CHAPTER 10

OTHER PEOPLE'S MESSES: THE ARBITRATOR AS CLEANUP HITTER

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The heart of the arbitration process is to clean up messes made by the parties—employers, unions, and employees. However, on occasion the award or conduct of another arbitrator becomes the subject matter of a new decision by a colleague. In these instances the issues can become very difficult and sensitive for the second arbitrator.

The research on this topic of reviewing the actions of other arbitrators was most interesting for a number of reasons. Like most of us at Academy meetings, I have heard hallway talk or engaged in it myself about "Did you hear what Arbitrator Heinsz did this year?" However, when I went to research the subject, I came almost to a dead end. There were a few scattered court cases where an arbitrator's decision had been set aside for misconduct, such as engaging in ex parte contacts, including a case where an arbitrator ate meals with one side during one hearing and went on fishing trips with representatives of that side during subsequent hearings,[1] or where an arbitrator failed to disclose a family relationship with a party[2] or to disclose a relevant pecuniary relationship with one of

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[1] *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 139 LRRM 2256 (9th Cir. 1991) (number of ex parte contacts with union representatives and total disregard of employer's arguments in arriving at decision in favor of union caused court to set aside arbitrator's award).

[2] *Morelite Constr. Corp. v. Carpenters Dist. Council (New York City) Benefit Fund*, 748 F.2d 79, 117 LRRM 3009 (2d Cir. 1984) (failure by arbitrator-son to disclose that union officer was his father caused court to vacate award on grounds of evident partiality).

the parties.[3] But these involved voided awards due to misfeasance or malfeasance rather than an arbitrator simply "dropping the ball."

This led to the conclusion either that there were no messes or that we have the tact to keep them "in-house" and under the rug. In other words, with few exceptions, we do not broadcast our problems through the Bureau of National Affairs or Commerce Clearing House. At this point I decided to seek some data from arbitrators.

I sent a questionnaire to a random sample of 140 Academy members. I asked for situations, opinions, and awards that might involve "messes." Specifically, the questionnaire asked (1) whether the respondent had ever ruled on the same issue with the same parties as another arbitrator; (2) under what circumstances would the second arbitrator be bound by the prior arbitrator's decision on the same issue; (3) whether the arbitrator had ever been asked by parties to take over another arbitrator's case which the parties believed had been botched; (4) whether an arbitrator should decide a "fee mess," that is, accept an appointment regarding the fee charged by another arbitrator; and (5) whether an arbitrator who became convinced that another arbitrator's "mess" rose to the level of unethical conduct would report this to the arbitrator, the parties, the appointing agency, the National Academy of Arbitrators.

Of the 80 responses, many included extended comments and copies of awards. Respondents usually asked me not to name parties or arbitrators because the cases were unpublished or because someone did not want names mentioned. Thus, in describing some of the "messes" in this paper, I use hypotheticals, unless a decision was published or the respondent gave consent. However, all situations in the paper are based on actual cases.

First, this paper discusses what authority we arbitrators have to clean up a mess. When must we follow a prior arbitrator's award?

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[3] *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir. 1982) (court vacated award because of arbitrator's failure to disclose his adversary relationship; arbitrator involved with a family insurance company that was entangled in a dispute with parties to the arbitration; arbitrator also under investigation by state bar association regarding allegations of trust account violations involving insurers); *Sun Ref. & Mktg. Co. v. Statheros Shipping Corp.*, 761 F. Supp. 293 (S.D.N.Y. 1991), *aff'd*, 948 F.2d 1277 (2d Cir. 1991) (arbitration award vacated because of panel chairman's evident partiality due to involvement in separate and ongoing arbitration between arbitrator's employer and one of the parties). In most cases involving arbitral misconduct, the complaining party must not only prove the wrongdoing, but also that the misbehavior affected the outcome. *See* Zirkel, *The Legal Boundaries of Professional Responsibility: Impartiality and Proper Conduct of Labor Arbitrators*, The Chronicle, Apr. 1994, at 4–5.

When do we and, most importantly, when should we? Then I analyze arbitrators' responses to specific messes as cleanup hitters. Finally, I review handling ethical problems of other arbitrators.

The Rules of the Game—Stare Decisis, Res Judicata, Collateral Estoppel

Before stepping onto the playing field, we must know the rules of the game. In the arbitral mess situation, by definition, a later arbitrator disagrees with a prior award. The extent to which an arbitrator possesses the authority to reject another's opinion entails notions of stare decisis, res judicata, and collateral estoppel. These are words that make not only the palms of first-year law students in civil procedure sweat, but likewise those of most arbitrators who want to avoid rigid legalistic rules in deciding cases. However, arbitrators recognize that the principles embodied in these legal concepts are based upon "common sense, policy and labor relations."[4]

Some views have become so embedded in labor arbitration jurisprudence that, while not technically binding precedents, arbitrators almost universally apply them. For instance, placing the burden of proof on an employer in a discharge case has been "arbitral law" if not from the Book of Genesis at least from the book of Elkouri and Elkouri.[5] Yet, if an arbitrator determined to place the burden of disproving the just cause of a discharge on the union, this approach, while perhaps heresy, would not violate any binding principle of stare decisis.

Stare decisis is the application of awards "involving different parties but similar issues" where the subsequent arbitrator applies the reasoning found in a prior case.[6] In legal decisions a precedent is binding when determined by a superior court and applied by an inferior tribunal. Since arbitrators are considered "courts of equal rank," decisions by other arbitrators may be persuasive but not binding.[7] In a recent case from the Sixth Circuit Court of Appeals[8] involving a challenge to a second arbitrator's decision which was contrary to that of a prior award, the court dealt with concepts

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[4]*Pan Am. Ref. Corp.*, 9 LA 731 (McCoy 1948).
[5]Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985), at 661.
[6]Fairweather's Practice and Procedure in Labor Arbitration, 3d ed., ed. Schoonhoven, (BNA Books 1991), at 374.
[7]Howan, Comment, *The Prospective Effect of Arbitration*, 7 Indus. Rel. L.J. 60, 65 (1985).
[8]*Action Distrib. Co. v. Teamsters Local 1038*, 977 F.2d 1021, 141 LRRM 2606 (6th Cir. 1992).

of res judicata and collateral estoppel. Describing the claim-preclusion effect of a prior award, the court determined that the prior decision "operates as an absolute bar to any subsequent action on the same cause between the same parties or their privies—not only with respect to every matter that was actually litigated in the first matter, but also to every ground of recovery that might have been presented."[9] In describing the issue-preclusion effect of a prior award, the court stated: "[O]nce an issue is actually and necessarily determined . . . that determination is conclusive in subsequent suits based on a different cause of action involving any party to the prior litigation."[10]

While the notions of res judicata or claim preclusion and collateral estoppel or issue preclusion sound technical, their applications are commonplace. It is not unusual for parties to seek interpretations of the same contract provisions on issues that have been raised before another arbitrator. Almost 85 percent of the respondents to the questionnaire had ruled on an issue that had been decided by another arbitrator in a case involving the same parties.

Although res judicata in the arbitration context is a fertile field, it is well-plowed ground by many eminent arbitrators and commentators.[11] These authorities indicate a clash between two fundamental principles of arbitration: (1) bringing stability to the chaos of labor disputes through predictability, and (2) the rugged individualism of an arbitrator's decision.

In considering the limits that courts place on an arbitrator's authority to reject a prior award involving the same issue between the same parties, the guiding star is *W.R. Grace & Co. v. Rubber Workers Local 759*.[12] There a second arbitrator had found that the first arbitrator's interpretation of the collective bargaining agreement concerning seniority provisions was not binding. The Supreme Court focused only on the enforceability of the second award without commenting on the validity of the first,[13] and decided that the scope of the second arbitrator's authority to

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[9]*Id.* at 1026.

[10]*Id.*

[11]Elkouri & Elkouri, *supra* note 6, at 414–36; Fairweather, *supra* note 6, at 374–87; Hill & Sinicropi, Evidence in Arbitration, 2d ed. (BNA Books 1987), 390–409; Grenig, *Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration*, 38 Lab. L.J. 195 (1987); Malin & Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration From the* Steelworkers Trilogy *to* Gilmer, 44 Hastings L.J. 1187 (1993).

[12]461 U.S. 757, 113 LRRM 2641 (1983).

[13]*Id.* at 765.

determine that he was not bound by the prior decision was itself a matter of contract interpretation. The Court concluded that the second arbitrator's decision, holding the first award without precedential force, drew its "essence" from the provisions of the contract and thus met the *Enterprise Wheel* review standard.[14] Although some have questioned the extent of the *W. R. Grace* holding,[15] it suggests that res judicata in labor arbitration is not a binding legal principle but a matter of contract interpretation.

Subsequent lower court cases have leaned in this direction.[16] For example, in *Local 504 v. Roadmaster Corp.*,[17] the union had lost an arbitration in which it had claimed that the employer must continue to bargain with it and apply a contract despite the hiring of a majority of permanent replacements during a strike. Undeterred, the union filed a second grievance alleging the same claim but based on a different theory. The company refused to arbitrate on the ground that the claim was precluded by res judicata. The Seventh Circuit, citing *W. R. Grace*, found no preclusion and affirmed the district court judge's order to arbitrate:

> Whether more than one arbitrator can take a crack at interpreting the contract is itself a question of contractual interpretation . . . . Arbitrators frequently interpret the scope and binding effect of earlier arbitral decisions. Parties to a collective bargaining agreement may elect to have rigorous rules of preclusion or lax ones. Courts enforce rules of merger and bar, precluding a second litigation to consider claims that could have been, but were not, resolved in the first. Contracting parties and their arbitrators do not always select such strict rules.[18]

This deference to the second arbitrator defining the binding effect of a prior award was more recently followed in *Hotel Ass'n of Washington, D.C. v. Hotel Employees Local 25*,[19] but with a

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[14] *Id.* at 766; *see also Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 46 LRRM 2423 (1960).

[15] Elkouri & Elkouri, *supra* note 6, at 425–26 n.46.

