CHAPTER 7

FUNCTUS OFFICIO UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY: THE ETHICS OF STAYING WRONG

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I rise, Mr. Chairman, to challenge a cherished article of faith of this organization. Section 6(D)(1) of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, proclaimed by the Academy, the American Arbitration Association, and the Federal Mediation and Conciliation Service, provides that without the consent of both parties "no clarification or interpretation of an award is permissible" for an arbitrator. You have been told some time ago that "the time-honored doctrine of functus officio is a rule of law, of prudence, of loyalty, and of ethics."[1] In my view, that claim is extravagant to the point of fatuity. Whether a particular award of a modern-day labor arbitrator requires clarification or interpretation, and if so, who has primary responsibility for doing the job are not issues, I think, for a moral philosopher. Professional ethics have nothing to do with the case. My simple thesis is that the arbitrator who responsibly faces up to these issues and deals with them should not be branded a moral leper, unfit for the polite society of this distinguished—and for me—unexpectedly hospitable assembly. I urge deletion of this provision from the Code.

It is true that the doctrine of functus officio is old, but, if anything, time has rather dishonored it. Clothed in a Roman toga, it denotes a task or office performed. It traces back more than 700 years to the reign of Edward I. In those gamy days judges had gotten into the habit of altering records to conceal their own misbehavior, so the king declared in 1285 that:

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[1]Nolan, *Discussion: The Code and Postaward Arbitral Discretion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 137.

> [A]lthough we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may rase their rolls, nor amend them contrary to their original enrollment.[2]

After returning from his French dominions a few years later, the exertions of this British monarch in laying down many of the foundations of the common law left him short of cash. One of his budget-balancing solutions was to levy enormous fines on his judges if they erased, modified, or tampered with their records. The reason was not derived from the Nichomachean Ethics but simply because the king said so.

Those of you who keep Blackstone's Commentaries on your nightstands will recall that that learned commentator explained that the royal decree was taken to mean that "a record surreptitiously or erroneously made up, to stifle or pervert the truth, should not be a sanction for error; and that a record, originally made up according to the truth of the case, should not afterwards by any private rasure or amendment be altered to any sinister purpose."[3] The severe fines, Blackstone observed about 480 years after Edward, "seem to have alarmed the succeeding judges, that through a fear of being said to do wrong, they hesitated at what was right."[4] "As it was hazardous to alter a record duly made up, even from compassionate motives, . . . they resolved not to touch a record any more, but held that even palpable errors, when enrolled and the term at an end, were too sacred to be rectified or called in question" and because the king had forbidden "all criminal and clandestine alterations, to make a record speak a falsity, they conceived that they might not judicially and publicly amend it, to make it agreeable to truth."[5]

Blackstone goes on to recount how in succeeding centuries this sullen timidity of the judges led to refusal to amend even the most palpable errors and misentries. An almost religious observance of these precedents led to the "great obstruction of justice and ruin of the suitors who suffered as much by this scrupulous obstinacy and literal strictness of the courts, as they could have done even by their iniquity."[6] This medieval pathology, wittingly or unwittingly, is now reflected in section 6(D)(1) of the Code.

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[2]*See* 3 Blackstone, Commentaries 409 (1765), referring to 13 Edw. I.
[3]*Id.* at 409.
[4]*Id.* at 410.
[5]*Id.*
[6]*Id.* at 411.

It took centuries to liberate the courts from such talismanic ritualism. Modern procedural systems not only permit courts to order new trials but to alter or amend judgments and to remedy clerical mistakes of judges, their clerks, or other personnel. Motions for rehearing or reconsideration are commonplace. Rule 60(b) of the Federal Rules of Civil Procedure, for example, authorizes a court, on motion of a party made within a reasonable time and not more than one year, to undo a judgment made by mistake, inadvertence, various specified reasons, or for "any other reason justifying relief from the operation of the judgment." Of course, courts still deny such relief for lack of merit, fault on the part of the moving party, lack of timeliness, or for many other reasons; they do not refuse to act because revising a document is thought to be beyond their powers or unethical or a breach in the Ark of the Covenant.

Arbitration has walked lamely and haltingly along the same path. Originally, of course, the entire process was disdained as mere attempted usurpation of the jurisdiction of judges. Agreements to arbitrate were not enforced. Later, arbitration became recognized, but only with a jaundiced eye. Judges who were themselves fettered by functus officio doctrine were not likely to be more indulgent of umpires and arbitrators. Third parties asked to resolve disputes were still told that once an award was issued, they were powerless to change a jot or tittle. The moving finger having writ, neither impiety nor wit was permitted to cancel half a line or wipe out a word of it.

In the last few decades, however, there has been a sea-change. Arbitration of both labor disputes and nonlabor disputes is not only countenanced sympathetically but actively encouraged. Courts are anxious to pare their dockets by sending or tempting potential litigants to what we now call alternative dispute resolution. Parties are told that they cannot complain even if awards are riddled with errors of fact and law since they voluntarily agreed to be bound by the decisions of the arbitrators they selected. The old common law rule that the courts could not recommit a deficient award to the arbitrator has been turned on its head. The courts, whether they invoke the Federal Arbitration Act, passed in 1925,[7] the Uniform Arbitration Act adopted

[7] 9 U.S.C. §1 *et seq.*

by many states,[8] or the Labor Management Relations Act,[9] now declare that if an award of an arbitrator is ambiguous or contains mistakes or does not dispose completely of the issue submitted, they will not presume to reform the award but will return it to the arbitrator for appropriate remediation. The original empowerment by agreement of both parties is thought sufficient basis for the arbitrator to act anew. Even though one party is content with the award, mistakes and all, and resists any change, that party's consent is no longer necessary and the arbitrator is expected to proceed regardless. The reviewing court in effect makes a new contract for the parties to submit the unresolved issues to arbitration before the former arbitrator or a new one. Arbitrators who have done their duty and are ethically foreclosed by the Code from doing anything more are nonetheless expected to comply with a directed remand in a proceeding in which they were not a party and of whose very existence they may have been unaware.

The arbitrator, though functus officio, is then faced with sturdily adhering to the professional strictures of the Code or bowing to the legally questionable direction of the reviewing court. I have discovered no instance where the court's commission was refused. Despite qualms about grasping for business, arbitral overreach, and charging the parties for errors which may not be their own, even fastidious members of the Academy are apparently able to resume their duties under the benign shelter of external law. This accommodation does not, it seems, preclude attendance at annual meetings where functus officio is enthusiastically welcomed as protection from moral stain.

Even without any statutory authority, the modern common law takes a more relaxed view than the Academy. Twenty-five years ago in *La Vale Plaza, Inc. v. R. S. Noonan, Inc.*,[10] the Court of Appeals for the Third Circuit, applying the common law of Pennsylvania to a dispute about a construction contract, declared that the principle that an award once rendered is final "contains its own limitations." It has been recognized, the court observed:

> [T]hat the arbitrator can correct a mistake which is apparent on the face of his award. Similarly, where the award does not adjudicate an

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[8]*See* 27 LA 909 *et seq.*
[9]29 U.S.C. §185 (1947).
[10]378 F.2d 569 (3d Cir. 1967).

> issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination. In such a case the arbitrator is not exposed to any greater risk of impropriety than would normally exist during the pendency of the arbitration proceedings, a risk which is inherent in the submission of disputes to nonjudicial determination.[11]

The court referred to a 1908 case in Pennsylvania where an award was incomplete and was set aside, whereupon the arbitrator completed his award, which was again challenged by one of the parties. The Pennsylvania Supreme Court confirmed the award, saying:

> . . . The rule undoubtedly is that, when an arbitrator has made and delivered his award, the special power conferred upon him ends. But an award must be final, complete, and coextensive with the terms of the submission. The arbitrator, through mistake, failed to consider and decide a part of the dispute submitted to him, and the award was invalid because incomplete. But the agreement was still in force, and it was competent for the arbitrator to finish his work by making a full and complete award.* * *[12]

As I read the Code, a labor arbitrator in the eyes of the Academy does not have as much freedom to correct errors or deficiencies in the award as a commercial arbitrator in Pennsylvania has enjoyed since 1908. Ironically, an organization wary of creeping legalism has thus seen fit to impale the arbitration process on a dogma of 13th-century English common law. In the *Enterprise Wheel and Car* case, which became a linchpin of the *Trilogy*, the arbitrator had directed reinstatement but had not fixed the amount of back pay to which the grievants were entitled. It was urged that the award was unenforceable because it was incomplete. The Fourth Circuit Court of Appeals[13] found that the old rule that the award could not be resubmitted to the arbitrator for correction or amendment was developed when the courts looked with disfavor upon arbitration proceedings and should not be applied under the federal substantive law which courts were directed to fashion by *Lincoln Mills*.[14] The Court directed the parties to take steps to have the arbitrator ascertain the amounts due each grievant. As Professor Rehmus pointed

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[11] *Id.* at 573.
[12] *Frederick v. Margworth*, 221 Pa. 418, 70 A. 797 (1908).
[13] *Enterprise Wheel & Car Corp. v. Steelworkers*, 269 F.2d 327, 332, 44 LRRM 2349 (4th Cir. 1959).
[14] *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456–57, 40 LRRM 2113 (1957).

out in his discussion of these issues in 1989,[15] the Supreme Court on review agreed that "the amounts due the employees may be definitively determined in arbitration."[16]

Remand to the arbitrator to perform unfinished business is the procedure that has been overwhelmingly accepted in the federal courts. In *International Association of Machinists v. Crown Cork and Seal Company,*[17] the Third Circuit, in obedience to *Enterprise Wheel,* remanded to the arbitrator who had not passed on the "damages question" after finding a breach of contract. In *United Steelworkers of America, AFL-CIO v. Timken Roller Bearing Company,*[18] the remand to the original arbitrator by the Sixth Circuit was to clarify the "meaning and scope" of the award. In *Hanford Atomic Metal Trades Council v. General Electric Co.,*[19] where it was not clear what the three arbitrators "fully intended" when they sustained a grievance, the remand by the Ninth Circuit to the arbitrators was so that the dispute could be completely resolved.

A dozen years ago the First Circuit was able to declare that it was "firmly established within the federal labor law" that a district court may "resubmit an existing arbitration award . . . to the original arbitrators for 'interpretation' or 'amplification,'" quite irrespective of statute or any contractual provisions.[20] "Where the arbitrator did not decide the question presented to him," it is appropriate to remand "to avoid the draconian choice of penalizing either the company or the employee for what is, after all, the arbitrator's failure," the Sixth Circuit declared in *Grand Rapids Die Casting Corporation v. Local Union No. 159, UAW.*[21] In *United Steelworkers of America, AFL-CIO-CLC v. W.C. Bradley Co.,*[22] the arbitrator directed reinstatement with uncertain seniority and to the extent work was available; the Fifth Circuit noted that neither of these questions would likely have reached the court had the parties notified the arbitrator of all the facts; to

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[15]Rehmus, *The Code and Postaward Arbitral Discretion,* in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 127, 130.

[16]*Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599, 46 LRRM 2423 (1960).

[17]300 F.2d 127, 49 LRRM 3043 (3d Cir. 1962).

[18]324 F.2d 738, 741, 54 LRRM 2701 (6th Cir. 1963).

[19]353 F.2d 302, 307, 61 LRRM 2004 (9th Cir. 1965).

[20]*Electrical Workers (IBEW) Local 2222 v. New England Tel. & Tel. Co.,* 628 F.2d 644, 647, 103 LRRM 2864 (1st Cir. 1980).

[21]684 F.2d 413, 416, 111 LRRM 2137 (6th Cir. 1982).

[22]551 F.2d 72, 73, 95 LRRM 2177 (5th Cir. 1977).

afford the parties the benefits of the arbitrator's bargained-for judgment, the case was remanded to him. Where the award was found by the district court to be contradictory with respect to certain calibration tests, the Second Circuit indicated that with this finding the court was then bound to commit the matter to further arbitration either before the original arbitrator, a new arbitrator selected by the parties, or, if they cannot agree, by an arbitrator appointed by the district court.[23]

If the remand is to the original arbitrator, it can plausibly be claimed that his original empowerment by the parties was to render a full and complete award. That was what was intended and the arbitrator is simply afforded opportunity to complete the work. When another arbitrator is asked to finish the job, logic would dictate that a new grievance must be filed, that time limits must be waived, that all the steps of the grievance procedure prior to arbitration must be exhausted, and that both parties—despite the chronic intransigence of one—must agree to submit the matter to arbitration. That, however, is not the way it works. Courts are impatient with such ritualism.[24] With a wave of the judicial wand, a new arbitrator is not only permitted but expected to finish the job.

To this end, functus officio and the scruples of the Code have simply fallen by the wayside. In the words of the First Circuit in *Courier-Citizen Company v. Boston Electrotypers Union No. 11, International Printing & Graphic Communications Union of North America*:[25]

> In fashioning a substantive law of labor relations pursuant to section 301 of the Labor Management Relations Act . . . the federal courts have refused to apply the strict common law rule of *functus officio*.

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[23]*Bell Aerospace Co. Div. v. Auto Workers Local 516*, 500 F.2d 921, 925, 86 LRRM 3240 (2d Cir. 1974). *See, to similar effect, Sheet Metal & Air Conditioning Contractors Ass'n v. Sheet Metal Workers Local 17*, 619 F. Supp. 1073, 1082 (D. Mass. 1985); *Teamsters Local 618 v. Sears, Roebuck & Co.*, 581 F. Supp. 672, 676 (E.D. Mo. 1984); *Painters Local 1179 v. Welco Mfg. Co.*, 472 F. Supp. 1207, 1211 (W.D. Mo. 1979); *Steelworkers v. Interspace Corp.*, 477 F. Supp. 387, 391, 97 LRRM 3189 (W.D. Pa. 1978); *Teamsters Local 25 v. Penn Transp. Corp.*, 359 F. Supp. 344, 350, 83 LRRM 2537 (D. Mass. 1973); *Electrical Workers (IBEW) Local 494 v. Brewery Proprietors*, 289 F. Supp. 865, 870, 69 LRRM 2292 (E.D. Wis. 1968). An illuminating discussion is in Werner & Holtzman, *Clarification of Arbitration Awards*, 3 Lab. Law. 183 (1987), and *see* Annotation, *Re-Exhaustion of Arbitration Procedure as Appropriate Course for Resolving Backpay Issues Arising as a Result of Resolution of Grievance*, 59 A.L.R. Fed. 501 (1982).

[24]*See, e.g., Electrical Workers (IBEW) Local 2222 v. New England Tel. & Tel. Co.*, *supra* note 20, 649; *Beer, Soft Drinks, Water, Carbonic Gas & Liquor Sales Drivers v. Vierk Corp.*, 549 F. Supp. 393, 398 (N.D. Ill. 1982).

[25]702 F.2d 273, 279, 112 LRRM 3122 (1st Cir. 1983).

Again in 1987 the Court declared in *Red Star Express Lines v. International Brotherhood of Teamsters, Local 170*:[26]

> [T]he application of *functus officio* to labor disputes is considerably less absolute than the Union suggests. Strong authority in this circuit (as in other jurisdictions) holds that a labor arbitrator may, for example, "interpret or amplify" his award, *functus officio* notwithstanding.

Functus officio, a district court in Missouri declared in 1984 ". . . does not apply to federal court enforcement of arbitration awards . . . federal courts have the power to remand an arbitration award to the arbitrator that issues it, where the award is incomplete, ambiguous or inconsistent."[27]

Thus, I think it is safe to say with confidence that in labor arbitration functus officio is no "rule of law." Further, I find it meaningless as a measure of "loyalty." The parties expect a full and complete and final award which, if need be, can be enforced. It is disloyalty to one's trust if the award is anything less. Presumably, arbitrators intend to do their duty. If the award contains a miscalculation or misidentification, even the purists permit the arbitrator to remedy a facial error although that most certainly constitutes "clarification" of the award.

