CHAPTER 5

THE ARBITRATION OF STATUTORY DISPUTES: PROCEDURAL AND SUBSTANTIVE CONSIDERATIONS

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The central premise of this paper is that arbitrators of statutorily based employment disputes act differently in significant respects than arbitrators of contractually based employment disputes. Those differences flow from the following factors:

1. The bases of statutory and contractual arbitration models
2. The authority of the selecting parties
3. The greater responsibility of the arbitrator to ensure that statutory awards are based on an adequate record and are in accord with applicable legal precedent
4. The types of records traditionally developed in statutory cases
5. The prospect of review or appeal

Arbitrators hearing statutory claims must exercise greater activism and greater independence than is customary in contractual disputes to competently and properly fulfill their roles. These differences, however, should not mask the fact that labor arbitrators will act significantly differently than courts or administrative judges hearing similar issues. This is true because of labor arbitrators' instincts to promote informality and to avoid workplace disruptions, because of their respect for the institution of collective bargaining, and because of their desires for a reasonably speedy resolution of the dispute, for finality, and for arbitration to both provide a fair adjudication and leave participants with the belief that their claims have been fairly adjudicated. These theses will be tested by examining five types of

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statutorily based employment disputes which are already being arbitrated with some frequency:

1. Claims of violation of civil service law in the federal sector
2. Employment benefit claims arising under the Employee Retirement Income Security Act (ERISA) and section 302 of the Labor Management Relations Act (LMRA)
3. Discrimination claims arising under federal and state laws
4. Union fair-share fee disputes, and
5. Claims of violation of the National Labor Relations Act (NLRA)[1]

At the outset a number of disclaimers should be made. This paper will not review the decades-old debate as to whether, when, or how arbitrators should apply statutory law in the resolution of grievances; for purposes of this paper, the propriety of arbitral application of statutory law is assumed. Labor arbitrators currently consider external law in several different contexts.

First are purely statutory claims, i.e., cases where the basis of the claim is wholly statutory in nature and the arbitrator is asked to decide the statutory issue in dispute. Some statutory claims are presented for arbitral decision by joint agreement between the parties. More customarily, however, the arbitrator is granted that authority and responsibility by Congress, a state legislature, or the courts.

Second are claims of contractual breach, where external law is incorporated by agreement of the parties or where external law is cited by one or both parties as an aid for the interpretation and application of ambiguous contractual language. Arbitral use of external law as an aid to interpreting ambiguous contract language is little more than a specific application of the general contract law principle that, where two constructions of contract language exist, one lawful and the other unlawful, it is presumed that the parties intended the lawful course of action, and con-

[1]In addition to those statutes selected for discussion, labor arbitrators frequently are asked to apply the Occupational Safety and Health Act, the Fair Labor Standards Act (FLSA), the Equal Pay Act, government contract related wage statutes, federal and state veterans' preference laws, the Employment Polygraph Protection Act, and state employment statutes.

struction of the agreement consistent with law is favored. Incorporation of external law into the agreement evidences the parties' joint intention that the claimed violations of external law also violate the agreement and are to be adjudicated and enforced through the grievance and arbitration procedures. Since the arbitrator is furthering the intent of the parties, there can be no serious objection to arbitral consideration of external law.

Third are cases involving application of external law to resolve a grievance where the contract is silent. The propriety of such arbitral action has been hotly debated over the years,[2] but is assumed for purposes of this paper.

Fourth are cases where external law is asserted to conflict with the clear provisions of the agreement. In these cases the U.S. Supreme Court has confined the arbitrator's proper role to fidelity to the agreement, leaving to the courts the task of declaring the parties' mutual agreement invalid. Despite that role, however, arbitrators may be reluctant to direct an employer or a union to continue conduct believed to constitute a violation of applicable criminal or civil law.[3]

As a second disclaimer, this paper assumes that the arbitrator selected for a statutory claim has the competence to hear that case. It is also assumed that the parties and/or the appointing agency have selected only competent arbitrators or that unqualified arbitrators will admit that fact and decline the selection.

The third and final disclaimer is that this paper is based on my views—how I handle statutory claims and the approaches I find helpful in fulfilling decisional and case-management responsibilities—and the reasons for my actions. Conversations with colleagues reveal that other arbitrators use similar approaches.

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[2]The propriety of this action is for the most part outside the scope of this paper. For an excellent presentation of divergent views on this subject, see 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. Rehmus (BNA Books, 1968); Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books, 1967); Howlett, *The Arbitrator, the NLRB and the Courts, id.*; Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 Arb. J. 55 (1985).

[3]Such conflicts might include arbitral orders to make contributions to a pension or welfare trust in violation of §302, LMRA; enforcement of a contractual provision which unlawfully discriminated against women or minorities; or enforcement of a pay practice which violated the FLSA.

However, I do not intend to portray my methods as norms of current arbitral practice in these cases.

Differences in Purpose Between Contractual and Statutory Arbitration

Labor arbitration was the creation of the collective bargaining parties and represented a voluntary alternative to strikes as a means of resolving workplace grievances. The process placed a premium on speed, informality, a realistic appreciation of the particular work environment (i.e., the law of the shop), and the avoidance of unnecessary legal formality. The policy favoring arbitration of contractually based workplace grievances in the private sector was strong and beyond question.

In that type of decisionmaking, arbitrators serve as an extension of collective bargaining. Arbitral responsibilities traditionally have been limited by the parties to interpretation and application of their collective bargaining agreements. The U.S. Supreme Court has repeatedly recognized that labor arbitrators are vested with the responsibility to apply the parties' agreement and the common law of the shop, not the law of the land. The Court has stated that arbitration awards based exclusively upon external law and not upon the collective bargaining agreement will be unenforceable, having been issued in excess of the submission to arbitration.[4] Many labor arbitrations are presented by nonattorneys without briefs, transcripts, or other formalities associated with legal and administrative hearings.