[16] *Hotel Ass'n of Washington, D.C. v. Hotel Employees Local 25*, 963 F.2d 388, 140 LRRM 2185 (D.C. Cir. 1992); *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 916 F.2d 1161, 135 LRRM 2831 (7th Cir. 1990); *Connecticut Light & Power Co. v. Electrical Workers (IBEW) Local 420*, 718 F.2d 14, 114 LRRM 2770 (2d Cir. 1983); *Courier-Citizen Co. v. Boston Electrotypers Local 11*, 702 F.2d 273, 112 LRRM 3122 (1st Cir. 1983); *Westinghouse Elevators of P.R. v. SIU de Puerto Rico*, 583 F.2d 1184, 99 LRRM 2651 (1st Cir. 1978).

[17] *Supra* note 16.

[18] In the first grievance the union argued that the arbitrator had made his decision solely on the basis of the National Labor Relations Act but that in its second grievance the union was basing its claim on the collective bargaining agreement. *Id.* at 1162.

[19] *Supra* note 16.

twist. There the subsequent arbitrator had disagreed with a prior arbitrator's award interpreting a premium pay clause even though the two were members of a permanent panel for the parties.[20] Again, the appellate court applied *W. R. Grace* for the proposition that it was the second arbitrator's call to determine the binding effect of the prior arbiter's award. The employer argued that the first arbitration by contract was "final and binding," and thus bound subsequent arbitrators. The court rejected the argument, noting that both arbitrators' opinions were plausible interpretations but that the court was reviewing only the second. In such a circumstance, the court would enforce the second inconsistent award since "the [collective bargaining agreement] as a whole requires [the second arbitrator] only to consider, not necessarily to follow, a prior award in making his own decision."[21] According to *Hotel Ass'n of Washington*, the second arbitrator is not totally a "free agent" since she must give some consideration to prior interpretations.

Lest arbitrators think courts have completely accepted the "rugged individualist" theory, they should keep in mind cases like *Trailways Lines v. Trailways, Inc. Joint Council*.[22] There, a second arbitrator, contrary to the decision of a prior arbitrator, had struck down an employer's "no beard" grooming rule. The appellate court concluded that the second arbitrator's award did not draw its essence from the contract because it ignored what the court considered relevant contract provisions and the law of the shop. The court determined that, when the first arbitrator definitively construed a provision of the collective bargaining agreement, such construction became part of the existing labor agreement. The court held:

> Although an arbitrator generally has the power to determine whether a prior award is to be given preclusive effect, . . . courts have also recognized that the doctrine of res judicata may apply to arbitrations with strict factual identities. . . . If an arbitrator does not accord any precedential effect to a prior award in a case like this, or at least

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[20]In 1986 the first arbitrator had determined that a hotel need not pay a part-time employee "premium pay." In 1988 the second arbitrator under the same contract with the same parties, although a different hotel in the multi-employer association, found that the hotel was required to pay part-time employees such premium pay. The second arbitrator rejected the company's claim of res judicata and collateral estoppel, stating that "no Arbitrator should issue a decision that is contrary to his own judgment on the law or his own sense of justice." *Id.*

[21]*Id.* at 390.

[22]807 F.2d 1416, 124 LRRM 2217 (8th Cir. 1986).

> explain the reasons for refusing to do so, it is questionable when, if ever, a "final and binding" determination will evolve from the arbitration process.[23]

In *Trailways Lines*, the court gave more deference to the idea that the first award had contractual effect. Thus, in addition to considering the first arbitrator's interpretation, it behooves the second arbitrator to explain its inapplicability where a contract makes arbitration decisions final and binding on the parties.

Another danger of inconsistent awards was exemplified by *Connecticut Light & Power Co. v. Electrical Workers (IBEW) Local 420*.[24] Two arbitrators in a span of months gave contrary interpretations to a manning clause. The first arbitrator required the company always to have a three-person crew; the second held that this was not necessary. The court determined that both awards would survive judicial scrutiny under the *Enterprise Wheel* test. However, the court concluded that in such circumstances it was up to it to select the interpretation most nearly conforming to the intent of the parties. The court then resolved the conflict by acceding to the second award, which it concluded was the better reasoned approach and more closely reflected the intent of the parties. Although the court's decision brought finality to the dispute, it is difficult to avoid the conclusion that the result was at the cost of the court deciding the merits when it chose the "correct" award.

Despite *Connecticut Light & Power*, under the "essence" standard of review, courts generally should confirm even conflicting awards. The "legal rules of the game" allow subsequent arbitrators much latitude to disregard the awards of prior arbiters. As long as the awards have a basis in the contract, each one passes *Enterprise Wheel* muster. If the parties cannot abide resulting inconsistencies, resolution is available at the negotiating table or again through grievance arbitration machinery. But it is an understandable temptation for a court, as in *Trailways Lines* or *Connecticut Light & Power*, to step in and "straighten out" the mess. These cases should be a warning sign to us to tread carefully when declaring that a prior opinion involving the same parties and the same issue is unsound (and that our reasoning is better). No matter how much

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[23] *Id.* at 1424–25. It is interesting to note that the second arbitrator did refer to the award of the first but concluded that the prior decision represented the "minority view" and did not resolve the contractual issue presented to the second arbitrator. The second arbitrator also noted "[t]he principles of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings." *Id.* at 1419 n.7.

[24] *Supra* note 16.

a later arbitrator believes that the first arbitrator "blew the call," there will be an advocate for that first arbitrator, that is, the winning party who might think the second arbitrator shortsighted. Unless the subsequent reasoning is convincing to the prior winner/now loser, it may result in a third arbitration or litigation for the parties. Due care in explaining both the rightness of a position and the wrongness of the prior award is necessary to ensure surviving a strict *Enterprise Wheel* scrutiny by a reviewing court.

The weight of legal authority has placed the deference accorded to a prior award primarily in the hands of arbitrators. The issue of determining the binding effect of a prior award between the same parties on the same issue is a common one. Of the 85 percent of responding arbitrators who indicated that they had encountered this situation, 56 percent upheld the prior award while 44 percent did not. Arbitrators hold a spectrum of views on the binding effect of prior awards.

As in most arbitral situations, the first principle is to follow the intent of the parties. Some contracts specifically state that prior decisions are binding; others (e.g., in expedited cases) state just the opposite.[25] Special situations exist in national industries, such as coal, steel, railway, and the postal service, which have established national and regional arbitration boards. Here concepts embodied in the notions of stare decisis and res judicata often are binding by contract and applied through an appellate review board or umpire.[26] Arbitrator I.B. Helburn has noted that, even where contracts require that national awards bind regional arbitrators, as in the postal service, regional arbitrators often attempt to avoid the implication of national awards "by distinguishing the fact situations and then saying that because of the differences, the national award is not binding."[27] Despite these attempts, arbitrators normally should follow national awards if the agreement of the parties so requires.

Close to this end of the spectrum of contracts that specifically require that prior awards have precedential effect are arbitrators who utilize the "incorporation theory."[28] Under this approach, the typical contractual clause making an arbitral decision final and

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[25] *See, e.g., Teledyne Ryan Aeronautical*, 95 LA 1072 (Weiss 1990).

[26] Elkouri & Elkouri, *supra* note 5, at 422–25; *Shrewsberry Coal Co.*, 98 LA 108 (Volz 1991) (discussing doctrine of res judicata in Arbitration Review Board cases in coal industry); *McElroy Coal Co.*, 93 LA 566 (McIntosh 1989).

[27] Letter from I.B. Helburn to Timothy J. Heinsz (Feb. 5, 1994).

[28] Fairweather, *supra* note 6, at 380–81; *Allegheny Ludlum Steel Corp.*, 30 LA 1011, 1013 (Valtin 1958).

binding causes the award to become part of the contract. This is especially true where subsequent negotiations have not changed the outcome of the award. Accordingly, a later arbitrator faced with the same issues between the same parties is as bound by the first decision as by the language of the parties' agreement.

An example of this approach is Arbitrator Dennis Nolan's decision in *Stone Container Corp.*[29] There a prior arbitrator had granted monetary relief against the employer for improper overtime bypasses. Nolan determined that the company had not litigated the remedy issue before the first arbitrator. In other words, had this been a case of first impression, Nolan indicated he would have concluded that there was no binding practice requiring a monetary remedy as opposed to an opportunity to make up missed overtime work. Nevertheless, Nolan concluded that the company had an opportunity to arbitrate the issue of remedy and that the first award of monetary relief was controlling.

Arbitrator Hartwell Hooper in *Monarch Tile*[30] gave the rationale for the incorporation theory:

> If this arbitrator were to ignore the earlier decision and issue a contrary decision merely because he preferred a different interpretation, the parties would be right back where they were when the dispute first arose. They would have gone through the trouble and expense of two arbitration cases without having their dispute resolved. If the Company were to prevail this time, the parties would be deadlocked at a score of 1 to 1. Under these conditions, no one should be surprised if the Union wanted another turn at bat. Like an extra-innings baseball game, the dispute could potentially go on indefinitely and never be resolved if each subsequent arbitrator felt free to go his own way with the issue. That would defeat the purpose of the arbitration clause and deprive the parties of any degree of confidence in what the contract means. They would not be well served by that.[31]

However, even under the incorporation theory, there are generally accepted exceptions when a later arbitrator may disregard a prior award, as noted by Arbitrator Jack Clarke in *North American Rayon Corp.*:[32]

> The situations where an arbitrator has commonly declined to follow a prior arbitration decision between the same parties at the same facility and involving the same issue are those wherein (1) the prior

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[29]96 LA 483 (Nolan 1990); *see also United Tel.-Southeast,* 101 LA 316 (Nolan 1993).
[30]101 LA 585 (1993); *see also Fire Fighters (IAFF),* 86 LA 1201 (Alleyne 1986).
[31]101 LA at 587.
[32]95 LA 748 (1990); *see also* Hill & Sinicropi, *supra* note 11, at 399–400; Elkouri & Elkouri, *supra* note 5, at 428–30; *Monarch Tile, supra* note 30, at 587.

> decision was an instance of bad judgment, (2) conditions existing at the time of the prior decision and of the grievance being arbitrated are significantly different, (3) there was not a full and fair hearing at the time of the earlier decision and (4) the prior decision was made without the benefit of some important facts or considerations.[33]

These exceptions provide wide discretion for a second arbitrator to distinguish the decision of the first in appropriate circumstances. However, when the parties and the issues are the same, most arbitrators who follow the incorporation theory place a heavy burden of persuasion on the party seeking to reverse a prior decision.