The Academy's own Committee of Professional Responsibility has declared that computational, identification, or other clerical errors which may be said to be "evident" in an award can be remedied by the arbitrator. Opinion No. 20, issued October 27, 1989,[28] after proclaiming that it is consistent with the common law, indicates that notwithstanding the Code, an arbitrator at the request of one party only or on the arbitrator's own initiative "can and should" correct such an error, provided the parties have been afforded an opportunity to express their views. Thus, some India rubber has been fused with the ironclad exactions of the Code.

Where the award is ambiguous or incomplete, it should be no less remediable by the arbitrator. In reviewing a commercial award the Second Circuit Court of Appeals declared:[29]

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[26]809 F.2d 103, 106, 124 LRRM 2361 (1st Cir. 1987).

[27]*Teamsters Local 618 v. Sears, Roebuck & Co.*, *supra* note 23, at 676. *See also Steelworkers v. Ideal Cement Co.*, 762 F.2d 837, 841–42 (10th Cir. 1985).

[28]The opinion may be found among nondecisional materials in Labor Arbitration Reports (LA).

[29]*A/J Siljestad & Hideca Trading*, 678 F.2d 391, 392 (2d Cir. 1982). *See also Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980).

> An arbitration award is generally not final if it is not intended by the arbitrators to be a complete determination of all the claims submitted to them.

Since it can hardly be thought that an inadequate or erroneous award was deliberately intended by the arbitrator, such an award is not complete; the arbitrator retains authority to correct it and no court should have to issue a reminder to that effect. Put otherwise, if a court may remand the award in fulfillment of the national labor policy, the arbitrator, made aware of the deficiency, has a duty to make timely correction in fulfillment of the same national labor policy. Professional ethics requires the arbitrator to meet the obligation imposed by the original commission, not to shirk it or to demand that the parties first go through litigation hoops before completing the job.

While it is too much to expect the beneficiary of a defective or deficient award to surrender the advantage it may offer, I think that in calmer moments most parties would be satisfied when the arbitrator takes a second look and cures the error or deficiency in the original award. With all the polling skills I learned from the Literary Digest, I recently sampled the views of a group of members of the Detroit Chapter of the Industrial Relations Research Association. They were selected more or less at random, excluding arbitrators, and they responded to my questionnaire anonymously. When asked if they favored continuation of section 6(D)(1) of the Code in its present form, 80 percent of the respondents said no; 66 percent said the Code provision fails to protect the interests of employers, employees, and unions alike. If our concern is with "loyalty" to the parties who seek our services, I suggest that the Code provision mocks that ideal.

In discharge cases, particularly, managements shy away from exploring the grievant's subsequent employment efforts as well as evidence of what would have been earned in the terminated employment lest the arbitrator suspect some queasiness in the employer's position. Unions do not pursue these matters lest they be suspected of irritating overconfidence in presuming that the discharge will be set aside. The arbitrator, recognizing that an award which simply rejects the discharge will not comprehensively resolve the dispute, may reserve jurisdiction to deal with these foreseeable differences arising in implementation of the award. Professor Rehmus has discussed this practice sympathetically without quite acknowledging it for what it is—a palpable evasion or circumvention of the language of the

Code.[30] Despite the qualms which some have expressed, the courts have held such retention of jurisdiction to be entirely proper.[31]

Another escape-hatch from the imprisonment of the Code, the interim award, though championed by distinguished arbitrators,[32] has apparently enjoyed little popularity. Those who have circulated so-called draft opinions to fellow members of boards of arbitration may be skeptical of the efficacy of this practice which one court has branded a permissible but "foolhardy" technique.[33] On the other hand, a postaward affidavit from an arbitrator that he really "intended" his award to be preliminary was regarded by the Eighth Circuit Court of Appeals as liberating the arbitrator from the rigors of functus officio.[34] Without derogating from the usefulness of these techniques in specific situations, intellectual candor demands that the Code provision simply be abandoned.

For those who shrink in horror that this would invite instability in every award, their alarms seem overblown. Without functus officio arbitrators would be no more vulnerable than judges. The only rationalization for perpetuating the doctrine apart from precedent seems to be that it prevents "one who is not a judicial officer and who acts informally and sporadically" from reexamining a decision "because of the potential evil of outside communication and unilateral influence which might affect a new conclusion."[35]

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[30]Rehmus, *supra* note 15, at 127.

[31]"There is nothing wrong with this practice." *American Standards Union Switch & Signal Div. v. Electrical Workers (UE)*, 900 F.2d 608, 611, 133 LRRM 2985 (3d Cir. 1990). "The arbitrator properly retained jurisdiction to decide disputes arising in the administration of the award." *Hughes Aircraft Co. v. Electronics & Space Technicians Local 1553*, 822 F.2d 823, 827, 125 LRRM 3243 (9th Cir. 1987). A "collateral dispute" under the award is properly to be resolved by the original arbitrator, the court retaining jurisdiction until such clarification is completed. *Transport Workers Local 234 (Philadelphia) v. Philadelphia Transp. Co.*, 228 F. Supp. 423, 425–26, 55 LRRM 3014 (E.D. Pa. 1964); *see also Kennedy v. Continental Transp. Lines*, 230 F. Supp. 760, 763, 56 LRRM 2663 (W.D. Pa. 1964).

[32]*See* Seitz, *Problems of the Finality of Awards, or Functus Officio and All That—Remedies in Arbitration*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1964), 165. *Cf. Steelworkers v. Ideal Cement Co.*, *supra* note 27; *Sunshine Mining Co. v. Steelworkers*, 823 F.2d 1289, 1294, 124 LRRM 3198 (9th Cir. 1987); E. Jones, *Arbitration and the Dilemma of Possible Error*, 11 Lab. Law. 1023 (1960).

[33]*Air Line Pilots v. Northwest Airlines*, 498 F. Supp. 613, 619 (D. Minn. 1980).

[34]*Food & Commercial Workers Local P-9 v. George A. Hormel & Co.*, 776 F.2d 1393, 120 LRRM 3283 (8th Cir. 1985).

[35]*LaVale Plaza v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967). *See also A/J Siljestad & Hideca Trading*, 541 F. Supp. 58, 61 (S.D.N.Y. 1981), *aff'd*, 678 F.2d 391 (2d Cir. 1982).

Today's professional labor arbitrators are made of sterner stuff. They will not countenance communications privately made by one party without notice to the other. They would not seriously correct an award without affording the opportunity to both parties to offer their views. The Code has undeniably and commendably elevated ethical standards. In my experience I have been aware of fewer backdoor efforts to influence arbitrators than to influence politically appointed and dependent judges. I find it hard to believe that more improper influence will be attempted after an award is issued than while an arbitrator is being selected or the hearing is being held or before the award is issued. I do not propose abolition of functus officio to corrupt the process but to conform our moral protestations to what we do or should be doing in practice.

The vast majority of all awards are responsive to the issues and relatively unambiguous and free from error, and there is no provocation or excuse for either party to seek to revise them. The very manner of the arbitrator at the hearing can make emphatic the message that frivolous postaward attempts to reargue issues or introduce new ones will not be countenanced. This message can be enforced before or at the hearing as well, even by warning of additional fees in appropriate situations. Arbitrators have control over procedural matters; even though the contract contemplates the division of costs, it is not unknown for the party requesting an adjournment to bear the entire cancellation or postponement fee. The party who interposes a frivolous request for reconsideration of an award might well be expected to defray the entire cost of rejecting it. One who imposes additional charges for correction of omissions or ambiguities or outright mistakes in an award for which the arbitrator is plainly responsible is not likely to win any popularity contests. But correction of an award which is the product of omissions or misconduct, advertent or inadvertent, of one or both of the parties seems to me properly reparable at the arbitrator's regular rates. This, once again, is more properly controlled by the economics of the market than by commandment.

