CHAPTER 12

SPECIAL ISSUES IN ARBITRATION

I. CONDUCTING THE HEARING

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Ad Hoc Tripartite Arbitration Panels

The collective wisdom of more than 40 years of thoughtful introspection by the most noted members of this Academy represented in the published volumes of the Annual Meetings is a source of both comfort and disquiet when preparing remarks to share with you. In the Proceedings of the 21st Annual Meeting[1] Harold W. Davey spoke on "The Uses and Misuses of Tripartite Boards in Grievance Arbitration."[2] His talk was followed by three workshops that are also reported.[3] It is comforting to discover that your concerns are not merely idiosyncratic or related to your limited experience with tripartite situations. The disquiet follows from the recognition that after all these years some rather common problems of the misuse of tripartite arbitration boards have not disappeared and neutral arbitrators are no better equipped to deal with them now.

Ben Aaron reminded us of the arbitrator's duty of fairness to the parties and their representatives, as well as the concern about fairness to the grievant.[4] He noted that the Code of Professional Responsibility dictates "within the limits of [the] . . . responsibil-

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[1]Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968).

[2]Davey, *The Uses And Misuses of Tripartite Boards in Grievance Arbitration, supra* note 1 at 152.

[3]*Id.*, at 180–197.

[4]Aaron, *The Role of the Arbitrator in Insuring a Fair Hearing*, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. James L. Stein and Barbara D. Dennis (Washington: BNA Books, 1982), 30, 43.

ity [to provide a fair and adequate hearing], an arbitrator should conform to the various types of hearing procedures desired by the parties."[5] In the ad hoc tripartite process the neutral arbitrator is often pinched by these twin obligations which either push or pull in opposite directions.

Normally, and certainly in a first-time situation, the neutral will not be aware until arriving at the hearing that the collective bargaining agreement (CBA) calls for a tripartite panel. In fact, there have been occasions when it is even midway in the proceedings that the arbitrator becomes aware of the existence of such a contractual provision and the parties then advise that they waive it.

Because the process is "owned by the parties," the arbitrator is hard-pressed to object when they mutually agree to modify it. Since the advocates are the ones that usually make these proposals of modification, the arbitrator must assume that they speak for the "principals," who are frequently not present at the hearing. In fact, who is authorized to waive provisions of a CBA? I know of no attempted challenges to ad hoc waivers, but it is an intriguing question. Signatories to the contract may surely waive provisions just as they may mutually agree to renegotiate. But, if ad hoc waiver is "negotiation," what about approval procedures? There is another interesting question, the answer to which I do not know. Does the grievant have standing to raise questions about a waiver by the parties? Is there a latent duty-of-fair-representation issue in this practice?

Another common practice is a partial waiver of the tripartite panel, with the advocates indicating they will serve *pro forma* as the "wings," with the indication that their panel participation will be limited to concurrence or dissent with the opinion of the neutral. The "loser" always dissents, usually without opinion.

Under either of the above circumstances I find it troubling that the parties don't go the full route and change the collective bargaining agreement. It seems likely that at least some of the principals on both sides know of these practices. Whether the union membership knows or the non-labor relations management knows, or cares, the neutral arbitrator is rarely, if ever, in a position to find out.

The neutral arbitrator's worst nightmare is probably the situation in which the advocates indicate that they will be the wings

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[5]*Id.*, at 53; Code of Professional Responsibility, ¶106A.

and proceed to perform the roles of both advocate and wing at the hearing and subsequently in an executive session. I have never experienced that horror. However, Hal Davey reported in 1968, "Regrettably, in some cases party-appointed board members present the case for the parties."[6]

I will skip the "optimal tripartite process," a term used by Davey in the 1968 discussion, which I understand from conversation with my friends and colleagues is still the dominant pattern in the airline industry. In my own airline cases, however, in executive session the parties essentially restated with emphasis the position of the advocates at the hearing.

In cases in which I have been advised in advance that there is a tripartite requirement, and in which a modest effort has been made to carry on the hearing under tripartite conditions, we have had post-hearing discussions about executive sessions. In those situations I have proposed alternatives with some limitations. The principal one is that if the parties expect me to do a draft opinion and decision, the content of the opinion is subject to their modification unless that would render the decision ridiculous, but the decision itself is not negotiable. If, however, they wish an opinion marshaling facts and setting forth their positions without indication of the discussion and conclusion of the neutral, their input regarding ultimate outcome is certainly a matter to be considered at an executive session. In other words, "the optimal tripartite process."

