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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employee benefit claims, discrimination cases, and National Labor Relations Act (NLRA) claims.

Fundamental Differences Between Arbitration and Court Cases

At the outset, I believe there are fundamental differences between grievance arbitration and arbitration pursuant to statute. Since these differences, for the most part, track the differences between grievance arbitration and ordinary court litigation, my analysis begins with some general observations on these two forums.

When two parties meet in court, it is unlikely they will ever meet again. The litigation process is painfully slow, unconscionably expensive, and almost always resolved by settlement. Furthermore, what brings the parties together in the first place is usually just an issue of money.

The outcome of a civil trial depends, in large measure, on the application of legal principles derived either from statutory language or prior cases (precedents) involving other parties from other times. The system not only permits, but seems almost to encourage, appellate review of legal interpretations, procedural rulings, and even, at times, factual findings of either judge or jury. Finally, if the litigation ultimately produces an incorrect result despite all of the built-in levels of review, the long-term effects of that result are less likely to be felt by the litigants themselves—who go their separate ways—than by future parties who do not yet even realize that someday their paths will cross.

Not a single one of these observations applies to grievance arbitration under a collective bargaining agreement. In fact, on each point, the exact opposite is usually true. Perhaps the most fundamental difference is the relationship between the adversaries. If litigation resembles a war between nations, arbitration is more like a family feud. Far from being strangers temporarily drawn together by a commercial dispute or a chance occurrence such as an automobile accident, a company and union in an arbitration are linked even closer than next-door neighbors. They are cohabitants under the same roof.

Next there is the forum itself. With no formal pleadings, little if any discovery, and few cases lasting longer than a day, grievance arbitration is designed to be quick and cheap. Settlements

are more the exception than the rule. Indeed, I have handled cases where my client is actually less interested in the outcome of the case than in the "political" need to have the dispute resolved by a third party as opposed to settled by internal compromise. Such motivation would be unheard of in civil litigation.

Particularly in discipline cases, grievances seldom get to arbitration solely because the parties cannot agree on how much money the case is worth. It is principle—real or imagined—that drives most of these cases; for the cost of the arbitration, especially if there are posthearing briefs, inevitably exceeds the amount that the typical grievant would take in exchange for resignation. Yet, what management labor lawyer has not heard this anguished cry? "If that so and so is reinstated, we might as well just turn the factory over to the union."

Unlike court cases, grievance arbitrations are seldom decided by external precedent. The "law of the shop," the past practice of the parties, the contract negotiation history—much more often these are the outcome-determining factors, not how an arbitrator ruled in a prior case with different parties and a different contract. Certainly there are generally accepted legal principles in arbitration; but, as any lawyer knows who has ever searched Labor Arbitration Reports (LA) or Elkouri[1] for arbitral precedents, cases "directly on point" are devilishly elusive. There are just too many contract nuances, too many unique fact patterns, and too many different factory cultures.

Finally, there are the related issues of finality and long-term effect. Like a diamond, a bad arbitration is forever. Since the famous 1960 *Steelworkers Trilogy*,[2] the courts have constantly reminded us that arbitrators are private judges. We "bought" them. We are "stuck" with them. They are not to be reversed for errors of fact, for errors of law, and certainly not for errors of judgment. As a result, any arbitrator who does not realize that interpretation of a hotly disputed contract clause or treatment of a terminated employee will often have a profound and long-lasting effect on company-union relations simply does not belong in this business.

I believe that the combined effect of these sharp differences between court cases and grievance arbitration supports the con-

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[1]Elkouri and Elkouri, How Arbitration Works, 4th ed. (BNA Books, 1985).

[2]*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

clusion that a labor arbitrator should be less proactive than a trial judge and more conscious of deciding only the specific issue involved.

Consider how little an arbitrator often knows about a case before the day of the hearing. Unlike the typical trial judge who, by the day of trial, has already held pretrial conferences and settlement conferences, ruled on discovery disputes, decided motions, and generally is familiar with the case, the arbitrator may not even know the issue, much less the disputed facts, until moments before the first witness takes the stand. For this arbitrator to raise issues, *sua sponte*, during the hearing, or to supplement counsels' questioning of witnesses, is to invite disaster. The arbitrator has no way of knowing why certain questions weren't asked by the litigants or why certain contract clauses were not cited. Like the listener who turns on the radio in the middle of a symphony, the arbitrator often hears only a single "movement" of a dispute, not the entire piece.