In recent years there has been a clear acceleration of governmental regulation of the employment relationship. The complex network of overlapping employment statutes and regulations has resulted in significant growth of protections for individual workers and of increased restrictions upon employer actions. Along with this new layer of regulation, there has been a shift of decisional authority from employer managers and union business agents to attorneys. Today advice is routinely sought for a variety of issues that not many years ago would have been viewed by managers and union officials as nonlegal business decisions.

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[4]*See, e.g., McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 290–91, 115 LRRM 3646 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 7 FEP Cases 81 (1974).

The labor arbitration process has not been unaffected by these fundamental changes in the employment relationship. At last year's Annual Meeting Richard Mittenthal theorized that the increased legalization and formalization of labor arbitration was due in large part to the influence of market factors and the preference of attorney presenters/selectors. I agree with that hypothesis and suggest that increased legalization of the employment relationship may also explain the preference of the selecting parties for a more formal and legalistic arbitration process.

Fewer and fewer aspects of the employment relationship depend exclusively upon voluntarily negotiated contract provisions. The opportunity for disgruntled employees, unions, and employers to obtain "second bites" at the proverbial apple through litigation is greater than in the past. This may take the form of (1) an action to overturn the arbitration award, (2) filing a section 301 and breach of the duty of fair representation action, (3) the pursuit of state statutory or common law remedies, or (4) the pursuit of federal statutory causes of action. An approach toward arbitral decisionmaking that culminates in an award which is considered final and discourages collateral litigation or, if such litigation is filed, maximizes the likelihood that the award will be granted deference, serves the needs of both collective bargaining parties.

The complex network of overlapping contractual and legal provisions, and the desire that the arbitration process fairly adjudicate disputes arising in the workplace with reasonable finality, have changed the attitudes of arbitrators and the parties toward the arbitration process. Resort to litigation is increasingly commonplace in American society. More and more arbitrators conduct hearings on the assumption that the grievant may not fully trust the union or its representative and is uncertain about the impartiality of an arbitrator about whom the grievant knows little. The line supervisor, who was involved in the action leading to the arbitration and attends the hearing, may have similar doubts (i.e., not fully trusting the employer or its representative to properly represent the supervisor's interests, not trusting the union or its representative, and unsure about the impartiality of the arbitrator).

To ensure that the parties leave the arbitration process believing they have received the fair hearing they are in fact receiving, the arbitrator must avoid a degree of familiarity inappropriate

for an "arms length" independent decisionmaker and must issue a comprehensive opinion making clear that the record has been carefully studied, that the parties' contentions have been carefully considered, and that the "bottom line" was reached for persuasive reasons. This approach enhances the finality of arbitration in that it maximizes the likelihood that the union, the employer, and the grievant will accept the award as final without resort to further appeal or collateral litigation. In addition, if there is an appeal or collateral litigation, it is more likely that the award will be deferred to or upheld as the proper resolution of the dispute.

In statutorily based employment disputes, however, the arbitrator's responsibility is to determine whether the parties have complied with externally imposed legal restrictions on decisionmaking in the workplace. The power of the parties to the dispute is less than absolute and must bow to contrary requirements of law. In this setting arbitration serves as an alternative to litigation, not to the strike. This difference in purpose supports greater arbitral activism to ensure the adequacy of the evidentiary record, to ensure that procedural due process requirements are satisfied, and to ensure that the dispute is finally resolved by the arbitrator in accordance with applicable legal and other precedent.

The Federal Sector

Section 7121 of the Federal Service Labor-Management Relations Statute (Statute) provides for mandatory arbitration of grievances. Grievances in the federal sector include, as a matter of both law and agreement, alleged breaches of the collective bargaining agreement and alleged violations of applicable law, rule, and regulation. Given the limitations on the scope of bargaining and the extent to which the federal employment relationship is governed by laws, rules, and regulations, an arbitrator hearing federal-sector cases normally must address questions of statutory interpretation and application.

Even where specific contractual provisions govern a particular subject, the language of the agreement often mirrors language in applicable law, rule, and regulation and adds certain negotiated procedures governing the impact and implementation of those statutory and/or regulatory provisions.

Unlike the private sector the Statute contains election of remedies provisions and a built-in review process. Section 7121(d) and (e) provides that employees may appeal adverse actions either to the Merit Systems Protection Board (MSPB) or to arbitration, but not to both. Similarly, a claim that an employee has been discriminated against, or otherwise has been the victim of a prohibited personnel practice, may be raised under statutory procedures or under the grievance procedure, but not under both. Section 7116(d) contains an election of remedies in connection with unfair labor practices. Thus, the federal sector has no deferral concept similar to cases under the NLRA.

Given the responsibility to make determinations regarding claimed breaches of law, rule, and regulation, the limited authority of the collective bargaining parties,[5] the ready availability of free appeals avenues, and the mind-set of many participants in the federal-sector labor relations program, it is not surprising that arbitration awards are frequently appealed.[6]

In cases involving adverse actions, the legal status of the arbitration award is similar to that of a final MSPB order, and appeals ordinarily are filed with the Court of Appeals for the Federal Circuit. Other appeals from arbitration awards generally proceed by filing exceptions with the Federal Labor Relations Authority (FLRA), an agency with duties and responsibilities under the Statute similar to those of the National Labor Relations Board (NLRB). Upon the timely filing of exceptions, the FLRA reviews the arbitration award (and often the opinion as well) to ensure that it is not contrary to law, rule, or regulation. Modification or vacation also may be required on grounds similar to those applied by federal courts in the private sector.[7]

Issues that commonly arise in federal-sector arbitrations include the following:

1. Challenges to performance evaluations,

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[5]Most federal-sector parties do not have authority to bargain over most monetary items, including wages. This precludes many traditional forms of compromise reached on private-sector grievances. Nonwaivable statutory management and other rights and the restricted authority of the participants in the arbitration process also may limit the parties' ability to negotiate a solution to the grievance.