I have urged elimination of this Code provision in an article appearing in a forthcoming issue of California's Industrial Relations Law Journal; these remarks may be considered a supplement to it. But my current preoccupation with functus officio under the Code is not because I have personally chafed from its exactions. As I recall, I have received only three or four requests

for clarification of an award, from one or both parties, over more than four decades of decisionmaking. One of my awards, without any prior request for clarification to me, did end up in the Sixth Circuit Court of Appeals. The contract provided that under a system of progressive discipline, four unexcused absences within a 12-month period would automatically result in discharge. The grievant was represented by skilled and experienced counsel who dramatically emphasized that what I was to decide was simply whether the fourth absence was excusable. It plainly was not. The grievant's explanation crossed the line from mere inventiveness to outright perjury. I denied the grievance after noting that the termination was justified. Literally, the day after my award was issued another arbitrator, the late Harry Casselman, found that the grievant's suspension for the third absence was not for just cause. I had not been advised that such a proceeding was pending and I was not told of the Casselman award. Grievant's counsel was no doubt confident that I would bow with servility to the Code so he asked for no clarification from me. Management tenaciously insisted that grievant should remain fired, and the grievant went directly to the district court to set my award aside because of a postaward development. That court and then the Court of Appeals evidenced no concern that both Casselman and I were functus officio once our awards had been proclaimed. They decided that the grievant's fate was ambiguous under the two awards so they directed the parties to submit their dispute to the two arbitrators for further proceedings.[36]

The collective bargaining agreement made no provision for such a procedure, and it was certainly not welcomed by one party. Neither Harry nor I had been joined in the court proceedings and neither had any notice of their pendency. We respectfully undertook a further joint hearing because the courts wanted us to. Since the grievant had been fired after three rather than four valid unexcused absences, our joint opinion restored her to her job with considerable back pay.

That example of arbitral justice had another disturbing aspect. My original opinion was issued March 9, 1971. The district court opinion was issued June 30, 1971. The Court of Appeals opinion was issued May 3, 1972. The opinion issued by

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[36]*Printing Pressmen No. 135 v. Cello-Foil Prods.*, 459 F.2d 754, 80 LRRM 2309 (6th Cir. 1972).

Casselman and me was issued October 3, 1972—more than a year and a half after the first award. I offer that chronology to those who claim that functus officio discourages delay and helps make arbitration the efficient and expeditious remedy which the parties seek. Whatever the delay in allowing an arbitrator to dispose of a motion for reconsideration or clarification of an award, it is puny when measured against the time normally required for judicial review and remand.[37]

No less chimerical is the claim that eliminating functus officio will invite staggered or piecemeal submission of evidence or retrial of issues already determined. Functus officio does not avoid these possibilities; it only defers confronting them. Notwithstanding the Code, "It is an arbitrator, and not the court, who is to decide whether the same issue has already been resolved," the Third Circuit made clear.[38] Even if the question is whether the arbitrator's authority has been exceeded, the Seventh Circuit has emphasized that a "remand is appropriate to avoid having courts rather than the arbitrator clarify the bases for the initial decision."[39] Unless these directions are defied, they mean that eventually the arbitrator will have to determine whether the award requires interpretation or clarification. Deletion of section 6(D)(1) from the Code would do no more than release the parties to a collective bargaining agreement from unnecessary preliminary entanglement in the coils of the law. What arbitrators can do on direction of the courts, they should be free to do on their own responsibility.

There remains for consideration what has been called the counsel of prudence in support of this ancient doctrine. "If *functus officio* were not a notion so firmly imbedded in the common law of arbitration, we would have to invent it," Peter Seitz told this assembly in 1964.[40] The doctrine is needed, he said, to protect the arbitrator against late evening telephone calls from parties who did not adequately present their positions at the hearing and would like a second chance. Better, Seitz declared, to invoke the Code and thus put the dispute to bed and prevent

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[37]*See Kennedy v. Continental Transp. Lines, supra* note 31.

[38]*Mine Workers Dist. No. 5 v. Consolidation Coal Co.*, 666 F.2d 806, 811, 109 LRRM 2001 (3d Cir. 1981). *See also Seaboard World Airlines v. Transport Workers, Air Transp. Div.*, 460 F. Supp. 603, 605–6, 100 LRRM 2952 (E.D.N.Y. 1978).

[39]*Textron, Inc. Burkart Randall Div. v. Machinists Lodge 1076*, 648 F.2d 462, 468, 107 LRRM 2836 (7th Cir. 1981). *See also Teamsters Local 115 v. De Soto, Inc.*, 725 F.2d 930, 940, 115 LRRM 2449 (3d Cir. 1984).

[40]Seitz, *supra* note 32, at 165.

dead horses from being whipped. Despite their aphoristic appeal, I find these words, otherwise so uncharacteristic, to be tinged with both complacency and cynicism.

As we have seen, functus officio is no longer firmly imbedded in the national law of grievance arbitration; it is honored in the breach or the exception. It now provides less protection to the arbitrator from late evening telephone calls than would an unlisted telephone number. It does not put a dispute to bed but only shifts the terrain to the courts, who will eventually return it to the shirking arbitrator. If reconsideration is sought by a party who has simply failed to present his case completely, should not the arbitrator say so without ducking until months or years later when directed by a court to pass such judgment? Mr. Seitz's scenario is incomplete. What if the awards fail to decide the issues squarely?[41] Do the arbitrators turn a blind eye and a deaf ear to the consequences of their own fallibilities? As Judge Posner has observed, "It cannot be correct that arbitrators are required to write good opinions."[42] They may even on occasion be responsible for the ambiguities which confound the parties. Mr. Seitz would let sleeping dogs lie, even if they have fleas from the arbitrator's own easy chair. I don't think that is the course of prudence or professionalism.

My proposal here is a modest one. All that I ask is that section 6(D)(1) be eliminated from what has been widely accepted as the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, whether they arise under state or federal law. Such deletion would not prevent the loyal partisans of Edward I from obeisance to his royal decree or cure the lingering addiction of some courts to functus officio even when they are purporting to implement national labor policy. Elimination of this Code provision would simply permit the nonroyalists among us to determine ad hoc and with a clear conscience whether or not an award issued by ourselves or another merits clarification or interpretation and, if so, to see that the task is undertaken with dispatch.

I see no need to require the sponsors of the Code to fashion elaborate substitute provisions. A typographical error might be corrected without hearing in some instances, while in others a

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[41]A more realistic response is suggested in *Peabody Coal Co.*, 90 LA 201 (Volz, 1987).

[42]*Typographical Union No. 16 (Chicago) v. Chicago Sun-Times*, 935 F.2d 1501, 1506, 137 LRRM 2731 (7th Cir. 1991).

full opportunity to both parties may be essential to meet criteria of fairness and due process. I am confident that arbitrators are competent to make that judgment. If, as the Supreme Court indicated in *Misco*,[43] the United States Arbitration Act, though technically inapplicable, may still guide labor arbitration, a motion to modify or correct an award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered," as prescribed by section 12 of that Act.[44] If, under the guise of clarifying or interpreting awards, arbitrators really exceed the bounds of their authority, the courts are still available to deny enforcement.

In my view, the present Code provision does not genuinely serve the interests of the parties. It certainly does not promote the ideal of justice. Its purpose seems principally to spare arbitrators from the indignity of being directly confronted with their own deficiencies or from tailoring their ultimate judgments to facts and law which may have eluded them or the parties the first time around. Arbitrators are excused from the bother of having to consider what may at worst be justified or unjustified motions for rehearing or reconsideration. But ease and comfort are not the destiny of man. Those who are allergic to heat should stay out of the arbitration hearing room as well as the kitchen.

MANAGEMENT PERSPECTIVE

MICHAEL H. CAMPBELL*

I must admit to approaching this task with some trepidation because I think all in this room will agree that Erwin Ellmann has staked out the solid ground with arguments that are persuasive, compelling, and difficult to assail. I do not believe that there is a per se "management position" on either the doctrine of functus officio, in general, or on eliminating section 6(D)(1) of the current Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the Code), in particular.

