key to continued vitality of professionals and their profession is growth and effective response to change and uncertainty. Labor arbitrators have always confronted challenge and embraced change. Continued loyalty to the needs of the parties and the institution we serve compels similar conduct now.[28]

MANAGEMENT PERSPECTIVE

STEVEN B. RYNECKI*

Introduction

Over the past decade as Wisconsin Chapter Industrial Relations Research Association (IRRA) Secretary-Treasurer, I have seen a radical waning of interest in traditional "bread and butter" private-sector issues, such as strikes and picketing or aggressive, hard-nosed bargaining for major new gains. Instead, labor seems on the defensive almost everywhere in the private sector. And the future does not seem to hold much promise. Although those of us active in joint labor-management activities, like the IRRA, are committed to slowing or reversing the slide into oblivion, it seems more of a calling than a lucrative career as we become increasingly irrelevant to the world around us.

But all is not lost. The public sector is an exception to the general demise of industrial relations. As opportunities in private-sector industrial relations have dwindled, public-sector opportunities have expanded. For those able to adapt to the different challenges of the public-sector practice, this growth has helped fill the void left by the diminishing private-sector work. For example, since the early 1970s, my firm's practice has developed from a private-sector base involving only a few attorneys to a burgeoning private/public-sector practice constituting a large percentage of the overall gross billings of our law firm.

Now, once again, we are facing new challenges. While the growth is continuing in the public sector, the nature of the practice is changing. Increasingly we are getting cases involving civil rights and other employment law claims against union and nonunion employers (public and private sector). Consequently,

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[28] *See* Stark, *The Presidential Address: Theme and Adaptations*, in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 1, 29.

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I believe attorneys with a typical employer-side labor law practice need not fear negative results from the decline of the private sector. The mushrooming development of increasingly complex state and federal nonunion-type employment legislation almost guarantees a full larder for even the mediocre management lawyer.

Practice of Arbitrators

What holds true for advocates applies to neutrals as well. Business will no doubt continue to be good for arbitrators who can work both the public and private sectors. Business will be great for arbitrators who possess the special skills to enable them to handle the complex issues of civil rights, ADA, and other employment law disputes. I fear, however, that private-sector industrial relations nonlawyers of all stripes may be an endangered species.

ADR Growth

I believe there will be, at a minimum, a leveling off of labor arbitration activity, if it hasn't already occurred. Steve Hayford speaks of a new phase of labor arbitration stemming from the currently developing legislative and judicial arena and the adjudication of statutorily based individual rights claims by employees. I agree that there will be, and currently there is, a great need for the benefits inherent in labor arbitration, such as speed, relatively low expense, finality of outcome, simplicity, and access to a specialized, private judge. I also wholeheartedly agree that Alternative Dispute Resolution (ADR) is the "wave of the future" for many employment-related disputes. Legislatures, courts, bar associations, and law schools across the country are riding the "wave" and embracing ADR. The overburdening of the federal and state court systems has led to increased acceptance and endorsement of ADR by the courts. Bar associations and law schools have responded by developing policies and training programs for attorneys. But this increased visibility and expansion of the use of ADR is not a panacea for existing labor arbitrators. I must disagree with any notion that today's labor arbitrators can simply "slide over" into deciding civil rights, ADA, or other nonunion employment law disputes.

Arbitrators Will Need Special Skills

The highly complex and technical field of labor relations has its own vocabulary, its own procedures, and its own practices. While the vocabulary and procedures may seem simple, they can be understood only by someone who knows the objectives, rules, and practices of the field. Arbitrators have been required to develop a knowledge of industrial relations issues, such as compensation and classification, scheduling and work hours, hiring and termination, layoff and recall. Like the field of labor relations, employment law has its own rules, processes, and language. Just as labor relations requires the arbitrator to have special knowledge, so does employment law.