[6]Many arbitrators find distasteful the possibility that their work product will be reviewed by the FLRA or the courts and for that reason, among others, have declined to hear federal-sector cases. We should remember that we earn a living as decisionmakers reviewing the actions of others for compliance with contractual and legal limitations.

[7]The complex procedures for handling appeals of "mixed" cases involving equal employment opportunity issues is beyond the scope of this presentation. It is sufficient to note that there are complex procedures involving the Merit System Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), and the courts in such appeals.

2. Discipline and discharge,
3. Denials of promotions, including career-ladder promotions,
4. Claims of unlawful discrimination,
5. Details or work assignments belonging to a higher graded position,
6. Work assignments and management rights,
7. Unfair labor practice claims,
8. Flextime and work schedules, and
9. Union institutional concerns, including granting or denial of official time.

On appeal to the FLRA, many cases challenge awards which arguably substitute the arbitrator's judgment for a management right conferred by section 7106 of the Statute. Challenges may also allege that the arbitrator's remedy is inconsistent with the Back Pay Act. Although the responsibility of the FLRA is to review the arbitrator's award and not the opinion, an award's legality often depends upon the arbitrator's findings of fact in the opinion.

For example, to be upheld, a back pay award must include subsidiary findings by the arbitrator that "but for" the breach of contract or law, rule, or regulation, the employee would have been treated in a particular manner (e.g., promoted). The Back Pay Act further provides for awarding reasonable attorney's fees "in the interest of justice." Many FLRA arbitration appeals cases involve opinions which fail to appropriately analyze case law surrounding that standard developed in MSPB, FLRA, and court cases.

The parties in the federal sector approach arbitration differently than their private-sector counterparts; they desire the arbitrator to have independent familiarity with federal-sector civil service law. With rare exceptions the parties (including those represented by legal counsel) have no objection if the arbitrator raises on the record legal questions (e.g., whether the remedy sought is consistent with the Back Pay Act or the most recent FLRA precedent) or asks the parties to submit the current case law on a particular matter. The participants in federal-sector arbitration believe that the process is designed to reach accurate, informed, fair judgments.[8]

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[8]This viewpoint may well be affected by the participants' career choice of public service, by the belief in and familiarity with administrative appeals mechanisms, and by the fact that federal-sector arbitration functions generally as a substitute for more formal administrative appeals, not as a substitute for the strike.

The conduct of the arbitration hearings is quite similar to private-sector cases involving similar issues; however, the principal differences are twofold:

1. The volume of paper is significantly greater in federal-sector cases; therefore the arbitrator should request the parties to docket in advance of the hearing as much paper as possible.[9] This expedites the hearing (which often takes more than one day) and limits surprise. Similarly, arbitrators should insist that parties docket with their posthearing briefs copies of all cited authority. This ensures that the arbitrator has ready access to all cited statutes, regulations, and precedent cases and reduces unnecessary "string citations" in the briefs.

2. The "common law of the shop" (which the parties expect the arbitrator to know) is an amalgam of federal civil service laws, rules, and regulations as well as the realities of the rule-driven federal-sector labor-management relationship. The parties generally expect the arbitrator to apply legal precedent without regard to personal views about the correctness of statutory and administrative case law.[10]

Arbitration awards in the federal sector are often more comprehensive and legalistic than in the private sector because that type of award is more responsive to the parties' desires, review by the FLRA or the courts is more likely, and the issues and contentions are more complex. A comprehensive opinion furthers the parties' joint interest in finality since it maximizes the possibility that the litigants will accept the award as final and minimizes the possibility that the award will be vacated on appeal for failure to articulate the necessary factual predicates.[11]

Pension and Benefit Claims

Three types of pension and benefit cases are typically adjudicated in arbitration:

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[9]A suggestion that the prehearing docketing will not waive the right of either party to object on grounds of relevance or materiality to the entry of those documents into the record may remove a disincentive for the parties to comply with such a request.

[10]The Supreme Court in *Cornelius v. Nutt*, 472 U.S. 648, 119 LRRM 2905 (1985), held that Congress intended that arbitrators handling adverse action cases apply the same substantive standards as the MSPB. The Court reasoned that this would discourage forum shopping.

[11]The degree to which arbitrators are expected, by the parties or the courts, to engage in independent research into FLRA or MSPB administrative and judicial case law is a question about which reasonable arbitrators may disagree. Many arbitrators hearing federal-sector cases, however, do engage in independent research when necessary to reach a lawful and appropriate result.

1. Claims for withdrawal liability under the 1980 Multiemployer Pension Plan Amendments Act (MEPPAA), amending ERISA,
2. Trustee deadlocks in jointly trusteed LMRA (Taft-Hartley) section 302(c)(5) trust funds, and
3. Claims for benefits under the terms of pension and welfare benefit plans.