I therefore believe that an arbitrator, hired for a limited and specific purpose, should take on faith that if counsel chooses not to enter an area that seems relevant, there is good reason for that decision. The arbitrator, too, should leave the area alone. The reason is that, unlike the trial judge, there is no risk of reversal for the arbitrator, and the decision will not likely have any effect outside the walls of the company. However, by yielding to intellectual curiosity, the arbitrator may unwittingly write a decision that creates more problems than it solves, even though it may be a fine piece of judicial scholarship.

Take, for example, a hypothetical case involving interpretation of a bargaining unit work clause. The contract provides that "routine maintenance and repair of equipment must be performed by bargaining unit employees." A dispute arises when the company hires an outside contractor to replace a defective and outdated mechanical counting device with a new electronic scanner. The issue before the arbitrator is whether the subcontracted job constitutes "routine maintenance and repair of equipment."

As the case unfolds, it seems clear that both sides are focusing only on the question of whether the disputed task is "routine." The arbitrator thinks this odd, because there seems to be a threshold question of whether the subcontracted work constitutes "maintenance and repair" in the first place. The arbitrator begins to question the witnesses on this point. Unbe-

knownst to both the arbitrator and the union, however, management is contemplating a major upgrade of its Number 1 production line for the next quarter. It plans to subcontract the entire project and is prepared to defend any grievance on the ground that completely replacing old equipment is not "maintenance and repair."

When the arbitrator sits down to write the opinion, the decision is to deny the grievance. As a service to the parties, however, the entire clause is parsed, and the arbitrator gratuitously holds that "maintenance and repair" should be broadly interpreted to include any normal replacement of worn-out equipment. The grievance is denied on the ground that because new technology is involved, replacing a mechanical counter with a digital scanner is not "routine." Without even realizing it, the arbitrator has decided not only this case but the next, much more important case as well. What is even worse, the decision has left both sides unhappy.

Statutory Issues and Pro-active Conduct by the Arbitrator

I turn now to the basic question at hand. To what extent should my fundamental preference for nonproactive grievance arbitrators change in cases where statutory issues are present? I believe the answer to this question is directly related to how much, if at all, the injection of statutory issues into arbitration alters the fundamental distinction between arbitration and court litigation.

MEPPAA Arbitrations

The role of the MEPPAA arbitrator is almost exactly the same as that of a trial judge, and these cases present the least need for arbitral conservatism for the following reasons:

1. Arbitration is mandated by statute, not selected voluntarily by the parties.
2. The parties—a multiemployer pension plan and an alleged withdrawn employer—much more closely resemble ordinary parties to commercial litigation. There is no ongoing relationship. On the contrary, the dispute itself is triggered by the severing of a relationship.

3. The issues, like the procedure, are all statutory, resulting in much greater reliance by the parties on general rules of statutory construction as well as reported arbitral and judicial precedent.
4. What is at stake is not an issue of principle; it is an issue of money—often a very large sum of money.
5. The arbitrator seldom starts the hearing in a vacuum. There has usually been discovery, pretrial rulings, and a stipulation of issues.
6. The arbitration proceeding will probably not be the end of the case. MEPPAA permits appeals to both district and circuit courts. Even though the statute gives a presumption of correctness to the arbitrator's decision, the large amounts usually at issue make appeals inevitable in most cases.

All of these points suggest that it is appropriate for the MEPPAA arbitrator to take a more active role in the case than should normally be taken in a simple contract grievance. The MEPPAA arbitrator often is making law for the public and is clearly subject to judicial review. There is also the fiduciary nature of the arbitrator's function. Since the ruling will definitely alter the financial condition of the plan, most MEPPAA arbitrators believe that they are fiduciaries within the meaning of the Employee Retirement Income Security Act (ERISA). Such a belief naturally makes them reluctant to sit by quietly while the litigants ignore important issues or arguments.

As a practical matter, of course, this fiduciary status carries little real risk. If the arbitrator upholds the assessment of withdrawal liability, there can be no breach of fiduciary duty, since the plan has been financially enriched. Moreover, if the plan's claim is denied, the trustees will almost certainly appeal, if only out of their own sense of fiduciary duty. Should the arbitrator be affirmed by the court, it would be hard to imagine a successful argument that the denial of liability was a fiduciary breach. If the arbitrator is reversed, the plan wins after all.

LMRA Section 302(c)(5) Cases

Arbitration under section 302(c)(5) of the Taft-Hartley Act likewise more closely resembles a court trial than a true grievance matter because it is statutorily required in order to break trustee deadlocks. As under MEPPAA, the arbitration result will

often turn on external precedent and be subject to judicial review. It is true that the parties, almost always management-appointed versus labor-appointed trustees, do have an ongoing relationship. However, unlike the parties to a collective bargaining agreement, resort to arbitration by Taft-Hartley plan trustees is usually a very rare occurrence. There is, therefore, little likelihood of the arbitrator's decision unwittingly impacting disputes not involved.