At the other end of the doctrinal spectrum are arbitrators who emphasize the independent judgment that parties want an arbitrator to bring—even to issues heard a second or third time. For instance, Arbitrator Millard Cass in *Hotel Ass'n of Washington, D.C. v. Hotel Employees Local 25*[34] disregarded another arbitrator's award on the same contractual issue between the parties and concluded that this was appropriate when the prior decision was contrary to his own judgment on the law or his sense of justice. This position was well stated by Arbitrator Robert Williams in a case where he gave no effect to the awards of two prior arbitrators on an issue involving assignment of overtime, because they incorrectly interpreted the agreement.[35] This "independent judgment" approach allows each succeeding arbitrator de novo to determine the correctness of the prior award in interpreting the contract. Williams invited the parties to relitigate the same issue in a later incident until their agreement is correctly interpreted and applied. As to his own award, he believed:

> [I]f a party does not understand the reasoning and result in this case to correctly interpret and apply the Agreement, they are free to grieve a later similar incident and seek another arbitrator's opinion. The next arbitrator can review the opinions of three (3) prior arbitrators and decide his case. At least in theory, the parties and arbitrators eventually will recognize correct reasoning and results.[36]

A study of arbitral cases and the responses to the questionnaire indicate that most arbitrators are closer to the incorporation theory than to the independent judgment theory. Typical of the

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[33]95 LA at 751.

[34]*Supra* note 16, at 389; *see also Westinghouse Elevators of P.R. v. SIU de Puerto Rico, supra* note 16.

[35]*Hercules, Inc.*, AAA Case No. 31 300 00129 91 (Williams 1992) (unpublished opinion).

[36]*Id.* at 26–27.

questionnaire responses were that the first arbitration decision should be followed "unless completely off the wall" or "clearly erroneous" or "palpably wrong" or "it should be thrown in the wastebasket." One arbitrator noted that "although [the arbitration system involved] no hierarchy, [following a prior decision on the same issue between the same parties] avoids confusion and arbitrator shopping." Another insightfully pointed out that the parties could "overrule bad decisions in negotiations."

Nevertheless, few espouse complete adherence to a res judicata approach. The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes not only requires impartiality but also that the arbitrator assume "full personal responsibility for the decision in each case decided."[37] This approach requires the second arbitrator not to elevate consistency above reason so as to perpetuate erroneous interpretations. In many instances, a fair award depends upon the flexible approach of determining the binding effect of a prior award as applied to the individual factors of a subsequent case. For these reasons too legalistic an application of stare decisis, res judicata, or collateral estoppel should be avoided.

On the other hand, the essence of a contract is to allow parties to plan for and control the future of their relationship to the extent possible. Consistency in decision making on the same issue fulfills their expectations as to the working of the grievance arbitration clause. These guides to the future enable the parties not only to plan their actions in accordance with past interpretations but also to settle similar grievances without incurring the expense of another arbitration proceeding. Abuse of the arbitral system through harassing claims is also avoided. This approach engenders a respect for the arbitration mechanism in that judgments will be based upon reason rather than individual opinion. Congruity and finality instills in all parties—employers, unions, and employees—a proper regard for the integrity of the process.

This principle of constraint was analyzed by Arbitrator Edgar Jones in *Lucky Stores, Inc.*,[38] where he followed a prior award regarding bargaining unit work under an agreement between a

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[37]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §§1.A.1.; 2.G.1. (1985). Section 2.G.1.b. of the Code discusses the use of precedent when the parties have not addressed this in their agreement: "When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full responsibility for the award."

[38]88-2 ARB ¶8316 (E. Jones 1988).

multi-employer and multi-union unit. Jones concluded that, once the issue had been decided after a full and fair hearing, the award became part of the binding consensus of the parties, subject to alteration only by mutual agreement. The second arbitrator must bring to the proceeding the integrity, intelligence, and prudence that the parties expect, and is not precluded but is constrained in the exercise of that jurisdiction. In other words, courts when reviewing arbitral decisions rightly reject the incorporation theory since it leads them too deeply into a consideration of the merits of arbitrators' decisions under *Enterprise Wheel* standards. Nevertheless, as a matter of interpretation, arbitrators normally should apply the incorporation theory as a principle of constraint that accords with the parties' contractual expectations. This rationale was also adopted by the late Arbitrator Ralph Seward as umpire in *Bethlehem Steel Corp.*[39]

> It is obvious . . . that one of the primary purposes of the Umpire system is to aid the parties in reaching a clear understanding of the meaning of their Agreement as applied in practice in the plant. Relitigation of decided issues—repeated attempts to persuade an Umpire to change an established interpretation of the contract merely because one side or the other does not like it—refusal to accept Umpire decisions as the basis for settling grievances without arbitration—cannot fail to defeat this purpose.[40]

The "mess" situation falls squarely under the exception to the incorporation theory that the prior decision was an instance of bad judgment, clearly wrong, or should be thrown in the wastebasket—or does it? The courts basically have said that the subsequent arbitrator decides what is and what is not binding. Even under the principle of constraint, when the second arbitrator declares that the prior award was a "mess," the rules of the game allow that arbitrator to step into the batter's box as the cleanup hitter. In fact, the later arbitrator may be on a mission—to correct the prior injustice. However, before the subsequent arbitrator becomes the designated hitter to clean up the mess, all of the reasons for the principle of constraint should be taken into consideration. Otherwise, in the words of Arbitrator Hooper, the later arbitrator may have just created "an extra-innings ballgame,"[41] if not for that arbitrator, for the affected employer and union and another arbitrator.

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[39] *Bethlehem Steel Corp.*, Grievance Nos. 9266 and 9267 (Seward, 1953), *quoted in* Armco, Inc., 95 LA 34 (Strongin 1990).

[40] 95 LA at 37–38.

[41] *Monarch Tile, supra* note 30, at 587.

Some Messes

Pinch-Hitting

An arbitrator receives a conference call from attorneys for an employer and union: "Will you pinch hit for Arbitrator Heinsz? He has done it again!" The questionnaire indicated that calls to replace an arbitrator either during or immediately following a hearing or an award are relatively rare. Only 15 of 70 arbitrator respondents indicated that they had been involved in this situation. This number might be greater because, as one member pointed out, it was not until sometime after he had decided a case that he learned he had taken the place of another arbitrator. Many instances of replacement were not due to incompetence or misconduct—for example, the parties had not received the award for two years or the arbitrator slept through the hearing—but rather incapacity—illness, physical or emotional.

Few of the respondents indicated that they would have a problem stepping into a case for another arbitrator. After all, it is the parties' process and, even though it is during the game, if they become dissatisfied and agree, they can choose a new hitter. Most of the respondents agreed that, if the parties requested, they would use the records submitted to the prior arbitrator. A more difficult question occurs when the parties agree that they want a replacement arbitrator but disagree whether to use the prior record or to hold a new hearing. If there are a completed transcript and exhibits, efficiency and economy would dictate their use. Also, the new arbitrator should hesitate to let the complaining party "add" to its case now that its side has seen and heard the other's witnesses and arguments. On the other hand, there may be valid reasons for the second arbitrator to view the witnesses rather than rely on a cold record. This is particularly true when credibility is an important issue. At a minimum, the second arbitrator would need a statement of reasons from both parties as to why a second hearing should or should not be held and to review what record exists before making a determination on whether to order another hearing.

Despite the overwhelming response that arbitrators would act as pinch hitters, there are certainly some caveats. The mess might have been created by the parties rather than by the arbitrator. For instance, if the case involved discipline or discharge, the parties may not have liked the outcome expected from or provided by

arbitrator #1 but the grievant would or did. Although a joint decision by the parties to go to another arbitrator may mean that the first arbitrator was acting out of bounds, in an adversarial, yet representative, process involving third-party grievants, it may be that the employer and the union are "off base." Another situation which should raise the pinch hitter's eyebrows is where the first arbitrator, who voluntarily withdrew during the course of the proceeding, might have known something the parties have not told arbitrator #2. In other words, before pinch-hitting, the second arbitrator may want a statement as to why the arbitrator was disqualified or withdrew. Also, a review of any record and decision in the first case would be essential to determining the propriety of taking the case. If the second arbitrator develops suspicions that the conduct of the parties and not of the first arbitrator was questionable, the second arbitrator should consider requesting permission from the parties to contact arbitrator #1. If they decline, the second arbitrator may want to become a "free agent" and bat elsewhere. Otherwise, instead of cleaning up a mess, the pinch hitter may be walking into one.

Batting in the Number 3 or Number 4 Spot

When an arbitrator bats #3 or #4, there are different considerations than when the person is the second arbitrator or a pinch hitter. If two prior arbitrators have looked at essentially the same situation between the same or related parties and have come up with conflicting results, from the parties' perspective there is a mess. This may not be due to an error by the prior arbitrators. Difficult issues may cause arbitrators reasonably to view the same issue and reach different results. The second arbitrator who disagreed with the first may not have been convinced by the persuasiveness of the principle of constraint. Whatever the cause of the contrary decisions, the parties look to the third arbitrator to clean up what has become a mess in their relationship.

For example, suppose that an employer and a union have an overtime clause that requires: "All work performed on Saturday will be at overtime rates when the department is in operation." The employer claims that this means "full" operation; the union argues that the clause applies when there is "any" operation on Saturday. Arbitrator A finds for the union; Arbitrator B determines that A was "clearly wrong" and holds for the company. If the parties take the

issue to a third arbitrator, whose award should that arbitrator follow—B, who was last; A or B, whoever the third arbitrator believes reasoned the issue better—or should the third arbitrator follow different reasoning? When faced with diametrically opposed awards, the third arbitrator is in a situation different from that of a reviewing court that can apply the *Enterprise Wheel* standard and hold that both A and B are right, that is, both decisions draw their "essence" from the contract. In the situation of a third arbitration, the parties do not want to know whether the opposite conclusions of A and B can be considered grounded in the contract. Rather, they need to know whether employees who work on Saturday should receive straight time or overtime rates.

Arbitrator Edward Krinsky, when faced with conflicting awards, aptly concluded: "It does not make sense to this arbitrator to reverse [Arbitrator B] simply because this arbitrator would not have reversed [Arbitrator A] had he been in [B's] place."[42] In other words, Krinsky determined on the basis of the principle of constraint that B's decision, that A's opinion was "clearly erroneous," was incorrect. He appropriately gave more deference to A's award as a reasonable interpretation of the contract that he would have followed. However, since B had not followed A's decision, Krinsky had to provide the parties with a resolution.