ERISA considerations may also arise in labor arbitrations. When the parties fail to argue the application of ERISA in these cases, arbitrators must decide whether to consider on their own motion the impact of ERISA on the matter in dispute.[12]

MEPPAA Withdrawal Liability Claims. The process for litigating withdrawal liability under MEPPAA combines the federal district court and labor arbitration models. MEPPAA's dispute-resolution process is triggered by a fund's issuance of a demand for withdrawal liability to an employer. As part of the demand, the fund directs the employer to begin making withdrawal liability payments, usually on the basis of a monthly payment schedule. The employer may challenge that assessment but must make the demanded payments during the course of the challenge and seek a refund at the conclusion of the arbitral challenge. In short, MEPPAA provides for a "pay first, challenge later" dispute-resolution process.

If the employer disputes the assessment, a request for review must be filed with the trustees pursuant to MEPPAA section 4219. Thereafter, under MEPPAA section 4221, the employer may file for arbitration. However, the time limits for initiation of arbitration are relatively brief and continue to run regardless of whether the trustees respond to the request for review. The employer has the burden of identifying errors in the demand for withdrawal liability and of persuading the arbitrator that the fund's actions were contrary to law. MEPPAA contains presumptions of correctness.[13]

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[12]Most parties recognize possible ERISA issues related to pension benefits. However, they often do not recognize ERISA as a broad, preemptive regulation applicable to various types of welfare plans. Examples include interpretation and application of severance pay plans, funded vacation plans, apprenticeship programs, and many types of health and life insurance disputes.

[13]There has been substantial litigation concerning the constitutionality of the presumptions. The Court of Appeals for the Third Circuit has held the presumptions unconstitutional as a denial of procedural due process of law in *Teamsters Local 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by an equally divided Court*, 481 U.S. 735 (1987).

Pursuant to section 4221, the Pension Benefit Guaranty Corporation (PBGC) has promulgated "fair and equitable procedures" for the conduct of MEPPAA withdrawal-liability arbitrations. The PBGC regulations provide for prehearing discovery patterned on the Federal Rules of Civil Procedure (FRCP). In addition, they provide for arbitration hearings, written opinions and awards, and the opportunity in limited circumstances for reconsideration by the arbitrator.

The American Arbitration Association (AAA), in conjunction with the International Foundation of Employee Benefit Plans, has also promulgated rules for handling MEPPAA withdrawal-liability claims. These rules closely track PBGC regulations and have been recognized by the PBGC as an approved alternative procedure for the adjudication of withdrawal-liability claims. The AAA rules are referenced specifically in many multiemployer pension plans and plan rules.

MEPPAA cases tend to be complex. A "small" case may involve hundreds of thousands of dollars; large cases involve many millions of dollars. Attorneys are always involved, often several for each party. Typical legal and factual issues include the following:

1. Whether there was a withdrawal,
2. Whether an ongoing labor dispute precludes issuance of the withdrawal-liability determination,
3. Whether the fund applied erroneous actuarial assumptions in calculating and assessing liability,
4. Sales of businesses, changes in business form, and who is included in the "control group" of businesses responsible for the withdrawal liability,
5. The date of withdrawal, whether the payment schedule was validly determined, and
6. Issues related to employer bankruptcy and insolvency.

The MEPPAA arbitration scheme has been imposed upon the parties by Congress. Because the time limits for initiating arbitration are brief, arbitration is often demanded prior to the time the parties know whether they can resolve their dispute without it. In many cases preliminary discovery must take place before the parties can make informed litigation assessments as to trial or settlement. As a consequence, they often hold cases in abeyance for an extended period pending possible resolution. Unlike judges, arbitrators tend to be sympathetic to this situation

and usually do not press to hear the matter prior to the time the parties so desire.

The opinions in withdrawal-liability arbitrations typically are lengthy and complex, and differ significantly from those in labor arbitrations. This is due to several factors. The nature of the issues often requires significant analysis partially in response to the style of litigation. In addition, MEPPAA arbitration is a relatively new process; many decisions, both procedurally and substantively, are rulings of first impression. Arbitrators have a greater tendency to explain an award when novel issues are involved and when judicial review (provided in MEPPAA section 4221) is foreseeable.

Although the parties do an admirable job of resolving issues prior to arbitration, few cases can be mediated to resolution by the arbitrator. However, arbitrators can save the parties significant litigation costs and encourage a possible settlement of the dispute by a number of "case-management" techniques. Chief among these is the severance of one or more issues for litigation on a preliminary basis, possibly through the use of a stipulated record. Once a decision has issued disposing of one or more major issues, it may be unnecessary to litigate the remaining issues; they may be moot or withdrawn. The parties may also continue attempts to resolve the dispute, and the pendency of unresolved issues may permit greater flexibility in settlement negotiations.

Resolution of these cases is often affected by concerns about the trustees' fiduciary responsibilities in agreeing to a settlement which may be significantly less than the full amount of the claim and by fear of a potential collateral attack on the settlement in a lawsuit filed by one or more plan participants. Concerns about the initial ruling becoming a precedent may also influence resolution of the dispute.

The issues carved out for adjudication in phase two of the dispute usually attack the plan's actuarial assumptions and/or methodology. This litigation usually requires expert witnesses and is often expensive. Although severance of one or more issues in appropriate cases is advantageous from a case-management perspective, arbitrators must be cautious to avoid inappropriate piecemealing of the litigation.

It is not uncommon for the arbitrator to raise to the parties legal questions which, by oversight or design, they have not raised. Given the decisional responsibilities thrust upon the MEPPAA arbitrator by Congress, as well as the potential fiduci-

ary role, it is not merely inappropriate but may actually be dangerous for the arbitrator to adopt a wholly passive approach in these cases, thereby ignoring perceived problem areas.