The most peculiar of the partial waivers of the tripartite system, and the most troubling, is where the parties at hearing waive the requirement of tripartite members, subject to the calling of an executive session by either party within ten days after receipt of the opinion and decision. My advice to the arbitrator going into this situation is to inquire each time at the point of waiver what is to be accomplished, or what is to be the subject of the post-decision executive session if requested. My own lapse in failing to explore that stemmed from the parties' frequent representation by different advocates. When I finally was invited to a post-decision executive session, I discovered it was a "beat on the arbitrator" session by the loser and an attempt to plea bargain the remedy. Perhaps such a session would be proper if it were in the nature of a motion to reconsider with a brief filed in support thereof, copied to the other party, with

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[6]Davey, *supra* note 2, at 161.

opportunity to reply. That approach would invite the arbitrator to reconsider arguments about error beforehand and to come to the executive session with a supplemental decision granting or denying the motion. Fairness dictates, however, that this option should be codified in the collective bargaining agreement.

My own unfortunate situation produced no results but an acrimonious public declaration of the arbitrator's persona non grata. The union lawyer, who had prevailed in the case, made only a feeble defense. Perhaps it was due to her being as much in the dark as the arbitrator regarding the purpose of or the procedure for the executive session. That matter could be cured by my 20/20 hindsight observation; namely, the arbitrator should insist that post-decision executive sessions be handled as formal motions to reconsider with all the formalities thereof. There is an obvious alternative—to make clear to the parties ahead of time that discussion of the outcome at any such session is excluded.

A post-decisional executive session with no indication of substantive issues or procedure raises grave questions about fairness. However, since the parties own the process, the arbitrator is between a rock and a hard place. In a similar situation in the future, informed by my prior experience, I would determine the limits of such an executive session, and either withdraw or get fired before hearing the case.

Another difficulty with the tripartite approach is that under the AAA voluntary rules of labor arbitration (Rule 25), whenever there is more than one arbitrator, all decisions shall be made by majority vote. The award shall be made by majority vote unless the concurrence of all is expressly required. It must be assumed that, when the parties waive the tripartite board even subject to the ten day rule, they have waived the "signing by the majority" requirement. In my illustrative case, in the previous eight to ten cases I had decided for the parties and in all cases cited as authorities in their briefs, none was executed by anyone other than the neutral arbitrator.

My final disquiet about the tripartite arbitration system: We have a Code of Professional Responsibility subscribed to by the Academy, AAA, and FMCS; the "wings" are governed by no such code. I began this presentation with a quote from Ben Aaron paraphrasing a section of the Code of Professional Responsibility, which is now Rule 5 (but was then 603A, I think). The current Code has a section on responsibility to the parties

(Rule 2). In recognition of diversity in arbitration arrangements, Rule 2 states we should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which we serve. It goes on to note that such understanding does not relieve the arbitrator from the responsibility of seeking to discern and refusing to consent to any collusive attempt by the parties to use arbitration for an improper purpose.[7] Are we obliged to discern and refuse to lend approval to the improper use of arbitration only if it's collusive?

I have decided that an unstructured, "beat on the arbitrator" post-decision session in the nature of plea bargaining is inconsistent with my own sense of professional responsibility. I am obliged, consistent with confidentiality, to remain mute about the identity of the party involved. My efforts at post-discharge education of the advocate resulted in a futher accusation impugning my neutrality and integrity. Perhaps my concern with what I see as palpable abuse of process stems from my naivete or, as Arnold Zack put it, "I guess I still covet some of the idealism of the textbook tripartite panel."[8] I also share his expectation that "the credibility of the arbitration system, single or tripartite, dictates that the procedure called for in the parties' agreement be utilized, not fabricated. As long as the parties themselves have not amended their agreement to exclude the tripartite system, they and their partisan arbitrators are obligated to adhere fully to that process."[9] What does the ad hoc arbitrator do when faced with the situations described above? As Zack indicated, resignation is always an option.

The Advocate As Witness

I have not been so unfortunate as to experience an arbitration in which the parties have a tripartite system where the advocates opt to act as partisan panel members and one advocate acts as a witness in the proceeding. However, it is reported that: "Union or management representatives who present their party's posi-

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[7]*See* Nolan, Labor Arbitration Law and Practice, 5th ed. (St. Paul, MN: West Publishing Co.), 299, 317.

[8]Zack, *Tripartite Interest and Grievance Arbitration*, ch. 8, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. James L. Stein and Barbara D. Dennis (Washington: BNA Books, 1981), at 278.