When an arbitrator is faced with prior, inconsistent interpretations, each of which is reasonable, the rationale for the incorporation theory wanes since the parties have achieved neither consistency nor finality. Certainly the parties do not intend to incorporate into their collective bargaining agreement clauses that cancel each other out. By calling in the third arbitrator, they have indicated that they have been unable to resolve the matter either in negotiations or through the grievance process. In this situation Krinsky decided that "it would seem best that this arbitrator do what the parties have asked him to do in their stipulation of the issue, namely to review the merits of the issue and make an award."[43] Applying the independent judgment theory is a sensible approach in this situation. While the third arbitrator may be influenced by the soundness of the reasoning of A or B who were faced with the same issue, this effect is more like the persuasiveness of precedent than the principle of constraint. When neither the prior arbitrators nor the parties themselves can give definitive

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[42] *Escanaba Paper Co.*, FMCS No. 79K/22108, at 6–7 (1979) (unpublished opinion).
[43] *Id.* at 7.

meaning to their contract, the arbitrator who bats #3 should have more room to create a solution that will be dispositive. Arbitrators who bat fourth,[44] fifth, or further down the lineup,[45] should make the "call" a fortiori.

The depth of the mess posed by conflicting awards and the ingenuity sometimes required to resolve it were demonstrated in an award by Arbitrator Richard Mittenthal in the postal service.[46] In the postal service there are regional agreements and arbitrations as well as a national agreement and arbitration system.[47] Regional agreements or arbitration awards cannot be inconsistent or in conflict with the national agreement. On the other hand, national arbitrators are not to decide regional issues in the first instance. Using a hypothetical overtime clause again, Arbitrator A had held for a regional postal employer; Arbitrator B for the union. Compounding the problem of inconsistency, Arbitrator A's award was extremely difficult to understand.[48] Arbitrator B's award was understandable, but he had not fully answered the issue, that is, he may have determined the amount of the overtime rate but did not decide under what circumstances it should be awarded. Mittenthal, the national arbitrator, concluded that the overtime issue was properly to be resolved by regional arbitration. At this point, it would have been easy to tell the parties to return to the regional forum, select a new arbitrator, and start over; but, since the basic grievance had been in dispute for 10 years, he decided that he would provide "guidance."[49] He accomplished this in the framework of the parties' arbitral system by stating how he would decide the case, that is, whether a particular outcome would be consistent with the national agreement, if it had been presented to him after appropriate regional awards. He then used the reasoning of Arbitrator B, where appropriate, and filled in logic of his own, which was even better. In this manner Mittenthal brought a finality to the dispute, which had eluded the prior arbitrators,

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[44]For an arbitrator acting as a "cleanup hitter," see *Independent Steelworkers' Alliance*, 88-1 ARB ¶8273 (Mikrut 1988). Arbitrator John Mikrut was faced with three differing interpretations by prior arbitrators of the effect of a waiver on the grievance and arbitration procedure in a last-chance agreement.

[45]In *Certainteed Corp.*, AAA Case No. 30 300 00065 92 (Abrams 1993) (unpublished), Arbitrator Roger Abrams found himself batting sixth with five prior decisions ahead of him.

[46]*U.S. Postal Serv.*, Case Nos. H4C-4C-C 24016, H1C-4C-C 13693 (1989) (unpublished).

[47]For a description of labor relations in the Postal Service under the Postal Reorganization Act of 1970, see Elkouri & Elkouri, *supra* note 5, at 15, 59.

[48]Many messes created by arbitrators seem to result from lack of clarity in opinion writing.

[49]*U.S. Postal Serv.*, *supra* note 46, at 9.

within the bounds of the postal arbitral scheme. Such creativity is often necessary to sweep away the mess.

Keeping the Game in Extra Innings

Another potential problem area is where an arbitrator decides to take a game into "extra innings." The doctrine of functus officio[50] tells arbitrators that once the award issues, the authority to play the game, with few exceptional circumstances,[51] ends. However, the arbitrator may want to view the final inning to ensure the outcome by retaining jurisdiction as to the remedy ordered.[52] The rationale is to secure its implementation without the need of a joint request, about which the loser is never thrilled, or the filing of another grievance to remedy the arbitrator's remedy. But in retaining jurisdiction, the arbitrator risks crossing the line between overseeing the cure and causing a new malady.

For instance, suppose the parties have an agreement allowing union representatives paid time "for official business." The company argues that the clause means payment for union business only in relation to the company (e.g., processing grievances or negotiating agreements); the union argues that it means for any union business (e.g., attending union-sponsored conferences and schools or assisting in organizing other employers' plants). Arbitrator A agrees with the union's broader interpretation and retains jurisdiction to assure that all instances of time off for union

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[50] *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327 (3d Cir. 1991) (once an arbitration panel renders a decision regarding the issues submitted, it lacks power to reexamine that decision); *Mine Workers v. Sunnyside Coal Co.*, 841 F. Supp. 382, 145 LRRM 2467 (D. Utah 1994) (when arbitrator executes and delivers award without any preconditions, award becomes final and under doctrine of functus officio arbitrator cannot change it); *Sears Logistics Servs.*, 97 LA 421 (Garrett 1991) (after final award issued, arbitrator denies employer's request for a supplemental opinion under functus officio doctrine); *Kohn Beverage Co.*, 78 LA 1156 (Abrams 1982) (arbitrator denied company's motion for reconsideration of award based on functus officio doctrine).

[51] These exceptions are to modify or correct a prior award due to miscalculation of figures, mistakes in descriptions, removal of portions of the award exceeding the submission, corrections in form, a request by both parties, or a court remand of the case to an arbitrator. Fairweather, *supra* note 6, at 383–87, 458–59; Hill & Sinicropi, *supra* note 11, at 330; Werner & Holtzman, *Clarification of Arbitration Awards*, 3 Lab. Law. 183 (1987). The doctrine of functus officio finds a basis in the Code of Professional Responsibility, §6.D.1, that without the mutual consent of the parties, no "clarification or interpretation of an award is permissible."

[52] *Young's Commercial Transfer*, 101 LA 993 (McCurdy 1993) (arbitrator retained jurisdiction for purposes of calculating back-pay award after prior decision reinstating employees); *General Mills, Inc.*, 101 LA 953 (Wolff 1993) (arbitrator retained jurisdiction for 90 days from date of award to resolve any unforeseen issue as to remedy); *Defense Commissary Agency*, 101 LA 850 (Wren 1993) (arbitrator retained jurisdiction until parties were satisfied that there had been full compliance with award).

business are properly paid. In one case, Arbitrator A had been presented evidence that there were over 1,000 instances of claimed violations of this type of clause by a national employer.[53] He found for the union and ordered the employer to cease and desist from refusing such paid time off and to pay the union's claims, and retained jurisdiction. The employer believed that the arbitrator's award was in error and in many instances continued to refuse payment for time spent on union business, perhaps in hope of seeking a "better" interpretation from another arbitrator.

Who hears the 1,000 individual claims covered by the award? Who hears the instances of continued refusal to pay employees for official union business? Arbitrator A, possibly not wanting to take a chance on the doctrine of res judicata and the principle of constraint as applied by other arbitrators, determined that he should remain the "designated hitter" and ordered the employer to cease and desist from selecting other arbitrators to decide what he considered the same issue.[54] Has Arbitrator A simply placed appropriate curbs on a recalcitrant party, or has he overstepped the "rules of the game"? This somewhat simplified statement of a mess of Herculean proportions ended up before another arbitrator.[55] Ruling on this type of prior arbitral award requires insight and sensitivity because now Arbitrator B is reviewing not only the logic and reasoning of A but also essentially the propriety of A's conduct. Cease-and-desist orders, while in the broad arsenal of arbitral remedies, are slippery at best.[56] Generally, arbitrators measure the propriety of past actions against contractual norms and order remedies accordingly. It is up to the parties to conform their future conduct to the award. If not, they may end up in front of another arbitrator. However, an arbitrator's attempt to control future actions through a cease-and-desist order is often a futile

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[53]*Social Sec. Admin.*, AAA Case No. 16 30 00422 87 (Jaffe 1998); *see also Social Sec. Admin.*, 33 FLRA 743 (1988); *Government Employees (AFGE)*, 29 FLRA 1568 (1987).

[54]*Social Sec. Admin.*, AAA Case No. 16 30 00422 87 (Jaffe 1988), at 2.

[55]The employer had challenged Arbitrator A's award under the Federal Labor Relations Act to the Federal Labor Relations Authority (FLRA). The FLRA sustained the employer's exception to Arbitrator A's cease-and-desist order that he resolve all official time disputes arising during the term of the parties' collective bargaining agreement. However, the FLRA concluded that Arbitrator A could decide official time disputes that had been placed before him and ordered the parties either to reach agreement or submit to a second arbitrator the dispute over Arbitrator A's authority. *Government Employees (AFGE), supra* note 53.

[56]Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books 1991), at 323–26. Nevertheless, a number of arbitrators have utilized cease-and-desist orders as remedies. *Brushy Creek Coal Co.*, 101 LA 960 (Harlan 1993); *Town of Stratford*, 101 LA 508 (Halperin 1993); *Killingly Bd. of Educ.*, 101 LA 438 (Meredith 1993).

act.[57] Unlike a court issuing an injunction or an administrative agency, a cease-and-desist order, there is no mechanism for the arbitrator to enforce this remedy through contempt or subsequent court action. Also, future conduct may fall outside the bounds of the arbitrator's ruling. Thus, the cease-and-desist order may be nothing more than an admonition, unless this remedy is coupled with a retention of exclusive jurisdiction, as Arbitrator A did.

Arbitrator A's approach helps promote consistency and finality and reduces harassment by a party continuing to press frivolous or "decided" grievances to arbitration. Although consistency and finality are virtues in the arbitration process, attempts by arbitrators to control the relationship are a vice.[58] It is the parties' prerogative to determine the extent to which they will accept a prior arbitrator's award as binding on future conduct. If there is disagreement as to the prospective effect of the prior award, they can resolve the matter in the same manner as any contractual dispute—by negotiation, arbitration, self-help, or other means. But this is a decision for the parties, not the first arbitrator, to make.