Remedy issues often remain even after final adjudication of the merits of the dispute. If errors are found in the assessment of withdrawal liability, the arbitrator will usually remand the matter to the fund for a recalculation of the proper assessment amount (if any). Only if there is a dispute about the validity of the recalculation or the amount of the refund do the parties return to the arbitrator for additional action. Section 4221 also requires that the arbitration award provide for an allocation of reasonable attorney's fees and arbitral fees.

Inasmuch as time limits for appeals of arbitration awards to the district court begin upon the "completion of arbitration proceedings in favor of one of the parties," it often is helpful, when issues are bifurcated or remedy questions remain, to issue an interim award and to expressly reconfirm that interim award at the conclusion of the arbitration to trigger the section 4221(b)(2) 30-day time limit.

Jointly Administered Plan Trustee Deadlocks. The second type of ERISA arbitration consists of resolving deadlocks among the trustees of jointly administered Taft-Hartley section 302 trust funds. Typical issues include selection of professional personnel servicing a fund (e.g., actuaries, attorneys, accountants, or administrators), proposed changes in benefits, and other plan-design changes. The degree of formality in the presentation of deadlock cases varies significantly. Because the arbitrator may be considered a plan fiduciary and is governed by the same substantive standards of conduct (i.e., to act in the best interests of the plan participants and beneficiaries when resolving a deadlock), the process requires a significant amount of activism by the arbitrator serving as impartial umpire under section 302(c)(5).

It is common for the parties to provide the umpire with certain basic information prior to the hearing. This prehearing filing has multiple benefits:

1. It avoids beginning the hearing with arbitral review in superficial fashion of potentially lengthy documentation.
2. It minimizes claims of surprise.
3. It is often helpful, particularly in informal deadlock cases where the trustees play an active role in the hearing process, to appreciate prior to the start of the hearing the

stated positions of each trustee group. These positions may include matters which, from a fiduciary perspective, cannot be properly considered by the trustees or the arbitrator (e.g., the political impact of limiting retiree benefits in a local union where retired members vote, the business impact of assessing withdrawal liability vis-a-vis competitors.[14]

4. The arbitrator is better able to grasp factually intricate issues with a prior review of the legal documents related to the plan as well as external information (e.g., written proposals and cost/impact studies performed in conjunction with proposals to change benefits).
5. In many deadlock cases the parties desire a prompt decision. The opportunity to review documents and to study the issues prior to the hearing facilitates presentation of legal concerns or questions at the hearing and expedites the hearing as well as the decisionmaking process.

The types of documents provided by the trustees or requested in advance by the umpire may include: (1) the plan itself, (2) the trust agreement, (3) the summary plan description (SPD), (4) minutes, which may reflect discussion of the deadlocked motion, regardless of when the meetings took place, and (5) other relevant and helpful information. The caption of the dispute or conferences with counsel prior to the hearing may suggest additional information which the umpire may specifically request.

Procedurally, trustee deadlocks range from extremely informal meetings (with no attorneys or with only a single fund counsel representing both the fund and the trustees collectively) to adversarial proceedings (with union-appointed and employer-appointed groups of trustees represented by separate counsel). In any event, the process often demands that the arbitrator adopt a fairly activist role. In some cases activism is dictated because the arbitrator's experience in the benefits area may exceed that of some or all of the participants.

For example, the arbitrator should not break a deadlock by voting in favor of a motion to amend the plan where the amendment may be unlawful or where it may endanger the qualified status of the plan, even if the advocates never raise that conten-

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[14]See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 107 LRRM 2769 (1981), for a discussion of how the legal role of the trustees in plan administration differs from collective bargaining.

tion. Similarly, if the arbitrator knows of a solution to the problem that appears preferable to the deadlocked motion, the arbitrator ought to bring this to the trustees' attention. In some disputes the trustees may recognize that the deadlocked motion is poorly worded or does not address the underlying problem. As a result, they may grant the arbitrator broad authority to fashion a solution to the problem instead of merely voting for or against the deadlocked motion.

More commonly, arbitral activism stems from a fiduciary obligation. The arbitrator decides questions with wide-ranging import, potentially affecting the plan's survival; therefore the decision must be made in an informed and prudent manner. Concern that the trustees have considered all relevant information to protect them against a possible fiduciary breach claim also contributes to an unusual degree of arbitral activism. In trustee deadlock cases the arbitrator's function is akin more to an interest dispute than to a grievance dispute. Since the negotiating parties are expected to consider the impact of external law, the umpire should do likewise.

The format of the arbitral opinion depends on the nature of the issues and the stated desires of the trustees. In some cases, however, the umpire must issue a detailed opinion to minimize the likelihood of a challenge in the courts, alleging that the award breaches the fiduciary and other obligations imposed by ERISA.[15]

Benefit Plan Claims

Many pension and welfare plan claims procedures and collective bargaining agreements require arbitration of benefit claims prior to resort to the courts under ERISA. Benefit-claims cases usually involve disputes between the plan and the participant. In these cases there is often a mismatch of representation. The plan may be represented by experienced ERISA counsel, but the individual participant may proceed *pro se* or may be represented by an attorney who lacks significant benefit-law experience. It is not uncommon for arbitrators hearing these claims (with the consent of both parties) to mediate a resolution of the dispute.

If the matter proceeds to decision, however, the opinion must apply prevailing ERISA concepts if it is to be accorded deference

[15]An action in this regard could conceivably be brought by any of thousands of plan participants.

upon appeal or upon the filing of an ERISA lawsuit. The audience for the arbitrator's opinion, therefore, includes not only the participant and the plan, but also potentially a judge who needs to know the basis, factually and legally, for the holding. An adequate written opinion is particularly important in cases where the arbitration takes place without a transcript.

