbitrator will be presumed to have stayed within contractual bounds unless the award manifests otherwise.[4]

Wearing my professor hat, my message is: Don't problem solve without contractual authorization. Wearing my union hat, my message is: If you problem solve without contractual authorization at our request, don't say you're doing it. And if, by chance, the employer asks you to problem solve, consult my views as professor.

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[2]Cox, Bok, Gorman & Finkin, Cases on Labor Law, 11th ed. (St. Paul, MN: West Publishing Co., 1991), 770–75.

[3]United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 594, 46 LRRM 2414 (1960). *See also* Paperworkers v. Misco, Inc., 484 U.S. 29, 126 LRRM 3113 (1987).

[4]Enterprise Wheel, *supra* note 3; Misco, *supra* note 3.