One very real need for proactive arbitration of section 302(c)(5) deadlocks is the need for the arbitrator to conform the decision not only to the plan document and the trust agreement, but to ERISA as well. A classic example of this problem occurred in *Cutaiar v. Marshall.*[3] After the trustees of the Philadelphia Teamsters Pension Trust Fund deadlocked over whether to loan money to a sister health and welfare fund, the matter proceeded to arbitration before the late Herman Stern, law professor at Temple University. Stern upheld the loan on the basis of the plan and trust documents. He found nothing in ERISA that prohibited it. The trustees then made the loan, only to receive an opinion letter from the U.S. Department of Labor that the loan was a prohibited transaction under ERISA, notwithstanding Stern's award. The Third Circuit ultimately upheld the Department's position, teaching a valuable lesson to future 302(c)(5) arbitrators concerning the need to explore statutory issues as fully as possible.

Arbitration under section 302(c)(5) presents an ideal forum for the arbitrator to act as mediator. In the typical grievance arbitration I do not need or want the arbitrator to engage the parties in lengthy, pressure-filled settlement discussions. By the time most grievances reach arbitration, attempts at settlement have already failed. The parties are ready for a judge, not a compromiser. By contrast, Taft-Hartley trustees are not supposed to be adversaries in the first place. They are supposed to be all pulling the oars in the same direction—acting solely and exclusively in the interests of the participants and beneficiaries.[4] For that reason, I believe it is perfectly appropriate for the arbitrator to help the trustees reach agreement without litigation if at all possible. Indeed, as Jaffe points out in his paper, given the ERISA implications of trustee deadlocks, proactive settle-

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[3]590 F.2d 523 (3d Cir. 1979).
[4]*See NLRB v. Amax Coal Co.*, 453 U.S. 322, 107 LRRM 2769 (1981).

ment attempts by the arbitrator may prevent one side or the other from having to articulate positions "on the record" that may ultimately be held unlawful.

Other Statutory Issues

In contrast to arbitrations arising entirely under statute, I see no reason for a grievance arbitrator to become more proactive in a basic contract dispute merely because an issue appears to involve interpretation of external law. The case remains a dispute between two parties under a privately negotiated collective bargaining agreement. The fact that the grievant in a discipline case, for example, may be a protected minority, who can get a second bite of the apple before some agency, should make no difference. The arbitrator has been hired to adjudicate a private dispute between the employer and the union, and should therefore react only to what the parties voluntarily present at the hearing.

As a practical matter, it is almost inconceivable in today's workplace that either party to a collective bargaining agreement would attempt, for example, to defend a discriminatory seniority system on the ground that the contract does not prohibit such a practice. The same can probably be said for any employment practice that is patently unlawful. Therefore, it should not matter very much whether the contract does or does not contain a "no-discrimination" clause.

Similarly, in a mixed-motive situation, how likely is it that a union will fail to argue discrimination, if the grievant is a protected minority and there exists any basis for arguing that the employer's action was motivated by that minority status? It is probably a very fair assumption that, if the union or the grievant does not raise this issue, then the parties themselves do not believe it is part of the case. Contract clause or not, this is just common sense.

The same, I believe, can be said for other potential statutory defenses or attacks. If the union chooses not to argue that a particular work procedure is unsafe, why should the arbitrator inject the Occupational Safety and Health Act (OSHA) into the case? So also with potential arguments that grieved conduct violates the Americans with Disabilities Act (ADA) or the Fair Labor Standards Act (FLSA), or for that matter any statute that regulates employer conduct. If the parties want a private

arbitrator's interpretation of the law, let them ask for it by raising the issue themselves. Otherwise, as with any other grievance, the arbitrator should confine the matter to the issues submitted.

I realize that a grievant has rights, even if the union fails to assert them. I simply disagree with Jaffe over whether it is appropriate for the arbitrator to become the champion of those rights. A contract arbitration is a proceeding between the employer and the union. The union is the grievant's "exclusive bargaining agent." Regardless of what the arbitrator would like to say at the hearing or to write in the decision, it is the union's responsibility to decide what arguments to raise, and the grievant decides whether further proceedings are warranted after the arbitrator has considered the union's arguments.

Of course, if the parties themselves raise collateral statutory issues, then I agree with Jaffe completely that the arbitrator should resolve those issues as much as possible like a state or federal judge. It is entirely appropriate in such cases to apply statutory presumptions and burdens of proof. Furthermore, the arbitrator's research should not be limited to what the parties submit in posthearing briefs. This is particularly true if uncited precedents are important to a proper outcome. In addition, a higher standard of care by the arbitrator obviously increases the likelihood of deferral by a subsequent agency or court.