Determining continued jurisdiction and employment raises at least the appearance of impropriety.[59] In a sense, Arbitrator A made himself the parties' umpire for this particular issue. Since he had already ruled on the matter, it would be hard to convince the losing party that Arbitrator A would have an open mind on future instances when the union claims breach and the employer asserts that neither the contract nor Arbitrator A's prior ruling applies. More basically, extending jurisdiction beyond the issue that has been brought before that arbitrator undermines the notion of who determines arbitral authority in a contractual matter. Section 2.E.1 of the Code counsels arbitrators to "observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves."[60] Arbitrators who retain jurisdiction risk going from interpreting the contract to enforcing the award which section 6.E.

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[57]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.

[58]Similarly, courts have not been amenable to parties' attempts to prospectively apply arbitral awards in similar situations to avoid repetitive grievances. *See* Howan, *supra* note 7.

[59]*Pitta v. Hotel Ass'n of New York City*, 806 F.2d 419, 124 LRRM 2109 (2d Cir. 1986).

[60]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes §2.E.1. (1985).

of the Code admonishes is not the "arbitrator's responsibility."[61] Thus, in the "union time" case Arbitrator B worked out of the mess by concluding that Arbitrator A could continue to determine whether the outstanding claims that gave rise to the grievance should be paid in accordance with A's award but that A could not continue to rule on those issues in futuro.[62]

Salary Arbitration

Another messy area is what might be referred to as "salary arbitration." This does not involve the grand sums arbitrators award to baseball players. Rather, this type of case looks at our colleagues' bills.[63]

Suppose an arbitrator receives a notice of appointment from the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS) and next to the names of the parties is the cryptic identification of the issue as "arbitrator's fee." Does the second arbitrator agree to step into the batter's box as the cleanup hitter, or should the arbitrator refuse to play in this ballgame? This issue led to an interesting debate in *The Chronicle* between two arbitrator colleagues. Reginald Alleyne suggested that an arbitrator should apply the "abstention" doctrine, whereby federal courts sometimes refuse to decide cases even though they have jurisdiction to do so, and thus avoid the fee-dispute case.[64] Ira Jaffe concluded that an arbitrator has a responsibility to the parties to decide cases legitimately grounded on the contract, including those involving other arbitrators' fees.[65] Arbitrator respondents to the questionnaire also split on the issue of accepting an appointment involving the appropriateness of another arbitrator's fee. The majority were against an arbitrator taking such a case—36 percent agreed that it was acceptable; 64 percent believed that it was not.

There are many reasons making this issue a "mess," but the primary one is that, like the extension-of-jurisdiction situation, the second arbitrator is ruling more on the propriety of another arbitrator's actions than on that person's logic or reasoning. Certainly, caution in this area is advisable. There is another

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[61] *Id.* §6.E.

[62] *Social Sec. Admin.*, AAA Case No. 16 30 00422 87, at 82 (Jaffe 1988).

[63] *Printing Pressman No. 2 (New York) v. New York Times Co.*, 123 ALAA ¶10,419 (S.D.N.Y. 1992); *Social Sec. Admin.*, 93 LA 1166 (Jaffe 1989); *Social Sec. Admin.*, 90 LA 247 (Berger 1987).

[64] Alleyne, *Arbitrators and Arbitrator-Fee Disputes*, The Chronicle, Feb. 1991, at 3.

[65] Jaffe, *Letters, Arbitrators and Arbitrator-Fee Disputes*, The Chronicle, May 1991, at 3.

mechanism for arbitrator #1 to collect unpaid fees—the courts. Also, in the second arbitration the first arbitrator is not a party, and sticky questions of deferral arise in any later proceedings, either to enforce the award of arbitrator #2 or in a separate proceeding by arbitrator #1 to collect the fee. For instance, if arbitrator #2 finds that the nonpaying party did not violate the collective bargaining agreement by refusing to pay a fee to arbitrator #1, a difficult issue arises as to the effect of that award on a lawsuit filed by arbitrator #1 against the nonpaying party for collection of the fee. Finally, some argue that the fee clause in the typical collective bargaining agreement, that each party will pay one-half, is an allocation mechanism and not one upon which to base an arbitral claim as to the appropriateness of the amount.

On the other hand, arbitrators rarely decline to resolve messes, even ones where they must disagree with prior rulings or reasoning of other members of the profession.[66] The doctrine of abstention is often one of "last resort." Courts limit abstention to situations that involve serious constitutional issues of separation of powers, that is, significant danger exists of federal entanglement with a state's or other branch of government's administration of its own affairs.[67] It is and should be difficult to turn aside parties who properly assert jurisdiction but whose claims are not the type a court believes it should decide.

In a fee-dispute case, the issue is arbitrable, that is, based on the contract, and the parties through their agreement have chosen to bring the matter to a second arbitrator. The existence of other, arguably better, forums has not caused arbitrators to decline to hear issues that also might have a statutory basis allowing a party to bring suit despite an arbitrator's award.[68] As to the problem of the unpaid arbitrator's nonparty status in the second arbitration proceeding, many times persons with a substantial interest are not present at hearings involving issues of seniority,[69]

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[66]One respondent noted that many bar associations offer arbitration or mediation of attorney-fee disputes, and attorneys sit as arbitrators on those cases. *See* Rau, *Special Edition: Alternative Dispute Resolution and Procedural Justice and the Role of the Attorney in ADR Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. Rev. 2005 (1993); Traverso, *How to Survive Mandatory Fee Arbitration*, 2 (No. 4) Legal Malpractice Rep. 3 (1991).

[67]Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543 (1985).

[68]*McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

[69]*Armco Inc., Tex-Tube Div.*, 101 LA 1024 (Weisenberger 1993); *Alltel Fla.*, 101 LA 798 (Thornell 1993); *York Int'l Corp.*, 100 LA 929 (Strasshofer 1993).

work jurisdiction,[70] subcontracting,[71] or alter egos.[72] If the first arbitrator's presence is deemed necessary, that person can be subpoenaed to the second hearing.[73] Moreover, the parties in the second arbitration should have a strong, albeit different, interest from the unpaid arbitrator—the proper functioning of their dispute-resolution procedure. This might be an issue involving more than simple fee allocation.

For instance, in *Social Security Administration*[74] Arbitrator Mark Berger was faced with a claim by the employer that the union had undermined the arbitration process by threatening to withhold payment from another arbitrator, unless that arbitrator made a satisfactory clarification of an award and by a history of either of not paying or challenging the fees of other arbitrators. Although Arbitrator Berger questioned the union's conduct, he found that there was insufficient evidence to establish with adequate certainty that the union violated its financial obligation.[75] In such a case the union might raise the reasonableness of the prior arbitrators' fees as a defense to the employer grievance. However, the heart of the dispute was whether the union through the tactic of nonpayment was improperly attempting to influence the outcome and subvert the purpose of the arbitration mechanism. Since a fee-dispute grievance goes to the essence of the parties' relationship, it would be appropriate for a later arbitrator to hear.

Thus, the simple notation on the AAA or FMCS form that the issue is "arbitrator's fee" might be insufficient to answer the abstention question. Since abstention is a matter of discretion and the policy reasons for accepting or refusing fee-dispute cases are close ones, it is not surprising that some arbitrators are willing to bat as cleanup hitters and others are not.

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[70] *Pittsburgh Tube Co.*, 97 LA 1151 (Dean 1991).

[71] *ABB Combustion Eng'g*, 101 LA 258 (Cohen 1993); *Angelus Block Co.*, 100 LA 1129 (Prayzich 1993); *Pittston Coal Group*, 97 LA 1216 (Duff 1991).

[72] *Demby Rod & Fastener Mfg. Co.*, 97 LA 111 (Feldman 1991).

[73] Heinsz, *An Arbitrator's Authority to Subpoena: A Power in Need of Clarification*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 201; French, *Arbitral Discovery Guidelines for Employers*, 50 U. Mo. K.C. L. Rev. 141 (1982); Bedikian, *Use of Subpoenas in Labor Arbitration: Statutory Interpretations and Perspectives*, 1979 Det. C. L. Rev. 575 (1979).

[74] 90 LA 247 (Berger 1987).

[75] *Id.* at 252.

Not Playing by the Rules: The Ethical Mess

The final "mess" is when an arbitrator discovers that another arbiter has not played by the rules and in fact has violated them. Suppose that during a hearing on an issue, which has already been ruled upon by Arbitrator A, Arbitrator B learns of facts similar to those that occurred in *Printing Pressman No. 2 (New York) v. New York Times Co.*[76] There Arbitrator A, prior to sending out an award, informed first the union attorney and then the company attorney on an ex parte basis that he was charging a higher fee because he considered the case to be an interest arbitration rather than a contract grievance.[77] This conduct could raise a number of ethical issues as to integrity, impartiality, ex parte contracts, fee charging, and acting within the jurisdiction conferred by the parties.[78] Is Arbitrator B required to report this "mess" and to whom and, if not required, should Arbitrator B so report?

The Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, unlike the codes for attorneys, physicians, engineers, and architects, does not mandate the reporting of knowledge of unethical conduct. This is not surprising because unlike these other professionals, arbitrators rarely have direct knowledge of the professional actions of other arbitrators. Since these other professionals often work collaboratively or, in the case of attorneys, adversarially, they have an opportunity to know firsthand whether another has committed unethical acts. Most arbitrators, like Arbitrator B in the hypothetical, would learn of misconduct through the testimony of others. As arbitrators know from experience, information filtered through the perspective of others is often an unreliable indicator of what actually occurred and why it happened. The Code suggests that the parties who have direct knowledge of the events should bring complaints of unethical conduct.

Whom should an arbitrator contact with information about questionable practices by another arbitrator? The possibilities include the other arbitrator, the parties, the appointing agency, or the Committee on Professional Responsibility and Grievances

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[76] *Supra* note 63.

[77] Counsel for the union in an affidavit stated that he believed that a fee of about $7,000 for the six days of hearing and the necessary days to study and draft the award would have been appropriate at the arbitrator's $600 per diem. The arbitrator in conversation with union counsel said that he believed $25,000 would be an appropriate fee. *Id.* at 23,010.

[78] Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §§1.A.1., 2.C.1., 2.E.1., 2.K.1. (1985).

(CPRG), if A is a member of the National Academy of Arbitrators. Of arbitrator respondents, only 30 percent thought it proper to discuss the supposed misconduct with the other arbitrator. One was more inclined to do this if the other arbitrator was a friend. It is not surprising that there would be hesitancy in confronting a stranger with allegations of professional misconduct without some prior relationship. An overwhelming number, 96 percent, considered it inappropriate for Arbitrator B to contact the parties about ethical misgivings concerning Arbitrator A. This is a strong message that arbitrators do not believe that they should interfere with the relationship between an arbitrator and the parties. These responses suggest that arbitrators believe the parties should be sophisticated enough to discover and act on misconduct.