[9]*Id.*

tion in arbitration may also be involved in contract negotiation and grievance handling. It is thus not uncommon for an advocate to testify concerning the grievance process, past practice, or bargaining history."[10]

Owen Fairweather[11] has expressed concern about efforts through litigation to exclude the testimony of advocates from the arbitral proceeding, or to have the advocate witness's testimony expunged from the record. However, there seems to be agreement that an advocate need not withdraw from an arbitration case in order to testify, as would be required in the courts.[12] More expansive interpretations in states regarding the professional responsibility of lawyers might extend the rules applied in litigation to all proceedings in which a lawyer is a party. However, those rules would have no applicability to other union or management advocates.

Without resolving the legality or the professional responsibility issue, the practice is fraught with danger. I shudder to think of the advocate partisan member of a tripartite board who becomes a witness and gives testimony that the neutral arbitrator finds less than credible. Whatever the status of the advocate as witness, there remains the risk regarding the credibility of the testimony. If the arbitrator concludes the advocate is lying as a witness, it will inevitably affect confidence in other aspects of the case that the advocate is presenting.

Even without the problem of credibility, advocates' testimony raises the question of bias, interest, or motive. "Merely because the witness lacks an interest in the outcome does not imply that he is telling the truth. Moreover, having an interest or stake in the outcome does not disqualify a witness; rather, the arbitrator can be expected to subject that testimony to a greater degree of scrutiny than would otherwise be the case if the witness had no interest or bias."[13] It has been noted that interest, by itself, is no basis for discrediting testimony. However, it may serve to weaken credibility just as lack of interest may serve to strengthen credibility: "Interest alone may tilt the scales in some cases but

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[10]Gosline, *Witnesses*, in Labor and Employment Arbitration, eds. Tim Bornstein and Ann Gosline (New York: Mathew Bender, 1991), ¶4.12.

[11]Fairweather, Practices and Procedures in Labor Arbitration, 3rd ed. (Washington: BNA Books, 1983), 169–171.

[12]*Id.*; *see also* Gosline, *supra* note 10.

[13]Hill and Sinicropi, Evidence in Arbitration (Washington: BNA Books, 1980), 105.

not in others."[14] Where the interest issue may affect the outcome in a critical case, the advocate-witness invites special scrutiny.

What should be the form of the unusual procedure when the advocate becomes a witness? It has been suggested that the arbitrator request another person appearing on behalf of the same party pose the questions. "Usually, however, arbitrators receive the testimony of advocate-witnesses in narrative form."[15] The short answer to the problem is that the arbitrator has no basis for refusing testimony by an advocate-witness. Any format that allows presentation of the information in an orderly fashion and that includes appropriate cross-examination would be acceptable. As to unpleasantness and difficulty, the advocate who takes the witness chair and is sworn assumes the risk.

Rules Of Evidence As Impediments To Efficiency

One evidentiary rule that does not help in the arbitration process (or, if it does, doesn't help much) is objection to the form of a question. The response is usually, "Would counsel please rephrase the question?" Most lawyers can easily do that, though some nonlawyers have difficulty. In any event, it usually delays the proceeding and clutters the record. Everybody knows what was asked and what the answer was the first time around. The exchange indicates that one party does or does not know rules of evidence. As a tactic it might rattle the opposing advocate and, if successful, make it more difficult to get the testimony in the record in a coherent and understandable fashion, but it contributes little to the efficiency of the arbitration process.

The second needless objection is to a witness's response when the question was asked and answered. This may be useful if the response has been long and rambling and, if permitted, would clutter the record. I find it valuable since it minimizes duplications in the record. It is, of course, good practice to treat a subject completely at one time because if we encounter it at a later point in the record, we have to cross-check so that something different isn't addressed the second time around. I usually try gently to admonish both the party making the objection and the party guilty of the infraction, advising them of the risk that they will confuse the arbitrator rather than emphasize the point.

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[14]*Id.* at 106.
[15]Gosline, *supra* note 10.

The third objection that impedes efficiency occurs when the witness is reading a document: "Objection, the document speaks for itself!" What's the harm in permitting the witness to read aloud at least that portion of the document which is in issue? Of course, it wastes time and pagination to put into the record what is already within a document admitted into evidence, but more often than not the colloquy over it wastes more time than permitting the witness to read. The reading seems particularly useful in hearings where there is no transcript. Then the witness should be permitted to read the parts that are in issue so that everybody can focus specifically on that language in the context of the testimony.