We all are frequently reminded of the humbling principle of labor law that sooner or later, whatever the issue, "what goes around, comes around." That is certainly true on whether an

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[43]*Paperworkers v. Misco, Inc.*, 484 U.S. 29, 40 n.9, 126 LRRM 3113 (1987).
[44]9 U.S.C. §§1, 12.
*Ford & Harrison, Atlanta, Georgia.

arbitrator, after rendering an award, has become functus officio. As an advocate, whether you represent management or unions, you will find yourself arguing either side of this issue—depending on what happens to your client in arbitration.

Several months ago Ellmann graciously sent me a draft of his paper, and in the intervening time I have read most of the court cases, arbitral decisions, and literature on the subject of functus officio. Also, thanks to Academy member Frederick Bullen, I was given access to source materials on the current Code. Bullen served as a member of the joint steering committee that did an outstanding job in rewriting the 1951 Code of Ethics and Procedural Standards for Labor-Management Arbitration (the old Code). Bullen provided me with the transcripts of the 1974 Kansas City meeting of the Academy, where there was a great deal of floor discussion on whether and how the doctrine of functus officio should be addressed in the new Code. Bullen also shared with me letters written by arbitrators to the steering committee that suggested revisions to the old Code, including ideas on how to treat the subject of functus officio.

I am troubled by two points that Ellmann makes. The first is his legal point that because a court may (consistent with federal labor law and without regard for functus officio) order a case remanded to the original arbitrator for interpretation or clarification, it follows that the original arbitrator should have the same authority to reopen the case on the motion of one of the parties. That, to me, does not necessarily follow.

I say this for the following reasons. First, it is only in exceptional cases that courts remand matters to arbitration for further proceedings. In those rare cases where a remand is ordered, it is only after a court, an outsider to the original arbitration proceeding, has reviewed the arbitration award and decided, on balance, that the strong federal labor policy in favor of arbitral finality[1] should give way to further arbitration proceedings. There is a check and balance system at work, with the courts protecting the finality of the arbitration process. That system would be undermined, in my judgment, by providing the original arbitrator with the same authority as a court to reopen the arbitration process for further proceedings.

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[1] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1966); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

It can be argued, and I am sure Ellmann would do so, that arbitrators are, in the first instance, fully competent to protect the finality of the arbitration process. But I would contend that the very process of reconsideration by an arbitrator would seriously erode the finality of the award. If arbitrators were permitted to consider routinely postaward challenges and appeals, the proverbial floodgate would be opened for time-consuming and costly postaward challenges. At present, the parties seem to accept that a case is over when an arbitrator rules, except for the few extraordinary cases where one party feels a manifest injustice has occurred and proceeds to court. Neither management nor labor nor, for that matter, arbitrators should want to lose this sense of "how the system works."

Further, in the exceptional cases where a court must direct a remand to arbitration, the remand is typically quite specific as to the purpose and the issues to be addressed on remand.[2] My view is that a court is in a better position to frame the issues for clarification and interpretation than is the original arbitrator, especially where the arbitrator's ambiguous award has become the source of the parties' dispute.

Finally, when there is a remand to arbitration, the court must decide whether the dispute should be remanded to the original arbitrator or to a different arbitrator.[3] The emotions of the parties in these cases can run quite high because the prevailing party in arbitration naturally seeks to preserve the "win." A court is in a better position (for reasons I think obvious) than the original arbitrator to decide whether further proceedings

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[2]Several courts have refused to allow an arbitrator to reexamine the merits on remand. *See, e.g., Oil, Chem. & Atomic Workers Local 4-228 v. Union Oil Co. of Cal.*, 818 F.2d 437, 125 LRRM 2630 (5th Cir. 1987) (remanding for determination of whether award conflicted with public policy), *on remand*, 92 LA 777 (Nicholas, 1989) (describing narrowness of Fifth Circuit's remand); *Textron, Inc., Burkart Randall Div. v. Machinists Lodge 1076*, 648 F.2d 462, 468, 107 LRRM 2836 (7th Cir. 1981) ("courts must approach remand to the arbitrator with care lest the arbitrator believe that a 'remand' is equivalent to 'retrial'"); *Hanford Atomic Metal Trades Council v. General Elec. Co.*, 353 F.2d 302, 308, 61 LRRM 2004 (9th Cir. 1965) ("resubmission to the arbitration committee was not for the purpose of relitigating or modifying the award"); *Printing Pressmen Local 1 v. U.S. Trucking Corp.*, 441 F. Supp. 469, 476, 96 LRRM 2535 (S.D.N.Y. 1977) (court not "inviting the Arbitrator to reexamine the merits of the dispute"), *appeal dismissed*, 478 F.2d 1369, 98 LRRM 2438 (2d Cir. 1978); *see also Newspaper Guild Local 35 (Washington-Baltimore) v. Washington Post Co.*, 442 F.2d 1234, 1238, 76 LRRM 2274 (D.C. Cir. 1971) ("[a]rbitrators are not and never were intended to be amendable to the 'remand' of a case for 'retrial' in the same way as a trial judge").

[3]In both *Bell Aerospace Co. Div. v. Auto Workers Local 516*, 500 F.2d 921, 925, 86 LRRM 3240 (2d Cir. 1974) and *Grand Rapids Die Casting Corp. v. Auto Workers Local 159*, 684 F.2d 413, 416–17, 111 LRRM 2137 (6th Cir. 1982), the court remanded to a different arbitrator.

should be before the original arbitrator or whether circumstances require that a different arbitrator be appointed to resolve the postaward dispute.

The second troubling point is Ellmann's position that, if the sponsors of the current Code could be persuaded to eliminate section 6(D)(1) as he advocates, the sponsors should further be persuaded not to include any substitute provisions on functus officio. Again, that does not necessarily follow.

I believe that we need established, published standards whereby the parties and the arbitrators know the ground rules regarding the modification of awards. If for no other reason, these standards protect arbitrators from frustrated lawyers and disappointed clients who want to relitigate their cases to the end.

By one estimate there are over 5,000 arbitrators.[4] I do not believe it is prudent, nor do I think it is fair to the parties, to permit each arbitrator to establish on a case-by-case basis the guidelines for modifying awards and the time limits for entertaining challenges to awards.[5]

If as Ellmann advocates section 6(D)(1) in its present form were eliminated, I believe that the sponsors of the Code should be encouraged to look to other sources for more specific standards as to when arbitrators may modify final awards. Many states have adopted some form of the Uniform Arbitration Act, section 9, which sets forth standards for clarifying an award.[6] Section 11, United States Arbitration Act, has similar standards.[7] By way of analogy Rule 60 of the Federal Rules of Civil Procedure establishes grounds for vacating a final court judgment.[8] In drafting an alternative to section 6(D)(1), these and other sources may provide valuable guidance.

When Ellmann focuses our attention on the shortcomings of section 6(D)(1) in the current Code, I find his arguments most

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[4]Zack, *Dissemination and Enforcement of the Code of Ethics*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1989), 216, 219.

[5]For examples of divergent views on whether mutual consent is required, *compare Beaunit Corp.*, 64 LA 917, 919–20 (Matthews, 1975) (modifying award upon unilateral request) *with Expedient Servs.*, 68 LA 6082 (Dworkin, 1977) (requiring consent of both parties).

[6]Uniform Arbitration Act, §9, Change of Award by Arbitrators.

[7]9 U.S.C. §11.

[8]Federal Rules of Civil Procedure 60(b). In *Union Oil Co. of Cal.*, 92 LA 777 (Nicholas, 1989), Arbitrator Nicholas observed that the Fifth Circuit's instructions on remand to reconsider his decision in light of the public policy implication of postaward events presented him with some of the same issues that arose under a Rule 60(b) motion to vacate based on newly discovered evidence.

persuasive and compelling. To be honest, despite the best of intentions, the sponsors of the Code did not resolve the long-standing debate over functus officio when section 6(D)(1) was substituted for part II, section 5(a) in the old Code. Tongue-in-cheek Ellmann suggests that the new Code "resolved" the controversy over functus officio by perpetuating it. I agree.