Antidiscrimination Statutes

The law prohibiting workplace discrimination is in a state of rapid change. The Americans with Disabilities Act (ADA) will revolutionize workplace customs to a degree not experienced since the passage of Title VII of the Civil Rights Act (Title VII) in 1964. Arbitrators are already required to consider claims arising under Title VII, the Age Discrimination in Employment Act (ADEA), the Pregnancy Discrimination Act (PDA), and a variety of state antidiscrimination laws. Government contractors are subject to extensive federal regulations enforced by the Office of Federal Contract Compliance Programs.

Discrimination claims arise in several contexts. Arbitrators hearing pure contract disputes may be required to resolve claims of discrimination in violation of contractual antidiscrimination provisions. In just cause cases claims may be asserted that the grievant was the victim of disparate treatment for discriminatory reasons or that a particular form of harassment should excuse or mitigate workplace conduct. With greater frequency arbitration cases involve discrimination based on disability of employees with drug, alcohol, and a variety of emotional disorders as well as claimed physical disabilities and the obligation of reasonable accommodation. Several developments are likely to result in significant increases in the arbitration of employment discrimination claims in the near future.

First is the willingness of sexual harassment victims to assert their claims. Despite *Gardner-Denver*, permitting independent access to the courts without exhausting grievance and arbitration processes, these claims will certainly be raised in the future, either independently or as evidence that particular disciplinary action was pretextual and lacking in just cause.[16]

Second is the passage of the ADA. Many workplace practices are at odds with ADA requirements. Reasonable accommoda-

[16]In one recent case the AAA provided two factfinders, one male and one female, to investigate and report on a sexual harassment claim.

tion may involve serious conflict between the rights of disabled and nondisabled employees.[17] Regardless of views concerning arbitral cognizance of external law, many disputes are likely to involve conflict between the agreement and the requirements of the ADA.

Third is *Gilmer v. Interstate/Johnson Lane Corporation*,[18] decided by the U.S. Supreme Court in 1991. The *Gilmer* decision questioned many of the reasons expressed by the Court in *Gardner-Denver* for refusing to require exhaustion of arbitration under a contractual nondiscrimination provision and for permitting de novo resort to the courts in Title VII cases. One of the following scenarios is likely to take place in the post-*Gilmer* period:

1. *Gilmer* will be merely the first in a series of decisions ultimately overruling *Gardner-Denver* and imposing upon unions the responsibility to adjudicate statutory claims in the grievance and arbitration procedure. The Court in *Gilmer* found arbitral procedures appropriate for the resolution of statutory claims. Concerns about arbitral competence were held an insufficient reason for denying arbitration. The fact that remedies in statutory actions might be broader was found insufficient to waive the right to go to court and to submit those claims to arbitration.
2. *Gilmer* will be limited to the securities industry and will not be extended to union or nonunion employment due to exclusion in section 1 of the Federal Arbitration Act (FAA) of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
3. The *Gilmer* decision will lead to expansion of arbitration involving statutory employment claims in the nonunion work force, where it is required by individual employment contracts or binding policy-manual provisions. Absent negotiation of a separate process to resolve individual statutorily based discrimination claims, arbitration will not be required within the organized work force, where the terms and conditions of employment result from collective bargaining and are memorialized in collective bargaining agreements.

Although no data support a secure prediction, sophisticated parties will probably experiment in the EEO area with negoti-

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[17]Conflicts will likely arise in the area of job assignment and compensation, among others.

[18]111 S.Ct. 1647, 55 FEP Cases 1116 (1991).

ated statutory dispute-resolution mechanisms which represent a hybrid of formal litigation and informal arbitration models. Some procedures will be negotiated for prehearing discovery, probably with limitations short of full-blown application of the FRCP. The hearing process will be somewhat formal, with the involvement of legal counsel, but with only limited application of the rules of evidence. The form of arbitration opinion will be somewhat formal and legalistic depending on the complexity of the issues, and the scope of remedies awarded by the arbitrator will be somewhat limited. Finally, this system will be invoked only upon the application of individual employee claimants, and an agreement will accompany its use indicating that this quick appeals process has been accepted by the employee, as well as the employer and the union (if one is involved), as a final and binding determination of the dispute.[19]

In *Gardner-Denver* in footnote 21, the Supreme Court set forth a number of factors which courts must consider in determining the weight to accord an arbitration award, including (1) the existence of provisions in the collective bargaining agreement which substantially conform with Title VII, (2) the degree of procedural fairness in the arbitral forum, (3) the adequacy of the record with respect to the issue of discrimination, and (4) the competence of the arbitrator.

Clearly, the likelihood that a reviewing court will grant great weight to the arbitral opinion and award, and that the award may even persuade the employee not to pursue collateral litigation, will depend in large measure upon the degree to which the record adequately presents the discrimination claim and the degree to which the opinion and award reflect analysis consistent with the judicial and other precedent under antidiscrimination statutes. If a significant record is presented on discrimination claims, therefore, the parties are better served by an arbitrator who employs the statutory burdens of proof and persuasion even if the parties do not reference the appropriate standards in their presentations. Arbitral decisions must be written with

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[19]Employers and unions might adopt such systems to obtain somewhat greater control over the means for resolving workplace discrimination claims than exist under a wholly external statutory system. Additionally, arbitrators hearing such cases, whose background includes traditional labor arbitration values, presumably would balance the impact of workplace disruptions and the impact on the individual somewhat differently from juries and judges hearing such matters. Claimants might agree to use such systems due to their relative speed and informality and the ability to pursue a claim without the cost and burden of retaining private legal counsel.

appropriate recognition of the burdens of proof and substantive standards contained in statutory precedent, and arbitrators must be somewhat more activist in the development of the factual record, to ensure that the grievant's right to redress against unlawful discrimination is adequately protected and resolved based on a full and fair record.