Steve Hayford said that individual arbitrators must have functional proficiencies and the subject-matter knowledge required of the matters they handle. He believes that a law degree is not a prerequisite for handling the new legislative and judicial matters. I disagree. Hayford's outline of the required competencies surely portends the future for arbitrators: an understanding of the law, knowledge of and familiarity with discovery procedures, ability to adhere to the formal rules of evidence, and knowledge of and ability to apply the legal standards for remedies. In other words, arbitrators will be required to master a number of subjects from the advanced-level law school curriculum. An arbitrator cannot be "all things to all people." "In Greek mythology it is reported that Minos prepared himself for a posthumous career as a judge of shades by first exposing himself to every possible experience in life."[1] That same impracticality exists here.

Current court-annexed arbitration programs provide a model of what can be expected in the future. Arbitrators must generally be certified by the court they serve. Courts typically require court-annexed arbitrators to be lawyers or retired judges with at least a minimum of practice experience. Some require arbitrators to have special knowledge of the law in the cases they will hear. The complexity of the issues in employment law disputes and the more legalistic procedural standards require arbitrators to have unusual legal qualifications and broad experience in these matters. Arbitrators who possess those qualifications should experience growth in their practices. Those who do

[1]Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3.

not will, of necessity, need to focus on the remaining industrial relations disputes.

What Does the Future Hold?

I wonder where the next generation of neutrals will come from and whether we will continue to enjoy the skills and abilities of experienced NAA member arbitrators to the degree that we have historically. Clearly, existing arbitrators will face growing competition. Unfortunately, labor arbitrators are creatures of the union/management bargaining process. The new growth areas do not envision a role for unionized labor. Without that I do not see clients crying out for services of any particular type of neutral, thus opening the door for a new breed of neutral. As more bar associations and law schools embrace ADR, the number of arbitrators will grow. New agencies and private ADR businesses are springing up every day. Unlike the labor relations arena, where most arbitrators are drawn from a few organizations (e.g., AAA and FMCS), arbitrators of the new disputes will be drawn from many sources. Existing arbitrators will face competition from retired judges, attorneys, and law professors, to name a few.

Given that it won't happen naturally, how can NAA members plug into all of this new opportunity? How can they successfully market themselves amid the growing competition? Some ideas I might offer the ambitious:

1. Have unions promote arbitration to union and nonunion workers to resolve these matters even though no labor contract is involved.
2. Work with management groups to develop employer-sanctioned arbitration as an alternative to court litigation. This will be difficult. Most Fortune 500 companies surveyed by the ABA's Section of Employment and Labor Law felt that mandatory arbitration was an unnecessary evil because employee lawsuits were not perceived as a serious problem. The survey showed that employers preferred the judicial system, where the threat of lengthy and costly legal proceedings encourages settlement. Finally, employers with experience in labor arbitration perceived a pro-employee bias.
3. Work with judges and legislators (state and federal) to promote arbitration, using the existing labor arbitration

resources as a good way to resolve employment law litigation.

4. Work with the management and employee bars to promote use of arbitration over litigation and use of the existing labor arbitrators over new, untested, and inexperienced arbitrators. Attorneys will respond if they perceive, as perhaps they should, that arbitration is indeed a useful tool in resolving the cases that are piling up on their desks and irritating their clients to distraction. But the parties must also perceive arbitrators as possessing the requisite skills to effectively arbitrate employment law disputes.
5. Establish a pool of arbitrators who possess the skills necessary to arbitrate the highly complex and technical employment law disputes.

Conclusion

The practice of labor and employment law is ever changing. These changes present difficult challenges for advocates and arbitrators. Clearly the great rise in disputes over employment matters offers opportunity to expand the scope of arbitration. Without major effort to promote the value of experienced labor arbitrators, however, I fear we may see an unfortunate decline in the quality of arbitration hearings and decisions. I hope the NAA can find its place in helping to resolve the new breed of employment law disputes.

LABOR PERSPECTIVE

GREGORY N. FREERKEEN*

Introduction

Evolutionary adaptation is something we can see in the world of arbitration as well as in the world of living organisms. For instance, if a species of animal becomes extinct, other species adapt in an evolutionary fashion to occupy the extinct animal's niche in the environment. The environment causes the newcomer species to adapt in a fashion similar to the predecessor, and thus the new species may assume many of the predecessor's characteristics in response to the same environment.

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