Academy President-elect Sinicropi and Marvin Hill[16] advise us that technically the parol evidence rule is not a rule of evidence but a substantive rule of contract interpretation, which forbids the use of extrinsic parol to "vary" or "alter" the written agreement. I am not suggesting that the rule has no proper place in interpreting contracts. My colleague in Wisconsin, Stewart Macaulay, has waged a career campaign against the abuse of the rule involving contract law.[17] It is more appropriate, however, when both parties are fully equal in drafting the language and in accepting and understanding common principles of language and of law. In the case where one party is represented by counsel and the other party is not, and in most instances where neither the lawyer nor the non-lawyer advocates were parties to the collective bargaining process which produced the contract, the use of the rule to exclude extrinsic evidence as to the meaning of a term or provision of the collective bargaining agreement seems risky.

Here I resort to the definition of the parol evidence rule in *Black's Law Dictionary*:

> Under this rule, when parties put their agreement in writing, all previous oral agreements merge in the writing and a contract as written cannot be modified or changed by parol evidence, in the absence of a plea of mistake or fraud in the preparation of the writing . . . but the rule does not forbid resort to parol evidence not inconsistent with the matters stated in the writing.

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[16]Hill & Sinicropi, *supra* note 13, at 51.

[17]*See, e.g.*, Macaulay, *Bambi Meets Godzilla: Reflections on Contract Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HAMLINE L. REV. 575 (1989).

> Under this rule, parol or extrinsic evidence is not admissible to add to, subtract from, vary or contradict judicial or official records or documents, or written instruments which dispose of property or are contractual in nature, and which are valid, complete, unambiguous and unaffected by accident or mistake.

We can set aside the past practice issues wherein the parties contend that subsequent to the adoption of the agreement they implicitly or explicitly (but not in writing) accepted practices that varied the meaning of the contract. Although the parol objection is frequently lodged in these cases, that's not what the rule was intended to address even in commercial contracts.

The conflicts in arbitration occur when one party claims the language is clear and unambiguous, while the other party claims it's not only ambiguous but means something different from its obvious interpretation and presents evidence from the negotiation process to back up that claim. The first hurdle is to determine whether the language is ambiguous. That question is difficult because lawyers can make almost any language seem ambiguous, and Congress almost always does.

What happened to the old rule that included in the exception to parol evidence a plea of mistake or fraud in the preparation of the writing? Rarely does a party claim fraud but almost always, implicitly, there is a claim of mistake if the language is contrary to what was intended. Under those circumstances it is, of course, easier just to exclude the evidence and resort to the "clear" language. But does that really do justice in the arbitration process?

The U.S. Supreme Court has told us: "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." And later on: "The labor arbitrators' source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." Now, these pronouncements are peripheral to the Court's admonition to itself and to lower courts: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage."[18]

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[18]Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416, at 2418–19 (1968).

The question is whether strict observance of the parol evidence rule is consistent in principle with the Supreme Court's admonition regarding arbitrability. I should hasten to note that in the *Warrior and Gulf* case there was some difficulty about whether the Court should examine and evaluate evidence of bargaining history at all to determine the meaning of a contractual provision.[19] Nothing in the opinions, however, suggests arbitrators ought to refuse testimony as to bargaining history by conveniently relying on the truncated parol evidence rule. I say "truncated" because, when the rule is used to exclude extrinsic evidence, the exception for mistake is ignored. Permitting introduction of parol evidence does not, of course, ensure that this evidence will be sufficiently weighty to counter clearer, less ambiguous language of the contract.

The problem that exclusion avoids is a determination that the language of the disputed clause was not what the party offering the parol evidence agreed to. Thus, there was no meeting of minds by the parties and therefore no *contract* on that issue. Perhaps in those cases we should just say that and refer the matter back to the parties for bargaining. Use of the rule to exclude is a little like last-offer interest arbitration, except that excluding parol evidence is a convenient way of choosing the written version even if it resulted from mistake or fraud.

II. STRIKE-RELATED DISCIPLINE

A. GABRIEL N. ALEXANDER*

We have been impanelled by the Program Committee to examine the experiences and pronouncements of arbitrators with respect to discharges for misconduct by striking employees excluding wildcat strikes. Our discussion will cover the following questions:

1. Is there a common law of arbitration in alleged strike-misconduct cases?
2. What are the criteria in deciding these cases?
3. Are the standards of 1955 applicable to cases today?
4. How do these procedural standards help when there are multiple arbitrators?

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[19] *Id.*, at 2427 (concurring opinions of Justices Brennan, Harlan, and Frankfurter).

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