Fair Share Fees

The U.S. Supreme Court has recognized that the First Amendment of the Constitution protects the rights of members of collective bargaining units to be free from a legal obligation to contribute dues or its monetary equivalent to a labor organization when the monies in question are not sufficiently connected to the union's collective bargaining responsibilities. In a series of decisions arising in the public and private sectors, the Supreme Court has differentiated between union activities which are and are not chargeable to an objecting nonmember "fair share fee" payer.

In *Chicago Teachers Union v. Hudson*[20] the Supreme Court held that, in order to survive First Amendment scrutiny, the union bore the burden of proving that the proportion of dues charged to dissenting nonmembers met constitutional requirements, that adequate information supporting the proportionate share was provided to all nonmembers, and that a procedure was set up to ensure "a reasonably prompt decision by an impartial decisionmaker." The Court rejected the notion that ordinary judicial remedies allowed nonmembers to have their "objections addressed in an expeditious, fair, and objective manner," and found that ordinary judicial remedies did not provide the required speed.

Thereafter many unions adopted arbitration procedures for handling challenges to the fees charged nonmembers. The AAA promulgated Rules for Impartial Determination of Union Fees. Those rules provide for the appointment of an arbitrator by the AAA and for the full compensation of the arbitrator by the union. To a large degree, the rules mirror AAA Voluntary Labor Arbitration Rules. The process for handling these cases, however, differs significantly from ordinary labor arbitrations and presents many problems.

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[20]475 U.S. 292, 121 LRRM 2793 (1986).

First, the emotional level of animosity between the objectors and the union is often very high. Disputes arise regarding scheduling hearings. The objectors typically prefer that hearings be held outside working hours, thereby avoiding the loss of pay. The union typically requests that the hearings be held during normal working hours.

Second, the objectors may or may not be represented by counsel and may or may not receive legal assistance (e.g., from the National Right to Work Committee). Should the arbitrator assist in educating the objectors (e.g., by serving them copies of the controlling Supreme Court pronouncements), thereby encouraging them to withdraw clearly nonmeritorious challenges?

Third, many unrelated individual claims often are consolidated for hearing and determination. To whom should notices and information be provided? Is personal notice required if there are several hundred objectors in a consolidated statewide proceeding? Arbitral assistance to designate one or more members as representatives of the objector class for purposes of notice and to have a central location to docket information (e.g., the AAA office) will expedite the hearing process.

Fourth, a number of states have enacted fair-share fee statutes containing substantive and procedural requirements for fair-share fees of public employees. Some states distinguish between objections based on religious grounds and those based on other First Amendment rights.

In addition to the formidable logistical problems, many objectors fail to actively pursue their claims. Thus, the arbitrator must adjudicate "paper" constitutional challenges (which may or may not have been adequately articulated by the objectors) in the absence of an effective advocate to challenge the union's submission or to cross-examine the union witnesses. The question of whether, and to what degree, the arbitrator has an independent ethical responsibility to probe the union submissions is unclear.

To compound the procedural morass, there often are multiple levels of unions represented at the hearings, each with its own counsel, accountants, and experts. The validity of a proportional assessment by a local union depends upon proof as to the proportion of chargeable expenses at the state and/or national levels since a substantial portion of local union expenses often consists of per capita payments to state and national organizations.

If the objectors fail to identify with specificity particular charges in dispute, should the arbitrator exclude expense items deemed chargeable by the union but clearly not chargeable under constitutional law? Suppose that the objectors raise a blanket, nonspecific challenge to paying any monies not required by the Constitution and state law, and neither the objectors nor the union cite *Lehnert v. Ferris Faculty Association.*[21] If the chargeability determination and audit were accomplished prior to that decision, is the arbitrator obligated to apply it and, if so, should the impact of *Lehnert* be raised by the arbitrator at the hearing?

The case law imposes on the union the burden to establish the propriety of its chargeability determinations with "reasonable precision." Thus, the arbitrator must review reports generally prepared by certified public accountants specifically for this purpose. The appropriate backup information is also provided and scrutinized. Interesting questions of privilege may arise as to charges for litigation expenses. The allocation of salary and benefit expenses may have a major impact on the overall chargeability percentage and may require review of time records and testimony as to the responsibilities and activities of various union employees during the particular year under consideration. The fact that some individuals work for more than one organization (e.g., the local union and the state and/or national organizations) compounds these problems.

To date these cases have been relatively few and have involved predominantly the public sector. Like many other statutory cases, however, they require an independent and informed decisionmaker. The arbitrator cannot assume that the parties will competently present the relevant evidence and controlling statutory and case law. Since complex constitutional issues must be resolved, the arbitrator is responsible for obtaining the required legal knowledge prior to the hearing or at least prior to completing the decision.

NLRB Deferral

The presentation of NLRA claims in arbitration is not new. The current Board favors broad deferral of unfair labor practice (ULP) cases until the completion of the grievance and

[21] 111 S.Ct. 1950, 137 LRRM 2321 (1991).

arbitration processes even where the issue is limited to a contractual breach and the ULP claim will not be presented to the arbitrator for decision.[22]

Absent joint agreement to submit the ULP issue for arbitral resolution, the arbitrator's decisional responsibility is limited to the contract breach. Sometimes the parties jointly request at the outset of the hearing that the arbitrator decide the ULP issue. Whether or not this request is made, arbitration of the contract claim will be affected by NLRA case law. For example, discharge of a union official for participating in an alleged violation of the contractual no-strike clause can hardly be resolved without considering the criteria in the Supreme Court's *Metropolitan Edison*[23] decision.