Although a greater number, 43 percent, would report knowledge of unethical acts to an appointing agency, a majority, 57 percent, would not. Some questioned the effectiveness of action by AAA or FMCS. Although both agencies adhere to the same Code as the NAA, neither has formalized mechanisms with due process procedures to inquire into allegations of unethical activities. The sanction of removal from a roster, with its substantial adverse economic impact on the arbitrator, might cause hesitation to report allegations of misbehavior to an appointing agency.[79]

Despite the disinclination to discuss allegations of wrongdoing with another arbitrator, the parties, or appointing agencies, an overwhelming majority, 64 percent, indicated that, if they became convinced that an arbitrator had engaged in unethical acts, they would contact the NAA. As one arbitrator noted, as members of the profession and this organization, labor arbitrators are the protectors of the process. Academy members with experience in the workings of the CPRG with its provisions for notice, hearing, right of representation and confrontation, and appeal, believe that fair procedures will be followed before a finding of an ethical violation is made.[80]

Making a judgment that another has committed an unethical act is a most serious decision for an arbitrator since the profession is based on impartiality and integrity. Since the misdeed is rarely

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[79]Krislov, *Disciplining Arbitrator Misconduct: Should the Academy Adopt the Judicial Machinery?* 41 Lab. L.J. 431, 436 (1990).

[80]*See Manual of Procedures of the Committee on Professional Responsibility and Grievances for Disciplinary Proceedings Under Article IV, Section 2, of the By-laws of the National Academy of Arbitrators, reprinted in* Arbitration 1993: Arbitration and the Changing World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), Appendix C, 343.

witnessed, most arbitrators would act reluctantly and only on the basis of overwhelming certainty. Such a report requires circumspection and confidentiality. It is critical that arbitrators have faith in the NAA's procedure, namely, that the CPRG will investigate and determine the facts in a manner that will not only appropriately clean up the ethical mess but also strengthen the arbitral profession.

Conclusion

The grist of the arbitrator's mill is cleaning up the messes of employers, unions, and employees; however, frequently arbitrators are confronted with the opinions or actions of colleagues. In this situation a distinction should be made between honest disagreement and messes. Arbitrators often are presented with the decisions of other arbitrators on the same issue and between the same parties. A review of awards indicates that under the principle of constraint arbitrators viewing the same issue between the same parties will follow the prior decision unless, in the words of Bernard Meltzer, it is "preposterously wrong."[81] Or, as paraphrased by Marvin Hill, "arbitrators have the jurisdiction to be wrong but not goofy." Even in the situation where the second arbitrator feels compelled to disagree with the prior arbitrator, this disagreement is often accomplished by distinguishing facts or arbitral principles rather than by saying that the prior decision was "palpably erroneous." In most circumstances there is no mess but rather a difference of opinion. Since claims rising through the grievance process to arbitration are often close issues, it is not surprising that arbitrators reach different, albeit sound, conclusions. This is why courts under *Enterprise Wheel* review have no hesitancy in upholding conflicting awards.

Before declaring a prior award as clearly erroneous and becoming the "cleanup hitter," Meltzer suggests that, "arbitrators should keep their humility in order."[82] Perhaps consistency and finality are better served by following the principle of constraint rather than creating a mess of conflicting awards that others must clean up. However, when the arbitrator bats further down the lineup after others have "hit" conflicting opinions or when the arbitrator

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[81]Meltzer, *Ruminations About Ideology, Law, and Labor*, in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. D. Jones (BNA Books 1967), 1, 2.

[82]*Id.* at 8.

is faced with a true mess, such as those involving the replacement of another arbitrator, extension of jurisdiction, appropriate fees, or ethical matters, it is a test of judgment and creativity to handle the matter in a manner that not only resolves the problem with discretion but also affirms the belief of the parties in the arbitration system.

Comment

REGINALD ALLEYNE*

Tim Heinsz has presented a reflective study of difficult arbitrator-caused problems for other arbitrators to resolve. He gracefully gathers and weaves them into a common thread of what-to-do dilemmas. Ethical overtones run through some of them. And among these I believe that the arbitrator-fee issue is the most serious problem. There ethical ramifications inextricably link up with an arbitrator's decision concerning the propriety of another's fee—and in a manner far more dramatic than the linkage of other fee and threshold-resolution issues.

Merits-Reaching and Decision Costs

Arbitrability and Res Judicata

If a judge decides that the statute of limitations has run for a tort action, the judge will dismiss the lawsuit, no matter how complex or emotionally wrenching the issues presented by plaintiff's injuries. What might otherwise be a lengthy trial quickly ends. When the judge's paycheck arrives, its size would be the same, no matter what the disposition of the timeliness issue.

An arbitrator faced with issues of arbitrability, res judicata, or other threshold issue preceding a decision on the merits earns one fee if the threshold argument is sustained and the issues on the merits are avoided as a result, and another—sometimes much larger fee—if the issues on the merits are decided. We rarely think of these as ethical issues, and it is easy not to, because the parties themselves most often agree to employ the same arbitrator for both the threshold issues and the issues on the merits. The parties are aware that bifurcating the issues and the arbitrators is their

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mutual option.[1] Exercising it would avoid all concerns that the arbitrability decision, for example, could be influenced—perhaps unconsciously—by the greater number of billing days available if a dispute is determined to be arbitrable or not controlled by res judicata.

Tim has described an understandable division of opinion among arbitrators on these often difficult issues. Given their frequent complexity, I would like to see more parties make sure that these "messes" are not compounded. I believe parties should more often bifurcate these issues and place them before different arbitrators.

Retention of Jurisdiction

Retention of jurisdiction is particularly vexing, because—unlike the nonbifurcated arbitrability and res judicata contexts—it is exclusively the arbitrator's decision to retain jurisdiction that prompts potential problems. My sense is that parties do not often ask the arbitrator to retain jurisdiction but that the arbitrator simply decides to do so. That was certainly true in one of the *Social Security Administration*[2] cases Tim mentioned, where the arbitrator was not only uninvited to retain jurisdiction but tried to enjoin parties from using other arbitrators. I agree with Tim's admonitions against the retention of jurisdiction. To his comments I would add fee-related implications.

I recently came across a collective bargaining agreement clause prohibiting the arbitrator from retaining jurisdiction. I am not sure what prompted its inclusion in the grievance arbitration clause. I suspect that the parties had suffered an experience in which retention of jurisdiction by the arbitrator was in some way abused.

What I like best about functus officio—the end of the arbitrator's jurisdiction with the forwarding of the award and opinion—is that it provides an incentive for the arbitrator to write a decision with no loose ends left for further interpretation. Why should we not avoid retaining jurisdiction unless the parties invite us to do so? Why risk conveying the impression that retention of jurisdiction is another way of inducing the extension of fee-generating time?

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[1]A mutual bifurcation decision is not as easily reached as it may appear. The employer would benefit more from bifurcation because it probably has something to gain and little to lose unilaterally. If the employer makes a bifurcation request, the union, with little incentive to agree, will ordinarily object. What should the arbitrator do when the request is made by one party and opposed by the other?

[2]AAA Case No. 16 30 00422 87 (Jaffe 1988).

If the parties want to extend to someone else the invitation to interpret the award, why not let them do so?

We all know the arguments in favor of retention: In its absence a dispute over interpretation of the award and who should hear it must be resolved by another arbitrator through another grievance. Nonetheless, I think the equities weigh heavily on the side of letting the parties decide, and if—as would infrequently be the case—they are unable to do so and a new grievance must be filed over the interpretation of the award, so be it.

Fee-Allocation Clauses

These fee-related issues coalesce in one case, *Social Security Administration.*[3] I refer to it in support of my view that arbitrators should not decide the propriety of other arbitrators' fees. I made that argument in the National Academy of Arbitrators' newsletter, *The Chronicle,* three years ago, but Tim Heinsz's paper has opened my eyes to another way an arbitrator can avoid deciding the merits of a reasonable-fee issue. He wisely conducted a poll and asked arbitrators a series of questions, among them whether they would hear a grievance over the reasonableness of another arbitrator's fee. When I wrote the *Chronicle* article, I assumed that all arbitrators would agree to hear an arbitrator-fee grievance. It never occurred to me that some arbitrators would not accept them. Tim's data show that 64 percent of those polled would not. I propose to demonstrate how an arbitrator should hear and decide them without resolving the reasonable-fee issue.

Textual Interpretation

Cases on this topic are not numerous. Tim has noted three of them in his paper, two of them Social Security Administration cases, and to his three I add *City of Portage.*[4] That was a different kind of fee dispute, in that it was not over a disputed fee amount, but

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[3]93 LA 1166 (Jaffe 1989).

[4]In *City of Portage,* 85 LA 1123 (Flatten 1985), the amount of the cancellation fee was not in dispute. The refusing party was new to arbitration and did not agree that an arbitrator should be paid for a day when no work was done for the parties! The arbitrator in the fee dispute, aware of the rationale behind the obligation to pay cancellation fees, decided that the nonpaying party's refusal violated the collective bargaining agreement. Though the issue was not the size of the cancellation fee but whether it was validly assessed, I would nonetheless conclude in that case—as in a fee-size case—that the agreement did not contemplate use of the arbitration forum to recover a cancellation fee. And this appearance-of-conflict argument in fee-size disputes is also applicable in *City of Portage.*

over a party's failure to pay its share of another arbitrator's cancellation fee, on the ground that no work was done by the arbitrator when the hearing was canceled.

Despite their small numbers, these cases are very important. They have the potential for setting dangerous precedents. They bear on the integrity of the labor arbitration process by calling into question the appearance of conflict of interest. For me that makes these cases more important than the other messes Tim has so gracefully described for us.

I think there is little support for the view that collective bargaining agreements contemplate grievances over the reasonableness of arbitrators' fees. I will use ethical implications as a premise to support my view of how fee-allocation clauses should be interpreted: To me these cases present such a danger to institutional arbitration interests that only the clearest language in the collective bargaining agreement should support an arbitrator's authority to decide them on the merits.