The language in section 6(D)(1) is narrow in scope, providing that it is not ethical for an arbitrator to interpret or clarify an award without the consent of both parties. But the doctrine of functus officio is much broader than simply prohibiting an arbitrator from interpreting or clarifying an award.[9] Inexplicably, the current Code does not condemn as unethical the very heart of functus officio: Once a final award has been rendered, there can be no reexamination to change the results of the award.[10]

This leads to a related point raised by Ellmann with which I wholeheartedly agree: The meaning of section 6(D)(1) is not plain on its face. Its ambiguity presents at least the following questions:

1. Was the intent of section 6(D)(1) to incorporate all of the doctrine of functus officio?
2. Was the intent only to address the narrow point of functus officio to prohibit an arbitrator from clarifying or interpreting a final award?
3. Why treat only a portion of functus officio?
4. Why not expressly provide that it is not ethical to reexamine the results of an award?

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[9]Broadly stated, functus officio prevents an arbitrator from taking any further action after publication and delivery of a final award. *See, e.g., Food & Commercial Workers Local P-9 v. George A. Hormel & Co.*, 776 F.2d 1393, 1394, 120 LRRM 3283 (8th Cir. 1985) ("[t]he authority and jurisdiction of arbitrators are entirely terminated by the delivery and completion of an award"); *See, e.g., LaVale Plaza v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir. 1967) ("once an arbitrator has made and published a final award his authority is exhausted and he is functus officio and can do nothing more in regard to the subject matter of the arbitration"); *Ocoma Foods Co.*, 36 LA 979, 980 (Bothwell, 1961) ("[w]hen a hearing has been concluded and an award rendered, the arbitrator may not subsequently reopen the hearing to consider new evidence"). Some courts and arbitrators have held that award clarification lies outside the prohibitions of functus officio. *See, e.g., Red Star Express Lines v. Teamsters Local 170*, 809 F.2d 103, 106, 124 LRRM 2361 (1st Cir. 1987); *Steelworkers v. Ideal Cement Co. Div.*, 762 F.2d 837, 841–42 n.3, 119 LRRM 2774 (10th Cir. 1985); *Electrical Workers (IBEW) Local 2222 v. New England Tel. & Tel. Co.*, 628 F.2d 644, 647, 103 LRRM 2864 (1st Cir. 1980); *Hanford Atomic Metal Trades Council v. General Elec. supra* note 2, at 308.

[10]The central prohibition of functus officio concerns reopening of the merits of a case. *LaVale Plaza v. R.S. Noonan, Inc., supra* note 9, at 573 (Functus officio "forbids an arbitrator to redetermine an issue which he has already decided") (quoted in *McClatchy Newspapers v. Typographical Union No. 46* (Central Valley), 686 F.2d 731, 734 & n.1, 111 LRRM 2254 (9th Cir.), *cert. denied*, 459 U.S. 1071, 111 LRRM 3064 (1982)).

5. What does it mean to clarify or interpret a final award?

Many of you in this room have taught us, in situations such as this, to look to the prior drafts of the language and to "bargaining history" discussions as sources to determine the meaning of a provision in question. But the tried and true standards we all use for construing ambiguous language are not much help here.

Research shows that the language used in section 6(D)(1) was chosen as a compromise between two strongly held views on the old Code: One wanted to eliminate the old Code language in part II, section 5(a), prohibiting an arbitrator from further duties; the other wanted to retain the provision.

But quite frankly, research also shows that the "new" language in section 6(D)(1) was not new at all. Virtually the same language was used elsewhere in the 1951 Code. Part II, section 5(f) of the old Code provided that an arbitrator, after issuing a final award, "should not issue any clarification or interpretation of that award." In other words, the language in section 6(D)(1), considered to be a compromise on how to treat with the subject of functus officio in the new Code, involved nothing more than carrying forward, with slightly different wording, an unchallenged, noncontroversial, and little used paragraph that was previously in the old Code. I believe that Ellmann, above all else, raises for consideration the continuing need for a clarification or interpretation of this ambiguous language.

I shall conclude with an observation. In reviewing the literature on functus officio, several papers before this body truly stand out in the debate, including Peter Seitz's paper in 1964 (advocating the use of interim awards as a creative way to treat with the subject),[11] Lou Crane's paper in 1973 (advocating the more traditional view, at one end of the spectrum, that an award should put the dispute to bed and let sleeping dogs and arbitrators lie),[12] and, finally, Charles Rehmus's paper in 1989, with accompanying discussions (recognizing that arbitrators remain divided on how to treat functus officio, even after section 6(D)(1) was implemented).[13] Ellmann's paper is at the other

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[11]Seitz, *Problems of the Finality of Awards, or Functus Officio and All That—Remedies in Arbitration*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1964), 165.

[12]Crane, *The Use and Abuse of Arbitral Power*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators eds. Dennis & Somers (BNA Books, 1973), 66.

[13]Rehmus, *The Code and Postaward Arbitral Discretion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 137.

end of the spectrum. It urges the complete elimination of section 6(D)(1). The paper is persuasive and thought provoking and at the same time entertaining, and will no doubt take its place among the major papers on functus officio. For that all of us should be most appreciative.

That having been said, I declare myself functus officio, reserving, of course, jurisdiction to interpret, clarify, or even overrule some of my remarks.

LABOR PERSPECTIVE

ROBERT H. NICHOLS*

It is with a certain sense of trepidation that I rise to speak in any capacity on the subject of functus officio. The long line of distinguished commentators who have preceded me, specifically including our principal speaker today, is at least cautionary if not totally intimidating.

The published debate in this area, just within this body, was firmly joined over a quarter of a century ago at your 17th Annual Meeting when one of your distinguished members, Peter Seitz, argued for the efficacy of the interim award as a way to deal with many of the problems addressed by Erwin Ellmann.[1] Parenthetically, our chair today, Mark Kahn, served as editor of those Proceedings. Eight years later at your 25th Annual Meeting, the debate resumed, with Lou Crane providing a rejoinder to Peter Seitz's observations.[2] Finally, at your 42nd Annual Meeting in 1990, an article authored by Chuck Rehmus, with ensuing comments by Academy members Dennis Nolan and Francis Quinn, once again plowed this field.[3]

Perhaps surprisingly, given the degree of attention this matter has engendered over the years, Ellmann has made a significant contribution to the debate. And that is so because of the facially limited nature of the proposal being advanced, namely, the

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[1]Seitz, *Problems of the Finality of Awards, or Functus Officio and All That—Remedies in Arbitration*, in Labor Arbitration: Perspectives and Problems, Proceedings of the 17th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1964), 165.

[2]Crane, *The Use and Abuse of Arbitral Power*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1973), 66.

[3]Rehmus, *The Code and Postaward Arbitral Discretion*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1990), 137.

elimination of section 6(D)(1) of the Code of Professional Responsibility, which provides that, absent consent of all parties, "no clarification or interpretation of an award is permissible" by an arbitrator.

This proposal as promulgated is not analytically related to the issue of whether an arbitrator in some limited circumstances may or should retain jurisdiction. When this is done for an appropriate purpose, such as reservation of jurisdiction for the calculation of a make-whole remedy in a discharge case in the event the parties themselves cannot resolve the issue, few if any sophisticated practitioners would contest its propriety. Indeed, in most cases there is tacit if not articulated understanding that this is how the parties wish to proceed. The union puts in evidence on the merits and the employer meets it. The union, motivated in most cases by interests of economy, does not wish to take on an entirely new set of issues, and the employer's advocate is at least as reluctant to debate matters, which might be perceived, at least by the client, as a lack of confidence in the outcome. Other remedial issues lend themselves to a similar approach.

Under these circumstances an arbitrator may retain jurisdiction provided the retention is time-limited and precisely defined as to scope. If the parties have not given the neutral detailed evidence on a submitted issue, the neutral's obligation under the Code is to render a "definite, certain and as concise as possible" award.[4] If the neutral cannot in conscience do this with respect to a submitted issue, a retention of jurisdiction is appropriate.