If the parties do request the arbitrator to resolve the statutory claim, the conduct of the hearing as well as the opinion and award may be affected. Although the hearing is conducted in accordance with the labor arbitration rather than the NLRB model, adoption of different standards for analysis of the NLRA issue or rejection of the Board's approach as to remedies may result in the Board's refusal to defer to the arbitral award.

In NLRA cases arbitrators must write fuller opinions, analyzing Board and court decisions, to ensure that the process fairly adjudicates the statutory claim, is final and binding, and can withstand NLRB review. In cases involving jurisdictional disputes or questions concerning representation, the need to apply Board case law is particularly acute. In jurisdictional disputes section 10(k) proceedings are often occurring at the same time

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[22]In *United Technologies Corp.*, 268 NLRB 557, 115 LRRM 1049 (1984), the Board enunciated a broad policy of deferring ULP claims pending exhaustion of negotiated grievance and arbitration procedures. In *Olin Corp.*, 268 NLRB 573, 115 LRRM 1056 (1984), issued on the same date, the Board clarified its standards in such deferrals, stating that an arbitrator would adequately resolve the ULP where the contractual issue is factually parallel to the ULP and these facts are considered in resolving the ULP. Any differences between contractual and statutory standards would be examined by the Board to be sure that the award was not "clearly repugnant to the Act"—the standard for deferral enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152 (1955). In *United Technologies* the Board also made clear that the party seeking to avoid deferral had the burden of proving that such action was appropriate, that the arbitration opinion need not be "totally consistent" with Board precedent, and that unless the decision "is not susceptible to an interpretation consistent with the Act" it would not be deemed "palpably wrong" and deferral would occur.

[23]In *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 112 LRRM 3265 (1983), the Supreme Court held that, absent a contractual provision which clearly and unequivocably imposed greater obligations upon union officials and waived their statutory rights to receive nondiscriminatory treatment, it was a violation of §8(a)(3) of the Act to discipline a union official who had participated in an unauthorized work stoppage more severely than rank and file employees engaging in similar conduct.

as the arbitration. Following issuance of the Board's decision, arbitrators may be required to accord collateral estoppel effect to the Board's findings as to the contractual rights of the respective parties to perform the disputed work.

Conclusion

The role of the arbitrator in statutory disputes differs in significant ways from that in contract disputes. In the latter case, the arbitrator has responsibility for enforcing the terms of the parties' private bargain and is the creature of the collective bargaining process. However, the arbitrator who is required, either by agreement of the parties or as a result of external mandate, to resolve a question of public law violation assumes additional decisional and ethical obligations. These disputes may require the arbitrator to go beyond the traditional limits of the collective bargaining process. Although labor arbitrators are sympathetic to the goals of minimizing disruption in the workplace and of protecting the collective bargaining process to a greater degree than judges and administrative agencies, these sympathies have clear limits and must not compromise the obligation to decide statutory issues fairly in a manner consistent with applicable legal precedent.

Arbitrators who decide statutory cases preside over processes more complex and more legally oriented than labor arbitrations involving pure contract disputes. In some statutory arbitrations the greater degree of legal formalism results from statutory mandate. In other cases increased formalism is due to the actions both of the parties and of arbitrators, who believe that formalism enhances the fairness and finality of the process and makes more manageable the development of the evidentiary record and the decisionmaking process.

With the delays in court dockets ever more severe, with litigation costs spiraling out of control, and with the resolution of many employment disputes requiring ever-greater specialized legal expertise, many more statutory employment issues will be arbitrated in both union and nonunion sectors. The parties may establish innovative statutory grievance and arbitration procedures, independent of the traditional collective bargaining models, with different hearing procedures, greater individual employee involvement, and potentially different arbitrators. This will result in better handling of complex cases in a more

formalistic process without losing the speed and informality needed for the prompt resolution of contractually based workplace disputes.

The truly difficult question is not whether the arbitrator must assume a more legalistic, independent, and activist role, but to what degree this is appropriate. The resolution of these questions depends upon a variety of factors, including, but not limited to, the personal style of the arbitrator, the degree to which the advocates have competently presented the relevant factual and legal materials, external directives of case law or internal directives of the agreement to arbitrate, and the nature of the particular factual and legal issues in dispute.

MANAGEMENT PERSPECTIVE

JACOB P. HART*

Ira Jaffe's basic thesis is that arbitrators in cases involving statutory issues should generally be more proactive than in cases involving only the interpretation of collective bargaining agreements. He tests his thesis by examining several types of cases where the arbitrator must at least consider, if not actually decide, statutory issues. In each case Jaffe concludes that his thesis is correct.

While I generally support Jaffe's thesis, as well as his thoughtful analysis, the strength of my support is not uniform. Unlike Jaffe I draw a distinction between the need for a proactive arbitrator in cases actually arising under statutes, such as the Multi-Employer Pension Plan Amendments Act (MEPPAA) and section 302(c)(5) of the Taft-Hartley Act, and cases where statutory issues are present in otherwise ordinary contract disputes. In the latter type of case, such as a discharge where the union raises an issue of sex discrimination, I still prefer a "John Wayne" style arbitrator: strong and silent.

Since my labor practice is concentrated in the private sector and involves only the representation of management, I do not feel qualified to comment on Jaffe's handling of civil service cases or union fair share fee disputes. Therefore, I have confined my analysis to the other three areas he discusses—

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