NLRB Deferral Cases

There is one type of grievance arbitration where I do want the arbitrator to consider an issue, whether or not it is raised by the union on behalf of the grievant. These are cases where an unfair labor practice charge (ULP) has been filed over the same issue and the regional office of the NLRB has deferred processing the charge pursuant to *Collyer Insulated Wire*[5] and *United Technologies Corp.*[6]

The Board will *Collyerize* a case only if the employer agrees to waive any procedural defenses to arbitration, such as timeliness, and to allow the case to be heard promptly on its merits. For this reason, an employer who could raise such defenses successfully has no incentive to waive them unless it can be sure that the resulting arbitrator's award will be accepted by the Board as

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[5]192 NLRB 837, 77 LRRM 1931 (1971).
[6]268 NLRB 557, 115 LRRM 1049 (1984).

dispositive of the ULP. This, however, requires that the award conform to the requirements of *Spielberg Mfg. Co.*[7] and *Olin Corp.*[8] These requirements include, *inter alia*, (1) an arbitration whose procedures are fair and regular, (2) an award that is not repugnant to the purposes and policies of the NLRA (i.e., not palpably wrong even if the NLRB might have decided the case differently), and (3) a showing that the arbitrator was presented generally with facts relevant to the statutory issue.

In order to make certain that the *Spielberg* requirements are met, I take great care that the arbitrator knows this is a deferral case. In fact, in the unlikely event the union does not raise the ULP issues, I invite the arbitrator to hear testimony on these issues, even though I am making arguments (then rebutting them) that my opponent should be making! To complete the circle, my posthearing brief always includes a section on the ULP issue, complete with citations to Board cases.

Unfortunately, all of this will be for naught if the arbitrator's opinion does not demonstrate that the ULP issues have been considered and decided in a manner not "repugnant" to the Act. In my experience, however, most arbitrators fully understand the laws of deferral and are anxious to help the parties comply with them.

Conclusion

At the 29th Annual Meeting of this Academy in 1976, Professor David Feller, in a paper entitled "The Coming End of Arbitration's Golden Age,"[9] lamented the increasing willingness of courts and agencies to intrude upon and second-guess private-sector labor arbitrators. Like Jaffe, Feller recognized that the traditional "law of the shop" was being steadily eroded by legislated employee rights, both substantive and procedural.

Unlike Feller, however, Jaffe does not see the increased "legalization" of the employer-employee relationship as signaling the end of an era. He offers, instead, a practical set of guidelines for arbitrators who must decide statutory issues as well as traditional grievances. While I do not agree with all of his views, I assuredly

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[7]112 NLRB 1080, 36 LRRM 1152 (1955).
[8]268 NLRB 573, 115 LRRM 1056 (1984).
[9]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1976), 97.

share Jaffe's conclusion. It is critical to the stability of employer-employee relations that arbitration remain a viable, cost-effective alternative to protracted court litigation, even if this occasionally requires increased formalization of the process to accommodate the rapidly expanding body of employment law.

THE AUTHORITY'S PERSPECTIVE

JEAN MCKEE*

It would be presumptuous of me to claim expertise in all the statutory issues raised by Ira Jaffe. Unlike you I am not an arbitrator. However, like you I am a neutral. With 22 years in the federal government, and now as Chairman of the Federal Labor Relations Authority (FLRA), I do feel qualified to comment concerning federal-sector labor issues.

At the Authority we are aware of the need to change. As Academy President Tony Sinicropi stated, this need is directly related to changes in labor relations due to outside forces which alter the relationships between the parties. In the federal sector such forces include, for example, the recent cuts in the defense budget which are leading to layoffs of civilian employees, downsizing of many units, and consolidation of units represented by different unions.

As a result of changes in the labor relations climate, the Authority has begun a comprehensive review of the federal-sector labor-management relations program with the goal of improving our procedures. Similarly, the time has come for arbitrators to begin a review of their role in the federal sector. The time has come to discuss the need to look differently at federal-sector arbitration.

The arbitration process is one of our concerns because arbitration exceptions represent the highest number of cases for review by our three Presidentially appointed members. Currently we have a case inventory of 200, and a high share of that number consists of arbitration cases.[1]

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[1]During fiscal year 1991, the Authority received 268 exceptions to arbitration awards, 213 unfair labor practice complaints, 196 negotiability appeals, and 28 representation cases. During the same period 7,327 unfair labor practice charges were received by the Office of the General Counsel.