Collective bargaining agreements typically provide for the equal division of arbitration costs, including the arbitrator's fee. Occasionally we find loser-pay-all clauses. As I read them, both types of clauses are expense-allocation clauses exclusively. They represent no more than (1) an agreement that fees will be shared, and (2) an agreement on how the shared fee will be allocated between the parties. I find in them nothing suggesting, in tandem, that (1) an unreasonable arbitrator's fee need not be paid, and (2) that arbitration is the appropriate forum for determining the reasonableness of the fee.

Fee-allocation clauses may implicitly contemplate a reasonable arbitration fee, but I think they contemplate challenges to an allegedly unreasonable fee by resisting payment and forcing the unpaid arbitrator to pursue a remedy in the courtroom. That has been the traditional way of handling arbitrator-fee disputes. Then what kinds of fee disputes, if any, are covered by fee-allocation clauses?

I believe fee-allocation clauses are intended to handle the kinds of disputes we almost never see, because fee-allocation clauses are so explicit. If one party, for example, paid its one-half share of the bill and the other party paid a one-quarter share, thinking—quite unwisely, of course—that the agreement required that it pay no more and that the other party should pay 75 percent of the fee, an arbitrator could correctly find in the fee-allocation clause a basis for deciding the merits of that dispute. The size of the arbitrator's

fee would not be at issue in the hypothetical case, where no one would dispute the total amount of the arbitrator's fee. The Social Security Administration case illustrates the difference.

The essential facts in *Social Security Administration* were not disputed. In 1988 an arbitrator decided a grievance filed by the Social Security Administration (SSA) against a local of the American Federation of Government Employees (AFGE).[5] The grievance was over an employee's use of eight hours of official time to attend a union-sponsored training session. The arbitrator held hearings for two days in 1987, generating a transcript of 483 pages, excluding exhibits. Both parties filed posthearing briefs.

Two issues were placed before the arbitrator: (1) whether an SSA employee was entitled to eight hours of pay for her attendance at a union-sponsored training session, and (2) whether res judicata bound the arbitrator to follow another arbitrator's decision. The arbitrator decided that res judicata did not apply, but departing from the norm of next deciding the merits of the dispute, he did not address the training time pay issue.[6]

For his arbitration services in the case he billed the parties $7,800, based on two hearing days and 17.5 days of research and writing at his per diem rate of $400. SSA paid its one-half share of the bill, but AFGE refused to pay its portion.

Rather than sue immediately, the unpaid arbitrator wrote SSA and requested the agency to pay the union's share of the bill. His letter stated in part that "[t]he law is clear in both federal and state courts that the obligation to pay the Arbitrator is joint and several. . . .", and that "[u]pon payment, the agency would immediately have a claim for contribution against the [Union]."[7] SSA wrote a letter to AFGE accusing it of deliberately delaying payment of fees when arbitrators rule against the union, and asking the union to explain its intentions concerning refusal to pay the arbitrator.[8] SSA next filed a grievance over the union's refusal to

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[5]*Government Employees (AFGE) Council 220, AFL-CIO and Social Sec. Admin.*, FMCS No. 87/05301 (1988) (unpublished). Arbitrator Jaffe attached the unpaid arbitrator's opinion to his as an appendix in *Social Sec. Admin., supra* note 3. However, as the Jaffe opinion notes, that appendix was omitted from the published text. *Id.* at 1167.

[6]The unpaid arbitrator refused to apply res judicata by following the award of Arbitrator Smith on the ground that the latter had exceeded his authority by engaging too actively in the enforcement of his awards. He cited, among other cases, *American Chair & Cable Co.*, 58 LA 724, 732 (Dunne 1972).

[7]*Supra* note 3, at 1168–69.

[8]*Id.* at 1169.

pay the arbitrator. AFGE responded that it had not been approached by the arbitrator on the fee issue and that the arbitrator's fee was excessive. The grievance went to arbitration before Arbitrator Ira Jaffe, who denied it.

Apart from a textual analysis of the agreement, I have another basis for my interpretation of fee-allocation clauses. Who are the parties to these grievances and what are their interests in the outcome? In the SSA case the real party in interest, the unpaid arbitrator, was not a party. He was unable to file a brief, unable to place documents into evidence, call witnesses or cross-examine those presented by the union or the employer. A judge hearing a fee dispute between a union and an employer could likely insist that the arbitrator be named as a party to the suit, and if that were not possible, the judge might dismiss it on the ground that an essential party was missing.[9]

Tim Heinsz has alluded to the unpaid arbitrator's nonparty status, but without the emphasis I would place on what bothers me most about it. Tim describes problems of "deferral" to the fee-case arbitrator's award. He means, I gather, that a reviewing court would not accept a fee-case arbitrator's decision or part of it as its own decision, on the ground that the unpaid arbitrator was not a party to the arbitration proceedings. I would agree and add that the fundamental unfairness of an arbitrator deciding the arbitrator-fee issue in the unpaid arbitrator's absence is what would prompt the court's refusal to defer.

I think the arbitrator's absence as a party avoids being a grave problem for the unpaid arbitrator in a fee-arbitration case only because a court, in a subsequent judicial proceeding brought to recover the fee, would not likely be bound in any way by the fee-arbitrator's no-arbitrator-party decision in favor of the nonpaying party.

The unpaid arbitrator's nonparty status is an essential element of my contractual-meaning argument. Do parties to a collective bargaining agreement really contemplate the use of fee-allocation clauses to litigate an issue involving someone other than one of the two competing parties, and concerning which the absent arbitrator has overriding and crucial interests in the outcome? I think no such scenarios are intended by drafters of grievance arbitration fee-allocation clauses.

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[9] *See, e.g.*, Fed. R. Civ. P. 19.

Party Interest

Protecting the Arbitration Process. Compare the competing and far lesser interests of the union and employer parties to arbitrated reasonable-fee disputes. I do not share Tim's view that "the parties in the second arbitration should have a strong, albeit different, interest from the unpaid arbitrator—the proper functioning of their dispute-resolution procedure." Nor do I agree with his statement that "[s]ince a fee-dispute grievance goes to the essence of the parties' relationship, it would be appropriate for a later arbitrator to hear."[10]

These are legitimate but vague party interests. The question is not even the legitimacy of that interest but how it might be vindicated. However that interest is defined, a fee grievance is not required to protect it. By filing a lawsuit against the nonpaying party, the arbitrator can satisfy fee interests directly and derivatively satisfy a party's interest in the integrity of the grievance arbitration process. Also, to the extent that arbitrators would be discouraged from hearing cases involving a chronic deadbeat party, they would be equally discouraged if nonpayment required a lawsuit by them or a grievance by a party. Why should arbitrators be placed in the unseemly position of having parties serve as collection agents? Can an arbitrator be the beneficiary of a party's grievance-fee recovery one day and appropriately serve in a subsequent case involving that party? I think not.

Protecting Against Joint Liability. Another union or employer party interest in a reasonable-fee dispute centers around the issue of joint and several liability. A paying party could argue that its interest in the fee arbitration is to avoid liability for the other party's fee. The premise is sound. However, liability for the entire amount of an arbitrator's fee—on joint liability grounds—can be remedied with an action by the paying party against the nonpayer. These cases are rare in labor arbitration because fee lawsuits by arbitrators are most often winners for them. The joint liability option is useful mainly in the event of a nonpaying party's inability—as distinguished from refusal—to pay its share of the arbitration fee.

So for all of these reasons—textual contract reading, notions of probable party intent, the absence of the really interested party—

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[10]*See Social Sec. Admin.*, 90 LA 247 (Berger 1987).

I think fee-allocation clauses do not cover disputes over the reasonableness of arbitrators' fees. That makes arbitrator-fee disputes prime candidates for arbitral decisions on that ground, without reaching the merits of the reasonable-fee issue.

Merits Avoidance

Here, Tim and I may have another difference in point of view. As Tim states, a fee-dispute may be "based on the contract," and it may also be true that "the parties through their agreement have chosen to bring the matter to a second arbitrator." But agreement to bring a dispute to arbitration is one thing; agreeing that the arbitrated dispute may be decided on the merits is something else. A sophisticated respondent in a fee-dispute arbitration would argue not only that the unpaid fee was unreasonable but that the fee-allocation clause did not provide an arbitration forum for the recovery of an arbitrator's fee.

Indeed, the union in the SSA case was sufficiently sophisticated to challenge the grievance on the ground that the agreement did not cover it. The union argued that "[t]here was no evidence that the parties desired to convert one another into collection agents for arbitrators whose fees are not timely paid."[11] And Arbitrator Jaffe agreed. In his opinion, he said:

> There was no indication in this record, however, that the language of Article 25, Section 5.B., [the fee-allocation clause] even when coupled with the broad definition of grievance contained in Article 24, Section 2.C. of the Agreement, was intended to provide a forum for *legitimately disputed* claims for fees and expenses by arbitrators.[12]

But he then went on to decide the merits of the reasonable-fee issue.[13] He discussed the unpaid arbitrator's ratio of hearing time to decision-writing time and concluded that "the other arbitrator's study and decision-writing time were somewhat high"[14] and "raised sufficiently serious questions that the Union was warranted in challenging its obligation to pay those billed fees."[15]

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[11] *Supra* note 3, at 1175.

[12] *Id.* at 1177.

[13] In a letter dated July 5, 1994, solicited by this author, Arbitrator Jaffe reiterated his remarks during the floor discussion on this issue that he did not decide the merits of the arbitrator's fee in this case: "I . . . determined that the Agreement's fee sharing provision did not require that one party pay the fees of an arbitrator in circumstances in which it held reasonable, good faith doubts about the legitimacy of the billed fees and prior to the resolution of those doubts."

[14] *Supra* note 3, at 1178.

[15] *Id.* at 1177.

To me this is similar to an arbitral opinion denying a grievance on the merits after finding it was untimely filed. I would not go so far as to say that the merits of the fee issue lacked substantive arbitrability, but the result should have been the same: grievance denied—without discussing the reasonableness of the unpaid arbitrator's fee.

Appearance of Impropriety

External Appearances

Arbitrators are paid on a per case, per diem basis, and for many labor arbitration is a sole source of income. For others it is an important producer of supplemental income. Parties who use labor arbitrators—particularly union parties—are keenly sensitive to issues of per diem fees, ratios of hearing time to decision-writing time, cancellation and postponement fee practices. A weak economy and á not robust union movement heighten concerns about arbitration costs and arbitrator-fee practices. In this atmosphere an arbitrator who decides in favor of the reasonableness of another's fee inescapably generates an image I find troubling.