In certain circumstances this practice can, as Ellmann has observed, become "a palpable evasion or circumvention of the language of the Code." In point of fact, I received many years ago from a member of this Academy an award which provided:

> My Award shall not take effect until 25 days after its issuance, and until that time I reserve jurisdiction of the case to amend or revoke the award or further to postpone its effective date, at the instance of either party or of my own motion.

Such a practice is fairly subject to criticism.

Similarly, a 1980 study of the American Arbitration Association (AAA) found that, out of approximately 870 awards rendered in the Boston and New York areas, jurisdiction was

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[4]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §6(C)(1) (1985).

retained in 49 cases. One of the reasons advanced for the retention of jurisdiction was "in the event the parties seek clarification of the award."[5] While some might take solace in the fact that the cited reason refers in the plural to the "parties," the retention of jurisdiction in such circumstances would be superfluous because the parties mutually may seek clarification at any time.

However, I do not think that this is the issue here. Rather the issue arises when one of the parties, over the objection of another, seeks clarification or interpretation of an award which the neutral considers complete, definite, certain, final, and, we are confident, concise, but which one of the parties urges is "ambiguous or incomplete," to adopt the formulation advanced by our speaker.

With respect to this situation, our speaker has enumerated the circumstances under which the law provides that a neutral may properly render an interpretation of the award. Ellmann notes that under the provisions of the Uniform Arbitration Act, for example, certain types of errors in the award may, upon motion by only one of the parties, be corrected.[6] By statute those corrections are limited to situations where:

1. There is "evident miscalculation of figures or an evident mistake in the description of any person, thing or property,"
2. The award "is imperfect as a matter of form, not affecting the merits of the controversy," and
3. Such motions may be granted "for the purpose of clarifying the award" (of direct relevance here).

The dilemma presented by these provisions of the Uniform Arbitration Act for neutrals whose cases take place in states

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[5]American Arbitration Association, *Retaining Jurisdiction*, in Study Time (July & October 1980).

[6]Ellmann also has referred to the United States Arbitration Act, 9 U.S.C. §1 *et seq.* That reference appears misplaced. Section 1 of the Act specifically excepts from its operation "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." More to the point, the notice provisions in §12, to which reference is made, deal with requirements when a party seeks in the district court to vacate or modify an award. Under that Act, which in §10 permits the court to direct an arbitral rehearing when an award is vacated, no application to the neutral by a party is permitted. That is in direct contrast to the Uniform Arbitration Act. To the extent therefore that the United States Arbitration Act shall "guide labor arbitration," the argument can be made that it is supportive of the Code provisions here assailed.

which have this statute, and the contrary admonitions of section 6(D)(1) of the Code, is obvious.[7]

Similarly, our speaker has exhaustively chronicled the cases, both in the United States district courts and courts of appeals, in which the courts have developed, as part of that substantive body of federal labor law, the doctrine that the courts should require the parties to resubmit[8] an ambiguous award for interpretation or amplification to the original arbitrator.[9] That this is the law, and that this power is routinely exercised in situations where the court in fact perceives such a need, is true.

The real issue, however, is whether these facts warrant the abolition of the Code provision. In my view, if this were true, the exception effectively would have swallowed the rule. It does not logically follow, from the fact that the courts on occasion require the parties to resubmit an award to the arbitrator for clarification or interpretation, that neutrals themselves should have this power.

The unstated premise here is that, in all cases in which the award is unclear or susceptible of more than one interpretation, the battlefield inevitably shifts to the courtroom. As the parties are well aware, that is not the case. Many, many awards are not models of clarity and completeness, despite the Code's admonitions. In the vast majority of these cases, the parties simply work

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[7]The Federal Mediation and Conciliation Service apparently is unimpressed by the Act's provisions in this regard, and, according to one source, on March 3, 1980 issued a memorandum to persons on its roster endorsing the Code provision. "The submission of a Decision removes an arbitrator from further authority for a particular matter. Absent a *joint* request, any response by an arbitrator [should] be limited to stating the function of the office ceases with the Decision submission. Even an abbreviated explanation is too much." Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books, 1985) 283, n.265. The Uniform Arbitration Act permits either the court or the arbitrator, for certain, more restricted grounds, to change an award. Significantly, however, the court when vacating an award also may direct a rehearing. Under the circumstances the FMCS advice appears sound.

[8]Ellmann has made much of the fact that arbitrators usually are not parties to court proceedings in which matters are "remanded" to them. Clearly, courts that purport to "remand" are at least guilty of sloppy analysis. The correct procedure, and the one utilized in a majority of decisions, is to order the parties to "resubmit" the matter to the original neutral. When that is done, I am at a loss to understand Ellmann's qualms. From the perspective of the neutral, he clearly has two consenting parties before him, and there should be no inhibitions concerning his right to proceed.

[9]To the extent that courts have on occasion ordered the parties to resubmit the matter to a neutral other than the one who originally decided the case, their actions are much more questionable. Where an award has been completely vacated because the neutral did not demonstrate a fidelity to the charge, at least a plausible argument may be advanced in support of the court's actions. In instances where an interpretation or clarification of an award is sought, however, the rationale for the practice is elusive indeed.

it out, either with or without meaningful guidance from the opinion and/or award. In most of the remaining cases, the parties mutually agree to return to the arbitrator for clarification.

In only a tiny fraction of the cases are the parties unable to accommodate their differences. Ellmann tells us that in "four decades of decisionmaking" he has had his awards implicated in postaward litigation on only three occasions. My personal experience is more modest (limited as it is to a quarter of a century), but my firm has regularly arbitrated cases for more than four decades, and a poll of the lawyers in our office suggests that in all those years we probably have been involved in no more than 20 postaward litigated proceedings. In our experience those situations frequently involve considerations broader than the dispute over the arbitrated matter.

There are reasons for this. Parties have to live together, and most recognize that prolonged litigation over an arbitrated matter, when they earlier agreed to live with the result, carries a heavy price. It was William Camden who said, "Agree, for the law is costly," and he was certainly right. But it is not only expensive from an economic standpoint; there are additional costs associated with the declination by an employer, who almost invariably is the party implementing the award, to do so in a manner satisfactory to the other. In such circumstances the employer hands the union the means by which the employer may be pilloried, and morale and productivity may well suffer. In short, litigating over ambiguous and inartful awards is a step which most sophisticated parties take only after careful thought and generally only for good and sufficient reasons.

A review of the cases cited by Ellmann underscores this fact. The reality is that there are relatively few reported decisions requiring the parties to resubmit a matter to arbitration. Parenthetically, with no statistical evidence to support my view, I suspect that there are many more unreported decisions in which district courts have enforced arbitration awards by their terms (and even more where collective bargaining has overtaken the litigation process and the matter is finally resolved by agreement). At least this has certainly been the experience of our office.

Would the deletion of the Code provision have helped in those cases? I am sure that in a relative few the capacity of one party unilaterally to bring an issue back to the neutral may have served to resolve the matter. In more cases than not, however, the

failure of the other party to agree to resubmit the matter usually evidences fundamental disagreement over the outcome on the merits, as opposed to a genuine dispute over the interpretation of the award. Occasionally it discloses an agenda broader than the particular matter arbitrated. Cases of this sort necessarily must be resolved in another forum.

On the other hand, deletion of the Code provision would have, in my judgment, a deleterious effect on the finality of the arbitral process. Once again, I have no statistics to support my case, but as an experienced practitioner I am totally persuaded that the unilateral right to return to the neutral, even if that right is ostensibly limited to seeking clarification or interpretation of the award, would result in a literal flood of such applications, with a further round of briefs and decisions required, not to mention the attendant expense and delay. Many of these applications would not be limited to mere requests for interpretation or clarification, but would in effect seek to change the result.

Furthermore, many have decried the "creeping legalism" evident, at least to them, in the arbitral process. The proposed change clearly would exacerbate this problem. It is the finality of the award which forces the parties finally to put the issue to rest, regardless of whether the award does so with complete precision. If awards were subject to interpretation or clarification, certainly considerable ambiguity would be wrung out of them, but the cost to the process would be substantial.[10]

Ellmann counters by suggesting that neutrals can control this problem by making it clear that frivolous motions, or thinly disguised efforts either to reargue the merits or to introduce new evidence, will not be tolerated. He even goes so far as to suggest that abuses can be dealt with by the imposition of sanctions, in the form of ordering the offending party "to pay the entire cost" of such a petition. Such efforts, if attempted, would rapidly produce more litigation than the present issue has engendered over 20 years.

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[10]Ellmann tells us that an internal poll of Michigan practitioners suggests that the Code provision does not truly protect the interests of the parties. If these parties feel this way, they should provide in their agreements that awards may be interpreted by the arbitrator. Otherwise it should be presumed that they have negotiated their agreement, including the "final and binding" language in the arbitration provision, mindful of external "law," including the Code provisions.

That, however, is not the real problem. The fact is that arbitrators are not judges, and their demeanor relative to the parties day in and day out reflects that reality. The parties well know that arbitrators are notoriously poor in restraining excessive advocacy, whether it takes the form of prehearing motions, endless and repetitive cross-examination, or insistence on briefs in even the simplest cases. While neutrals decry such tactics at meetings like these and in practice seminars throughout the country, they routinely tolerate them at hearings. I would not be sanguine about the arbitrator's ability to control abuses in this area.

A personal postscript is perhaps in order. My views in this area may possibly be influenced by my own experiences, one of which is indelibly impressed upon my mind. We were the attorneys for Local P-9 of the United Food and Commercial Workers International Union, AFL-CIO, in one of the cases cited by Ellmann as illustrative of techniques arbitrators have employed to escape the rigors of functus officio.[11] Parenthetically, I was relieved of that position, which I had filled for almost 20 years, shortly before the commencement of a strike about which some of you may have heard. In any event, in the cited case, which on the merits involved a time-study issue, neither the union nor the company, Geo. A. Hormel & Co., had used attorneys at the hearing. The union was represented by its full-time business agent while the company was represented by its industrial engineers. Following a full hearing, the arbitrator submitted a signed and dated "opinion and award," explicitly issued pursuant to the language of the agreement, which provided for "final and binding" arbitration awards. That award favored the Union. However, a letter accompanying the award stated:

> If, after reviewing the award, the parties desire to discuss it, I would suggest the hearing be reconvened at 9:00 a.m. on Thursday, May 26, 1983 at the offices of the Company.

The letter did not suggest, however, that the award was merely a draft.

I became involved when the union was advised that the company intended to seek a reconvening of the hearing for the purpose of putting in additional evidence. A conference call was

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[11] *Food & Commercial Workers Local P-9 v. Geo. A. Hormel & Co.*, 776 F.2d 1393, 120 LRRM 3283 (8th Cir. 1985).

thereafter held. The union objected to a new hearing. The notes taken by the company representative of the conference call reflected the neutral as saying, in granting the Company's request to reconvene the hearing, that the original award was "final and binding" and that any reconvened hearing was "[n]o forum to debate" and "not to adjust the award."

The hearing was reopened, with the union interposing the appropriate objections. The neutral ordered a new round of briefs, to which the company appended a number of additional exhibits. Following receipt of the briefs, the neutral issued an "Amended Award," ruling in favor of the Company. At no point in the "Amended Award" did the neutral suggest that the earlier award was merely a draft. The union brought suit, seeking to enforce the "original" award and to vacate the "amended" award. The company responded, relying principally upon an affidavit of the neutral, which it had secured *ex parte*, and sought to enforce the amended award. While a lengthy document, the neutral's affidavit asserted, at paragraph 7:

> The initial Opinion and Award was sent to the parties on May 17, 1983. Although he signed and dated the Opinion, it was meant to only be a draft Opinion subject to further taking of evidence if it were found to be in error by either of the parties. It was his intention that, should the parties accept the Opinion, the initial Opinion would become the award. That did not happen.

The union objected to the affidavit, asserting among other things the applicability of the Code provisions involving postaward conduct on the part of the neutral, including the prohibition on voluntary participation in postaward enforcement proceedings.[12] The district court agreed, excluded the affidavit, and granted enforcement, holding that the original award could not be reconsidered by reason of the doctrine of functus officio.

On appeal the Eighth Circuit reversed and remanded the matter for trial. The Court noted the general applicability of the doctrine of functus officio and the correctness of the district court's ruling as to the provision of the neutral's affidavit dealing with the neutral's intent. It pointed out, however, that neutrals generally have full authority to establish the rules of procedure

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[12]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §6(E)(2).

for a given matter and noted that, at paragraph 6 of the affidavit, the neutral had asserted:

> At the initial meeting he indicated that he would be issuing an opinion and that, because it involved complicated observations, calculations and assumptions of various standards, he would be requesting that the parties be given an opportunity to present further materials at a reconvened hearing subsequent to the issuing of the draft Opinion and Award.

This assertion, the Court concluded, put into issue the question of whether the "original" award was "a preliminary one or a final one." This was a disputed issue of fact, not susceptible of resolution on a motion for summary judgment. The neutral's assertion in this regard, the court ruled, must be considered "along with all the other evidence—including the testimony of persons who were present at the initial hearing as to what the arbitrator did or did not say" in order to determine the ultimate character of the award.

Having lost even this battle to preserve an award favorable to my client, you may understand why I have so little stomach for the change urged by Ellmann. Moreover, while initially of the view that there was no "party position" on this issue, the more I reflect upon it, the more uncertain I am that this is really the case. The fact is that it is employers who implement contracts as they interpret them and employers who discharge employees when they believe just cause exists. Unions challenge some of the these actions. Arbitrators then rule upon these issues. If the actions are sustained, except in the most unusual case, that is the end of the matter. On the other hand, it is almost invariably only in the case of an affirmative award that a postaward argument arises. It is, after all, no coincidence that it is usually unions who sue to enforce awards and employers who seek to vacate them. The reality then is that the changes proposed by Ellmann will, on balance, be of more use to, or at least be used more by, employers than unions. For this reason as well, I speak against the proposal.

Oh yes, you ask, what happened to the P-9 dispute on remand? Does it come as any surprise to learn that it was resolved in bargaining for the next contract? Much less surprising, I am sure, is that the neutral is not a member of this Academy.

Comment

DENNIS R. NOLAN*

Let me first thank Mr. Ellmann for his thoughtful, powerful, and provocative advocate's brief on a subject of continuing interest to the Academy. His paper will take its rightful place with those of Peter Seitz and Charles Rehmus as fundamental discussions of this surprisingly complex issue.

Mr. Ellmann began his talk with a quotation from our 1989 Proceedings to the effect that the doctrine of functus officio is a rule "of law, of prudence, of loyalty, and of ethics." Mr. Ellmann described that statement as "exaggerated to the point of fatuity." He went on to use that statement as a foil and an organizing principle for the rest of his paper. This is an effective rhetorical device, but it misinterprets the original intention.

As the author of that 1989 statement, let me make a clarification. The statement referred to what I termed the "hard core" of the doctrine of functus officio, not to the matters involved in the vast majority of cases discussed by Mr. Ellmann. Topics such as interim awards, remands from a court, correction of typographical or arithmetical errors, and retention of jurisdiction to resolve remedy problems are far from that hard core.

Take away those extraneous issues and what remains is the real problem resolved by the functus officio doctrine: the request by a single party, often disguised as a plea for clarification or correction, to re-examine the merits of the dispute. Mr. Ellmann's paper was powerful advocacy precisely because, like any good advocate, he mentioned only the arguments in favor of his position. It did not engage in what the economists call "cost-benefit analysis." He did not, in other words, weigh the costs of abolishing the Code's prohibition on postaward activity.

Those costs include delay in implementation of the award, an occasional failure of implementation, extra litigation expenses, an appearance of arbitral overreach, and, most important, a lessened respect for the finality of the arbitration process. That, in my opinion, is too high a price to pay for the speculative benefits promised by Mr. Ellmann.

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