How, in that context, is it possible to avoid the appearance of helping a colleague maintain arbitration fees at an artificially high level? How can fee-case arbitrators avoid the appearance of derivatively helping their own economic status through a decision sustaining an allegedly excessive arbitration fee? The appearance of collusive and mutual back-scratching is unavoidable in these cases. It would not take many of them to endanger labor arbitration's generally excellent institutional reputation.[16] Denial of the fee grievance in *Social Security Administration* did not generate the appearance of an arbitration decision in the economic interests of other arbitrators. But I believe that any opinion that discusses the merits of an arbitration fee sets an undesirable precedent in favor of reaching the merits.

The arbitrator who finds an arbitrator's fee unreasonable has still another kind of appearance problem, one that arises only when a decision one way inevitably raises the appearance of conflict. The party seeking payment of the fee—like the SSA in that case—very likely perceives that the arbitrator bent over too far back-

[16]One of Tim Heinsz's respondents compared arbitration-fee disputes with those involving lawyers, implying that what is good enough for lawyers is good enough for arbitrators. I would apply the same conflict-of-interest argument to lawyer fee disputes.

wards to avoid the unavoidable: a conflict-of-interest appearance of favoring a colleague. This is a no-win situation for arbitrators.

Internal Ramifications

So far I have discussed external perceptions of parties in the labor arbitration process. What of internal perceptions within the community of labor arbitrators? Here, too, the consequences of arbitrating arbitrator-fee disputes can be quite adverse.

Labor arbitration is lonely work. The arbitrator lacks the judge's ability to walk down the hall and seek the views of a courthouse colleague. Nonetheless, there is networking through various types of industrial relations organizations to which arbitrators belong. Labor arbitrators also have their own organization—the National Academy of Arbitrators. At regional and national meetings we seek to improve our understanding of labor arbitration through informal social discourse and the presentation of papers. The loneliness of arbitration work makes networking all the more attractive. Would it not be unseemly and disruptive of the valuable social and academic interaction gained from these meetings if substantial numbers of our NAA members were deciding the reasonableness of each others' arbitration fees?

A Hypothetical Reasonable-Fee Clause

But let's say that a fee clause quite explicitly does more than allocate fees. For the sake of argument, it provides that "any dispute over the reasonableness of the arbitrator's unpaid fee may be the subject of a grievance." That, of course, is what I say a conventional fee-allocation clause does not mean. I am going to guess that many of Tim's 64 percent poll respondents—who would not even hear an arbitration-fee dispute—would maintain their refusal position in the face of that language.

In the hypothetical case none of my contractual-intent arguments work. Should I consequently decline to hear the case? Should I hear the case and abstain from reaching the merits, even though the grievance is arbitrable since the fee clause covers the grievance? Do my policy considerations weigh that heavily in the equation? I take comfort that I have never seen such a clause, but that's not a way out of the dilemma posed by the hypothetical scenario.

Yes, I would refuse to reach the merits, citing the policy grounds noted earlier. I agree with Tim Heinsz that abstaining is a difficult position to support. Only in extraordinary situations do federal

courts abstain from deciding cases over which they have jurisdiction. But I believe the combination of ethics-based policy reasons and the unpaid arbitrator's absence as a party is itself so extraordinary as to make abstention appropriate.

The unpaid arbitrator could laugh at the results of an adverse fee arbitration, even under the hypothetical clause, because the clause would not cure the problem of the arbitrator's absence from the arbitration-fee proceedings. The unpaid arbitrator could still take the case to court, and the court would in no way be bound by the arbitration result. Res judicata binds courts only when the parties to both the current and the prior proceeding are the same.

You see where this leads. I use the abstention hypothetical primarily to illustrate how a real fee-allocation clause differs from the hypothetical clause. I never expect to confront an abstention issue in the hypothetical context, because it is doubtful that many, if any, parties would have enough interest in arbitrator-fee payments to write such a clause. Parties generally expect that arbitrators will use courts to recover their unpaid fees. It follows that conventional fee-allocation clauses should not be interpreted as though they read like the hypothetical fee clause.

Conclusion

I not only want to influence this audience, I also want to make sure that no union or employer selects me to hear an arbitrator's fee dispute. And a paying party-grievant in a fee dispute slated for arbitration, aware of my views, would not select me as arbitrator. At least my 64 percent polled colleagues would simply refuse to hear any of these cases. They, of course, would receive no fee for their services. I would hear even the hypothetical case, abstain from a decision on the merits and bill the parties for my services. That surely will make me all the more unacceptable for fee-case arbitration work. I invite all of you to join me in becoming unacceptable for these bizarre and never-contemplated grievances over arbitrators' fees.

Comment

ROLF VALTIN*

Tim has so covered the waterfront that there is not much left to be said. But I'll try to make a few additional observations.

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I applaud the Program Committee for coming up with the topic. It has never before been set aside for separate treatment. And doing so, at least by Tim's treatment, has given us new and valuable insights.

But I don't think that the topic has a sound title. To begin with, the use of the term "Cleanup Hitter" mistakenly implies that an arbitrator who follows another is required to possess the grace and skill of the ballplayer who rises to the level of cleanup hitter. But my greater disagreement is with the use of the term "messes." I dissent from it both because it implies avoidable fault and because it implies high frequency.

Tim's paper is mainly concerned with the potential of conflicting decisions. They are bound to occur because the instruments we deal with are the product of consensus builders—who may fail in their task if they strive for the height of clarity. Conflicting decisions coming out of this milieu do not adversely reflect on our profession. And they are not, in my experience, a big or pervasive problem for the parties—unless they are parties, as seems to be the case with the Social Security parties, who prefer to play games over making collective bargaining work.

The words "final and binding" are at the heart of Tim's paper. I confess that I paid them no heed on the two or three occasions on which I had to face the question of whether to let the prior decision stand. I now recognize that final and binding can be made to govern and thus to foreclose renewed arbitration of the same issue between the same parties with respect to an unchanged agreement provision. But I do not think that foreclosure of the revisiting of an issue was in the minds of those who first adopted the final and binding phrase—or in the minds of the many who followed them in the use of the phrase. What final and binding was intended to show, rather, was that the arbitration decision would not be advisory. To be barred was the decision's nonimplementation by a dissatisfied company or union and strike action by disgruntled employees. The occasional revisiting of an issue is not inconsistent with these objectives.

That I previously proceeded without thought to the meaning of the final and binding phrase is not to be taken as a boast. But I think that the insufficiency of awareness led to the right course. The right course is to treat each of these second arbitration cases as having its own unique dimensions and to admit that we are called upon to make a value judgment. By whatever influences, we may conclude that the prior decision should stand. And, by

whatever contrary influences, we may conclude that asking us to go along with it is asking too much. We may employ the mask of legal principles, but we are making a value judgment nonetheless.

So to advocate is not to ignore the Meltzer admonition that "arbitrators should keep their humility in order." Indeed, of all the sayings quoted in Tim's paper, this one is my favorite. But I think we may properly apply it, not to the outcome of a second arbitration case, but to our approach to the problem and the kind of opinion we write for the case.

The problem of conflicting decisions was directly dealt with by the parties in the bituminous coal industry about 20 years ago through the creation of the Arbitration Review Board. The board was a body of national scope to which the decisions of the industry's district arbitrators could be appealed on certain grounds, one of which was that the decision of the district arbitrator was in conflict with that of another. For a variety of reasons there were many conflicting decisions. The board lasted for six or seven years. It fell apart because the miners believed they were losing too many cases they thought they had won—which may be a problem inherent in creating an appeal right. But the dissolution of the board came together with an agreement that its past decisions would continue to have precedential status. The parties thus found a device by which a great many issues arising from conflicting decisions were permanently laid to rest.

But I know of no other industry plagued by a long string of conflicting decisions. Tim says that "[t]he issue of determining the binding effect of a prior award between the same parties on the same issue is a common one." But he shows only that 85 percent of his respondents encountered such a situation, without saying how many of these situations they may have encountered. To repeat, my experience says that the problem is a rarity. I assume it's true of most of us.

Jack Clarke's decision in the *North American Rayon Corp.*[1] case mentions four situations in which arbitrators commonly decline to follow a prior arbitration decision between the same parties at the same facility and involving the same issue. One of them is "conditions existing at the time of the prior decision and of the grievance being arbitrated are significantly different."[2] Tim says that most arbitrators who follow the Clarke theory place a heavy burden of

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[1]95 LA 748 (1990).
[2]*Id.* at 751.

persuasion on the party seeking to reverse a prior decision. As to the quoted Clarke situation, I want to put in a small dissent, both as to the heavy burden and as to even calling it a reversal.

Nearly half a century ago George Taylor, always in the forefront of those seeking to make sense, issued a decision for General Motors and the United Automobile Workers which in effect said that fight cases involved facts which could not be unraveled and that the only sane thing to do was to treat the two combatants as equally guilty. The decision became known as the equal penalty rule. It was well understood by all concerned, and it well served the parties' predictability purposes. I doubt that it has survived to this day. But, if it has, I do not think that it could wisely be reapplied, in these days of individual rights and duty of fair representation suits, in a case in which one of the combatants was rather clearly the instigator. Involved is the abandonment of a rule wrought by changing times, not a disagreement with the holding of the first arbitrator.

I doubt that any of us is a member of absolute loyalty to either the incorporation camp or the independent judgment camp—at least not to the point of announcing to the parties upon the beginning of the hearing, "It's all over—I'm an incorporator," or "You may as well proceed as if the prior decision didn't exist—it is of no moment to me." Rather, we will be found in the one camp or the other, and interchangeably, depending on the totality of the particular record before us and what we think needs to be done about it.

The fact that we come out as an incorporator does not mean we have foregone making a judgment. It merely means we have made the judgment that, in this instance and by all involved in it, the prior decision should stand. I understand why the other school has the name of the independent judgment school. But it must not be taken to connote the lack of independent judgment where an arbitrator comes out as an incorporator.

The result in any of these cases may be characterized as a victory of the one school over the other. But, as a matter of our responsibility, it does not matter how we come out. Either way, as long as we have given earnest consideration to all that is before us, there is compliance with the Code's canon for assuming "full responsibility for the decision in each case decided."